IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

FILED

March 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9607-CR-00281
Appellee,	*	SULLIVAN COUNTY
VS.	*	Hon. R. Jerry Beck, Judge
JIMMY CULLOP, JR.,	*	(Possession of Contraband
Appellant.	*	in a County Jail)

For Appellant:

Laura Rule Hendricks
Eldridge, Irvine & Hendricks
Attorneys
606 West Main Street, Suite 350
P.O. Box 84
Knoxville, TN 37901-0084
(on appeal)

Terry Jordan
Assistant Public Defender
P.O. Box 839
Blountville, TN 37617
(at trial)

For Appellee:

Charles W. Burson
Attorney General & Reporter

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Joseph Eugene Perrin
Assistant District Attorney General
P.O. Box 526
Blountville, TN 37617

OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Jimmy Cullop, Jr., was convicted of possession of contraband while in jail under Tennessee Code Annotated § 39-16-201. The trial court imposed a Range I, four-year sentence. The sentence was ordered to be served consecutively to his prior sentence.

In this appeal of right, the defendant claims that the evidence was insufficient and argues that consecutive sentences are improper. We find no error and affirm the judgment of the trial court.

On June 23, 1995, Sullivan County Sheriff's Department Officer Robert Scott Dooley conducted a "shakedown" at a bay in the jail annex. The defendant, one of twenty inmates in the area, reached into a cup at his bunk bed and appeared to place something inside his underwear. When Officer Dooley ordered the defendant to remove the object, the defendant refused. As Officer Jerome Lewis was called to assist with the search, the defendant reached into his underwear and threw an object on the floor. Upon inspection, Officer Dooley found a blue coin roll containing what appeared to be eight marijuana cigarettes. Both officers saw the defendant throw the article on the floor. Officer Dooley testified that he never lost sight of the item as it traveled from the defendant to the floor.

After the completion of the shakedown, the evidence was transported to the TBI Crime Laboratory for analysis. Tests established the presence of marijuana.

Lieutenant Jerry Pratt, the keeper of the records at the sheriff's department, had the responsibility of supervising all entries into inmate files.

Lieutenant Pratt testified that nothing in the defendant's file indicated that the chief administrator of the jail had authorized the possession of the marijuana.

The applicable statute provides that "[i]t is unlawful for any person to [k]nowingly possess any of the materials prohibited in subdivision (a)(1) while present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution." Tenn. Code Ann. § 39-16-201(a)(2)(Supp. 1996) (emphasis added). Subsection (a)(1) of the statute includes controlled substances among the prohibited materials.

The defendant complains that the evidence is insufficient because the state failed to prove that the defendant possessed the substance without the express written consent of the chief administrator of the institution. He claims that the failure of the state to call the chief administrator of the jail is fatal to the prosecution.

We are guided in our review by several well-established principles. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). A conviction may be set aside only when the reviewing court finds that the "evidence is insufficient to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e).

In our view, the jury had a rational basis for its conclusion even though the state did not establish by positive proof that consent had not been provided by the chief administrator of the institution. There was no record entry of administrative consent. See Tenn. R. Evid. 803(b). The absence of the entry is direct proof that the chief administrator had not given his consent. See Advisory Commission Comment to Tenn. R. Evid. 803(7)[Reserved.](absence of a business entry does not pose a hearsay problem). The testimony established that the defendant immediately reached for the contraband as soon as Officer Dooley initiated the shakedown; the defendant did not respond to the officer's directive to assemble with the other prisoners. He hid the contraband in his underpants and did not cooperate when ordered to remove the object. When the defendant did finally move to the area of assembly, he threw the object to the floor in an apparent effort to avoid detection. The marijuana was hidden inside a paper coin roll. These facts circumstantially established that the defendant did not have permission to possess the marijuana; thus, the evidence was sufficient. See State v. Frederick Jefferson, No. 02C01-9505-CC-00124 (Tenn. Crim. App., at Jackson, Feb. 21, 1996), app. denied, concurring in results only (Tenn., June 3, 1996).

Next, the defendant contends that the trial court improperly imposed this sentence as consecutive to that he was serving as a habitual motor vehicle offender. The state concedes that the trial court erroneously concluded, as a basis for the consecutive sentence, that the defendant was on parole. In making the concession, the state observes that the defendant was serving a sentence of two years or less and that only inmates with a felony sentence of more than two years were eligible for parole consideration. See Tenn. Code Ann. § 40-35-501(a)(2). In State v. Bernard Miguel Wallace, No. 02C01-9406-CC-00108 (Tenn. Crim. App., at Jackson, Dec. 21, 1994), this court held that the defendant on a determinative

release, as was the case here, maintains a status of probation rather than one of parole.

The trial court, despite the erroneous conclusion, made the following additional observation:

> Upon a review of this record ... on consecutive sentences, [a] prior criminal record can be a basis for running sentences consecutive [and the defendant] does have a substantial prior criminal record. Mostly misdemeanors, but one prior felony, even if I exercise my discretion, I would not grant concurrent sentencing, for that additional reason. So, the sentence of four years is ordered to run consecutive for the reason[ ] stated.

Consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exists:

> (l) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) [T]he defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-ll5(b).

In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our supreme court ruled that consecutive sentences cannot be required for any of the classifications "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant."

The trial court classified the defendant as "an offender whose record of criminal activity is extensive" as an alternative basis for the imposition of a consecutive sentence. The record establishes that he has been convicted of vandalism of less than $500.00; two counts of resisting a stop, frisk, halt , or arrest; three counts of driving under the influence; violation of a habitual motor offender order, a Class E felony; evading arrest; two counts of driving on a revoked license; assault; failure to return from work release; two counts of public intoxication; destruction of public records; unlawful possession of drug paraphernalia; vandalism; assault and battery; possession of an illegal firearm; possession of intoxicating liquor by a person under twenty-one; and failing to stop at the scene of an accident. Charges pending at the time of this offense were for driving under the influence (fourth offense), possession of marijuana, and possession of drug paraphemalia. Based upon this extensive record of criminal activity, the defendant clearly qualified for consecutive sentencing. In our view, the aggregate sentence reasonably relates to the severity of the offenses.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

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William M. Barker, Judge