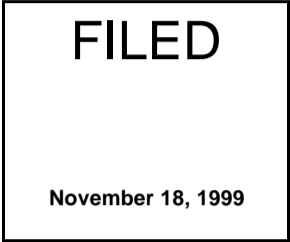


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1999 SESSION



STATE OF TENNESSEE,
9811-CR-00415

Appellee,

VS.

IRA J. BABB, JR.,

Appellant.

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C.C.A. # 03C01-

SULLIVAN COUNTY

Hon. Phyllis H. Miller, Judge

(Aggravated Assault, Two Counts Reckless
Endangerment, Driving on a Revoked
License, and Leaving the Scene of an
Accident)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Ira J. Babb, Jr., pled guilty to driving on a revoked license and leaving the scene of an accident with injury. Also charged with aggravated assault and reckless endangerment, he was found guilty of two counts of reckless endangerment. The trial court imposed sentences as follows:

<u>Offense</u>	<u>Class</u>	<u>Term</u>
Reckless endangerment	E felony	Two years
Reckless endangerment	E felony	Two years
Driving on a Revoked License, Second Offense	A misdemeanor	11 months, 29 days
Leaving Scene of an Accident involving injury	A misdemeanor	11 months, 29 days

Because all of the sentences were ordered to be served consecutively, the effective sentence is five years, eleven months and twenty-eight days. The trial court also ordered restitution in the approximate sum of \$2,200.00, which has been paid, and assessed fines totaling \$8,000.00.

In this appeal of right, the defendant does not challenge the length of the sentences on any of the four offenses, but does argue that the trial court erred by ordering consecutive terms. We find no error and affirm the judgment of the trial court.

The transcript of the trial was not made a part of the record. The sentencing hearing, which includes a summary of the facts, indicates that at approximately 6:00 P.M. on June 17, 1997, the defendant was driving a brown Cougar along Moreland Road in Sullivan County. He was following closely a car driven by the victim, Trent Neeley, who recognized the defendant as a former high school classmate. Later, the victim described the defendant, whom he believed to be intoxicated, as "all over the road." He reported that the defendant accelerated his vehicle and switched lanes before colliding into the rear of his vehicle. The victim believed the collision to be intentional. As a result of the impact, the victim was thrown from his car. Not seriously injured, he saw the defendant drive away

from the scene, almost causing another vehicle to veer off the road. The victim, who received cuts to his head, arms, and hand, remarked that he was lucky to be alive. His car was totaled.

At the sentencing hearing, it was established that the defendant, age thirty, had been married since July 13, 1987, and that he and his wife had no children. After completing high school in 1986, the defendant was employed by his father as a mason, earning approximately \$10.00 per hour for a work week consisting of thirty-five hours. He owned two older vehicles and made monthly payments on a mobile home and a personal loan. The defendant has back problems, due to the deterioration of discs, but is otherwise in good health. He reported a history of alcohol usage beginning at the age of fourteen, marijuana usage prior to his marriage, and periodic alcohol abuse. He testified that he had developed an addiction to pain medication for which he is treated three times per week in a methadone program in Knoxville. Among the prescription drugs that defendant admitted using were morphine and percodan. He has also used heroin, "where I could find it."

The trial court ruled in pertinent part as follows:

I am required to ensure that [imposition of] aggregate sentences is the least severe measure necessary to protect the public from your future criminal conduct. That ... any aggregate sentence must be related to your potential for rehabilitation... [Y]ou have an extensive record of criminal activity. It ... just meant nothing to you, that it was against the law for you to operate a motor vehicle while your license was revoked, and that's what we're dealing with here. You are not a murderer, rapist, or robber, but you are a person who has no regard for traffic laws. So, I find that by a preponderance of the evidence, from your ... extensive record of criminal activity, both before and after you committed this offense as reflected in your testimony and the presentence report, that that applies.... If you have been addicted to pain killers as long as you [say you] have, you have committed many, many offenses while you have been addicted.... You have been a dangerous offender for years. [T]he fact that you tailgated that man the way you did, the fact that you saw his car flying through the air, you didn't stop. It is just more evidence of your attitude, that you are going to do what you wanted to do, and you don't care who it endangered.... So, I find that you have no hesitation about committing crimes when the risk to

human life is high. Now, that's from your criminal history, from the types of offenses, and from the testimony and the evidence of your taking drugs illegally.... The court must also find that an extended sentence is necessary to protect the public against further criminal conduct by you. I find that it is. I find that it is necessary that you receive as lengthy a sentence as possible because of your criminal history.... I find that it is necessary to protect the public against further criminal conduct, and I find that consecutive sentences in all these cases reasonably relate to the severity of the offenses committed.

(Emphasis added).

When there is a challenge 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 trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). 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; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

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 placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), 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 routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary 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 criteria¹ 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

¹The 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.

committed while on probation;

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, ____ S.W.2d ____ (Tenn. 1999).

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, considered the most subjective of the classifications and the most difficult to apply, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate[] to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938.

Here, the presentence report indicates that the defendant committed a series of offenses between the age of nineteen and twenty-nine, all of which qualify as drug- or alcohol-related or as driving offenses. Convictions include public intoxication, instances of driving under the influence of an intoxicant, possession of cocaine and drug paraphernalia, speeding, no driver's license, several occasions of

driving on a revoked license, driving without a license in possession, and violation of the seat belt law.

The record demonstrates that the sentences for the prior offenses were lenient. The defendant has had at least twelve prior court appearances, each of which provided opportunities for him to demonstrate rehabilitative qualities. The record, in our view, not only establishes the extensiveness of the defendant's prior criminal activity but also his proclivity for driving without a license and under the influence of either drugs or alcohol. The defendant qualifies as having an extensive record of criminal activity. He is also a dangerous offender. These crimes do involve aggravating circumstances and suggest that the driving public must be protected from the defendant. The effective sentence of almost six years reasonably relates to the severity of the offenses. In our view, the record supports the trial court's conclusion that consecutive sentences were appropriate.

Accordingly, the judgment is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

Jerry L. Smith, Judge

James Curwood Witt, Jr., Judge