

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1996 SESSION

<p>FILED</p> <p>March 19, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 BILLY E. JOHNSON,)
 AKA WILLIAM E. JOHNSON)
)
 Appellant.)

No. 02C01-9605-CR-00162

SHELBY COUNTY

HON. JOSEPH B. DAILEY,
JUDGE

(Aggravated Assault, Driving on
Revoked License, Leaving Scene
of Accident)

For the Appellant:

Tony N. Brayton
Assistant Public Defender
201 Poplar - Second Floor
Memphis, TN 38103
(At trial)

William D. Massey
3074 East Street
Memphis, TN 38128
(On appeal)

For the Appellee:

John Knox Walkup
Attorney General and Reporter

Deborah A. Tullis
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

John W. Pierotti
District Attorney General

David C. Henry
Assistant District Attorney
201 Poplar - Third Floor
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

This is an appeal as of right by appellant, Billy E. Johnson, following his convictions in the Shelby County Criminal Court of aggravated assault, driving on a revoked license, fifth offense, and leaving the scene of an accident. As a career offender, appellant received a twelve (12) year sentence for the aggravated assault conviction. He received six (6) month sentences to be served at seventy (70) percent in the workhouse on the misdemeanor offenses. All sentences are to be served concurrently.

Appellant raises three issues on appeal. First, he argues the evidence was insufficient to support the conviction for aggravated assault. Secondly, he challenges the admissibility of testimony about his drinking at or near the time of the accident. Finally, he argues that his twelve (12) year sentence for aggravated assault is cruel and unusual punishment. Finding no merit to any of these issues, we affirm the convictions and the sentences imposed by the trial court.

On July 24, 1993, thirteen-year-old Becky Bailey was riding her bicycle on the street where she lived in Shelby County. As she was riding down Hale Street towards Merton, she noticed a white truck turning right onto Hale Street. The truck was traveling about 30-35 mph as it turned. She watched the driver swing the vehicle wide as he made the turn, causing the vehicle to cross over the center of the roadway to the wrong side of the street. She testified that the driver was looking over his left shoulder as he turned. Miss Bailey stated that the truck came into the lane of traffic where she was riding and headed straight for her. As a result, the truck struck her body and threw her from the bicycle onto the grassy area next to the curb.

The driver exited the truck and asked her if she was OK. She replied that she was hurt and asked that he summon her parents, who lived on the corner. The driver, promising to get help, returned to his vehicle and drove away. He never returned to the scene of the accident.

Two neighbors witnessed the accident and went to Miss Bailey's aid. Someone called the police and the neighbors decided to follow the man in the truck. As the truck went to the end of the street and turned onto Bingham, the driver began throwing Budweiser beer cans out of the truck. The two men followed the truck for several miles and wrote down the license number, but lost sight of the vehicle as they tried to flag down a policeman.

Miss Bailey suffered a broken arm, a hairline fracture of her left leg, and numerous bruises and scratches. Several days after the accident, she went to the police station and identified the appellant from a photo lineup as the driver of the truck. She also identified him at trial. The two men who followed appellant's truck likewise identified him at trial. One of the men, Clarence Williams, was an eyewitness to the accident. He confirmed that the truck was traveling 30-35 mph as it came around the corner. He described the event saying appellant "just went wide . . . he just lost control" and the truck jumped onto the opposite curb. Williams admitted that there may have been cars parked on the street where appellant turned. However, he denied that appellant needed to swing wide in order to avoid hitting them. While following the truck, appellant stopped once and asked Williams "Why you following me. If I was you, I wouldn't do you like that."

The other man, Mitchell Chandler, corroborated most aspects of Williams' testimony. He did not actually see the truck strike Miss Bailey; he only heard the accident. Chandler also testified that he observed a noticeable odor of alcohol about the appellant when he exited the truck to check on the victim. During the conversation Williams had with appellant after leaving the scene, Chandler heard appellant say that he was driving on a revoked license and that he was drunk. On cross-examination, he denied that either he or Williams threatened appellant during this conversation. Both Williams and Chandler confirmed that they heard appellant say he was going to get help when he left Miss Bailey.

The State also submitted proof of the revoked status of appellant's license at the time of the event. No proof was submitted on behalf of the appellant. The jury returned guilty verdicts on all three offenses. The trial court later determined appellant to be a career offender, noting that he had at least eleven (11) prior felony convictions in his criminal record. For the aggravated assault conviction, he was sentenced to the mandatory twelve (12) years to be served in the Department of Correction. Two concurrent sentences of six (6) months each were imposed at seventy (70) percent to be served in the workhouse for the misdemeanor offenses.

Appellant first challenges the sufficiency of the evidence to support the aggravated assault conviction. Specifically, he submits that the State failed to prove that his conduct was reckless, as required by the statute. We find this argument to be without merit.

An appellant challenging the sufficiency of the evidence has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In our review, we must consider the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). We further note that a guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the

witnesses for the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). In light of these considerations, we find the evidence was sufficient.

Appellant was indicted for the offense of aggravated assault. Particularly, the aggravated assault alleged in appellant's case is one which occurs when a person recklessly commits an assault¹ and it causes serious bodily injury to another *or* the person uses or displays a deadly weapon. Tenn. Code Ann. §39-13-102(a)(2) (Supp. 1996). In order for conduct to be considered reckless, it must be shown that a person "acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Tenn. Code Ann. §39-11-302(c) (1991). Disregard of this risk must constitute a gross deviation from the standard of care that an ordinary person would exercise. Id.

The theory of the State's case was that appellant had committed an aggravated assault on the victim by causing her bodily injury using a deadly weapon. The State asserted that the deadly weapon inflicting the bodily injury was the motor vehicle. We note that a motor vehicle may be considered a deadly weapon. State v. Tate, 912 S.W.2d 785, 787 (Tenn. Crim. App. 1995). The trial court instructed the jury in this regard. The element of bodily injury was established by the testimony of Miss Bailey. Thus, it remained for the State to prove the appellant's culpable mental state by submitting evidence sufficient to allow the jury to conclude beyond a reasonable doubt that appellant's conduct was reckless. The State successfully carried this burden.

The testimony at trial reflected that appellant was driving a three-quarter ton truck when he attempted to make a right turn onto a residential side street. When he attempted to negotiate this 90-degree turn, he was traveling at 30-35 mph. Likely due to his excessive speed, inattention, and perhaps intoxication, appellant made a wide right turn such that the truck veered far into the other lane of oncoming traffic. As a

¹An assault is defined, in relevant part, as intentionally, knowingly or recklessly causing bodily injury to another. Tenn. Code Ann. §39-13-101(a)(1) (1991).

result, he struck a young girl on a bicycle riding on the correct side of the street about one foot from the curb. As Mr. Williams described, appellant was traveling at such a rate of speed when he made the turn that he just lost control of the truck and it jumped up onto the curb on the opposite side of the street. We believe such conduct is sufficient to warrant an inference by the jury that appellant consciously disregarded a risk that he could collide with another vehicle when he attempted a sharp right turn at an excessive speed while not looking where he was going and veered into the lane of oncoming traffic. See State v. Norris, 874 S.W.2d 590, 595 (Tenn. Crim. App. 1993) (finding an inference of recklessness when a driver drives on the wrong side of the road).

In addition, Mr. Chandler observed that appellant smelled of alcohol and both Chandler and Williams observed him throw beer cans out the window of his truck while fleeing the scene. Finally, the appellant told Chandler that he was drunk. Considered in the light most favorable to the State, there was a reasonable inference from which a rational trier of fact could conclude that appellant grossly deviated from the standard of care that an ordinary person would exercise.

In attacking the evidence, appellant also points out several inconsistencies in the testimony given by the State's witnesses. He contends that in light of such testimony, the jury could not have found his conduct reckless. However, questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court is in no position to re-weigh the evidence and we find that the jury's verdict was amply supported by the proof at trial. This issue has no merit.

Appellant next argues that the trial court erred by allowing testimony alleging intoxication at the time of the accident. He contends that the probative value of this evidence was substantially outweighed by its danger of prejudice. Tenn. R. Evid. 403.

The admissibility of evidence is within the discretion of the trial court and that

decision will not be disturbed unless it is arbitrarily exercised. State v. Baker, 785 S.W.2d 132, 134 (Tenn. Crim. App. 1989) (citing State v. Hawk, 688 S.W.2d 467 (Tenn. Crim. App. 1985)). We cannot say that the trial court abused its discretion in allowing evidence of appellant's intoxication. The evidence of intoxication was clearly relevant to the jury's determination of the reckless nature of appellant's conduct. Davis v. State, 250 S.W.2d 534, 536 (Tenn. 1952) (holding that evidence was competent on the question of intoxication to show that the defendant was driving in a reckless manner). If relevant, evidence is generally admissible. Tenn. R. Evid. 402.

However, relevant evidence may be excluded if it can be demonstrated that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice. Tenn. R. Evid. 403. See also State v. Banks, 564 S.W.2d 947, 949 (Tenn. 1978). The potential unfair prejudice to the appellant here was an inference that he was driving under the influence of an intoxicant when he had not been charged with that offense. However, the evidence was highly probative in the jury's evaluation of appellant's conduct and whether it was a gross deviation from the ordinary standard of care. Davis, 250 S.W.2d at 536. Regardless of whether appellant was impaired or legally intoxicated, the ingestion of alcoholic beverages is relevant in that it makes it more probable that appellant's conduct was reckless. See Tenn. R. Evid. 401. The trial court did not abuse its discretion in admitting the evidence of alcohol consumption.

Appellant also argues that the State should have charged appellant with vehicular assault, in which intoxication is an element, if it sought to introduce this proof at trial. See Tenn. Code Ann. §39-13-106 (1991). However, the district attorney has wide discretion in choosing which offenses to charge. State v. Gilliam, 901 S.W.2d 385, 389 (Tenn. Crim. App. 1995) (citations omitted). See also State v. Turner, 919 S.W.2d 346, 350 n.2 (Tenn. Crim. App. 1995) (citations omitted). We see no abuse of that discretion here. The fact that the district attorney did not charge appellant with vehicular assault has no bearing upon whether evidence of appellant's intoxication

was relevant in the prosecution for aggravated assault. The State's theory was that evidence of alcohol consumption was probative of whether appellant's conduct was reckless. We agree. This issue has no merit.

Appellant's final issue challenges the sentence rendered by the trial court and the manner of service. He argues that the trial court erred in denying him community corrections. Also, he contends that the imposition of a twelve (12) year sentence for a Class D felony is tantamount to cruel and unusual punishment. These arguments are without merit.

It is our duty to conduct a *de novo* review of appellant's sentence with a presumption of correctness. Tenn. Code Ann. §40-35-401(d) (1990). This presumption is conditioned upon an 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 this review, we must follow certain procedures as set forth in the statute and consider the following:

- (1) The evidence, if any, received at the trial and the sentencing hearing;
- (2) [t]he presentence report;
- (3) [t]he principles of sentencing and arguments as to sentencing alternatives;
- (4) [t]he nature and characteristics of the criminal conduct involved;
- (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§40-35-113 and 40-35-114; and
- (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

Tenn. Code Ann. §40-35-210 (Supp. 1996).

In sentencing the appellant, the trial court examined the appellant's previous criminal history and determined that appellant had more than the requisite number of felonies to be classified as a career offender. See Tenn. Code Ann. §40-35-108 (1990). In fact, appellant had nearly double the number of required felonies. The appellant did not contest this classification at the sentencing hearing, nor does he object to it on appeal. When a trial court sentences a career offender, the sentence is mandatory. See Tenn. Code Ann. §40-35-108(c) (1990). The trial court has no discretion and does not consider enhancing or mitigating factors. Id. See also State

v. Albert Franklin, No. 02C01-9404-CR-00081 (Tenn. Crim. App. at Jackson, December 14, 1994); State v. Bernard Woodard, No. 03C01-9204-CR-00129 (Tenn. Crim. App. at Knoxville, February 2, 1993). The statute provides that a career offender “shall receive the maximum sentence within the applicable Range III.” Tenn. Code Ann. §40-35-108(c) (1990) (emphasis added). Thus, the trial court’s order of twelve (12) years on the aggravated assault conviction represents the maximum Range III sentence for a Class D felony and is proper.

However, the appellant argues that the trial court does have discretion in ordering the manner of service of the sentence. At the sentencing hearing, appellant requested community corrections as an alternative to confinement. While admitting that he does not meet the minimum eligibility standards for community corrections set forth in the statute, appellant maintains that such an alternative sentence comports with the guidelines of the Sentencing Act considering his particular circumstances. We believe, as this Court has remarked on a previous occasion, that “it is inconceivable that a career offender would be eligible for an alternative to confinement.” Jerry Lynn Hopson v. State, No. 03C01-9308-CR-00249 (Tenn. Crim. App. at Knoxville, September 27, 1994), perm. to appeal denied (Tenn. 1995). Appellant’s argument is without merit.

In addition to conceding in his brief that he fails to meet the minimum statutory eligibility requirements for community corrections, he also admits that he does not fall within the special needs provision of that statute. Tenn. Code Ann. §40-36-106(c) (Supp. 1996). Regardless, appellant still argues for this alternative contending that his poor physical health and questionable mental health make confinement improper. We strongly disagree.

Denial of appellant’s request for a community corrections sentence comports fully with the guidelines and principles of our Sentencing Act. Statutory considerations militating against alternative sentencing include:

Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; [c]onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. §40-35-103(1)(A)-(C) (1990). See also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Appellant's long history of criminal conduct indicates that confinement is necessary to protect society from further violations. Appellant's criminal history dates back to 1962, spanning a period of thirty-three (33) years. Appellant admittedly has abused alcohol and drugs almost continuously during this time. His offenses have been repetitive and numerous. The trial court found that appellant had eleven (11) felony convictions, basing that determination only upon previous sentencing orders of one year or more. Not even considered were a host of other convictions that had not been classified under the 1989 Sentencing Act.

Furthermore, his record is replete with orders of probation and relatively brief sentences. Obviously, measures less restrictive than confinement have frequently been unsuccessful. New violations have followed the completion of each sentence. Appellant's criminal conduct has not been deterred. A significant period of confinement is the only effective way to protect society from appellant and hopefully deter the appellant from criminal activity in the future. One of the inherent purposes of the Sentencing Act is the incapacitation of a career offender. Jerry Lynn Hopson v. State, No. 03C01-9308-CR-00249 (Tenn. Crim. App. at Knoxville, September 27, 1994), perm. to appeal denied (Tenn. 1995). The length of the sentences imposed on such offenders by the legislature demonstrates its belief that extended incarceration is the effective way to accomplish this purpose.

Neither do we find the sentence excessive as appellant argues. It is true that none of appellant's crimes have been particularly violent offenses and only a few have been crimes committed against a person. However, it is the appellant's protracted, repeated and blatant disregard for the laws of this State that disturb this Court. For

example, three days after committing the offense at issue appellant was involved in another vehicle accident and ticketed for driving on a revoked license, making that his sixth offense in that class. Less than two months after committing the present offense, appellant was arrested for shoplifting. A few months later, appellant was arrested for driving under the influence for a third time. This continuing criminal conduct was stopped only when the trial court revoked appellant's bond and incarcerated him. Thus far, confinement has been the only effective deterrent for the appellant. One of the purposes of the Sentencing Act is to restrain defendants with lengthy criminal histories. Tenn. Code Ann. §40-35-102(3)(A) (1990). Appellant's extended sentence of incarceration is necessary to accomplish such a goal.

Finally, appellant's argument that his sentence is cruel and unusual punishment is also without merit. He does not argue that career offender sentencing is *per se* unconstitutional, but as applied in his case, he asserts that it is a constitutional violation. This issue is without merit.

The supreme court has adopted the same test used by the federal courts in evaluating the proportionality of a sentence. State v. Harris, 844 S.W.2d 601, 603 (Tenn. 1992). First, a reviewing court must compare the sentence imposed with the crime committed. Id. If this comparison leads to an inference of gross disproportionality, the court must also compare the sentences imposed on other criminals in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions. Id. However, if there is no inference of gross disproportionality, the inquiry ends. Id. Successful challenges to the proportionality of sentences outside the context of capital punishment are exceedingly rare. Id. at 602 (citations omitted). We do not find appellant's case to be such a rare instance.

Appellant received twelve (12) years to be served at sixty (60) percent for the offense of aggravated assault. The sentence requires 7.2 years of service before parole eligibility. His reckless conduct injured a young girl riding a bicycle on a quiet

residential street, a place normally considered safe for her to ride. Because he was driving too fast and not maintaining a proper lookout, his truck careened into her bicycle causing two bone fractures and several minor injuries. Considering the evidence of alcohol consumption at the time of the accident, along with appellant's long history of alcohol and drug abuse, the sentence does not lead to an inference of gross disproportionality. This conclusion is strengthened by appellant's extensive criminal record. This issue is without merit.

For the above stated reasons, we find that the trial court committed no error. Appellant's convictions and sentences are affirmed, including the classification as a career offender.

William M. Barker, Judge

Gary R. Wade, Judge

David G. Hayes, Judge