IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1999 SESSION

STATE OF TENNESSEE,	)	C.C.A. No. 01C01-9903-CC-00074
	)	M1999-00279-CCA-R3-CD
Appellee,	)	
	)	Williamson County
vs.	)	
	)	Hon. Timothy L. Easter, Judge
MURRAY A. HERAUD,	)	
	)	(3 counts theft,
Appellant.	)	14 counts auto burglary)
	)	

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OPINION FILED: _____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Murray A. Heraud, appeals from his sentences imposed for his Williamson County Circuit Court convictions. The defendant pleaded guilty to fourteen counts of auto burglary, a Class E felony, and three counts of theft of property valued over $1,000, a Class D felony. After a sentencing hearing, the defendant was sentenced to an effective term of six years in the Department of Correction as a Range I, standard offender. In this direct appeal, the defendant complains that his sentences were improper. Following a review of the record, the briefs of the parties, and the applicable law, we affirm the defendant's sentences.

At the age of eighteen, the defendant in the case at bar embarked on an auto burglary career, albeit a short one. He was arrested just after his nineteenth birthday. Four months before the sentencing hearing in the case at bar, the defendant pleaded guilty to two counts of auto burglary and one count of theft of property valued over $10,000 for offenses committed in Davidson County. The actual number of offenses committed in Davidson County was so great that the defendant could not recall what was taken during the theft for which he pleaded guilty. For these offenses, he received a sentence of five years of probation.

The offenses in the case at bar were committed in Williamson County on three occasions at about the same time as the Davidson County offenses. On these three occasions, the defendant committed, and was ultimately indicted for, fourteen auto burglaries. He was also indicted for three offenses of theft of property valued over $1000 committed during three of the auto burglaries. The defendant pleaded guilty to these offenses.

At a sentencing hearing, the trial court imposed sentences of two years for each auto burglary, to be served concurrently with each other, and four years for each theft, each one to be served concurrently with the other theft convictions. The sentences for auto burglary were to be served consecutively to the sentences for theft, for a total effective sentence of six years. Also, these

sentences were to be served consecutively to the sentences the defendant received for his Davidson County convictions.

Sentencing

The defendant complains that he received excessive sentences. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). 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 burden of showing that the sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (Supp. 1999); Tenn. Code Ann. § 40-35-103(5) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App.1993).

The trial court found four enhancement factors and one mitigating factor applicable to the defendant. However, the factors were generally applied to the defendant rather than to specific offenses, as required by Tenn. Code Ann. § 40-35-210(f) (Supp. 1999). Thus, we will conduct our *de novo* review without the statutory presumption of correctness. See State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994).

a) Enhancement and Mitigating Factors

The defendant complains that the trial court did not recognize any mitigating factors other than that he assisted in the recovery of some of the property taken. In determining the sentences, the trial court applied four enhancement factors: (1) a previous history of criminal convictions and behavior, (3), the offenses involved more than one victim, (6), the amount of property taken was particularly great, and (8) a previous history of unwillingness to comply with the conditions of release in the community. See Tenn. Code Ann. § 40-35-114(1), (3), (6), (8) (1997). The trial court applied mitigating factor (10), that the defendant assisted the police in recovering some of the property taken during the offenses. See Tenn. Code Ann. § 40-35-113(10) (1997). In applying the enhancement and mitigating factors, the trial court found that the enhancement factors outweighed the mitigating factors and sentenced the defendant to the maximum term for each offense.

Considering both the defendant's prior criminal conviction history and his admission of the use of marijuana and other drugs, the record adequately supports the application of enhancement factor (1), that the "defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1) (1997). See, e.g., State v. Vanderford, 980 S.W.2d 390, 407 (Tenn. Crim. App. 1997) (holding enhancement factor (1) proper when defendant admitted to a history of drug use). Additionally, the defendant tested positive for marijuana when he was tested during the lunch break of his sentencing hearing. The defendant subsequently testified to using marijuana at a birthday party a week before the

sentencing hearing. Accordingly, we attach great weight to this enhancement factor.

There is little evidence in the record supporting application of enhancement factor (3), that more than one victim was involved for each offense. Tenn. Code Ann. § 40-35-114(3) (1997). The indictment for each of these offenses against property identified only a single victim. See State v. Freeman, 943 S.W.2d 25, 31 (Tenn. Crim. App. 1996) (factor (3) does not apply when there are separate convictions for each victim); but see State v. Charles Justin Osborne, No. 01C01-9806-CC-00246 (Tenn. Crim. App., Nashville, May 12, 1999) ("victim" for factor (16) interpreted to mean identified victim of the charged offense). However, the presentence report contains a victim impact statement made by the wife of the victim of count 15. In her statement she said that because of the auto burglary, she also suffered a loss. Also, the victim's wife for counts 10 and 11 testified at the sentencing hearing. She stated that there were three cars in her driveway that were burglarized that night. She testified that in addition to her husband's guitar, men's clothing that she bought for Christmas gifts was taken. We conclude that this evidence of victims other than those named in the indictments is sufficient to apply enhancement factor (3) to counts 10, 11, and 15.

The trial court applied enhancement factor (6), that "the amount of damage to property sustained by or taken from the victim was particularly great," but did not specify to which convictions this enhancement factor applied. Tenn. Code Ann. § 40-35-114(6) (1997). The trial court alluded to the total amount of property taken as being particularly great; however, this enhancement factor is to be applied individually to each victim. See Tenn. Code Ann. § 40-35-210(f) (Supp. 1999).

The record does not support application of enhancement factor (6). This court has held that normally it would be improper to further enhance a sentence by applying factor (6) to a theft offense, which is graded by the value of property taken. See Tenn. Code Ann. § 39-14-105 (theft of property valued at or over $1,000, but under $10,000, is a Class D felony); State v. Grissom, 956 S.W.2d

514, 518 (Tenn. Crim. App. 1997) (use of factor (6) based on the amount taken during a theft constitutes double enhancement and is prohibited by statute). The wife of the victim of counts 10 and 11 testified that her husband suffered a great loss when his Gibson guitar was taken because the guitar had 60 to 70 autographs engraved in it. Her husband is a musician, and the autographs were of other musicians that he had played with or known. She testified that the guitar was the most valuable item taken, but the guitar's value was not established. Not to diminish the sentimental value of the guitar, we conclude that the proof of harm does not rise to the level contemplated by the legislature for triggering this enhancement factor for the auto burglary, and this harm has been considered in the grading of the theft offense. Cf. State v. Mason Thomas Wilbanks, No. 01C01-9804-CR-00184, slip op. at 8 (Tenn. Crim. App., Nashville, May 21, 1999) (holding factor (6) applicable because there was evidence, aside from the value of property taken, that the "losses were particularly devastating to the students and staff . . . in that school pride was diminished, educational opportunities and benefits were lost"); State v. Barbara D. Frank, No. 03C01-9209-CR-00303, slip op. at 9 (Tenn. Crim. App., Knoxville, Dec. 22, 1993) (enhancement factor (6) applied because embezzlement theft of $52,000 approached the Class B felony range and losses were particularly damaging to owners of the victim business). Accordingly, enhancement factor (6) is not applicable.

The record does not support application of enhancement factor (8), that the defendant has a "previous history of unwillingness to comply with the conditions of a sentence involving release in the community." Tenn. Code Ann. § 40-35-114(8) (1997). The pre-sentence report shows that the defendant was placed on probation for a crime committed in Michigan. However, it does not show that he violated the terms of his probation. During the sentencing hearing, the defendant testified that he pleaded guilty to a charge of unlawful possession of a weapon during the summer of 1997. He stated that he was on probation for that offense when he committed the offenses for which he was being sentenced. Violation of probation by the current offenses does not show a "previous history;" therefore, factor (8) is not applicable. See State v. Hayes, 899 S.W.2d 175,186

(Tenn. Crim. App. 1995) ("commission of the offense for which a defendant is being sentenced should not make factor (8) applicable"). The trial court correctly noted that enhancement factor (13) could not be applied because the probated conviction was a misdemeanor. See Tenn. Code Ann. § 40-35-114(13) (1997).

This court has entertained the concept of applying factor (8) to sentencing of multiple offenses committed while on probation, using the series of offenses over time as evidence of a history of unwillingness to abide by community release conditions. See Hayes, 899 S.W.2d at 186. In Hayes, we considered, but declined to apply, this factor when the defendant committed two offenses while on probation. In that case the defendant presented sufficient evidence to show that he did not have "a previous history of unwillingness to abide by the conditions of his probation as contemplated under factor (8)." Id. In the case at bar, the defendant committed the subject offenses on three occasions; however, the state did not present any evidence indicating when the defendant committed the Davidson County offenses or if the defendant was on probation when the Davidson County offenses were committed. Under these circumstances we are not convinced that the defendant's series of offenses show a previous history of unwillingness to abide by community release conditions. Accordingly, we decline to apply enhancement factor (8).

With respect to mitigating factors, we conclude that the record supports mitigating factor (1), that the defendant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997). The defendant testified at the sentencing hearing that he acted as a lookout to ensure that no one came upon him and his accomplice as they broke into the vehicles during the middle of the night. However, we accord this mitigating factor little weight because auto burglary is inherently an offense that is committed with stealth and without involving the immediate presence of the victim. Also, mitigating factor (10), that the defendant assisted the authorities in recovering property, was found by the trial court and is supported in the record. See Tenn. Code Ann. § 40-35-113(10) (1997).

Finally, the defendant desires this court to recognize his showing of remorse as a mitigating factor. The defendant testified that he felt sorry for committing his crimes and offered to help in any way to recover the stolen property. However, we are mindful of the defendant's testimony that he was voluntarily participating in a drug rehabilitation program and that he was complying with the terms of his probation for his Davidson County convictions and had not used cocaine while on probation. In light of his admission of marijuana use only after being confronted with the results of a drug test performed during the sentencing hearing lunch break, the defendant's sincerity and credibility is suspect. Unlike the defendant in State v. Grissom, 956 S.W.2d 514 (Tenn. Crim. App. 1997), who, before sentencing, had spent time attempting to diminish the harmful effects of her misconduct and had also performed community service, id. at 518-19, the defendant in the case at bar has not convinced us that his remorse is genuine and sincere and has done nothing more than provide testimony that he is remorseful. We are unpersuaded that the defendant should receive mitigation based upon his alleged remorse for his crimes. See, e.g., State v. Barton L. Hawkins, No. 02C01-9711-CR-00430 (Tenn. Crim. App., Jackson, Nov. 12, 1998) (more is required to show remorse than simply saying "sorry"); State v. George Blake Kelly, No. 01C01-9610-CC-0048 (Tenn. Crim. App., Nashville, Oct. 13, 1998).

Where, as here, both enhancement and mitigating factors apply to Class B, C, D, or E felonies, the trial court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(e) (Supp. 1999). In the case at bar, we accord enhancement factor (1) substantial weight. We have considered and apply the mitigating factors. The mere number of enhancement and mitigating factors is not relevant, rather "the important consideration [is] the weight to be given each factor in light of its relevance to the defendant's personal circumstances and background and the circumstances surrounding his criminal conduct." State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995) (citing State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986)). We conclude that two years is

appropriate for each conviction of auto burglary and four years is appropriate for each conviction of theft of property valued over $1000.

b) Alternative Sentencing

The defendant contends he should have been granted alternative sentencing by being sentenced to the Community Corrections program. The defendant, a Range I standard offender, enjoyed the presumption of favorable candidacy for alternative sentencing for the offenses involved in this case. See Tenn. Code Ann. § 40-35-102(6) (1997).

The trial court found that confinement rather than an alternative sentence was warranted in this case based on the sentencing considerations of Code section 40-35-103. The trial court found as a "huge factor" in denying sentencing to the Community Corrections program that the defendant tested positive for marijuana at the sentencing hearing, while he was on probation for his Davidson County convictions and awaiting sentencing for the current offenses. This behavior shows that measures less restrictive than confinement have been unsuccessful in deterring the defendant from continued criminal conduct and directly relates to his potential for rehabilitation. See Tenn. Code Ann. § 40-35-103(1)(C) (1997); see also Tenn. Code Ann. § 40-35-103(5) (potential for rehabilitation). This finding is further supported by the fact that the seventeen offenses in the case at bar were committed while the defendant was on probation for his Davidson County convictions. Finally, the defendant was less than candid when he testified at the sentencing hearing that he was complying with the terms of his Davidson County probation because he had used marijuana while on probation. See State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994) (false testimony of defendant at sentencing hearing is probative of her prospects for rehabilitation); State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993) ("untruthfulness is a factor which may be considered in determining the appropriateness of probation"). Accordingly, the defendant's presumption of favorable candidacy for alternative sentencing has been amply rebutted by the defendant's numerous probation violations and his lack of potential for rehabilitation.

c) Consecutive Sentences

The defendant also complains about the imposition of consecutive sentences. Consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exist:

> (1) 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) The defendant is a dangerous and 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. § 40-35-115(b) (1997). In State v. Wilkerson, 905 S.W.2d 933, 937-38 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing under the dangerous offender category--the court must find consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. See State v. Lane, 3 S.W.2d 456 (Tenn. 1999).

On *de novo* review, we find that the defendant committed these offenses while on probation. Tenn. Code Ann. § 4-35-115(b)(6). Consecutive sentencing is particularly appropriate under this factor because of the defendant's repeated commission of offenses in violation and disregard of his probated sentence.[1] Accordingly, the defendant shall serve his sentences for auto burglary

[1] In the case at bar, the trial court found that the defendant was a "professional criminal who has knowingly devoted himself to criminal acts as a

consecutively to his sentences for theft, and he shall serve these sentences consecutively to his Davidson County sentence.

In consideration of the foregoing and the record as a whole, the sentences imposed by the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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ALAN E. GLENN, JUDGE

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major source of livelihood" and that the defendant was on probation when he committed these seventeen offenses. Because we hold that the defendant's commission of these offenses while on probation is sufficient to satisfy consecutive sentences, we decline to address the defendant's status as a professional criminal.