IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1999 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. No. 01C01-9810-CR-00410**
Plaintiff/Appellee,	)	M1998-00625-CCA-R3-CD
	)	**Overton County**
v.	)	
	)	**Honorable John Turnbull,**
CHARLES E. KILPATRICK, JR.,	)	**Judge**
	)	
Defendant/Appellant.	)	**(Poss. for Sale and Delivery)**
	)	**Affirmed**

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

MARK E. DAVIDSON
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
Nashville, Tennessee 37243-0493

FOR THE APPELLANT:

RANDALL A. YORK
P. O. Box 3549
Crossville, Tennessee 38557

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

The appellant, Charles E. Kilpatrick, referred hereinafter as "the defendant," appeals as of right from the judgment of the Overton County Circuit Court from a jury conviction for four (4) separate counts of the unlawful possession of controlled substances for resale or delivery. The defendant presents three appellate issues:

1. Whether the trial court erred in failing to suppress as evidence drugs found in the defendant's vehicle?

2. Whether the evidence contained in the record is sufficient to support the jury's finding that the defendant is guilty of four (4) counts of possession of controlled substances for sale or delivery?

3. Whether the trial court erred in its determination to run sentences for counts one, two, three consecutive to the sentence for count four?

After a proper review of the entire record, briefs of the parties, and applicable law, we AFFIRM the trial court's judgment.

FACTUAL BACKGROUND

Officer Kyle Norrod of the Livingston Police Department testified that he was on routine patrol and observed a vehicle passing him without taillights. Officer Norrod stopped the vehicle and asked the driver, who was the defendant, for a driver's license and registration papers. The defendant received a citation for faulty taillights and an expired registration. Officer Norrod asked the defendant if there were any guns or illegal drugs in the car, to which the defendant responded, "No." The defendant gave consent to search the car but advised Officer Norrod that the car belonged to his wife, who was in the car. Officer Norrod testified that the female in the car denied there was any illegal contraband in the car and consented to a search of the vehicle. Officer Norrod had the defendant open the trunk of the car, whereupon the officer found nine Glad-Lock bags of marijuana. The bags of marijuana were packaged in bags of one fourth (¼), one half (½), and one (1) ounce portions. Underneath the bags were several prescription pills. Officer Norrod identified a bag containing ninety (90) pills of ten (10) milligrams of Diazepam/Valium and thirty-two (32) packs of Ativan/Lorazepam. Officer Norrod testified that he also found numerous marijuana seeds in the trunk. At the suppression hearing, Officer Norrod identified one blister sheet of Alprazelam. In the glove compartment of the vehicle, Officer Norrod found some prescriptions. Two prescriptions were in Spanish and were made out to a Colby Williams Cook. Another prescription had the defendant's name on it. Officer Norrod also found some express mail receipts in the glove compartment with the address of Trolley Bearing Company, P.O. Box 413, Ackworth, Georgia. Officer Norrod tagged a book or ledger with the names of several persons and amounts with dollar signs next to the names as evidence. Further, Officer Norrod identified a set of scales found in the vehicle.

In cross-examination, Officer Norrod acknowledged that the defendant stated he had bought the pills in Mexico because of his wife's illness. He testified that the defendant was told by the Mexican sellers that it was necessary to declare the pills upon returning to the United States. The defendant did so and was given a clearance by the U. S. Customs.

Glen Everitt, a forensic scientist for the Tennessee Bureau of Investigations, testified that he examined certain pills introduced at trial and found that they contained Diazepam, a Schedule IV controlled substance. Agent Everitt also identified some pills containing Alprazelam, a Schedule IV controlled substance, and some yellow pills as Lorazepam, a Schedule IV controlled substance. Mr. Everitt testified that the pills were pain-killers, a class of tranquilizers, and such drugs are usually prescribed by doctors. As to the suspected grassy material in each bag, Agent Everitt testified that he conducted a microscopic test and a Duquenois-Levine test, which revealed the presence of 59.5 grams of marijuana.

Captain Tim Emerton of the Livingston Police Department testified that he went to the scene of the defendant's arrest after learning about a large number of drugs. Based upon experience, Captain Emerton testified that marijuana is usually sold in one fourth (¼) ounce bags for fifty dollars ($50.00) in Overton County. The Diazepam pill can be bought for five dollars ($5.00) a pill, and the Lorazepam can be bought for three ($3.00) to five dollars ($5.00) a pill. The defendant advised Captain Emerton that he bought the marijuana in Atlanta, Georgia. Based upon his experience in investigating drug offenses, Captain Emerton had seen ledgers of drug transactions which usually contained only the first names of individuals and whole dollar amounts, rather than an amount such as $49.99. Captain Emerton acknowledged that the pills had a U.S. Customs seal and that the defendant stated he got the pills in Mexico for his wife.

The defendant testified at the time of trial that he was in the music production business. Prior to that, he had worked for his father manufacturing conveyors for dry cleaning establishments. The defendant then started the Trolley Bearing Company, a ball bearing business. He testified that he and his wife, Shirley, were married in 1986 and that she suffered from neck and back fractures which occurred in a 1981 boating accident. His wife had developed "spinal stenosis," resulting in pain and loss of sleep. As a result, she takes various medications, such as Valium, Ativan, Xanax, Soma, Phrenilen Forte, and Talwin. The defendant testified that he had been to Mexico about three or four times for medication for his wife.

The defendant explained the procedure for obtaining medication in Mexico:

> When you get down there to the border and you go across the border into Mexico, being an American, there's usually a Mexican or Spanish person

> who will come up and approach you and say, "Do you want to see the pharmacy or the doctor?"
>
> Well, they'll take you to a doctor's office and you sit down and they have, they don't examine you or anything of that nature, they just have a sheet of paper. They have a desk with a glass top that will have a page underneath it with the different types of medication and you're allowed to get so many types of medication out of each category depending on what state you're from in the United States. You just tell them what you want and you pay them a small fee for writing a prescription.
>
> Then they take you from there to the pharmacy where they fill the prescription, and after you get the prescription filled they take you from there and go to the border and then you come across. The Customs agents ask you, they say, "Do you have any medications to declare?" and you, you know, I always say yes. You give them your driver's license. They make out a card and you're allowed to, like I said, you're allowed so much medication, a 90 day supply. . . . [a]nd then they check your medication and then they allow you to go through with it.

The defendant explained that it was difficult to obtain the prescriptions in the United States, since his wife's doctors were concerned with her possible addiction. The defendant testified that he and Colby Cook went to Mexico in January, 1997, and, upon his return to Laredo, Texas, he mailed the drugs to the Trolley Bearing Company for fear of being robbed. He has since sold the company to his brother, Marcus Kilpatrick. The defendant admitted the marijuana in the one fourth (¼) ounce bags was for his own personal use and not for re-sale. He had bought the marijuana in Atlanta, Georgia, for three hundred fifty dollars ($350.00). As to the marijuana seeds, he got them with the idea that he might grow some plants but decided against that. At the time of his arrest, the defendant was en route to Overton County to see Doug Thompson. The defendant and Doug Thompson hoped to sponsor a music festival in Cookeville that specialized in blues music. As to the ledger book, the defendant testified that the names of the individuals listed in the book were friends and acquaintances from his music business. The defendant started up the "Cotton Picking Productions" business to specialize in producing and selling blues music and to promote musicians. The defendant denied the ledger book was for drug transactions.

Douglas Thompson testified that he had known the defendant for two years and that they met in a blues bar in Atlanta, Georgia. Thompson was with "Mud Cat," a blues musician. Thompson stated that the defendant was to come to Overton County in February, 1997, so that they might go to Cookeville and sponsor a music festival at the "Magic Bean." Thompson stated that he knew nothing about the drugs in the defendant's vehicle.

Daniel Dudeck, known as "Mud Cat," testified that he is a self-employed musician specializing in blues music. Dudeck stated that he had known the defendant for three years and that the defendant had given him money to record a demo tape. The defendant had also financed Dudeck's first CD. For each CD sold, Dudeck would give the defendant

five dollars ($5.00). Dudeck identified several of his band members in the ledger book seized from the defendant's vehicle.

Marcus Kilpatrick, brother of the defendant, testified that he now lives in New Orleans, Louisiana, where he attends school and runs the Trolley Bearing Company. Kilpatrick testified that he bought the company from his brother in January, 1997, for ten thousand dollars ($10,000). Kilpatrick identified his name in the ledger book and denied any knowledge of any drug sales.

LEGAL ANALYSIS

PART A.

SUFFICIENCY OF EVIDENCE

The defendant asserts that the proof in this case is insufficient to support a conviction on all four (4) counts. More specifically, the defendant argues that the State failed to prove beyond a reasonable doubt the necessary intent to support the convictions. At most, the defendant would be guilty of simple possession of controlled substances. Naturally, the State contends otherwise.

When there is a challenge to the sufficiency of the evidence, the State is entitled to the strongest view of the proof at trial and all reasonable inferences which might have been drawn therefrom. *State v. Cabbage,* 571 S.W.2d 832, 836 (Tenn. 1978). A jury verdict approved by the trial court accredits the testimony of the witnesses for the State and resolves any conflicts in the evidence in favor of the State's theory. *State v. Williams,* 657 S.W.2d 405, 410 (Tenn. 1983), *cert. denied,* 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984). This Court may neither reweigh nor reevaluate the proof offered at trial and must not substitute its inferences for those drawn by the trier of fact. *Liakas v. State,* 199 Tenn. 298, 286 S.W.2d 856, *cert. denied,* 352 U.S. 845, 77 S. Ct. 39, 1 L. Ed. 2d 49 (1956). The ultimate issue is 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Tenn. R. App. P. 13(e).

The trial court charged the jury that the amount of controlled substances in the defendant's possession, along with other relevant facts surrounding the arrest, leads to the inference that such substances were possessed with the purpose of selling or otherwise dispensing. Tenn. Code Ann. § 39-17-419. The evidence in this record establishes that the defendant purchased approximately nine hundred (900) pills in Mexico and then mailed them from Texas to his business in Georgia. The pills had a U.S. Customs seal attached thereto. The defendant testified that he bought the pills and painkillers for his wife, who had been in a serious boating accident. The jury had the benefit of the testimony of the arresting officers concerning the ledger book found in the defendant's vehicle, along with their interpretation of the names and dollar amounts therein. The jury also had the defendant's explanation for these entries. The defendant testified that he had bought the nine bags of one fourth (¼) ounce marijuana for his private use. The defendant had been given thousands of marijuana seeds and scales, which are typically used to measure the weight of the marijuana found in the vehicle. The jury, with all this knowledge, resolved any conflict on behalf of the State. We find that there was sufficient evidence for the jury to

infer the defendant possessed these controlled substances for sale or delivery. There is no merit to this issue.

PART B.

MOTION TO SUPPRESS

The defendant asserts that the trial court erred in failing to find the search of the defendant's vehicle was improper and refusing to grant a Motion to Suppress the drugs found in the vehicle's trunk. The State contends that the trial court properly denied the Motion to Suppress.

We review the trial court's finding with this understanding. Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial court as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing, as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings will be upheld unless the evidence preponderates otherwise. *State v. Simpson,* 968 S.W.2d 776, 779 (Tenn. 1998); *State v. Odom,* 928 S.W.2d 18, 23 (Tenn. 1996).

At the suppression hearing, Officer Norrod testified that he saw the defendant pass him without taillights, so Officer Norrod stopped the defendant. Officer Norrod testified that he gave the defendant a citation and received his wife's permission to search her car. Officer Norrod had the defendant get the keys and open the trunk, where Officer Norrod found the drugs in issue. In cross-examination, Officer Norrod stated that he had consent forms in his squad car but did not request one to be signed.

The defendant testified that he recalled the police stop in which he was given a sobriety test and a citation for not having registration and improper taillights. During the stop, Officer Norrod asked the defendant about Stan Williams. The defendant explained that Stan Williams was his stepson, who had sold the car to his mother. The defendant stated that Officer Norrod searched the car after speaking with his wife. At the conclusion of the evidentiary hearing, the trial court found that the defendant's wife had given a valid consent to search the vehicle and denied the defendant's Motion to Suppress the evidence.

The defendant cites *State v. Morelock,* 851 S.W.2d 838 (Tenn. Crim. App. 1992) as analogous. In *Morelock,* a panel of this Court found that the stop of the defendant was reasonable in the beginning but became unreasonable toward the end. It is clear from the dialogue between the defendant and the arresting officer in *Morelock*, that the officer

detained the defendant's car for a drug search with the use of a drug dog. This Court found that this type detention for a routine traffic stop was unreasonable. Likewise, the panel was not impressed with the State's argument that Morelock gave a valid consent for the search of his vehicle. The facts in this case are distinguishable from *Morelock.* In the present case, there is no issue related to the duration of the defendant's stop. After talking to the defendant, Officer Norrod talked to the owner of the vehicle and received permission to search the car. There was no proof at the hearing to rebut the claim that the defendant's wife gave a valid consent to search the vehicle.

In *State v. Bartram,* 925 S.W.2d 227 (Tenn. 1996), the Supreme Court overruled the "angry wife" exception in determining the validity of a spouse granting law enforcement officers permission to search the property. Although we do not have an "angry wife" incident in this case, we find the language of the United States Supreme Court in *United States v. Matlock,* 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. E. 2d 242 (1974) compelling:

> Mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants had the right to permit the inspection in his own right, and that the others have assumed the risk that one of their number might permit the common area to be searched.

Id., 415 U.S. at 171, n. 7, 94 S. Ct. at 993, n. 7.

We find that the evidence does not preponderate against the trial court's judgment. There is no merit to this issue.

PART C.

SENTENCING

The defendant asserts that the trial court erred in its determination to run sentences in counts one, two, and three consecutive to sentence in count four. The State argues that the trial court properly sentenced the defendant.

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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).

When conducting a *de novo* review of a sentence, this Court must consider: (1) the evidence, if any, received at trial and the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) any statutory mitigating or

enhancement factors; (6) any statement made by the defendant regarding sentencing; and (7) the potential or lack of potential for rehabilitation or treatment. *State v. Smith,* 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987); Tenn. Code Ann. § 40-35-102, -103, -210.

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony, is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentencing involving incarceration." Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight (8) years or less, who is a standard or mitigated offender, is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *State v. Taylor,* 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss,* 727 S.W.2d 229, 235 (Tenn 1986)).

In lieu of the testimony at the sentencing hearing, the defendant submitted a Sentencing Memorandum to the trial court. The memorandum set forth the defendant's personal and historical background. The memorandum also included the defendant's prior record and sentencing, a list of State's enhancement factors, and a list of the defendant's mitigation factors. In its response, the State asserts that the defendant's sentences should be run consecutively pursuant to Rule 32, (c)(3)(A) of the Tennessee Rules of Criminal Procedure and that the defendant is a professional criminal.

Briefly, the memorandum reveals that the defendant is age 37, a graduate of the University of Georgia, and worked for his father. The defendant was married to Shirley Williams, who was seriously injured in a boating accident and became totally disabled. In 1990, the defendant was arrested for manufacturing marijuana in Georgia, to which he pled guilty. The defendant was sentenced to five years of imprisonment and, after serving sixteen (16) months, was placed on probation for five years. Upon his release, the defendant started a company, The Trolley Company, in which ball bearings were sold to dry cleaners across the United States. In 1997, the defendant sold his business and decided to try to make a living in the music business. Although the defendant and his wife have separated, he splits his time between his disabled wife and his father, who suffers from cancer. The memorandum sets forth three arrests in Georgia for violations of the Georgia Controlled Substance Act. In April, 1984, the defendant pled guilty to a violation

of the Act and was placed on "first offender" status. This is similar to "judicial diversion" in Tennessee. The defendant completed this status, and the charge was dismissed. But for an arrest in 1985 for simple possession of marijuana, this "first offender" status was extended for one year. The defendant was also convicted in Dalton, Georgia, in 1990 for shoplifting and affray.

The pre-sentence report supports the defendant's convictions and arrests, but the defendant disputes some of his past arrests. At the time of the sentencing hearing, the defendant was awaiting a hearing on a violation of probation in Georgia based upon his convictions in Tennessee, non-reporting in Georgia, and failed drug screens.

At the conclusion of the sentencing hearing, the trial court found three (3) enhancements factors: (1) the defendant has a previous history of criminal convictions and criminal behavior in addition to those necessary to establish the appropriate range; (2) the defendant has a previous history of unwillingness to comply with conditions of a sentence involving release in the community; and (3) the defendant committed these offenses while on probation for a prior felony conviction. In mitigation, the trial court stated that "the defendant could have got himself a prescription for Tylox or Dilotted (phonetic) or something like that down in Mexico and brought some real hard drugs up here, instead of Valium." Also, the trial court believed that the defendant's father's illness was appropriate for consideration. Further, the trial court commented that other than the proof at trial, that there was no extra proof that the defendant intended to sell the pills, except for the marijuana. The trial court imposed sentences of three (3) years for counts one, two, and three to be served concurrently with each other. As to count four, the marijuana conviction, the trial court imposed a one-year sentence to run consecutive to the counts one, two and three convictions for the possession of controlled substances with the intent to sell or deliver. The trial court denied the defendant's request for probation.

The defendant asserts that the trial court erred in finding that the defendant had a previous history of criminal convictions or criminal behavior to enhance his sentence, citing *State v. Blouvet,* 965 S.W.2d 489 (Tenn. Crim. App. 1997). We believe that the defendant's reliance on *Blouvet* is misplaced. We find that the record fully supports the trial court's application of factor (1), namely, that the defendant has a previous history of criminal convictions or criminal behavior beyond those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-114. The defendant has a felony conviction for a drug violation in Georgia, several misdemeanor convictions, of which several are drug related. Likewise, the record supports the trial court's application of enhancement factors (8), namely that the defendant has a previous history of unwillingness to comply with the

conditions of a sentence involving release in the community, and (13), that the present felony was committed while the defendant was on probation for a felony drug conviction. Tenn. Code Ann. § 40-35-114.

The defendant contends that the trial court erred in failing to consider four (4) mitigating factors: (1) the defendant's conduct neither caused nor threatened serious bodily injury; (2) substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense; (3) the defendant assisted the authorities in locating or recovering any property or person involved in the crime; and (4), the defendant, although guilty of a crime, committed the offense under such unusual circumstances, that it is unlikely that a sustained intent to violate the law motivated the criminal conduct.

In our *de novo* review, we conclude that mitigating factor (1), was applicable in that the defendant's conduct neither caused nor threatened serious bodily injury. However, we find that, in the total circumstances of this case, this factor is entitled to only minimum weight. *State v. Hooper,* No. 01C01-9711-CC-00507, 1999 WL 54811 (Tenn. Crim. App. Feb. 8, 1999), *perm. app. granted,* (Tenn. 1999); *State v. Jackson,* No. 02C01-9707-CC-00267, 1998 WL 285555 (Tenn. Crim. App. June 3, 1998), *perm. app. denied,* (Tenn. 1999). The defendant asserts that the defendant assisted the authorities in locating the drugs by consenting to the search, which is if this Court finds that those are the facts. However, the defendant contends that he did not give a valid consent to Officer Norrod to search the car. It was only as a result of his wife's permission to search the car that the drugs were found. There is no merit to this novel issue. As commented, the trial court applied two mitigating factors, but gave these minimum weight in arriving at a proper sentence. We find that the record supports the trial court's sentence of three (3) years for the unlawful possession of various pills with intent to sell, and one year for the unlawful possession of marijuana with intent to sell are appropriate.

The defendant asserts that he is a good candidate for full probation. In denying probation, the trial court commented on the defendant's intelligence, the fact that he is a college graduate, his history for drug convictions, and the defendant's knowledge that there was potential for a violation of the drug laws. The burden is on the defendant to show that the sentence is improper and that probation is appropriate. *State v. Ashby,* 823 S.W.2d 166, 169 (Tenn. 1991). We agree with the trial court that the defendant has not met his burden for full probation. The defendant's history of drug convictions and probationary status would indicate that the defendant is a poor candidate for rehabilitation. There is no merit to this issue.

The defendant asserts that the trial court erred in sentencing the defendant to a consecutive term of imprisonment for the marijuana conviction. The State contends that the trial court's sentence was reasonably related to the severity of the offenses committed, and the sentence for the conviction of marijuana was proper.

Tennessee Code Annotated § 40-35-115, is our statutory authority regarding multiple convictions to determine whether sentences should run consecutively or concurrently. This statute is essentially a codification of *Gray v. State,* 538 S.W.2d 391 (Tenn. 1976), and *State v. Taylor,* 739 S.W.2d 227 (Tenn. 1987). A trial court may order sentences to run consecutively if it finds by a preponderance of the evidence, that one or more of the statutory criteria exists. *State v. Black,* 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995), *perm. app. denied*, (Tenn. 1996). The trial court denied the State's request that the defendant be considered a "professional criminal" but did find that the defendant had an extensive criminal record in ordering the marijuana conviction to be served consecutively. We find that the consecutive sentence for the marijuana offense was warranted by the defendant's extensive criminal activity since 1985. The defendant candidly admitted he bought the marijuana, although for personal use, but it was packaged for re-sale. There were scales found in his vehicle for measuring drugs, a ledger book, and several thousand marijuana seeds from which the defendant entertained the idea of growing his own marijuana. This issue is without merit.

The judgement of the trial court is affirmed.

_____
L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JOE G. RILEY, JUDGE

_____
DAVID G. HAYES, JUDGE