FILED

October 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST 1996 SESSION

STATE OF TENNESSEE	*	C.C.A. #02C01-9510-CC-00292
APPELLEE,	*	MADISON COUNTY
VS.	*	Hon. Franklin Murchison, Judge
MICHAEL WAYNE ROBINSON, SR.	*	(Theft over $500.00)
APPELLANT.	*	

For the Appellant:

Scott Kirk
Harde, Martin & Jaynes, P.A.
213 East Lafayette Street
Jackson, TN 38301

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Sarah M. Branch
Counsel for the State
450 James Robertson Parkway
Nashville, TN 37342-0485

James G. Woodall
District Attorney General

Donald Allen
Assistant District Attorney General
P.O. Box 2825
Jackson, TN 38301

OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Michael Wayne Robinson, Sr., appeals as of right from a conviction of theft over $500.00 in the Madison County Circuit Court, Division II. He was sentenced to the maximum four years for this Class E felony as a Range II offender. On appeal, appellant raises two issues: (1) whether the evidence was sufficient to convict of theft of property over $500.00 and (2) whether the trial court erred in ordering the maximum sentence.

We find that the trial court committed no error and the judgment is affirmed.

On the morning of May 7, 1993, Charles Jones was working as an apprentice lineman for the Jackson Utility Division ("JUD") in Jackson. He observed three men in a white Ford pickup loading several large cast iron pipe fittings used by the Water Division and stored in a field off of Magnolia Street. He did not recognize the men as JUD employees, nor was the truck they were driving marked as a JUD vehicle.

After the men drove off and Jones finished his task, he reported the incident to the store keeper of this inventory at the storage yard, Greg Johnson. Based upon prior incidents, Johnson knew that such materials often were taken to a scrap metal dealer after being stolen. He immediately called two dealers in Jackson and reported the missing items and a description of the truck. Shortly thereafter, Johnson received a call from Hutcherson's Metal saying that three men were on the premises with cast iron fittings matching the reported description. Johnson telephoned the police, then went to the scrap yard and identified six pipe fittings.

The three men, one of which was appellant, were not immediately arrested at the scrap yard. After an investigation, however, Michael Shanklin, John Shanklin and appellant were indicted for theft of property over $1,000.00 from JUD. Michael Shanklin later pled guilty to the charge and testified for the State at the trial of appellant.

Appellant first contends that the evidence at trial was insufficient to convict him of theft of property over $500.00. Specifically, appellant attacks the evidence offered by the State to prove the value of the items stolen. When an appellant challenges the sufficiency of the evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct 2781, 61 L.E.2d 560 (1979). We do not re-weigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Appellant's argument, in essence, asks us to re-weigh the evidence offered as to the value of the stolen pipe fittings. We must decline.

Value of property is defined as the fair market value of the property at the time and place of the offense; or if the fair market value cannot be ascertained, the cost of replacing the property. Tenn. Code Ann. §39-11-106(a)(35) (Supp. 1995). At trial, Greg Johnson, the store keeper of the inventory, testified that the pipe fittings were worth $1,210.75. This reflected the cost that JUD paid for the fittings when purchased. He further testified that it would cost $2,808.00 to replace the pipe fittings on the market at the time of trial. On cross-examination, Johnson stated that when the police asked him to value the fittings at the metal yard, he told them they were worth about $100.00 each. He also stated this would have been their scrap value.

Based on the evidence, regardless of which value the jury relied upon, the conviction for theft over $500.00 was justified. Certainly $1,210.75 and $2,808.00 are well over $500.00. Even if the jury relied upon the scrap value ($100.00 each), the value would have been $600.00, which is still over $500.00. Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This factual issue was resolved

by the jury and we have no occasion to invade its province. Any view of the proof, and certainly the strongest view afforded the State, confirms the value of the pipe fittings was over $500.00. We will not disturb the jury's verdict.

Secondly, appellant argues that the trial court erred in ordering the maximum sentence for the crime committed. We find no error in the trial court's application of the sentencing principles and affirm the four year term imposed.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. Tenn. Code Ann. §40-35-401(d) (1990). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. §40-35-401(d) Sentencing Commission Comments. This presumption, however, 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 addition, there are a number of specific procedures to be followed in sentencing. The trial court must consider the following:

> (1) The evidence, if any received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

Tenn. Code Ann. §40-35-210 (Supp. 1995).

This section also provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. See Tenn. Code Ann. §40-35-210(c)-(e) (Supp. 1995).

As a Range II offender, the sentencing range for a Class E felony is not less

than two nor more than four years. Tenn. Code Ann. §40-35-112(b)(5) (1990). At sentencing, the trial judge found there were no sufficient mitigating factors. For enhancement factors, the trial court noticed the appellant had "in excess of fifteen prior convictions over a long, long period of time," including two prior felonies. In addition, the appellant committed this crime while on parole from a robbery conviction and this provided the second enhancement factor noted by the court. These two enhancement factors are appropriate considerations under the statute. See Tenn. Code Ann. §40-35-114 (Supp. 1995). The presumptive minimum sentence was enhanced by the two enumerated factors and the trial court considered no mitigating factors. The sentence was set above the minimum, but still within the range. As such, the maximum sentence of four years was justified and appropriate.

The trial court's judgment is affirmed.

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William M. Barker, Judge

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Gary R. Wade, Judge

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Jerry L. Smith, Judge