

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1996 SESSION

FILED
September 30, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
 v.)
)
 DAVID CLIFF,)
)
 APPELLANT.)

No. 02-C-01-9509-CC-00262
Dyer County
Joe G. Riley, Judge
(Aggravated Assault)

FOR THE APPELLANT:

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(On Appeal)

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OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, David Cliff, was convicted of aggravated assault, a Class C felony, by a jury of his peers. The trial court found that the appellant was a persistent offender and imposed a Range III sentence of confinement for fourteen (14) years in the Department of Correction. In this Court, the appellant presents three issues for review. He contends that the evidence is insufficient to support the verdict of the jury, the sentence imposed by the trial court is excessive, and the trial court erred in refusing to afford him an evidentiary hearing on the issue of whether he was denied his constitutional right to the effective assistance of counsel. After a thorough review of the record, the briefs of the parties, and the authorities that govern the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On the afternoon of September 21, 1994, the victim, Ervin Smith, and Victor Hill were engaged in a friendly conversation at the intersection of Bruce and Fair in Dyersburg, Tennessee. The appellant approached Smith and Hill, mumbled something, and walked away. A few minutes later, Hill told Smith to run. Smith looked behind him, saw the appellant carrying a "long gun," and began running away from the appellant. The appellant shot the victim with a shotgun. The pellets struck the victim in his back and the back of his legs. The victim ran to the home of an acquaintance and was taken to a local hospital for treatment.

The investigation immediately focused upon the appellant. The victim knew the first name of the appellant. Another person told police officers that he had seen the appellant standing in front of a home in possession of a shotgun. The witness provided the officers with the appellant's name. A spent shell was found in the vicinity of where the witness had seen the appellant.

The investigating officers retrieved a .12 gauge shotgun from the residence where the appellant lived. The officer smelled the gun to determine if it had been fired. The smell of gunpowder was strong enough for the officer to conclude that the shotgun had been recently fired. A test firing of the shotgun revealed that it was the same shotgun that fired the spent shell found by the officers in the vicinity of the shooting.

The appellant argues that the evidence which connects him to the offense in question is too speculative. He further argues that the record is devoid of any evidence regarding his motive for shooting the victim.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdicts returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the

record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

In this case, the direct and circumstantial evidence established that the appellant was the person who shot the victim. The victim knew the appellant by first name and sight. He made a courtroom identification. Another person also saw the appellant holding a shotgun. The evidence clearly established that the spent shell found in the vicinity of the crime was fired by the shotgun found in the residence where the appellant resided. The smell of gunpowder was strong, which indicated that the shotgun had just been fired. The jury could conclude from the facts adduced at the trial that the appellant left the corner of Bruce and Fair, went to his residence, which was a short distance from the corner, obtained the shotgun, and returned to the corner where he shot the victim. In other words, the evidence is sufficient to establish a finding by a rational trier of fact that the appellant was guilty of aggravated assault beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence clearly establishes that the appellant (a) intentionally, knowingly or recklessly caused bodily injury to the victim and (b) used a deadly weapon to inflict the injury.

This issue is without merit.

II.

The appellant contends that the sentence imposed by the trial court is excessive. He contends that the trial court erred by using enhancement factor (10) to increase his sentence within the appropriate range. See Tenn. Code Ann. § 40-35-114(10). He also argues that the trial court erred by failing to reduce his sentence within the appropriate range by failing to consider his remorse. See Tenn. Code Ann. § 40-35-113(13).

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that “the determinations made by the trial court from which the appeal is taken 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).

The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor and appearance.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210. State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

The State of Tennessee established that the appellant was a Range III persistent offender. The range of this Class C offense is ten (10) to fifteen (15) years. The trial court found that the evidence established four (4) enhancement factors, namely: (a) the appellant has a previous history of criminal behavior and convictions, Tenn. Code Ann. § 4 0 - 3 5 - 1 1 4 (1) ; (b) t h e appella

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The trial court should not have used enhancement factor (10) to enhance the appellant's sentence. This Court has held that the factor is inherent in the nature of the offense. However, the erroneous use of this factor does not mean the appellant is entitled to have his sentence reduced. See State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

This Court agrees with the appellant that there is testimony contained in the record that he had remorse for what he did to the victim. However, it must be remembered that the trial court had the opportunity to observe the appellant and hear this testimony. It is apparent that the trial court did not believe that the appellant had sincere remorse. This was the prerogative of the trial court. This Court cannot reweigh or reevaluate the credibility of a witness. As this Court said in State v. Gary Rocco Denami, Davidson County No. 01-C-01-9309-CR-00307 (Tenn. Crim. App., Nashville February 23, 1996): "The finding of the presence or absence of remorse requires the weighing of evidence, which only the trial judge can do. Appellate courts cannot make that type of determination from the cold, written record since remorse or lack thereof is extremely subjective and dependent upon many factors besides the spoken word."

This issue is without merit.

III.

Although represented by counsel, the appellant filed a pro se motion for a new trial. One of the issues raised in the motion was whether the appellant had been denied his constitutional right to the effective assistance of counsel. He claims that the trial court should have granted him a hearing on this issue. The remedy he seeks is a remand to the trial court for an evidentiary hearing.

This Court cannot determine whether the trial court conducted an evidentiary hearing or summarily dismissed the pro se motion. The record is silent. There is an order

contained in the record which simply states that the motion for a new trial was found to be “without merit.” The record does not contain a verbatim transcript or statement of the evidence of the hearing on the motion for a new trial.

As a general rule, this Court would conclusively presume that the judgment of the trial court was correct. However, given the history of this case, this Court will pretermitt this issue so that the appellant can raise it in a post-conviction proceeding.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

DAVID R. FARMER, SPECIAL JUDGE