IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1997

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9601-CC-00009**
	)	
Appellee,	)	
	)	**LAKE COUNTY**
VS.	)	
	)	**HON. JOE G. RILEY, JR., JUDGE**
ROBERT ARTHUR WHITE,	)	
	)	
Appellant.	)	**(ESCAPE)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF LAKE COUNTY

FOR THE APPELLANT:

G. STEVEN DAVIS
District Public Defender
P.O. Box 742
Dyersburg, TN 38025-0742

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

LISA T. KIRKHAM
Assistant Attorney General
Second Floor, Cordell Hull Building
426 5th Avenue North
Nashville, TN 37243

C. PHILLIP BIVENS
District Attorney General
P.O. Box E
Dyersburg, TN 38025

OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Appellant appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Appellant was convicted of escape at a jury trial in Lake County Circuit Court. The trial court sentenced the Appellant to one year and ten months as a Range I Standard Offender to run consecutively to the sentence he was serving at the time of his escape. We affirm the judgment of the trial court.

The Appellant argues two issues in this appeal. He first argues that there was insufficient evidence to support his conviction for escape. He then argues that the trial court erred in sentencing him to one year and ten months because he believes the sentence is excessive.

The Appellant was serving a twenty year sentence for aggravated rape at the time of his escape. He was incarcerated at the Northwest Correction Center. On the evening of November 19, 1992, an electronic technician was leaving work at the Northwest Correction Center when he discovered that his car had been stolen. The electronic technician alerted the officers at the correction center and a count was made of the inmates. The Appellant was the only inmate missing. There was no record of an order to move him to another facility or authorization for the him to be away from the correction center. The car was later found in Paducah, Kentucky with the steering column torn out. In August of 1994, the Appellant walked into the Lake County Sheriff's office and told the officers that

he had escaped from Northwest Correction Center. The sheriff's office held him until someone arrived from the correction center to take him back.

I.

The Appellant's first issue is whether there was insufficient evidence to support his conviction for escape. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Grace, 493 S.W.2d at 476.

There were several witnesses at trial. The electronic technician testified that his car was missing when he left work that night and that he had not left the keys in the car or given anyone permission to use his car. He testified that he notified the prison officials when he discovered his car was missing. He also stated that he later discovered his car was in Paducah, Kentucky, and the steering column had been torn out. The electronic technician stated on cross-examination that he did not see the Appellant take the car and did not know who damaged his car.

An individual who was a lieutenant in charge of the prison Internal Affairs Division at the time of the incident testified at trial. He stated that the missing car was reported to him, and an emergency count was held to determine if any inmates were missing. The Appellant was the only inmate missing at this count. This officer also testified that the Appellant was not authorized to be transferred or be away from the prison that night.

The Sheriff of Lake County also testified. He stated that in November of 1992 his office received a report concerning a missing inmate, and his officers did not find the inmate at that time. He also testified that the Appellant arrived at his office in August of 1994. He stated that when the Appellant came into the office, he told the Sheriff that he had escaped from the Northwest Correction Center in November of 1992 by hot wiring a car. He also told the Sheriff he drove a stolen car from Alabama to get to the Sheriff's office in Lake County, Tennessee. The Sheriff stated that the Appellant said that he had been in Memphis, Alabama and Florida. On cross-examination the Sheriff stated that the Appellant appeared normal, aside from appearing nervous.

An individual who was an officer with the Internal Affairs Division at the time the Appellant turned himself in testified at trial. He stated that the Appellant voluntarily told him that he stole a car at the prison and left. He also told the Internal Affairs officer that he drove away from the institution and went to Paducah. The Appellant told the officer that he had been in California, Mexico, Texas, Florida and Alabama. The Appellant stated that he had been involved in a car theft ring in Alabama. He also told the Internal Affairs officer that he had been arrested for charges in Alabama connected with this ring, made bond, and returned to Lake County. He stated that the Appellant appeared lucid and understood what he was saying. On cross-examination, the Internal Affairs officer testified that he had no personal knowledge of the information, and he only knew the information because the Appellant told it to him.

The Appellant also testified at trial. He stated that he did not remember making the statements to either the Sheriff or the Internal Affairs officer. He did not remember being an inmate at the Northwest Correction Center, but he had been given proof of that information. He did not remember leaving the prison. The Appellant testified that between November 1992 and August 1994 he had been living in Mobile, Alabama with his wife and child. However, he did not know where his wife was because she and their child had disappeared. He said that he worked at Auto Zone in Mobile. He testified that he bought a house in 1993, but could not remember when he moved to Mobile. He also testified that he did not remember being in court for the offense for which he was serving a sentence at the time of the escape. The Appellant stated on more than one occasion that it did not make sense that he had been in prison. He also stated that he had several unanswered questions from his past. He stated that his previous attorney

showed him information that he had a history of cerebral hemorrhages and psychotic episodes, and that he suffered from amnesia. However, at the time of trial, the Appellant did not know what had happened to this information.

On cross-examination, the Appellant stated that he knew his name and knew that he lived with his wife and child in Mobile. When asked how old his child was, he stated that she was born December 31, 1993. He remembered that he bought a home, but could not remember the address or the name of the street. He stated that the home was financed through an individual, and he had not been able to call and find out what happened to his house because there were computers on the phone and he could not make phone calls. The Appellant again stated that his wife and child had disappeared. The Appellant did not remember turning himself in to the Sheriff and did not remember coming to Tennessee.

It is unlawful for someone to escape from a penal institution. Tenn. Code Ann. § 39-16-605(a). "'Escape' means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole." Tenn. Code Ann. § 39-16-601(3).

We find that there is sufficient evidence for a rational trier of fact to find that the Appellant escaped from the Northwest Correction Center, a penal institution. The Appellant has not met his burden of proof to demonstrate the insufficiency of the evidence. The only evidence contrary to the proof of his conviction was his

own testimony at trial. All factual issues are to be decided by the trier of fact, and we do not find that the evidence goes against the Appellant's conviction.

Therefore, this issue is without merit.

II.

The Appellant's second issue is that the sentence imposed by the trial court was excessive. 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. There are, however, exceptions to the presumption of correctness. First, the record must demonstrate 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing. Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts. State v. Smith, 898 S.W.2d 742, 745 (Tenn. Crim. App. 1994), perm. to appeal denied, id. (Tenn. 1995).

In conducting a de novo review of a sentence, this court must consider: (a) The evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct

involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, & -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence, even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Appellant was sentenced as a Range I Standard Offender to one year and ten months to run consecutively to his previous sentence. The Appellant escaped while serving a sentence for a felony, therefore, his escape conviction is considered a Class E felony. Tenn. Code Ann. § 39-16-605(b)(2). Within Range I, the minimum sentence for a Class E felony is one year and the maximum sentence is two years. Tenn. Code Ann. § 40-35-112(a)(5). A sentence for an escape conviction is required to run consecutively to any sentence being served at the time of the offense. Tenn. Code Ann. § 39-16-605(c).

The trial court found one enhancement factor, that the Appellant had prior criminal behavior. Tenn. Code Ann. § 40-35-114(1). The trial court found two mitigating factors. First, the Appellant did not threaten or cause serious bodily injury. Tenn. Code Ann. § 40-35-113(1). Second, the Appellant voluntarily

turned himself in, although it was some time later. Tenn. Code Ann. § 40-35-113(13). The weight given to enhancement and mitigating factors is left in the discretion of the trial court as long as it complies with the sentencing purposes and procedures. State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993). We find that the trial court has correctly followed the procedures of the Sentencing Reform Act and has not abused his discretion.

The trial court applied one enhancement factor and two mitigating factors. The trial court obviously put a great deal of weight on the enhancement factor that the Appellant had a previous history of criminal convictions or criminal behavior. The Appellant was in prison for aggravated rape when he escaped. He also had a domestic violence arrest for which he was fined. These previous convictions coupled with Appellant's criminal behavior between his escape and the trial constitutes a previous history of criminal convictions and behavior such that this factor should be given a great deal of weight and outweigh the two mitigating factors.

When the Appellant returned to Tennessee, he admitted to stealing cars both to enable his escape and in the two years after he had escaped. He told the Sheriff that he had stolen a car to escape from prison and had stolen a car in Alabama so that he could return to Tennessee and turn himself in. The Sheriff stated that he checked the status of the car, and it was indeed stolen from Alabama. The Appellant told the current Internal Affairs officer that he had stolen a car to escape. He also admitted to being involved in a car theft ring in Alabama, for which he had been arrested, and had stolen a car after making

bond to return to Tennessee. The Appellant informed the Internal Affairs officer that he returned to Tennessee because the state of Alabama was trying to work a deal with him where he would testify against the other individuals in the car theft ring. He told the Internal Affairs officer that he would rather be in Tennessee.

We now address two issues concerning the use of the Appellant's criminal behavior between his escape and his turning himself in. We first address the issue of using offenses which occur after the offense at hand but before sentencing as previous criminal convictions or behavior under enhancement factor Tennessee Code Annotated section 40-35-114(1). This court has allowed incidents which occur after the offense for which the defendant is being sentenced to be used to enhance sentences pursuant to enhancement factor (1), that the defendant has a previous history of criminal convictions and behavior.

In State v. Shawn Phillip Yeager, No. 02C01-9502-CC-00052, Fayette County (Tenn. Crim. App., Jackson, filed Feb. 29, 1996)(Rule 11 application was not filed), this court used offenses which occurred in Mississippi after commission of the offense for which the defendant was being sentenced to enhance his sentence. In Yeager, the Mississippi offenses occurred after the Tennessee offense. The defendant had been arrested and convicted of the Mississippi offenses before going to trial on the Tennessee offenses in question in the appeal. This court held that the Mississippi convictions could be used as previous criminal convictions or criminal behavior.

Our second issue is using incidents for which the Appellant has not been convicted as previous criminal behavior under enhancement factor (1). We first acknowledge that a trial court should not use evidence merely showing arrests,

without more, to enhance a sentence within the appropriate range. State v. Newsome, 798 S.W.2d 542, 543 (Tenn. Crim. App. 1990). However, in the case sub judice Appellant admitted to more than one person his criminal behavior and arrest in Alabama. We find that this does not violate the holding in Newsome.

For the reasons stated above, we find that the Appellant was properly sentenced by the trial court to one year and ten months as a Range I Standard Offender to run consecutively to his previous sentence. Therefore, this issue has no merit.

We affirm the judgment of the trial court.

_____
THOMAS T. WOODALL, Judge

CONCUR:

_____
JOE B. JONES, Judge

_____
PAUL G. SUMMERS, Judge