IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

October 17, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9511-CC-00381
	)	
	)	Williamson County
v.	)	
	)	Hon. Henry Denmark Bell, Judge
	)	
GARY W. WITHERSPOON,	)	(Burglary and Theft Over $500.00)
	)	
Appellant.	)	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Gary W. Witherspoon, appeals as of right from his convictions by a jury in the Williamson County Circuit Court for burglary, a Class D felony, and theft over five hundred dollars, a Class E felony. As a Range II, multiple offender, he received consecutive sentences of eight and four years, respectively, and was fined $500.00 for each offense. The defendant challenges the sufficiency of the evidence for his theft conviction and the consecutive nature of his sentences.

This case relates to a theft of the Crosslin Supply store in Franklin, Tennessee. At trial, the store's vice president and general manager, Henry Davis, testified that he was at home at around 11:30 p.m. on November 26, 1994, when he was notified that the store's alarm had been activated. He rushed to the store and found that police were already on the scene and that the front glass window of the store had been broken. Items in the store were in disarray. Mr. Davis immediately noticed that two Makita chain saws were missing from a display and that he was also missing a Makita hammer drill that he had ordered specially. He also noticed a locking portion of an auto theft protection device called "The Club" lying on a shelf and said that the store did not sell "The Club."

Mr. Davis testified that one of the missing chain saws, a DCS430 model with the serial number 32026, was valued at $329.00, and the other, a DCS520 model with the serial number 9233304, was valued at $369. He said that the hammer drill had a sale price of $184. He recalled that he arrived at the store at 11:35 p.m. and that by 1:00 a.m. Deputy Paul Brady of the Williamson County Sheriff's Department had returned all three items to him. He testified that he knew the chain saws he received from Brady were the ones taken from the store because he verified the serial numbers and the chain saws still had the store's price tags on them. He recognized the hammer

drill as the one taken from the store because it had been special ordered but admitted that any Makita dealer could have ordered the same model drill.

Kevin Teague, a Franklin police officer, testified that he and another officer arrived at Crosslin Supply store at 11:35 p.m. on November 26, 1994. He recalled that a hole about four feet by four feet had been busted out of the store's front plate glass window. He recalled searching the inside of the building and identified a part of "The Club" that he recovered from a shelf in the store. He said that Henry Davis gave him a description of the two chain saws and the hammer drill that had been taken and said that he told his dispatcher about the missing items. Specifically, he reported that a Makita DCS430 model chain saw with the serial number 032036, a Makita DCS520 model chain saw with the serial number 9233304, and a cordless Makita hammer drill were missing. Officer Teague testified that a short time later, he was advised that a county officer had recovered two Makita chain saws and a Makita drill set during a traffic stop. He recalled Deputy Brady's arrival at the scene with the missing items and said that Henry Davis verified that the serial numbers matched those that were reported stolen. Officer Teague said that he was only able to lift partial fingerprints from the crime scene and that the Tennessee Bureau of Investigation determined that they were unidentifiable.

Deputy Paul Brady testified that he stopped the defendant at around 11:58 p.m. on November 26, 1994, because the license plate on the Ford Escort the defendant was driving was expired and was registered to a Honda. He testified that he arrested the defendant for driving on a revoked license and that he recovered two Makita chain saws and a cordless drill from the defendant's car. He said that he also noticed that the car contained small pieces of glass and a part of "The Club". He recalled taking the defendant, the two chain saws, and the drill to the Crosslin Supply store where he showed the items to Officer Teague. Deputy Brady admitted that he did

not look for or find a key to “The Club” and that he did not gather any glass from the car.

The state’s final witness was Bob Capra, a police dispatcher for the City of Franklin. He testified that he received a burglar alarm call from the Crosslin Supply store at 11:35 p.m. on November 26, 1994, and that he dispatched two cars to the scene. He recalled that Henry Davis made a statement to him about the missing items from the store, that he related the statement to another officer and that he heard radio traffic concerning the missing items at 11:49 p.m. The defendant presented no proof.

I

In his first issue, the defendant challenges the sufficiency of his theft conviction. In support, he cites alleged discrepancies between Officer Teague’s description of the items he reported missing and the items actually recovered from the defendant. Specifically, he notes that Officer Teague testified that one of the chain saws he reported missing had the serial number 032036 and that he reported that the missing hammer drill was a model 8400DVM[1]. The defendant admits that one of the chain saws recovered from him matched the description of one that was stolen but argues that because the other chain saw recovered from him had a serial number of 032026 and the drill was a Model 8400 9.6 Volt VBW[2] there is insufficient evidence to convict him of theft over $500. We disagree.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the

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[1] Our review of the transcript reveals that Officer Teague testified that he reported the drill’s model number as being 8400VDW.

[2] A picture of the drill set recovered from the defendant that was introduced at trial shows a 9.6 volt drill with a model number of 8400VDW.

crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

In the light most favorable to the state, the proof at trial showed that less than thirty minutes after someone left part of "The Club" at the Crosslin Supply store after using it to break into the store to take two chain saws and a hammer drill, the defendant was stopped with two chain saws, a hammer drill, broken glass and the other part of "The Club" in the car he was driving. Mr. Davis testified that the chain saws and the hammer drill recovered from the defendant were the same chain saws taken from Crosslin Supply store, and he testified that their total value was $882. There was ample evidence from which a rational jury could conclude beyond a reasonable doubt that the defendant was guilty of theft over $500.

II

In his final issue, the defendant challenges the consecutive nature of his sentences. The trial court imposed consecutive sentences because it found that the defendant is a professional criminal with an extensive record of criminal activity who committed the burglary and theft while he was on probation. See T.C.A. §§ 40-35-115(b)(1), -115(b)(2), and -115(b)(6). The defendant concedes that he was on probation when he committed the present offenses but argues that consecutive sentences are unwarranted because they do not reasonably relate to the crimes he committed and are not necessary to protect society from him. We disagree.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Under the relevant parts of T.C.A. § 40-35-115(b), the trial court was authorized to impose consecutive sentences once it found that:

> (1) [t]he defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
>
> (2) [t]he defendant is an offender whose record of criminal activity is extensive; [or]
>
> . . .
>
> (6) [t]he defendant is sentenced for an offense committed while on probation[.]

However, these factors "cannot be read in isolation from other provisions of [the Sentencing Reform Act of 1989.] The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995).

The record reflects that the defendant has a prior conviction for attempted grand larceny,[3] two prior convictions for grand larceny, two prior convictions for

[3] The presentence report actually reflects that the defendant has two prior convictions for attempted grand larceny but proof at the sentencing hearing established that the defendant has only one conviction for attempted grand larceny.

aggravated assault, two prior convictions for misdemeanor theft, five prior convictions for shoplifting, and various other misdemeanor convictions. Given the defendant's criminal history, we conclude that the consecutive sentences the trial court imposed are warranted. In addition to the defendant's sentence being imposed while he was on probation for another offense, the consecutive sentences in this case are proper because they reasonably reflect the severity of the defendant's repeated commission of theft-related offenses and are necessary to protect the public from him.

For the foregoing reasons, the defendant's convictions and sentences for theft and burglary are affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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John H. Peay, Judge

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David H. Welles, Judge