

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

FILED
May 16, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

ROY DANNY MAYO,

Appellant.

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C.C.A. NO. 01C01-9507-CC-00219

CHEATHAM COUNTY

HON. ROBERT E. BURCH
JUDGE

(Direct Appeal-Sentencing)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Roy Danny Mayo pled guilty in the Cheatham County Circuit Court to assault with intent to commit first degree murder, especially aggravated burglary, aggravated assault, and aggravated burglary. As a Range I standard offender, he received respective sentences of twenty years, ten years, five years, and five years. The trial court ordered the first two sentences served consecutively to each other but concurrently with the remaining two sentences, for an effective sentence of thirty years in the Tennessee Department of Correction. In this appeal, Appellant presents the following issue for review: whether his sentence is excessive.

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

I. FACTUAL BACKGROUND

During the early morning of July 6, 1991, Appellant burglarized a store owned by Kara and Gene Fox. The sounds of the burglary awakened the Foxes whose home was located adjacent to the store. While Mrs. Fox called 911, Mr. Fox went outside to investigate. Mr. Fox removed the keys from Appellant's car before retrieving an unloaded shotgun from his home. When Appellant left the store and approached his car, an altercation ensued between Mr. Fox and Appellant. In an effort to aid her husband, Mrs. Fox ran from the house and struck Appellant on the back with a broom stick. At some point during the altercation, Appellant shot Mr. Fox, striking him once in the arm and once in the chest. Mrs. Fox then fled into the house, locking the door

behind her. Appellant, who was unable to find his keys, kicked in the front door and forced Mrs. Fox outside at gunpoint, demanding that she help him find his keys. At this point, the police arrived.

Appellant was subsequently convicted of attempted first degree murder, especially aggravated burglary, aggravated assault, and aggravated burglary. At his original sentencing hearing, Appellant received mid-range sentences of twenty years and ten years for attempted first degree murder and especially aggravated burglary but minimum sentences of three years each for aggravated assault and aggravated burglary. The trial court ordered the first two sentences served consecutively to each other but concurrently with the remaining two sentences. On appeal, this Court, pointing out that the trial court had failed to make separate findings for each offense, questioned the imposition of mid-range sentences for two of the offenses and minimum sentences for the other two offenses. This Court also found that the trial court's justification for consecutive sentencing was not provided for by statute. As a result, this Court remanded the case to the trial court for resentencing. See State v. Mayo, No. 01C01-9308-CC-00287, 1994 WL 585420 (Tenn. Crim. App. Oct. 20, 1994).

Upon remand, the trial court ordered mid-range sentences for each offense, relying upon Appellant's prior criminal record and his parole status at the time of the offenses. See Tenn. Code Ann. § 40-35-114(1), (13). The trial court found that the imposition of consecutive sentences for the most serious offenses was appropriate because Appellant's actions indicated little or no regard for human life and no hesitation about committing a crime in which the

risk to human was high. See id. 40-35-115(b)(4). Appellant appeals from this sentence.

II. SENTENCING

Appellant alleges that his sentence is excessive. Specifically, he argues that the trial court erred both in determining the length of his sentences and in imposing consecutive sentences.

When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, this presumption of correctness is “conditioned upon the affirmative showing that the trial court in the record considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the

sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that, because the record fails to demonstrate full consideration of all the factors underlying the imposition of consecutive sentencing, our review of Appellant's sentence will be purely de novo.

A. LENGTH OF SENTENCE

Appellant first argues that the trial court erred in determining the length of his sentence.¹ Specifically, Appellant contends that, in applying enhancement factors (10) and (13), the trial court enhanced his sentence too much. Appellant also contends that the trial court should have applied mitigating factor (8), which states that “[t]he defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense” Tenn. Code Ann. § 40-35-113(8).

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range while the presumptive length of sentence for a Class A

¹During this argument, Appellant makes reference to the resentencing principle set out in North Carolina v. Pearce, 305 U.S. 711 (1969). In Pearce, the United States Supreme Court held that a harsher sentence after a new trial raises a presumption of "judicial vindictiveness," which may be overcome by an affirmative showing on the record of the reasons for the harsher sentence. Id. at 725-26; see also State v. Gillium, 901 S.W.2d 385, 392 (Tenn. 1995). In light of the fact that Appellant's effective sentence remained the same, we do not believe that he received a harsher sentence as anticipated by Pearce. Moreover, even if his new sentence is considered a harsher one, the trial court overcame the presumption of vindictiveness by making the following comments: “[S]ince [the aggravated assault and aggravated burglary convictions] ran concurrently, I figured they were gimmes anyway and really didn't have a factor of increasing [the effective length of sentence]. . . . I will give him a mid-range sentence of five years . . . [because] it seems to me that that complies with what [the Court of Criminal Appeals'] instructions are” We conclude that Appellant's new sentence was not a product of judicial vindictiveness and is not violative of Pearce.

felony is the midpoint in the statutory range. Tenn. Code Ann. § 40-35-210(c) (Supp. 1995). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Id. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

Appellant's first contention is without merit. Unless violative of the Sentencing Reform Act or unsupported by the record, the weight afforded an enhancement factor is left to the discretion of the trial court. See id. Appellant fails to even allege that either exception applies here. The trial court found two applicable enhancement factors and imposed a mid-range sentence. We conclude that such an enhancement is both supported by the record and in accord with the Sentencing Reform Act.

Appellant's second contention is also without merit. The only evidence to support Appellant's claim is a psychological evaluation performed over a year before the crimes were committed. Appellant fails to directly link this evidence to the crimes. Furthermore, at his plea hearing, Appellant failed to

assert that his actions were in any way a result of a mental condition.

Moreover, Appellant was given a psychological examination at the time of his guilty plea which concluded that Appellant's condition would not prevent him from assisting in his own defense and did not affect his ability to understand the nature of his guilty plea. Therefore, we conclude that the trial court acted within its discretion in declining to apply mitigating factor (8).

B. CONSECUTIVE SENTENCING

Appellant next argues that the trial court erred in imposing consecutive sentences. When imposing sentences for multiple offenses, the trial court has the discretion to order the sentences served concurrently or consecutively. Tenn. Code Ann. § 40-20-111 (a) (1990). The imposition of consecutive sentences is appropriate if the defendant has been convicted of more than one offense and the trial court finds, by a preponderance of the evidence, one or more of the following criteria:

- (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 . . . ;
- (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 (1990).

Here, The trial court found that Appellant was a dangerous offender as a ground for imposing consecutive sentences. See Tenn. Code Ann. § 40-35-115 (b)(4). However, this finding, standing alone does not justify consecutive sentences. A trial court may not impose consecutive sentences based upon the defendant's dangerous offender status unless the record establishes that:

(a) the defendant's behavior indicated little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(b) the circumstances surrounding the commission of the offense were aggravated;

(c) consecutive sentences are necessary to protect society from further criminal conduct by the defendant;

(d) consecutive sentences reasonably relate to the severity of the offenses committed; and

(e) the sentence is in accord with the principles set forth in the Sentencing reform Act.

State v. Wilkerson, 905 S.W .2d 933, 938-39 (Tenn. 1995); see also State v. Ross, No. 03C01-9404-CR-00153, 1996 WL 167723, *9 (Tenn. Crim. App. Apr. 10, 1996).

The trial court made adequate findings with regard to the first two requirements set out in Wilkerson, and the record supports such findings. However, the trial court failed to address the remaining three. Mindful of these remaining requirements, we will conduct a de novo review of the record. Appellant's criminal record and his parole status from an earlier felony conviction establishes a need to protect society from further criminal conduct

by Appellant. Moreover, as a result of the attack, Mr. Fox remained in intensive care for five days, suffering from two gunshot wounds and a broken jaw. At the original sentencing hearing, Mr. Fox testified that he had permanent nerve damage on the right side of his face and would have to undergo an additional surgery to have one of the bullets removed. Pursuant to his doctors' instructions, Mr. Fox has sold his store, no longer works, and lives off his savings. Given the seriousness and long-lasting nature of these injuries, we believe that Appellant's sentence reasonably relates to the severity of the offenses committed. We further believe that the imposition of consecutive sentences is in accord with the Sentencing Reform Act. When imposing a sentence involving incarceration, one of the purposes of the Sentencing Reform Act is to give priority to "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5). For the aforementioned reasons, we believe that Appellant is just such a convicted felon and that his sentence is in keeping with the dictates and purposes of the Sentencing Reform Act.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE