

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

FILED

December 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 JOSHUA S. MEININGER,)
)
 Appellant.)

NO. M1998-00437-CCA-R3-CD

MONTGOMERY COUNTY

HON. JOHN H. GASAWAY,
JUDGE

(Sentencing)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

Defendant, Joshua S. Meininger, entered an open plea of guilty to attempted second degree murder and received a sentence of ten years. In this appeal as of right, he contends his sentence is excessive. Upon review of the record, we **AFFIRM** the sentence imposed by the trial court.

FACTS

The defendant, co-defendant (the victim's wife), and the victim's step-daughter became intoxicated. One of them suggested they kill the victim for the money co-defendant would receive on an insurance policy on the victim's life. While the victim was sleeping, he was shot five times at close range with a .22 caliber pistol. Defendant testified that he only fired the first shot. However, the victim testified at the sentencing hearing that he saw the defendant fire the second, third and fourth shots, but was unsure who fired the fifth shot.

Defendant entered an open plea of guilty to attempted second degree murder and was sentenced to ten years as a Range I standard offender. The trial court applied the following enhancement factors:

- (1) The defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114(1).
- (2) The victim of the offense was particularly vulnerable because of physical disability. Tenn. Code Ann. § 40-35-114(4).
- (3) The defendant treated the victim with exceptional cruelty during the commission of the offense. Tenn. Code Ann. § 40-35-114(5).
- (4) The personal injuries inflicted upon the victim were particularly great. Tenn. Code Ann. § 40-35-114(6).
- (5) The defendant employed a firearm during the commission of the offense. Tenn. Code Ann. § 40-35-114(9).

The trial court found the defendant's age (twenty) and relationship with the victim's step-daughter substantially impaired his judgment, and further considered the defendant's plea of guilty to be mitigating factors. See Tenn. Code Ann. §§ 40-

35-113(6) and (13). After weighing the mitigating and enhancement factors, the court ordered the defendant to serve a mid-range sentence of ten years.

STANDARD OF REVIEW

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

DISPOSITION OF THE DEFENDANT'S CONTENTIONS

(1)

First, the defendant argues the trial court failed to consider alternative sentencing and his potential for rehabilitation. The defendant contends the trial court believed defendant was automatically ineligible for probation and claims this mistaken conclusion precluded the court from considering the appropriate sentencing principles.

The court initially stated probation was not an option. However, upon argument by counsel, it retracted that statement and agreed that if the defendant received a minimum sentence of eight years, he would be a candidate for probation. This issue is without merit.

(2)

Second, the defendant claims his criminal history should be given little weight by the trial court because his only prior convictions are two misdemeanors, which

arose out of the same incident. See Tenn. Code Ann. § 40-35-114(1). In addition, he claims the fact that a deadly weapon was used should be given little weight because this factor can be found in the majority of attempted murders. See Tenn. Code Ann. § 40-35-114(9).

No particular weight for each factor is prescribed by the statute, and the weight given to each factor is left to the discretion of the trial court, as long as the trial court complies with the principles of sentencing and its findings are supported by the record. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Leggs, 955 S.W.2d 845, 848 (Tenn. Crim. App. 1997); State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995); see Tenn. Code Ann. § 40-35-210 Sentencing Commission Comments. We find no abuse of discretion in the weight accorded these two factors by the trial court.

(3)

Third, defendant claims the trial judge incorrectly applied the following enhancement factors:

- (1) the victim was particularly vulnerable because of the “physical disability” of being asleep when the first shot was fired, Tenn. Code Ann. § 40-35-114(4); and
- (2) defendant treated the victim with exceptional cruelty, Tenn. Code Ann. § 40-35-114(5).

The range of punishment in this case was eight to twelve years. The defendant was sentenced to the mid-range term of ten years. Three enhancement factors clearly applied, and the trial judge applied two mitigating factors. Even if the trial judge did improperly apply the two questioned factors, we would not reduce the sentence. See State v. Lavender, 967 S.W.2d 803, 809 (Tenn. 1998) (misapplication of an enhancement factor does not necessarily mandate a reduction of the sentence.)

Thus, we see no reason for a detailed analysis of these two factors.

(4)

Finally, the defendant argues that the court did not adequately consider all applicable mitigating factors. He argues the trial court should have considered his learning disability, his expressions of remorse, the fact that he confessed, and his potential for rehabilitation.

The trial court considered and rejected the mitigating factors submitted by the defendant. Our review of the record supports the rejection of these factors by the trial court. This issue is without merit.

CONCLUSION

The trial court meticulously followed the statutory sentencing procedure and imposed a lawful sentence. Even if one or two enhancement factors were misapplied, the mid-range sentence of ten years is still justified. Thus, we **AFFIRM** the trial court's judgment.

JOE G. RILEY, JUDGE

CONCUR:

THOMAS T. WOODALL, JUDGE

JAMES CURWOOD WITT, JR., JUDGE

