IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9503-CR-00052
Appellee,	*	DAVIDSON COUNTY
VS.	*	Hon. J. Randall Wyatt, Jr., Judge
JAMES E. KENNER,	*	(Aggravated Burglary, Theft and
Appellant.	*	Possession of Weapon)

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OPINION FILED _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, James E. Kenner, was convicted of five counts of aggravated burglary, five counts of theft over $1000.00, and one count of unlawful possession of a weapon. The trial court imposed sentences of fifteen years on each of the aggravated burglary convictions, twelve years on each of the theft convictions, and eleven months and twenty-nine days on the weapon conviction. Each of the aggravated burglary sentences are to be served consecutively to each other but concurrently with the corresponding sentence for theft. The unlawful possession of a weapon conviction is to be served concurrently with one of the theft offenses. The defendant qualifies as a career offender. The effective sentence is seventy-five years at 60%.

In this appeal of right, the defendant claims the evidence was insufficient to support the unlawful possession of a weapon conviction and asserts that the sentences are excessive.

We affirm the judgment.

During a three-month period in 1993, the defendant burglarized several homes within an approximate six-block radius of his own residence. He stole several items during each break-in. The defendant possessed a weapon as he attempted to escape from the last of the burglaries.

Residence of Susan Warren

Susan Warren lived alone at 3525 West End Avenue, Apartment 1-B, in Davidson County. On March 2, 1993, she returned from work to find that her apartment had been burglarized. Eight rings, a television, and a portable stereo having an estimated value of $2600.00 were found missing. Police investigators lifted two latent palm prints matching those of the defendant at the point of the break-in.

Residence of Teresa Frazier

Teresa Lynn Frazier lived alone at 3907 Westlawn Place in Davidson County. On April 27, 1993, the police called her at work to tell her that her home appeared to have been burglarized. The front door had broken into and a stereo, VCR, television, leather jacket, and a stereo cabinet with a cassette player, all valued at $1850.00, had been taken. Police investigators lifted latent fingerprints from within the residence which were later matched to those of the defendant.

Residence of Rebecca Poland

Rebecca Poland lived with a roommate at 3217 West End Circle in Davidson County. On May 11, 1993, she returned to her residence and found that the front door had been broken and left open. A television, VCR, stereo, stereo speakers, radio, microwave, and items from her purse, all of which had a value of approximately $2000.00, were missing. Police investigators lifted latent fingerprints from within the residence which were matched to those of the defendant.

Residence of Teresa Abraham

Teresa Abraham and her son of 3704 Murphy Road in Davidson County were out of town on May 13, 1993, when a friend called to tell her that her house had been burglarized. The back door had been broken and all the lights had been left on. A stereo, stereo speakers, VCR, television, and Nintendo system and games, all of which had an estimated value of $6000.00, had been taken during the burglary. Police investigators lifted latent fingerprints from inside the residence which were later matched to those of the defendant.

Residence of Jeffrey Taylor

Jeffrey Taylor and a roommate lived in a condo at 221 37th Avenue North in Davidson County. On May 25, 1993, Cindy Ewing, a neighbor, heard dogs barking, looked outside, and saw an unfamiliar car leaving the driveway. She continued to watch the car as it was driven down a street then back into the driveway. A man she later identified as the defendant got out of the car and walked to the back door of the Taylor residence. When the defendant began to carry equipment back to his vehicle, Ms. Ewing called 911. Because the defendant loaded his car so quickly, she called 911 a second time and provided a description of the defendant and his vehicle. The defendant jumped into his car and started to leave. The police arrived and blocked the defendant in the driveway. They found a knife in his front pocket.

When Taylor returned to his condo, he discovered that the back door had been broken into and a stereo had been

moved to his backyard. A television, VCR, and telephone were also missing from the condo. The approximate value of all of the property was $2500.00.

I

The defendant challenges the sufficiency of the evidence on his conviction for unlawful possession of a weapon. He claims that because the length of the blade on the knife was less than four inches long the evidence is insufficient as a matter of law under Tenn. Code Ann. § 39-17-1307(a)(1).

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e). A crime may also be established by the use of circumstantial evidence only. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); Marable v. State, 203 Tenn. 440, 451-52, 313

S.W.2d 451, 457 (1958).

Tenn. Code Ann. § 39-17-1307(a)(1) provides that "[a] person commits an offense who carries with the intent to go armed a firearm, knife with a blade length exceeding four inches (4"), or a club." Under Tenn. Code Ann. § 39-17-1307(c)(1), however, a person commits the offense of unlawful possession of a weapon if he possesses a deadly weapon with the intent to employ it in the commission of or escape from an offense. Although there was evidence that the blade on the knife was less than four inches long, the indictment charged a violation of subsection (c)(1), not subsection (a)(1).

A deadly weapon is defined as "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury" or "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury[.]" Tenn. Code Ann. § 39-11-106(a)(5). By the terms of Tenn. Code Ann. §§ 39-17-1307 and 39-11-106(a)(5), a knife may be classified as a deadly weapon; there is no minimum length requirement for the blade. See Tenn. Code Ann. § 39-17-1307(c)(1).

The state presented testimony that the defendant had a knife in his possession as he attempted to flee from the Taylor residence. Under this circumstance alone, a rational trier of fact could have properly inferred that the defendant employed the weapon either in the commission of the burglary or the attempt to escape. See Jackson v. Virginia, 443 U.S.

307 (1979).

II

The defendant also asserts that the sentences were excessive. He claims the crimes did not warrant consecutive sentencing. 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). 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).

In calculating the sentence on a felony conviction,

the presumption is generally the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute effective July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). In the case of a career offender, however, the sentencing act mandates that the defendant "receive the maximum sentence within the applicable Range III." Tenn. Code Ann. § 40-35-108(c).

The defendant more specifically argues that the trial court failed to consider or specify the application of enhancement factors in arriving at the length of the particular sentences. He points out that the presumption of correctness 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 (Tenn. 1991).

Where the trial court applies inappropriate factors or fails to follow the provisions of the sentencing act, the presumption fails. State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992). Here, however, a maximum Range III sentence for each offense is required by Tenn. Code Ann. § 40-35-108(c) whether or not enhancement factors are applicable. Thus, the maximum sentence for each offense is warranted.

The trial court found a dual basis for consecutive sentencing: that the defendant was a professional criminal who

had knowingly devoted himself to criminal acts as a major source of his livelihood and that he had an extensive record of criminal activity. See Tenn. Code Ann. § 40-35-115(b)(1) & (2). We hold that the defendant qualified under either category.

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 be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Id. 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 criteria[1] exist:

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[1]The 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.

> (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 committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In our view, the record fully supports the trial court's finding that the defendant is an offender whose record of criminal activity is extensive. Tenn. Code Ann. § 40-35-115(b)(2). The 38-year-old defendant's lengthy prior criminal record covers a period of fifteen years. He has previously served time in jail or the penitentiary on several occasions and he has violated his parole on one occasion. These facts

support the application of consecutive sentences based on the defendant's "extensive" criminal history.

The record also supports the finding that the defendant was a "professional criminal who had knowingly devoted himself to criminal acts as a major source of livelihood." Tenn. Code Ann. § 40-35-115(b)(1). The defendant had an extensive criminal record at the time these crimes were committed, no visible means of income, and an almost non-existent work history. The presentence report also indicates that the defendant had supported a $300 a day cocaine habit by the commission of numerous burglaries. These facts support the application of subsection (b)(1).

In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), our high court reaffirmed principles relating to consecutive sentences that were first set out in Gray: consecutive sentences cannot be ordered "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." Id. at 938. Due in great measure to the fact that the defendant had at least eight felony convictions prior to these offenses, we hold that the aggregate sentence here serves each of the essential purposes indentified in Wilkerson.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Robert E. Corlew, III, Special Judge