IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1995 SESSION

FILED

September20, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9501-CC-00013**
Appellee,	)	
	)	**WAYNE COUNTY**
VS.	)	
	)	**HON. JIM T. HAMILTON,**
ROGER D. PULLEY,	)	**JUDGE**
	)	
Appellant.	)	(Sale of Cocaine, five counts)

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OPINION FILED:_____

AFFIRMED IN PART AS MODIFIED; REMANDED FOR RESENTENCING

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was convicted by a jury of two counts of the sale of cocaine and three counts of the sale of cocaine in excess of twenty-six grams. At the sentencing phase, the trial judge ordered him to serve a ten year sentence for each offense, with all sentences to run consecutively. The trial judge also imposed a total fine of one million dollars ($1,000,000.00).[1]

In this appeal as of right, the defendant presents three issues for review. In his first issue he maintains that the trial court erred in failing to sever the offenses charged in the indictment. In his second issue he challenges his sentence contending first that the trial court erred in sentencing him to ten years for each offense, and second, that the trial court erred in ordering the sentences to run consecutively. In his third issue the defendant alleges that the trial court erred in allowing the prosecution to file and/or request that the court enter a supplemental order setting out facts and conclusions of law after the defendant had been sentenced. Following our review, we find that the trial court did not err in failing to grant severance of the offenses; however, we remand for resentencing.

The proof offered on behalf of the State established that sometime in the middle of January 1993, Malcolm Crowell contacted Agent Ronald Gaskins of the Tennessee Bureau of Investigation (TBI) offering to set up and participate in an undercover drug sting. At that time, Crowell had a drug possession charge and a driving under the influence charge pending against him in Lewis County. In return for his participation, Crowell asked Agent Gaskins to contact the district attorney handling the charges pending against Crowell to recommend leniency. Gaskins told Crowell he might make a recommendation as to the pending charges depending on the outcome of the

[1]The judgment forms provide for a total fine of only $800,000 but the sentencing hearing transcript provides for a total fine of $1,000,000.

sting, but emphasized that he could make no promises regarding leniency.

On January 26, 1993, Crowell contacted Agent Gaskins and informed him that he had arranged to buy approximately 3.5 grams of cocaine from the defendant later that day at a tavern near Waynesboro. That afternoon, Gaskins met with Crowell to set up the undercover operation. After searching Crowell's car and person for weapons, drugs, or drug paraphernalia, Gaskins placed a transmitter and a microcassette recording device on Crowell. Gaskins then followed Crowell to the tavern, watched him go inside, and listened over the transmitter as Crowell gave another man three hundred dollars ($300.00) in exchange for the 3.5 grams of cocaine. Although Agent Gaskins never saw the defendant, the audio cassettes of the transaction that were produced by the prosecution at trial revealed that Crowell had repeatedly addressed the man selling the cocaine as "Rog." No arrest was made at that time.

Over the next eight weeks, Agent Gaskins and another TBI agent, Pat Howell, conducted four similar audio surveillance operations in which Crowell purchased progressively more cocaine from "Rog."[2] On February 12, 1993, Crowell purchased approximately 5.8 grams for six hundred dollars ($600). On February 17, 1993, he bought 26.8 grams for one thousand three hundred and fifty dollars ($1350). On February 23, 1993, Crowell bought 51.7 grams for two thousand five hundred dollars ($2500). Finally, on March 19, 1993, he bought ninety-two grams for four thousand eight hundred dollars ($4800).

Prior to the March 19, 1993, operation, Agents Gaskins and Howell had agreed to make an arrest immediately following the next sale to Crowell. After Crowell made his purchase, Howell quickly approached him and the defendant and identified

[2] Agents Gaskins and Howell testified that the voice of the individual selling the cocaine on each occasion was the same. Both further testified that the defendant Pulley's voice matched the one found on the tapes.

himself as a TBI agent. The defendant attempted to flee on foot but got only fifty yards before being apprehended by Howell. Although no money was found on the defendant, four thousand eight hundred dollars ($4800) was found in a ditch through which he had fled.

In his first issue the defendant contends that the trial court erred in failing to sever the offenses charged in the indictment. Rule 8(b) of the Tennessee Rules of Criminal Procedure, which governs permissive joinder of offenses, provides that "two or more offenses may be joined . . . if . . . the(y) constitute parts of a common scheme or plan or if they are of the same or similar character." Under Rule 14(b)(1), the defendant has a right to severance of offenses consolidated pursuant to Rule 8(b) "unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others." Tenn. R. Crim. P.14(b)(1).

To prevent a severance, the offenses must be part of a common scheme or plan and the evidence of one offense must be admissible upon the trial of the others. State v. Ronnie McKnight, 900 S.W.2d 36, 50 (Tenn. Crim. App. 1994); State v. James Clark and Ronald Gene Honaker, No. 02C01-9206-CR-00149, Shelby County (Tenn. Crim. App. filed October 23, 1993, at Jackson). This Court has found that the first prong is satisfied where the offenses are "so similar in modus operandi and occur within such relative close proximity in time and location to each other that there can be little doubt that the offenses were committed by the same person." McKnight, 900 S.W.2d at 50. The second prong is satisfied where the offenses are "so related to each other that proof of one tends to establish the others." McKnight, 900 S.W.2d at 50. (citations omitted).

Here, we find that the record establishes both prongs of the above-described test. First, there is little doubt that the five offenses consolidated in the indictment constitute a common scheme to distribute progressively more cocaine in the

Waynesboro area. The drug offenses occurred within eight weeks of one another and involved virtually the same sequence of events, the same confidential informant, and the same established procedure. There is no requirement that each incident be identical to the previous one. Further, we think the record supports a finding that the evidence of one would be admissible in the trial of the others. See State v. Steve Mosley, No. 01C01-9211-CC-00345, Dickson County (Tenn. Crim. App. filed September 9, 1993, at Nashville).

Moreover, the trial court instructed the jury that it must find guilt beyond a reasonable doubt with respect to each of the five offenses charged. This charge further reduced the possibility that the defendant would be prejudiced by the lack of severance. The issue of severance of offenses is a matter within the sound discretion of the trial court. State v. Wiseman, 643 S.W. 2d 354, 362 (Tenn. Crim. App. 1982); State v. Keith Mack and Terry D. Clark, No. 02C01-9107-CR-00156, Shelby County (Tenn. Crim. App. filed August 26, 1992, at Jackson). We will not reverse a judgment as to severance unless it "affirmatively appears from the record that the trial court . . . abused its discretion to the injustice of the defendant." State v. Jackie Porter, No. 03C01-9308-CR-00261, Hamblen County (Tenn. Crim. App. filed April 6, 1994, at Knoxville). After reviewing the record, we find that the trial court did not abuse its discretion in failing to grant severance in the instant case. The defendant's first issue is without merit.

In his second issue the defendant contends that the trial court erred in sentencing him. First, he maintains that the length of each of the individual sentences is excessive and second, that the trial judge erred in ordering them to run consecutively.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A.

§ 40-35-401(d) Sentencing Commission Comments. This presumption, however, 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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed by the trial court in determining the length of a particular sentence. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (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.

T.C.A. § 40-35-210.

The Act further provides that "(w)henever this court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

The defendant claims that the trial judge failed to affirmatively show that he considered the sentencing principles and all relevant facts and circumstances. We agree. Because the record fails to reveal that the trial judge considered these principles or made the required findings, we remand for resentencing. However, we will address

the enhancing and mitigating factors presented by the State and the defendant for guidance on remand.

The defendant contends that the record fails to support a single enhancement factor; however, the State raises two enhancement factors to be considered. First, the State claims that the "defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." T.C.A. §40-35-114(1). The presentence report shows that the defendant has a long history of offenses primarily relating to alcohol and traffic offenses but including an assault and battery, passing worthless checks and burglary other than a habitation. This proof clearly illustrates a previous history of criminal convictions and supports the application of this enhancement factor.

Second, the State argues the applicability of the enhancement factor that the felony was committed while the defendant was on bond for a prior felony conviction, if the defendant is ultimately convicted of such prior felony. T.C.A. § 40-35-114(13)(A). Here, the defendant committed the offenses while he was on bail for the offenses of sale of cocaine and percodan, assault, burglary, and arson. However, from the record it appears that the disposition of these cases was pending at the time of sentencing. Therefore, the applicability of this factor may be determined by the trial judge on remand.

Finally, the State argues that the defendant should receive a higher sentence within the relevant range for each offense because three of the offenses involved the sale of cocaine in excess of twenty-six grams. The defendant, citing State v. Dykes, 803 S.W.2d 250 (Tenn. Crim. App. 1990), contends that it is inappropriate for the trial judge to consider nonstatutory enhancement factors in fixing the sentence. In Dykes, the Court held that the mitigating and enhancing factors contained in T.C.A. §§ 40-35-113 and -114, respectively, are "the exclusive factors which may be considered

in setting the length of a sentence within a given range." Dykes, 803 S.W.2d at 258. We agree. The amount of cocaine itself is not a valid consideration as an enhancement factor.

The defendant contends that the court should consider in mitigation that his "conduct neither caused nor threatened serious bodily injury." T.C.A. § 40-35-113(1). The State maintains that there are no mitigating factors and rejects the defendant's contention that T.C.A. §40-35-113(1) applies as cocaine is an inherently unsafe drug which can produce rapid death. In Johnny Arwood v. State, No. 335, Hamblen County (Tenn. Crim. App. filed May 9, 1991, at Knoxville), this Court stated that "given the magnitude of the problem of cocaine abuse" the defendant's sale of 2.5 grams of cocaine threatened serious bodily injury. Slip op. at 8. We find that due to the large amounts of such a dangerous drug in the present case, this mitigating factor is not applicable.

In his second challenge to the length of his sentence, the defendant claims that the trial judge erred in ordering the sentences to run consecutively. In the case sub judice, we are unable to discern the trial judge's legal basis for consecutive sentences. In ordering sentences to run consecutively, a trial judge is to consider only the criteria established in T.C.A. § 40-35-115, Tenn. R. Crim. P. 32(c), and State v. Woods, 814 S.W.2d 378 (Tenn. Crim. App. 1991).[3] Further, this determination must be supported by the proof in the record.

We note, as plain error, that the defendant was sentenced for Class B felonies in counts one and two. These two counts failed to state the amount of cocaine sold. At the time of the commission of these offenses, the sale of less than .5 grams of cocaine was punishable as a Class C felony. See T.C.A. § 39-17-417(c)(2) (Supp. 1994). Because the indictment failed to allege the amounts of cocaine sold in these two counts,

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[3]See the recent supreme court decision in State v. Wilkerson, _____S.W.2d _____ (Tenn. 1995).

the defendant's convictions in counts one and two are reduced to Class C felonies. See State v. Emma Jean Dunlap Hilliard, No. 02C01-9402-CC-00027, Henry County (Tenn. Crim. App. filed March 22, 1995, at Jackson).

In his third and final issue the defendant claims that the trial court erred by allowing the State to file and/or request that the court enter a supplemental order setting out findings of fact and conclusions after the hearing. We agree. Nonetheless, because we remand the present case for resentencing, this issue is moot.

The defendant's convictions are affirmed but this matter is remanded for resentencing in conformity with this opinion.

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JOHN H. PEAY, Judge

CONCUR:

_____
GARY R. WADE, Judge

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DAVID H. WELLES, Judge