IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

March 22, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9506-CC-00186
Appellee,	)
	) Wilson County
V.	)
	) Hon. J. O. Bond, Judge
	)
DEWAYNE FOSTER,	) (Sentencing)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Dewayne Foster, pled guilty pursuant to a plea agreement to aggravated assault. Sentenced as a Range II multiple offender, the appellant received a ten-year sentence running consecutively to two existing sentences. In this appeal, the appellant raises two issues for review. First, he claims that the trial court imposed an excessive sentence. Secondly, he alleges error in the trial court's decision to run his sentence consecutively to the existing sentences. Following our review, we affirm the sentences.

First, we address the state's contention that the appellant does not have standing to pursue this appeal. The record indicates that the appellant's standard form petition to the trial court was entitled "Petition to Waive Trial by Jury and to Waive an Appeal." Within this petition, the appellant agreed to plead guilty to aggravated assault with all pending charges to be dropped by the state. No specific sentence was set forth in the agreement; however, a handwritten comment indicated that a sentencing hearing would be held.

The state contends that because the appellant's petition contains language indicating waiver of his right to appeal, he has no standing to bring this appeal. In the petition, we find boilerplate language which reads, "I fully understand my right to have my case reviewed by an Appellate Court, but hereby expressly and knowingly waive my right to file a motion for a new trial or otherwise appeal the decision made in my case here today." Citing State v. McKissack, No. 02C01-9503-CC-00077 (Tenn. Crim. App. Nov. 29, 1995), the state argues that the appellant is precluded from bringing this appeal because he bargained for the contents of the plea agreement. However, we find a distinction between McKissack and the present case. In McKissack the agreement included an agreed sentence of eight years confinement. Here, we find that the appellant agreed only to allow the trial judge to impose the sentence following a sentencing hearing.

In further support of the appellant's right to appeal, the transcript indicates that the trial judge stated at the conclusion of the sentencing hearing that the appellant "has a right to appeal." We conclude that the appellant has standing to bring this appeal.

We now turn to the appellant's two-fold attack on his sentence. Our review of the sentence imposed by the trial court is de novo with a presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). This presumption 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).

In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and circumstances of the offense, mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (1990); Ashby, 823 S.W.2d at 168.

In his first issue, the appellant argues that his sentence is excessive. The presumptive sentence shall be the minimum in the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c) (1990). However, if both enhancement and mitigating factors exist, the court must start at the minimum sentence in the range and enhance the sentence within the range as appropriate. Then the trial judge will reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e).

As a Range II offender, the appellant faced a potential sentencing range of six to ten years for aggravated assault, a Class C felony. Tenn. Code. Ann. § 40-35-112(b)(3) (1990). As enhancement factors the trial judge found that: the

appellant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; the personal injuries inflicted upon the victim were particularly great; the appellant has a previous history of unwillingness to comply with conditions of a sentence involving release in the community; the felony resulted in bodily injury to another person and the appellant has previously been convicted of a felony that resulted in bodily injury; and the appellant was on probation from a prior felony conviction when the instant felony was committed. Tenn. Code Ann. § 40-35-114(1), (6), (8), (11) & (13)(C) (1990). The trial court found no mitigating factors.

The appellant concedes that factors Tenn. Code Ann. § 40-35-114(8) and (13) apply. His first claim is that the trial judge erred in considering Tenn. Code Ann. § 40-35-114(1) which provides that the appellant has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. We disagree. The trial court used four previous convictions to elevate the appellant to Range II status. The presentence report contains almost eight pages of criminal convictions or behavior. This factor was appropriately applied.

Next, he claims that the trial court should not have applied Tenn. Code Ann. § 40-35-114(6) which states that the injuries inflicted upon the victim were particularly great. Although not considered at the hearing, the state argues that Tenn. Code Ann. § 40-35-114(9) is applicable due to the appellant's possession of a deadly weapon. This analysis directs us to the indictment which charges the appellant with causing serious bodily injury (Tenn. Code Ann. § 39-13-102(a)(1)(A)) by "cutting [the victim's] throat with a knife" (Tenn. Code Ann. § 39-13-102(a)(1)(B)) and cites the general section Tenn. Code Ann. § 39-13-102. Due to this surplusage, we are unable to determine under what subsection the appellant entered his plea agreement. However, we recognize that, regardless of the theory chosen, one of the enhancement factors should be given weight

without constituting an element of the offense.

The appellant's next attack is on the enhancement factor that the felony resulted in bodily injury to another person and the appellant has been previously convicted of a felony that resulted in bodily injury. Tenn. Code Ann. § 40-35-114(11). Although it is not clear that this factor was used by the trial judge, we believe it could be applicable given the appellant's previous convictions. In any event, we believe the sentence imposed was justified even if it is not applied.

The state submits that, although not considered by the trial judge, enhancement is proper because the appellant exhibited no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10). We find it unnecessary to address the applicability of this factor. The strength of the remaining factors supports the ten-year sentence. This issue is without merit.

The appellant's second issue is that the trial court erred in ordering his ten-year sentence to run consecutively to his existing ten and six year sentences. A trial court may order sentences to run consecutively if it finds, by a preponderance of the evidence, that:

> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (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;
>
> (6) The defendant is sentenced for an offense committed while on probation ...

Tenn. Code Ann. § 40-35-115(b)(2), (4) & (6) (1990). While any one of the above bases justifies consecutive sentences, we find support in the record, as did the trial court, for all of them.

Our review reveals that the presentence report contains approximately eight pages of criminal activity including criminal sexual conduct, theft, robbery and assault. We find that this basis is clearly supported by the record.

Secondly, the trial court found that the current offense was committed while the appellant was on probation. This fact has already been conceded by the appellant and is supported by the record. Likewise, this basis is applicable.

Finally, we review the trial court's finding that the appellant is a dangerous offender. In State v. Wilkerson, 905 S.W.2d 933, 937-38 (Tenn. 1995), our Supreme Court held that the proof must first show that the defendant is a dangerous offender. Once such a determination is made, the Court must also find that the sentence imposed reasonably relates to the severity of the offenses committed and is necessary to protect the public from further criminal acts by the offender. Id. at 938-39.

The proof in this case is scant but the presentence report indicates that Officers Manlove, Bare and Justice responded to a report of a fight. When they arrived on the scene, they observed the appellant walking with the victim with his arm around her neck. When the officers stopped the appellant, he pulled his hand across the victim's throat and ran from the scene. The victim was rushed to the emergency room where she required twenty stitches and twenty staples to close the wound on her throat described as extending from ear to ear. Because the appellant's conduct indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, we find that he is a dangerous offender.

As to the additional analysis required by Wilkerson, we find that the record supports these considerations. The trial judge found that the appellant's actions have been those "of someone who shouldn't be out in society." Further, based

on the facts of the offense detailed above, we find that the consecutive ten-year sentence is reasonably related to the nature of the offense committed. This basis is similarly supported by the record.

We conclude that the appellant's ten-year sentence running consecutively to his existing sentences is supported by the record. Therefore, the judgment of the trial court is, in all respects, affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

DAVID H. WELLES, Judge