

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1995 SESSION

**FILED**

**October 4, 1995**

**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

STATE OF TENNESSEE,

APPELLEE,

VS.

JEFFERY DION WEBB,

APPELLANT.

\* C.C.A. # 01C01-9409-CC-00327

\* LINCOLN COUNTY

\* Honorable Charles Lee, Judge

\* (Three Counts of Theft, Two  
Counts of Forgery, and Two  
Counts of Transferring a Forged  
Instrument)

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

AFFIRMED

Gary R. Wade, Judge

**OPINION**

The defendant, Jeffery Dion Webb, was convicted under separate indictments of two counts of theft of less than \$500.00, each of which was a misdemeanor, and several other counts of transferring forged instruments:

Case No. 014-94:	<b><u>Count</u></b>	<b><u>Sentence</u></b>
	1	11 months, 29 days
	2	Six years
	3	Six years
	5	Six years
	6	Six years

Case No. 047-94:	<b><u>Count</u></b>	<b><u>Sentence</u></b>
	1	11 months, 29 days
	2	Six years
	3	Six years
	6	Six years
	7	Six years
	10	Six years
	11	Six years
	14	Six years
	15	Six years

By our count, there were fourteen offenses, five in Case No. 014-94, and nine in Case No. 047-94. The trial court ordered a merger of those convictions for forgery and transfer of a forged instrument based on a single transaction. Thus, Count 2 was merged with Count 3 and Count 5 was merged with Count 6 under Case No. 014-94. In Case No. 047-94, the trial court merged Count 2 with Count 3, Count 6 with Count 7, Count 10 with Count 11, and Count 14 with Count 15. In consequence, there were convictions for a single theft and two transfers of forged instruments under Case No. 014-94. There was one theft offense, and four transfers of forged instruments under Case No. 047-94.

The two 11 month, 29 day sentences for theft were ordered to be served concurrently but consecutive to the remaining offenses. The effective sentence for the six convictions for transferring forged instruments was eighteen years. We have calculated the total sentence at eighteen years, 11 months, and 29 days.

In this appeal of right, the defendant complains that the sentences were excessive. He argues that the trial court should not have imposed the maximum possible sentence within the range for his several convictions and should not have ordered any of the sentences to be served consecutively.

We disagree. The judgment of the trial court is affirmed.

When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review ... 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). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any

mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210.

This case involved both felony and misdemeanor sentencing. In calculating the sentence on a felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). Misdemeanor sentences must be specific and in accordance with the principles, purposes, and goals of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §§ 40-35-104, -117, and 302; State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that

sentence designated for eligibility for rehabilitative programs. Tenn. Code Ann. § 40-35-302. Generally, a percentage of not greater than 75% of the sentence should be fixed for a misdemeanor offender; however, a DUI offender may be required to serve the full 100% of his sentence. Palmer, 902 S.W.2d at 393-94. In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Id; see also Tenn. Code Ann. § 40-35-302(d).

Upon service of that percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. Tenn. Code Ann. § 40-35-302(d). The trial court retains the authority to place the defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f). The governing statute is designed to provide the trial court with continuing jurisdiction in misdemeanor cases and a wide latitude of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

Here, the defendant's chief complaint is that a codefendant received a sentence of only two years despite

being charged with a greater number of offenses. While acknowledging that several of the charges against his codefendant were dismissed, the defendant contends that his sentence is disproportionately long.

We begin our analysis with the proposition that the defendant's considerable prior criminal record qualified him as a Range III, persistent offender. The possible range of punishment was up to 11 months and 29 days for each of the two misdemeanors and from four to six years for each of the Class E felonies. Tenn. Code Ann. §§ 40-35-111(b)(5)(e)(1) and 40-35-112(c)(5). The defendant makes no challenge to any of the enhancement factors enumerated by the trial court. See Tenn. Code Ann. § 40-35-114. His prior criminal history included three burglary convictions, one attempt to commit a felony, three other forgery convictions, and other offenses in addition to those necessary to establish the range. Tenn. Code Ann. § 40-35-114(1). The record reflects that the defendant violated conditions of his probation on one of his prior convictions; on another, he violated conditions of parole. Tenn. Code Ann. § 40-35-114(8). At least one other of the enhancement factors applied. The defendant stole the checks he forged from two of his prior employers, thereby violating relationships of private trust. Tenn. Code Ann. § 40-35-114(15). While the state concedes that the trial court misapplied at least one other enhancement factor and there was a single mitigating factor (the conduct did not threaten bodily injury, Tenn. Code Ann. § 40-35-113(1)), the trial court assigned significant weight to those enhancement factors

found to be present. In our view, these circumstances warranted the maximum sentences within the range, both as to the felonies committed by the defendant and the misdemeanors. Moreover, our law requires individualized sentencing. State v. Moss, 727 S.W.2d 229 (Tenn. 1986). "Each case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Thus, we cannot review the sentence here based upon what term a codefendant may have received under entirely different facts.

The defendant also argues that none of the sentences should have been ordered to be served consecutively. He reasons that the crimes were not violent and that consecutive sentences should not be routinely imposed.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before a defendant qualifies for consecutive sentences under any one of the classifications. Later, in Taylor, the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautioning language. Tenn. Code Ann. § 40-35-115. The 1989 act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria<sup>1</sup> exist:

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

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<sup>1</sup>The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

The trial court based its decision to impose consecutive sentences on the basis that the defendant qualified as a "professional criminal who had knowingly devoted himself to criminal acts as a major source of livelihood." Tenn. Code Ann. § 40-35-115(b)(1). The trial court acknowledged the defendant's considerable prior criminal record, characterized his employment record as "sporadic at best," and found "no other indication of any income which the defendant derived" other than through his criminal activities.

Only a "major source of livelihood or ... of substantial income or resources not shown to be derived from ... other than criminal activity" is required in order to qualify as a professional criminal. Gray, 538 S.W.2d at 393. While a reasonable argument may be made from this record that the defendant had not reached the status of "professional," we observe that he has established a pretty good start. In our view, the trial court could have more easily sentenced the defendant to consecutive sentences on the basis that he was "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). In our view, the defendant qualifies as such an offender and would, therefore, warrant consecutive sentences on that basis alone. Recently, in State v. Wilkerson, \_\_\_\_\_ S.W.2d \_\_\_\_\_ (Tenn. 1995), our supreme court reiterated the principles governing consecutive sentences. The reasonableness of the aggregate sentence and the protection of the public were considered as essential elements for consecutive sentences. Here, the record demonstrates that all of the required factors are present.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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John H. Peay, Judge

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David H. Welles, Judge