IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1999

FILED

November 24, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	**)**	**C.C.A. NO. 01C01-9810-CR-00421**
Appellee,	**)**	
	)	**DAVIDSON**
COUNTY		
VS.	**)**	
	)	**HON. CHERYL BLACKBURN**
JOSEPH OSCAR PRICE, III,	**)**	**JUDGE**
Appellant.	**)**	**(Direct Appeal - Especially Aggravated Kidnapping; Aggravated Robbery; Aggravated Burglary and Theft over $1000))**

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

On November 3, 1997, the Davidson County Grand Jury indicted the Appellant Joseph Oscar Price, III for especially aggravated kidnapping, aggravated robbery, aggravated burglary, and theft over $1,000.00. Following a jury trial on July 27 to 28, 1998, the Appellant was convicted of especially aggravated kidnapping, aggravated robbery, aggravated burglary, and theft in the amount of $500.00 or less. After a sentencing hearing on September 16, 1998, the trial court sentenced the Appellant as a Range I Standard Offender to twenty-four years for especially aggravated kidnapping, twelve years for aggravated robbery, five years for aggravated burglary, and eleven months and twenty-nine days for theft. In addition, the trial court ordered the sentences for especially aggravated kidnapping, aggravated robbery, and aggravated burglary to run consecutively and ordered the sentence for theft to run concurrently to the other sentences. The Appellant challenges his conviction for especially aggravated kidnapping and challenges all of his sentences, raising the following issues:

> 1) whether the conviction for especially aggravated kidnapping violates due process;
> 2) whether the trial court erroneously sentenced him to longer terms than he deserves for each conviction; and
> 3) whether the trial court erred when it imposed consecutive sentencing.

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

I. FACTS

On July 18, 1997, the Appellant, Joseph Oscar Price, III, burgled his father's home in Davidson County. The guest house on the property had also been forcibly entered. A handgun valued at under $100 had been taken in the burglary. When the Appellant's father checked his telephone answering machine after calling the police, he discovered a message from his son, the Appellant, informing the elder Mr. Price that the Appellant had decided to spare his father's life and directing his father to refrain from calling the police.

Later in the day on July 18, 1997, the Appellant abducted Mr. Bernard Weinstein at gunpoint as Weinstein sat in his car stopped for a red light. The Appellant then forced Weinstein, a gun pointed to his head, to drive around Nashville until the pair reached a secluded area. There the Appellant robbed Weinstein of his wallet, money and watch. The Appellant threatened to shoot Weinstein in the leg but relented when Weinstein pleaded with the Appellant not to shoot him. Instead, the Appellant forced Weinstein to disrobe and climb into a trash dumpster until the Appellant disappeared in Weinstein's car.

Finally, on the afternoon of July 18, 1997, the Appellant was arrested by the Tennessee Highway Patrol in Henderson County following a high-speed car chase in which the Appellant crashed into a number of other vehicles. He was armed with a handgun, a knife and a slapstick. He was also intoxicated and in possession of a number of items belonging to Mr. Weinstein. Other items belonging to Mr. Weinstein were found along Interstate 40 between Nashville and Henderson County.

The Appellant testified that he began drinking heavily at 4:00 a.m. forward on July 18, 1997. He remembered going to his father's house to get a gun to kill himself. He also remembered traveling on the interstate. Although he claimed to have no memory of the events surrounding the abduction and robbery of Mr. Weinstein, he expressed remorse for his actions.

II. CONVICTION FOR ESPECIALLY AGGRAVATED KIDNAPPING

Appellant contends that his conviction for especially aggravated kidnapping violates due process because that offense was essentially incidental to the aggravated robbery offense. We disagree.

In State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), the Tennessee Supreme Court addressed the issue of whether both robbery and kidnapping convictions can

be upheld when each conviction arises out of the same criminal episode. The Supreme Court stated that the relevant inquiry is

> [W]hether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction.

Id. at 306. The Supreme Court cited the following test, as taken from Faison v. State, 426 So. 2d 963, 965 (Fla. 1983), with approval:

> [I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:
>
> (a) Must not be slight, inconsequential and merely incidental to the other crime;
>
> (b) Must not be of the kind inherent in the nature of the other crime; and
>
> (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

Id.; See also State v. Darrell Wentzel, No. 01C01-9705-CC-00193, 1998 WL 842057, at *7–8 (Tenn. Crim. App., Nashville, Dec. 7, 1998); State v. Michael K. Christian, Jr., No. 03C01-9609-CR-00336, 1998 WL 125562, at *8–9 (Tenn. Crim. App., Knoxville, March 23, 1998).

It is clear that under this test, the Appellant's conviction for especially aggravated kidnapping does not violate due process, and thus, his conviction for that offense must be upheld. First, the Appellant's movement and confinement of Weinstein was certainly not slight, inconsequential, or merely incidental to the aggravated robbery. Indeed, the Appellant's actions in pointing a gun at Weinstein's head, forcing him to drive to two different locations under threat of being killed, and forcing him to remove some clothing and get into a dumpster resulted in confinement and movement that were clearly substantial. Further, these actions greatly increased the risk that Weinstein would be harmed during his encounter with the Appellant. Second, the Appellant's actions were not of the kind that are inherent in the crime of aggravated robbery. The Appellant could have easily completed the aggravated robbery by forcing Weinstein to give up his property during their initial

encounter on the side of the road. Third, while it was not necessary for the Appellant to force Weinstein to drive to two different locations in order to rob him, doing so made commission of the aggravated robbery easier and it lessened the risk of detection. Forcing Weinstein to leave the initial location by the side of the road and go to the alley behind the store and the area by the dumpster decreased the chance that a third person would observe the aggravated robbery. Furthermore, taking Weinstein to less visible areas, forcing him to remove some clothing, and leaving him without his car clearly prevented Weinstein from summoning help as quickly as he could have had he been robbed on the side of the road. In short, the Appellant's convictions for both especially aggravated kidnapping and aggravated robbery do not violate due process. This issue has no merit.

III. LENGTH OF SENTENCES

The Appellant contends that the trial court erroneously imposed a longer sentence than he deserves for each of his convictions. We disagree.

"When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted 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) (1997). "However, the presumption of correctness which accompanies the trial court's action 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). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and

mitigating factors, arguments of counsel, the Appellant's statements, the nature and character of the offense, and the Appellant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1998); Ashby, 823 S.W.2d at 169. "The defendant has the burden of demonstrating that the sentence is improper." Id.

In this case, the Appellant was sentenced as a Range I Standard Offender to a term of twenty-four years for the especially aggravated kidnapping conviction. Especially aggravated kidnapping is a Class A felony with an applicable sentencing range of fifteen to twenty-five years. See Tenn. Code Ann. §§ 39-13-305(b)(1), 40-35-112(a)(1) (1997). Appellant also received a twelve year sentence for the aggravated robbery conviction. Aggravated robbery is a Class B felony with an applicable sentencing range of eight to twelve years. See Tenn. Code Ann. §§ 39-13-402(b), 40-35-112(a)(2) (1997). Appellant received a five year sentence for the aggravated burglary conviction. Aggravated burglary is a Class C felony with an applicable sentencing range of three to six years. See Tenn. Code Ann. §§ 39-14-403(b), 40-35-112(a)(3) (1997). Appellant also received a sentence of eleven months and twenty-nine days for the conviction for theft of property worth $500.00 or less. This grade of theft is a Class A misdemeanor with an applicable sentencing range of any period less than eleven months and twenty-nine days. See Tenn. Code Ann. §§ 39-14-105(1), 40-35-111(e)(1) (1997).

In determining the length of the Appellant's sentences, the trial court found that two enhancement factors applied to all four convictions: (1) the Appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the sentencing range and (8) the Appellant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(1), (8) (1997). The trial court also found that three additional enhancement factors applied to the sentences for the especially aggravated kidnapping and the aggravated robbery convictions: (5) the Appellant treated the victim with exceptional cruelty during the commission

of the offense, (10) he had no hesitation about committing a crime when the risk to human life was high, and (16) the crime was committed under circumstances where the potential for bodily injury to the victim was great. See Tenn. Code Ann. § 40-35-114(5), (10), (16) (1997). The trial court found that mitigating factor(s) applied to all four sentences: because the Appellant had a good family, had worked hard in the past, and had a good education. See Tenn. Code Ann. § 40-35-113(13) (1997). Finally the trial court found that one additional mitigating factor applied to the sentences for the aggravated burglary and the theft convictions: (1) The Appellant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997). The trial court also found that one additional mitigating factor applied to the sentence for the especially aggravated kidnapping conviction since the Appellant had voluntarily released the victim alive. See Tenn. Code Ann. § 39-13-305(b)(2) (1997).

The Appellant does not challenge the application of enhancement factor (1) to all four of his sentences and we conclude that it was properly applied. Indeed, the record indicates that before he committed the crimes for which he was convicted in this case, the Appellant had been convicted of driving under the influence of an intoxicant and aggravated assault. Appellant had also admitted to using marijuana from 1978 until 1986.

The Appellant does not challenge the application of enhancement factor (8) to all four of his sentences. We conclude that it was properly applied, because the record indicates that the Appellant committed the offenses in this case while he was on probation for his previous convictions.

The Appellant contends that the trial court erred when it applied enhancement factor (5) to his sentences for especially aggravated kidnapping and aggravated robbery. We agree that the trial court erred when it applied this factor. The record indicates that the trial court based the application of this factor on the Appellant's

threats to kill Weinstein, his threats to shoot Weinstein in the leg, his actions in pointing the gun at Weinstein's head, and his actions in forcing Weinstein to remove his shoes, socks, and pants. While we agree that these actions were cruel and demeaning, the Tennessee Supreme Court has stated that before this factor may be applied, the facts in the case must "support a finding of 'exceptional cruelty' that 'demonstrates a culpability distinct from and appreciably greater than that incident to'" the crime. State v. Poole, 945 S.W.2d 93, 98 (Tenn. 1997)(citation omitted). See also State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995) (holding that application of enhancement factor (5) "requires a finding of cruelty over and above that inherently attendant to the crime"). A threat of the victim being shot or killed is inherent in the offenses of especially aggravated kidnapping and aggravated robbery that are committed by the use of a firearm. Furthermore, while forcing a victim to partially disrobe is certainly demeaning, we do not believe that it rises to the level of "exceptional cruelty" required by the Supreme Court for application of this factor. Indeed, enhancement factor (5) is usually found in cases of abuse or torture. See State v. Gray, 960 S.W.2d 598, 611 (Tenn. Crim. App. 1997). Appellant's actions simply do not rise to that level. Thus, application of enhancement factor (5) was not appropriate.

The Appellant contends that the trial court erred when it applied enhancement factor (10) to his sentences for especially aggravated kidnapping and aggravated robbery. Specifically, the Appellant argues that this factor was not applicable because it is inherent in the offenses. The Appellant is correct that enhancement factor (10) generally cannot be used to enhance a sentence for aggravated robbery because the offense of aggravated robbery necessarily entails a high risk to human life. See State v. Claybrooks, 910 S.W.2d 868, 872–73 (Tenn. Crim. App. 1994). The Appellant is also correct that enhancement factor (10) generally cannot be used to enhance a sentence for especially aggravated kidnapping because the factor is an element of the offense. See State v. Kern, 909 S.W.2d 5, 7–8 (Tenn. Crim. App. 1993). However, this Court has held that even when factor (10) is an element of the

offense, it may still be applied where the defendant creates a high risk to the life of a person other than the victim. State v. Bingham 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). In this case, the Appellant's perpetration of the especially aggravated kidnapping and aggravated robbery created a high risk to the life of persons other than Weinstein. Weinstein testified that the Appellant pointed a gun at his head and told him that if he did not follow his driving instructions he would be killed. The following colloquy that occurred during Weinstein's direct examination is illustrative of the danger the Appellant created to others:

> Q: Okay, and when you stopped at the red light, what was his next command?
>
> A: He told me to drive forward, and then right after that, he told me to pull into the left hand lane, and there was a car in the left hand lane, and I just, I said, "There is a car in the left hand lane," and he said, "Get in the left hand lane," and he made some motion. He had warned me not to look around, not to look at him or he would kill me, and I did get, somehow I got into the left hand lane.

It is clear that the Appellant's actions in pointing a gun at Weinstein, forcing him to drive through traffic without looking around at other cars, and forcing him to move into a traffic lane that was already occupied by another vehicle caused a significant risk that a traffic accident would occur and thus, caused a high risk to the life of persons other than Weinstein. Therefore, we conclude that the trial court properly applied factor (10).

The Appellant contends that the trial court erred when it applied enhancement factor (16) to his sentences for especially aggravated kidnapping and aggravated robbery. Specifically, the Appellant argues that this factor was not applicable because it is inherent in the offenses. The Appellant is correct that enhancement factor (16) generally cannot be used to enhance a sentence for aggravated robbery because the offense of aggravated robbery also necessarily entails a high risk of bodily injury. See Claybrooks, 910 S.W.2d at 872–73. Appellant is also correct that enhancement factor (16) generally cannot be used to enhance a sentence for especially aggravated kidnapping because the factor is an element of the offense. See Kern, 909 S.W.2d at 7–8. The State essentially concedes that factor (16) is

generally inapplicable to sentences for these offenses. However, the State contends that this factor was applicable because the Appellant's conduct created the potential for bodily injury to persons other than the victim. Indeed, in State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995), this Court held that factor (16) could be applied to a sentence, even when risk of bodily injury was an element of the offense, if the defendant's conduct created a risk of bodily injury to persons other than the victim. However, in State v. Charles Justin Osborne, No. 01C01-9806-CC-00246, 1999 WL 298220 (Tenn. Crim. App., Nashville, May 12, 1999), this Court rejected Sims and held that factor (16) cannot be applied to enhance a sentence when it is an element of the offense, even if there was a risk of bodily injury to persons other than the victim. 1999 WL 298220, at *3. In so holding, this Court noted that Sims had been implicitly rejected by the subsequent case of State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App. 1995), in which this Court held that only factor (10), and not factor (16), can be applied when the defendant's conduct causes a risk to persons other than the victim. Id.; 1999 WL 298220, at *3. The court also noted that unlike factor (10), factor (16) specifically requires that the risk or potential injury be "to a victim." Id.; 1999 WL 298220, at *3. We agree with this Court's opinion in Charles Justin Osborne. We particularly agree with the statement that under the express language of factor (16), the factor can only be applied when the risk of bodily injury is to the victim. See Tenn. Code Ann. § 40-35-114(16)(1997). Thus, we conclude that the trial court erred when it applied factor (16).

Finally, the Appellant contends that the trial court erred when it found that the mitigating factors were entitled to little or no weight. However, the weight to be assigned to the mitigating factors is within the discretion of the trial court. State v. Robinson 971 S.W.2d 30, 48 (Tenn. Crim. App. 1997). In any case, we agree with the trial court that the mitigating factors in this case are entitled to minimal weight.

Even though we hold that the trial court erred in applying some of the enhancement factors, a finding that enhancement factors were erroneously applied

does not equate to a reduction in the sentence. State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App. 1994). Indeed, two enhancement factors apply to the sentences for aggravated burglary and theft and three enhancement factors apply to the sentences for especially aggravated kidnapping and aggravated robbery. Under these circumstances, we conclude that the sentences imposed by the trial court are entirely appropriate in this case. This issue has no merit.

IV. CONSECUTIVE SENTENCING

The Appellant contends that the trial court erred when it ordered the three sentences for the felony convictions to run consecutively. We disagree.

Consecutive sentencing is governed by Tennessee Code Annotated section 40-35-115. The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Moreover, when consecutive sentencing is imposed because the defendant is found to a "dangerous offender", the court is required to determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

In imposing consecutive sentences, the trial court found that the Appellant was a dangerous offender whose behavior indicates little or no regard for human life and who has no hesitation in committing a crime in which the risk to human life is high. See Tenn. Code Ann. § 40-35-115(4)(1997). We agree. Indeed, the Appellant's conduct indicates that he has little regard for human life. The Appellant forced Weinstein to drive through traffic at gunpoint, threatened Weinstein's life several times, and left the message on his father's answering machine in which he indicated that his father was fortunate that he had not been killed. The Appellant was

subsequently involved in the high speed chase in both Decatur and Henderson Counties in which he reached speeds greater than 125 miles per hour and only stopped after he collided with several other vehicles. The Appellant's conduct demonstrated indifference to a high probability of calamitous consequences to himself and motorists whom he was certain to encounter. See Wilkerson, 905 S.W.2d at 937–38. Thus, the trial court was clearly correct when it determined that the Appellant is a dangerous offender.

The trial court made no express finding that consecutive sentencing is reasonably related to the severity of the offenses, but we conclude that it is. The Appellant was convicted of three serious felony offenses and he endangered several people during the commission of at least two of them. Additionally, the Appellant threatened Weinstein's life several times during the commission of the especially aggravated kidnapping and the aggravated robbery. He also threatened to shoot Weinstein in the leg for no apparent reason. Moreover, the Appellant's commission of the especially aggravated kidnapping and the aggravated robbery was obviously made easier by his commission of the aggravated burglary in which he obtained the gun.

The trial court expressly found that consecutive sentencing would serve to protect society from the Appellant's criminal conduct. The record indicates that before he was sentenced in this case, the Appellant was convicted of the offenses he committed during the high speed chase in Decatur County: possession of a weapon with intent to go armed, driving with a revoked license, evading arrest, reckless driving, and driving while under the influence of an intoxicant. The record also indicates that in addition to the two convictions for driving under the influence of an intoxicant and aggravated assault that occurred before he committed the offenses in this case, the Appellant was subsequently convicted of criminal trespassing and another offense of driving while under the influence of an intoxicant. Further, the record indicates that the Appellant committed the offenses in this case

while he was on probation for other offenses. The Appellant has clearly shown that he has no respect for the law. In addition, his conduct has become increasingly dangerous over time. Thus, it is clear that consecutive sentencing would serve to protect society from the Appellant's criminal conduct.

Finally, although the trial court made no express finding, we conclude that consecutive sentencing in this case is congruent with general principles of sentencing. This issue has no merit.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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THOMAS T. WOODALL, JUDGE

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NORMA MCGEE OGLE, JR., JUDGE