IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1996 SESSION

FILED

May 24, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9505-CC-00159**
Appellee,	)	
	)	**BEDFORD COUNTY**
VS.	)	
	)	**HON. CHARLES LEE,**
TOMMY ARWOOD, JR.,	)	**JUDGE**
	)	
Appellant.	)	(Resisting arrest; assault; theft)

FOR THE APPELLANT:

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(On Appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for resisting arrest, assault, and theft of property under five hundred ($500) dollars. The defendant was found guilty by a jury of all three offenses. After a sentencing hearing, the trial court sentenced the defendant to six months on the resisting arrest charge and eleven months, twenty-nine days on each of the other two charges, with release eligibility set at seventy-five percent. The sentences were ordered to run consecutively.

The defendant now appeals as of right, challenging the sufficiency of the evidence on all three offenses, and complaining that his sentence is excessive. We find no merit in any of the defendant's arguments and affirm the judgment below.

On February 27, 1993, Herbert Dixson was working for the Shelbyville Super Market as a meat cutter. He testified that he had observed a woman in the store that day with two cartons of cigarettes, "trying to get the cigarettes up under her wind breaker." He watched the woman walk up to the front of the store and give the cartons of cigarettes to the defendant. He testified that he had then watched the defendant walk out the door of the store with the cigarettes, and that neither the defendant nor the woman had first paid for the merchandise. Dixson informed the store manager, Mr. Ellis Sudberry, of the theft. They both went to the front door and saw the woman and the defendant driving away together.

Twenty to twenty-five minutes later that same day, the defendant came back into the store. Tina McCullough, one of the cashiers, testified that she had seen the defendant take at least two cartons of cigarettes down from the shelves on which they were placed. She testified that, after taking them from the shelf, "He took them back to

the back of the store." She then told Sudberry that she "was suspicious."

Amber Earl, another cashier, testified that she had also seen the defendant in possession of at least two cartons of cigarettes and that she had seen him return them to the shelf.

After the defendant put the cigarettes back, he headed toward the front door. Sudberry testified that he had met the defendant near the door and asked him, "did he find what he was looking for." According to Sudberry, the defendant then said, "'If you are looking for trouble . . . step on outside, . . . I will take care of you.' " The defendant then left the store and Sudberry followed a few moments later, "to get [the defendant's] license number." Sudberry walked by the ice machine which was in front of the store and picked up an empty plastic soda bottle. Sudberry testified that he had picked up the bottle not to arm himself, but simply to keep the area neat, and that he regularly picked up such bottles outside the store.

Sudberry testified, "I was standing there at the end of the porch. [The defendant] opened the car door and started to get in the car. And he saw me, and he c[a]me running back over here, and he said, 'We'll settle this right now.' " At that point, Sudberry testified, "I had started back towards the door to the store, and I stopped in front of the ice machine, and [the defendant] c[a]me and shoved me with both hands backwards into the ice machine." In response, Sudberry "struck [the defendant] with the plastic bottle." The defendant "stood there for a second, and then he turned around and started walking off."

Amber Earl testified that she had seen the defendant shove Sudberry while

she stood inside the front door and watched.

After the defendant left, Sudberry swore out two warrants against him: one for theft and one for assault. Two officers, George Marsh and Charles Kimbrell, picked the defendant up later that night at the Cadillac Ranch pursuant to these two warrants. Officers Marsh and Kimbrell arrested the defendant at the Ranch, handcuffed him and placed him inside the police car. On the way to the jail the defendant became verbally abusive, beat on the divider between the front and back seats with his handcuffs, and threatened to beat up Officer Kimbrell.

When they arrived at the jail and the defendant exited the vehicle, the defendant began physically resisting both officers' attempts to take him into the jail. Officer Marsh testified that the defendant had tried to "strike" Officer Kimbrell and that he had "squirmed around trying to kick, moving his body around, giving a hard time to hold on to." The two officers were eventually able to get the defendant into an area "similar to a holding cell," at which point, according to Officer Marsh, "He started again with swinging his arms and threatening . . . what was going to happen when we took the handcuffs off." At the time the jailer removed the handcuffs, they had four men surrounding the defendant.

Officer Kimbrell also testified to the defendant's struggles to keep from being taken into the jail.

The defendant called no other witnesses.

Although the defendant claims in his statement of the issues presented for

review that the evidence is insufficient to support the guilty verdict for the theft charge, he makes no argument in support of his contention. The jury heard testimony from Dixson that he saw the defendant walk out of the store carrying at least two cartons of cigarettes that had not been paid for. This testimony was uncontradicted and was sufficient to support the jury's verdict. This issue is without merit.

With respect to the assault charge, the defendant was convicted of a Class A misdemeanor assault. He claims, however, that the State proved at most a Class B misdemeanor assault. We disagree.

T.C.A. § 39-13-101 provides:

> (a) A person commits assault who:
>
> > (1) Intentionally, knowingly or recklessly causes bodily injury to another;
> >
> > (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
> >
> > (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.
>
> (b) Assault is a Class A misdemeanor unless the offense is committed under subdivision (a)(3), in which event assault is a Class B misdemeanor.

The defendant was indicted for violating T.C.A. § 39-13-101(a)(2), a Class A misdemeanor, and the jury returned a guilty verdict on this charge. Thus, the defendant was convicted of a Class A assault.

The uncontradicted testimony at trial was that the defendant "shoved [Sudberry] with both hands backwards into the ice machine." This action had been

preceded by the defendant coming at Sudberry while stating, "We'll settle this right now." While Sudberry did not specifically state that the defendant's words and actions caused him to fear imminent bodily injury, we find that there was sufficient circumstantial evidence for the jury to conclude beyond a reasonable doubt that Sudberry had experienced such fear as a result of the defendant's conduct. Sudberry testified that he had hit the defendant with the soda bottle in an attempt to defend himself. Obviously, although inadequately armed, Sudberry was sufficiently concerned about his safety to attempt some form of self-defense. Sudberry also testified that, although he had gone outside to get the license number of the car the defendant was in, he was unable to do so after the defendant had attacked him, in spite of there having been sufficient opportunity to do so. Sudberry's inability to concentrate on the license number is consistent with having been made fearful. Additionally, although Sudberry did not call the police after the theft, he did contact the police and swear out warrants for the defendant's arrest after the attack. Turning to the police for help is also consistent with having been made fearful. This evidence was sufficient for the jury to have found that all of the elements of a Class A misdemeanor assault had been proved beyond a reasonable doubt. This issue is without merit.

With respect to the resisting arrest charge, the defendant's entire argument regarding the sufficiency of the evidence rests on the misplaced notion that, since the defendant cooperated with the officers prior to, while and immediately after being placed in the squad car, he did not "resist arrest." That is, he cooperated while actually being placed under arrest, and did not begin his struggles until after he was arrested. Therefore, the defendant contends, the resisting arrest statute is inapplicable.

T.C.A. § 39-16-602(a) states: "It is an offense for a person to intentionally

prevent or obstruct anyone known to the person to be a law enforcement officer . . . from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another." However, the arrest process is deemed to continue until the arrestee is " 'delivered to the jailer and properly confined.'" State v. Paul E. Brown, Sr., No. 282, Washington County (filed September 19, 1991, at Knoxville) quoting Pope v. State, 528 S.W.2d 54, 58 (Tenn. Crim. App. 1975).

The uncontradicted evidence in this case was more than sufficient for a rational trier of fact to find the defendant guilty of resisting arrest beyond a reasonable doubt. This issue is without merit, and we affirm the three convictions.

The defendant next complains that his sentences are excessive and should not have been run consecutively. We disagree.

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 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 misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the trial court is required to allow the parties a reasonable opportunity to be heard on the question of the length of the sentence and the manner in which it is to be served. T.C.A. § 40-35-302(a). The sentence must be specific and consistent with

the purpose and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(b). A percentage of not greater than 75% of the sentence should be fixed for service, after which the defendant becomes eligible for "work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d).

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, in determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

The defendant was given the maximum sentence for each offense: six months for resisting arrest, and eleven months, twenty-nine days for each of the other two misdemeanors. All sentences were ordered to be served at seventy-five percent and consecutively to each other. These sentences were also run consecutively to a prior sentence from which the defendant was on parole at the time he committed the instant offenses.

In support of his sentencing decision, the trial court found three enhancing factors relevant to each offense: a previous history of criminal behavior in addition to that necessary to establish the appropriate range; a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and the offenses were committed while the defendant was on parole.[1] T.C.A. § 40-35-114 (1),

[1]The court below noted that the enhancing factor for committing the offenses while on parole applies to felonies, but stated that "in the principles of sentencing . . . the Court should and does take into consideration that these offenses were committed while the defendant was on parole." Because the defendant's sentences were appropriate even without this enhancing factor, we find it unnecessary to determine whether the trial court erred in applying this enhancing factor in these cases.

(8) and (13). With respect to the theft offense, the trial court found as an additional enhancing factor that the defendant was the leader in the commission of that offense which involved two actors. T.C.A. § 40-35-114 (2). With respect to the resisting arrest offense, the trial court found as an additional enhancing factor that the offense was committed under circumstances in which the potential for bodily injury to a victim was great. T.C.A. § 40-35-114 (16). The trial court found only one mitigating factor, and that applied to the theft crime only: that the defendant's criminal conduct neither caused nor threatened serious bodily injury. T.C.A. § 40-35-113 (1).

> The court below also made the following specific findings of fact:
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> 1. That the defendant is "almost devoid of the potential for rehabilitation[;]"
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> 2. That "confinement is necessary in this case to avoid depreciating the seriousness of the offense[;]"
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> 3. That "confinement is particularly suited to provide an effective deterrence to others likely to commit this offense[;]"
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> 4. That "confinement is necessary to protect society, by restraining an individual who has a long history of criminal conduct and also that measures less restrictive than confinement have both frequently and recently unsuccessfully been applied to this defendant[;]" and
>
> 5. That the defendant "is eligible for consecutive sentencing under the auspices of [T.C.A. §] 40-35-115 in that he has a history -- his record of criminal activity is extensive."

The defendant has made no showing whatsoever that the trial court erred in making any of these findings.

A review of the record reveals that the trial court properly considered the sentencing principles and all relevant facts and circumstances. The presumption of

correctness therefore attaches. The defendant has not carried his burden of proving by a preponderance of the evidence that the trial court's sentencing decision was in error. We therefore affirm the defendant's sentences.

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JOHN H. PEAY, Judge

CONCUR:

_____
JOE B. JONES, Judge

_____
DAVID G. HAYES, Judge