IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

	No. 03C01-9407-CR-00246
STATE OF TENNESSEE, Appellee,	ROANE COUNTY
vs.	Hon. Russell Simmons, Jr., Judge
	(Attempt to Commit
MACK DEVANEY, Appellant.	Aggravated Robbery)

FOR THE APPELLANT:

Joe H. Walker
Public Defender

Walter B. Johnson, II
Assistant Public Defender
P.O. Box 334
Harriman, TN 37748

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Darian B. Taylor
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Charles E. Hawk
District Attorney General

Frank Harvey
Assistant District Attorney General
P.O. Box 703
Kingston, TN 37763

OPINION FILED: _____

AFFIRMED

Robert E. Burch
Special Judge

OPINION

Appellant was convicted in the trial court of the offense of attempt to commit aggravated robbery for which he received a sentence of ten years consecutive to the sentence that he was already serving when he was sentenced. He appeals to this court and presents for review two issues:

(1). The sufficiency the evidence to sustain a conviction of that offense, specifically whether the facts in the record constitute an attempt to commit aggravated robbery or even simple robbery: and,

(2). Whether the trial court properly ordered his sentence to be served consecutively with his prior sentence for a separate offense.

FACTS

The facts in this case qualify for inclusion in one of the current publications recounting the misadventures of inept criminals.

At approximately 9:20 a.m. on June 20, 1994, Officer Dale Duncan, a patrolman with the Kingston Police Department, responded to a call by driving to Robinson's Jewelry in Kingston. He described the weather as sunny and hot. The store was scheduled to open at 10:00 a.m. Officer Duncan testified that he saw a man, later identified as the appellant, wearing a trench coat, a hat and sunglasses, and carrying a cane and briefcase, standing "directly" in front of the door of the Robinson Jewelry store. Officer Duncan stated the appellant caught his eye because of his heavy attire on such a warm, summer day.

Officer Duncan stated that he saw a silver Chevette without a license tag backed into the J.T.P.A. building, which was located about thirty feet up the street from the jewelry store. The officer approached the appellant, who then started walking towards him. Officer Duncan stopped appellant and asked him if the suspicious car belonged to him. Appellant replied in the affirmative and stated that he must have lost the license tag. Appellant then resumed walking towards the car.

Duncan followed the appellant, and when they reached the car, Officer Duncan requested

that the appellant provide some form of identification. Appellant gave Officer Duncan his driver's license. Officer Duncan called in a check on the appellant, and learned that there was an outstanding warrant for his arrest. At that point, the appellant was placed under arrest. A pat down of appellant's person revealed a loaded pistol tucked into the left side waistband of appellant's trousers, under the trench coat.

Officer Brian Mullins of the Kingston Police Department was called to the scene and arrived about the time that Officer Duncan arrested appellant. Officer Mullins opened appellant's briefcase. The case contained a blue notebook, an assortment of sunglasses, and a stethoscope. The notebook contained the initials M.D., and inside the pad, a note was clipped onto the first page. The note read, "Put all your jewelry in the case, all of it and you won't be hurt, and your money. Don't look back. I don't want to hurt you, please." Surprisingly, considering the facts of this case, the note was not signed.

STANDARD OF REVIEW - SUFFICIENCY OF THE EVIDENCE

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. *State v. Cabbage* 571 S.W. 2d 832 (Tenn. 1978). A verdict of guilt, approved by the trial judge, accredits the testimony of the State's witnesses and resolves all conflicts in testimony in favor of the State. *State v. Townsend* 525 S.W.2d 842 (Tenn. 1975). The presumption of innocence is thereby removed and a presumption on guilt exists on appeal. *Anglin v. State* 553 S.W. 2d 616 (Tenn. Crim. App. 1977). The appellant has the burden of overcoming this presumption. *State v. Brown* 551 S.W. 2d 329 (Tenn. 1977).

When the sufficiency of the evidence is challenged on appeal, the test is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Duncan* 698 S.W. 2d 63 (Tenn. 1985); *Rule 13(e), T.R.A.P.*

The facts of this case are almost undisputed. Appellant insists that the facts demonstrate that Officer Duncan did not see appellant actually standing in front of the door to Robinson's Jewelry but that, when first observed, appellant was walking past the said door in the officer's direction. The record does not bear out this interpretation. Under direct examination, Officer Duncan plainly stated that appellant was standing "directly" in front of the door to Robinson's Jewelry.

Appellant's counsel did attempt to get the officer to state that he did not see appellant actually standing at the door. Our reading of the record indicates that he was unsuccessful in this endeavor. In any event, we must resolve all conflicts in the evidence in favor of the State. *State v Cabbage*, supra. Therefore, for the purposes of our examination, appellant was standing in front of the door of the Robinson jewelry store.

The question, then, is whether these essentially undisputed facts constitute an attempt to commit aggravated robbery or even an attempt to commit robbery.

For many years, the leading case in the area of what constitutes an attempt has been the case of *Dupuy v. State* 325 S.W. 2d 238 (Tenn. 1959). The *Dupuy* case required *inter alia* an overt act toward the commission of a crime. Over the years, the requirement of the overt act has become so stringent that it was difficult to commit a legally sustainable attempt without committing the crime itself. Under the *Dupuy* doctrine, it is doubtful that the case *sub judice* could stand.

In 1989, the legislature revised the criminal code. The definition of criminal attempt was changed substantially. T.C.A. § 39-12-101 now reads, in pertinent part, as follows:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
> (1) ...
> (2)...
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.
> (b) Conduct does not constitute a substantial step under subdivision (a)(3) unless the person's entire course of action is corroborative of the intent to commit the offense.

What constitutes a "substantial step toward the commission of the offense" under the statute and an "overt act" under *Dupuy* are quite different. In the recent case of *State v Reeves* 916 S.W.2d 909 (Tenn. 1996), Justice Drowota explains the difference. Facts which did not constitute an attempt under *Dupuy* now do constitute an attempt under the statute. See *State v Reeves,* supra.

The legislature declined to define "substantial step", preferring instead to leave the issue of what constitutes a substantial step to the courts for determination in each particular case. T.C.A. §39-12-101, Comments of the Sentencing Commission.

ANALYSIS - SUFFICIENCY OF PROOF

In the case *sub judice*, appellant apparently removed the license plates from his vehicle in order to delay identification (although the effectiveness of this action is doubtful) and backed it into a parking space so that it faced the street in order to facilitate a rapid departure from the area. He wrote a "holdup note" and placed it in his briefcase, which doubled as a repository for the soon-to-be stolen goods. Appellant armed himself and donned a trench coat to cover the pistol. The dark glasses and hat were apparently for the purpose of disguising his identity. Appellant then positioned himself at the door of the jewelry store either to await the arrival of the owner or the opening of the store. At the point at which Officer Duncan observed him, appellant had gone as far as he could go toward committing the crime and was waiting for some event which he did not control to occur in order to consummate the crime. Appellant had gone beyond preparation, he was executing his plan, such as it was. His situation is not unlike an individual arming himself and lying in wait for his victim. He waits only for the arrival of his victim in order to consummate the crime. Appellant had taken a substantial step toward the commission of the crime. To require more would be to have appellant actually begin the robbery itself, with the attendant danger to the public.

We also find that, as required by T.C.A. §39-12-101(b), appellant's entire course of action is corroborative of the intent to commit the offense.

The legislature did not intend to adopt the examples of the Model Penal Code when they enacted T.C.A.§39-12-101, although the definitions of attempt are the same in both the statute and the Model Penal Code. *State v Reeves*, supra. We realize that when the Supreme Court examined the facts of *Reeves* in light of one of these examples (subsection (f) of the Model Penal Code definition of attempt) the reliance thereon was limited to the facts of that case. However, we observe that the reasoning of subsection (f) would also apply in this case.

> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession , collection or fabrication serves no lawful purpose of the actor under the circumstances;

As did the Supreme Court, we agree with the reasoning underlying this subsection. *State v Reeves,*supra at f.n. #3. Likewise, we do not adopt the examples contained in the Model Penal Code, but the particular example is persuasive.

In this case, appellant's actions were exactly described by subsection (f). The jury was entitled to find, as they did, that he had taken a substantial step toward the commission of the crime. Obviously, since appellant possessed a firearm, he intended to use the same at the proper time to induce the store owner to part with his merchandise. The evidence fully supports the verdict.

STANDARD OF REVIEW - SENTENCING

Appellate review of a sentence is *de novo* on the record with a presumption that the trial court's determinations are correct. T.C.A. §40-35-401(d). As noted in the Sentencing Commission Comments to this section, the burden is now on appellant to show that the sentence imposed was improper.

In conducting a *de novo* review of a sentence, this Court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see *State v. Moss*, 727 S.W.2d 229 (Tenn. 1986); *State v. Fletcher*, 805 S.W.2d 785 (Tenn Crim App. 1991).

Initially, it should be noted that the record on appeal does not contain the presentence report nor the certified copies of appellant's prior convictions, both of which were exhibited at the sentencing hearing. No testimony was presented at the sentencing hearing, which consisted of the presentation of the presentence report and prior convictions, arguments of counsel and the trial court's sentencing determination. The duty falls upon an appellant to prepare such a record necessary to convey a fair, accurate and complete account of what transpired relative to the issues on appeal. T.R.A.P. 24(b). In fact, this Court has held that it must presume that a sentence was appropriate when the record did not contain either the presentence report or a transcript of the sentencing hearing. State v. Beech, 744 S.W.2d *585, 588* (Tenn Crim.App. 1987). Obviously, the failure of the record to contain material which is required, under T.C.A §40-35-210, to be

considered in determining a sentence, necessarily prohibits this Court from conducting an appropriate *de novo* review.

Without an adequate record, it is presumed that the trial court's determinations made of record at the time of the sentencing were fully supported. In this regard, the trial court held that there was an extensive history of criminal convictions and that the potential for serious bodily injury was great. See T.C.A. § 40-35-114.

ANALYSIS - SENTENCING

We note from an examination of the record that the sentence imposed was the minimum within the range, therefore, an examination of enhancing and mitigating factors is not necessary. In his statements on the record, His Honor found that appellant's prior convictions placed him in range III and established that his criminal history was extensive. The trial court ordered the sentence for this crime to be served consecutively with the sentence(s) that he was already serving.

We note from the transcript of the sentencing hearing that appellant had seven prior convictions, apparently felonies committed on different occasions. T.C.A. §40-35-107(a)(1) allows a sentence with range III if, *inter alia,* appellant had five prior felony convictions (the conviction *sub judice* is a class C felony). With seven prior felony convictions, appellant's criminal history was extensive.

Appellant insists that the trial court was in error in using the same convictions to establish a sentence in range III and also to establish that appellant's criminal history was extensive, thus allowing consecutive sentencing. This Court has previously ruled this exact procedure to be proper. *State v. Bobby Ed Begley* (unreported) #01C01-9411-CR-00381 Court of Criminal Appeals at Nashville, opinion dated January 11, 1996. The issue has no merit.

The judgement of the trial court is affirmed.

_____

Robert E. Burch,
Special Judge

CONCUR:

_____
Gary R. Wade, Judge

_____
Joseph M. Tipton, Judge