

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 30, 2007

STATE OF TENNESSEE v. KARL DANIEL FORSS

Appeal from the Circuit Court for Cocke County
No. 9950 Rex Henry Ogle, Judge

No. E2007-01349-CCA-R3-CD - Filed January 30, 2008

D. KELLY THOMAS, JR., J., dissenting.

I agree with the majority, for the reasons outlined in its opinion, that it was error for the trial court to apply T.C.A. § 40-35-114(10) (2006) to enhance the defendant's sentence in this case. However, I respectfully disagree with the majority's conclusion that the trial court did not consider the mitigating factors proposed by the defendant. In my view, the sentencing hearing transcript establishes that the trial court not only considered the mitigating factors urged by the defendant, it also applied them. The record also establishes that the defendant had a record of illegal drug use, four DUI convictions, and a theft conviction. Thus, the trial court's conclusion, after weighing the enhancing and mitigating factors, that the enhancement factors greatly outweighed the mitigating factors was supported by the record.

In light of these conclusions, coupled with the advisory nature of Tennessee's revised Criminal Sentencing Reform Act, which designates the use of enhancement factors to be non-binding (see T.C.A. § 40-35-114 (2006)) and designates the guidelines for imposing a sentence within a range of punishment to be non-binding (see T.C.A. § 40-35-210(c) (2006)), I would find the trial court's error to be harmless and affirm the trial court's imposed sentence of six years in the Department of Correction. Therefore, I respectfully dissent.

D. KELLY THOMAS, JR., JUDGE