

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 2000

**FILED**

February 29, 2000

Cecil Crowson, Jr.

Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

V. )

LUCIAN D. BUCHANAN )

Appellant. )

NO. M1999-00599-CCA-RUC-1

WILLIAMSON COUNTY

HON. TIMOTHY EASTER, JUDGE

(THEFT OVER \$500.00)

FOR THE APPELLANT:

**DAVID NEAL BRADY**  
District Public Defender

**GENE HONEA**  
Assistant Public Defender  
407-C Main Street  
P.O. Box 68  
Franklin, TN 37065-0068

FOR THE APPELLEE:

**PAUL G. SUMMERS**  
Attorney General & Reporter

**TODD R. KELLEY**  
Assistant Attorney General  
2nd Floor, Cordell Hull Building  
425 Fifth Avenue North  
Nashville, TN 37243

**RONALD L. DAVIS**  
District Attorney General

**SHARON E. TYLER**  
Assistant District Attorney General  
P.O. Box 937  
Franklin, TN 37065-0937

OPINION FILED \_\_\_\_\_

AFFIRMED

THOMAS T. WOODALL, JUDGE

# OPINION

Defendant Lucian D. Buchanan pled guilty in the Williamson County Circuit Court to Class D felony theft, Class A misdemeanor theft, Class A misdemeanor possession of burglary tools, and Class B misdemeanor criminal impersonation. The trial court subsequently sentenced Defendant as a Range III persistent offender to terms of twelve years for the Class D felony, eleven months and twenty-nine days for each Class A misdemeanor, and six months for the Class B misdemeanor. In addition, the trial court ordered all of the misdemeanor sentences to run concurrently to each other, but consecutively to the felony sentence. Further, the trial court ordered the sentences in this case to run consecutively to a sentence that was previously imposed in another case. Defendant challenges his sentences, raising the following issues:

- 1) whether the trial court erroneously imposed longer sentences than he deserves;
- 2) whether the trial court erred when it ordered his misdemeanor sentences to run consecutively to his felony sentence; and
- 3) whether the trial court erred when it ordered the sentences in this case to run consecutively to a sentence imposed in another case.

After a review of the record, we affirm the judgment of the trial court.

## **I. BACKGROUND**

The record indicates that on November 11, 1997, Defendant stole a camera worth \$49.99 from a Williamson County store. On November 28, 1997, the police discovered that Defendant was in possession of a stolen vehicle worth \$2,700.00. Police officers also discovered a crowbar and some bolt cutters in the vehicle that they believed were burglary tools. When the police took Defendant into custody on that date, Defendant provided them with a fictitious name.

Defendant testified during the sentencing hearing that he had been incarcerated for eighteen of the last twenty years and he had only been employed for six months of the two years that he was not in confinement. Defendant also testified that he was currently serving a thirty-five year sentence that had previously been imposed in another case. In addition, Defendant admitted that he had had his parole revoked on three different occasions and he admitted that he was on parole when he committed the offenses in this case.

## II. LENGTH OF SENTENCES

Defendant contends that the trial court erroneously imposed longer sentences than he deserves. We disagree.

“When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d) (1997). “However, the presumption of correctness which accompanies the trial court’s action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant’s statements, the nature and character of the offense, and the defendant’s potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1999); Ashby, 823 S.W.2d at 169. “The defendant has the burden of demonstrating that the sentence is improper.” Id. Because the record in this case indicates that the trial court considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

The sentence for a Range III offender convicted of a Class D felony is between eight and twelve years. Tenn. Code Ann. § 40-35-112(c)(4) (1997). If the court finds that enhancement and mitigating factors are applicable, the court must begin with the minimum and enhance the sentence to appropriately reflect the weight of any statutory enhancement factors and then the court must reduce the sentence to appropriately reflect the weight of any mitigating factors. Tenn. Code Ann. § 40-35-210(e) (Supp. 1999). In addition, the sentencing range for a Class A misdemeanor is any period up to eleven months and twenty-nine days and the sentencing range for a Class B misdemeanor is any period up to six months. Tenn. Code Ann. § 40-35-111(e)(1)–(2) (1997).

The record indicates that in determining the lengths of Defendant's sentences, the trial court found that the following enhancement factors applied to all four sentences: (1) Defendant had a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, (8) Defendant had a history of unwillingness to comply with the conditions of a sentence involving release in the community, and (13) Defendant committed a felony while on parole for a prior felony. See Tenn. Code Ann. § 40-35-114(1), (8), (13) (1997). The trial court also found that the following mitigating factor applied: (1) Defendant's criminal conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997).

Defendant does not challenge the application of enhancement factor (1), and we conclude that it was properly applied. Indeed, the presentence report in this case indicates that Defendant's prior criminal record consists of approximately twenty-three felony convictions, eleven misdemeanor convictions, and four convictions for traffic offenses.

Despite conceding during the sentencing hearing that enhancement factor (8) was applicable, Defendant now contends that the trial court erred when it applied

this factor. The record indicates that Defendant has violated his parole on at least three occasions, and Defendant does not dispute that fact. Rather, Defendant argues that factor (8) was not applicable because a sentence for which a defendant is granted parole is not a “sentence involving release in the community” as that term is used in the statute. Essentially, Defendant argues that applying factor (8) when there has been a prior parole violation would be overbroad because almost all incarcerative sentences involve the possibility of parole. However, this Court recently rejected this precise argument and held that factor (8) is applicable when the defendant has previously violated parole. State v. Johnnie Shane Capley, No. M1999-00353-CCA-R3-CD, 1999 WL 1266334, at \*4–5 (Tenn. Crim. App., Nashville, Dec. 29, 1999). Moreover, this Court previously held that factor (8) is applicable when a defendant has violated parole. State v. Raymond Cartwright, No. 03C01-9611-CR-00413, 1998 WL 1679, at \*1 (Tenn. Crim. App., Knoxville, Jan. 5, 1998), app. denied, (Tenn. Jan. 4, 1999).

Defendant does not challenge the application of enhancement factor (13), that he committed the felony in this case while on parole for a prior felony conviction. The record does in fact indicate that Defendant was on parole for a felony when he committed the offenses in this case. Thus, we conclude that factor (13) was properly applied to Defendant’s Class D felony conviction. However, because the statute expressly states that it only applies to a sentence for a felony, Tenn. Code Ann. § 40-35-114(13) (1997), we conclude that this factor was not applicable to Defendant’s three misdemeanor sentences.

Defendant contends that the trial court erred when it failed to apply mitigating factor (1), that Defendant’s conduct did not cause or threaten serious bodily injury. This assertion is inaccurate. The record indicates that the trial court did apply this factor, but it concluded that the factor was only entitled to minimal weight. Regardless, we conclude that this factor was properly applied.

Neither Defendant nor the State argues that any other mitigating factors applied, and we conclude in our de novo review that none of the other mitigating factors of Tennessee Code Annotated section 40-35-113 were applicable in this case.

Finally, Defendant apparently contends that the trial court erred when it found that the enhancement factors far outweighed the mitigating factor. However, it is well-established that the weight to be given to each enhancement and mitigating factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Baxter, 938 S.W.2d 697, 705 (Tenn. Crim. App. 1996). The trial court did not abuse its discretion when it determined the weight of the factors in this case.

In our de novo review, we conclude that three enhancement factors apply to Defendant's felony sentence and two enhancement factors apply to Defendant's misdemeanor sentences. We also conclude that only one mitigating factor applies to all four sentences. Under these circumstances, especially in light of Defendant's long record of criminal conduct, we hold that the trial court properly imposed the maximum sentence for each conviction in this case. Defendant is not entitled to relief on this issue.

### **III. DISCRETIONARY CONSECUTIVE SENTENCING**

Defendant contends that the trial court erred when it ordered his misdemeanor sentences to run consecutively to his felony sentence. We disagree.

Consecutive sentencing is governed by Tennessee Code Annotated section 40-35-115. The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924

S.W.2d 912, 917 (Tenn. Crim. App. 1995). The record indicates that the trial court imposed consecutive sentencing based on a determination that (1) Defendant is a professional criminal who has knowingly devoted his life to criminal acts as a major source of his livelihood and (2) Defendant is an offender whose record of criminal activity is extensive. See Tenn. Code Ann. § 40-35-115(b)(1), (2) (1997).

In this case, we need not address the propriety if the trial court's determination that Defendant is a professional criminal because there is absolutely no question that Defendant's criminal record is extensive. In fact, Defendant's prior criminal record consists of approximately twenty-three felony convictions, eleven misdemeanor convictions, and four convictions for traffic offenses. The existence of one statutory factor is a sufficient basis for consecutive sentencing. See Black, 924 S.W.2d at 917. Indeed, this Court has previously stated that "[e]xtensive criminal history alone will support consecutive sentencing." State v. Adams, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997).

The trial court also determined that consecutive sentencing was appropriate under the test of State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995), in that consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. Because the trial court did not impose consecutive sentencing based on a determination that Defendant is a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4), the court was not required to find that consecutive sentences are reasonably related to the severity of the offenses committed and serve to protect the public from further criminal conduct by the offender. State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). Regardless, we agree with the trial court that consecutive sentencing in this case is clearly congruent with general principles of sentencing. Defendant is not entitled to relief on this issue.

#### IV. MANDATORY CONSECUTIVE SENTENCING

Although Defendant conceded during the sentencing hearing that the sentences in this case were properly ordered to run consecutively to a sentence that was previously imposed in another case, Defendant now contends that the trial court erred when it ordered the sentences to run consecutively. We disagree.

Rule 32 of the Tennessee Rules of Criminal Procedure provides, in relevant part:

Mandatory Consecutive Sentences. Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:

(A) To a sentence for a felony committed while on parole for a felony.

Tenn. R. Crim. P. 32(c)(3)(A). In addition, Tennessee Code Annotated section 40-28-123(a) expressly provides that a sentence for a felony offense committed while on parole must be served consecutively to the sentence for which the defendant was on parole. Tenn. Code. Ann. § 40-28-123(a) (Supp. 1999).

In this case, there is absolutely no dispute that Defendant was on parole for a prior felony conviction when he committed the offenses in this case. Thus, under the above provisions, the trial court was required to order Defendant's Class D felony sentence in this case to run consecutively to the sentence for which Defendant was on parole. In addition, as previously discussed in Part III, the trial court did not abuse its discretion when it ordered Defendant's misdemeanor sentences in this case to run consecutively to his Class D felony sentence. Thus, we conclude that the trial court properly ordered Defendant's sentences in this case to run consecutively to the sentence for which he was on parole when he committed the offenses in this case. Defendant is not entitled to relief on this issue.



Accordingly, the judgment of the trial court is AFFIRMED.

\_\_\_\_\_  
THOMAS T. WOODALL, Judge

CONCUR:

\_\_\_\_\_  
JOE G. RILEY, JR., Judge

\_\_\_\_\_  
JAMES CURWOOD WITT, JR., Judge