IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9810-CR-00363**
	)	
Appellee,	)	
	)	**WASHINGTON COUNTY**
VS.	)	
	)	
JAMES DARRELL HORN,	)	**HON. LYNN W. BROWN,**
	)	**JUDGE**
Appellant.	)	
	)	**(Aggravated Burglary and Theft)**
	)	

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

On November 6, 1995, the Washington County Grand Jury indicted the Defendant, James Darrell Horn, on twenty-three counts of aggravated burglary, five counts of theft under $500.00, four counts of theft over $500.00, twelve counts of theft over $1,000.00, and one count of theft over $10,000.00. On March 5, 1998, the Defendant was tried by jury on one count of theft over $1,000.00 and one count of aggravated burglary; he was found guilty of both charges. The trial court sentenced the Defendant as a Range II multiple offender to eight years incarceration for the theft conviction and ten years incarceration for the aggravated burglary conviction. The trial court also ordered that the sentences be served consecutive to each other and to a ninety-year sentence which the Defendant had previously received in Sullivan County for similar offenses.

Pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, the Defendant now appeals, presenting the following issues for our review: (1) whether the trial court erred by overruling his motion to suppress evidence seized from his home during a search of the premises; (2) whether the trial court erred by allowing a police officer to testify that the Defendant was suspected of committing other burglaries; and (3) whether the trial court erred by ordering that the Defendant's sentences be served consecutive to each other and to sentences previously received. We affirm the judgment of the trial court.

The convictions in this case stem from a single occurrence. The proof at trial showed that on January 29, 1995, the Defendant pried open the back door of Eric Whittimore's home in Johnson City while Whittimore and his family were away from the property. The Defendant then entered the home and took property from the home. Evidence presented at trial showed that the value of the stolen property totaled over $1,000.00.

I. MOTION TO SUPPRESS

The Defendant first argues that the trial court erred by failing to grant his motion to suppress evidence obtained during a search of his home. In the motion, the Defendant stated that law enforcement personnel searched his home in June 1995 without his permission. He asserted that he was away from his home at the time of the search and that the officers improperly obtained permission to search the house from Lynda McClain, the Defendant's girlfriend at the time. The Defendant maintained that at the time of the search, McClain did not reside in his home, did not have a key to the house, did not have the Defendant's permission to be on his property, and therefore did not have authorization to consent to the search.

At the hearing on the motion to suppress, Roger Bradley testified that in February 1995, he leased an unfurnished house on Anderson Road in Carter County to the Defendant, whom he then knew as David Morgan. He explained that the Defendant did not have a job at the time, but he and the Defendant agreed that the Defendant would pay a year's rent in advance before moving into the house, an amount totaling $6,000.00. He testified that the Defendant paid him in cash.

Bradley further testified that the Defendant approached him in March to ask whether Lynda McClain could move into the house with him, and Bradley agreed that she could. Bradley stated that he saw McClain often at the house and recalled that McClain had two small children who also lived with her and the Defendant. In addition, he reported that the utilities for the home were in McClain's name and introduced a bill from Sammons Communications addressed to McClain which had been sent to the house.

Officers from the Carter County Sheriff's Department testified that they conducted the search of the Defendant's home. When they arrived, no one was home, but Lynda McClain arrived at the house with her children shortly thereafter. McClain told the officers that she was living in the house and signed consent forms, allowing the officers to search the house. The officers testified that they gained access to the house by means of a key, which one officer testified McClain gave them, conducted a search, and located stolen property inside the home. The officers also noted women's and children's clothing inside the house.

Lynda McClain also testified at the hearing on the motion to suppress. She stated that at the time of the search she lived with the Defendant, whom she then knew as David Morgan. She reported that he asked her to move into his home in March 1995 and that she and her children did so in April 1995. She also testified that two other males lived in the house with her, the Defendant, and her children. She stated that she had activated the utility service and cable service in her name and paid bills for both services.

McClain recalled the day of the search as follows: She left the Defendant at a house "down the road" from their residence to "do a burglary." She then returned to their home to pack her belongings and leave. However, she found officers waiting at the house. She identified the Defendant to officers from a photograph and then granted them permission to search the house. She reported that she signed two consent forms, one allowing officers to search the house she shared with the Defendant and the other allowing officers to search an apartment she maintained in Kingsport. She insisted that although she had rented the Kingsport apartment a few weeks prior to the search, she was living with the Defendant at the time of the search. She maintained that all of her clothes and her children's clothes and toys were at the house. She stated that the only furniture inside her Kingsport apartment was a dresser.

McClain further testified that she did not have a key to the Defendant's house and stated that she told officers she had no key to the house. She explained that she was "not allowed to have keys" to the house and generally was with one of the other residents of the house at all times. She testified that when she arrived back at the house on the day of the search, she had intended to enter the house through an unlocked bedroom window, a method of entering the home that she had previously used whenever she was not in the company of another resident of the house. She explained that the Defendant left the window open to allow her access to the house. She testified that she did not give the officers a key to the house and reported that the officers entered the house through a living room window.

McClain next testified concerning a statement which she made to police on the date of the search. She stated that she wrote the four-page statement while under the influence of marijuana and LSD and insisted that much of the statement was false. She stated, "I made it up 'cause I was upset." She explained that she wrote the statement to appease law enforcement officers so that they would allow her to make a phone call. In the statement, McClain apparently claimed that she moved out of the Defendant's house several weeks prior to the search because she believed the Defendant was going to reunite with his wife.

In addition, McClain testified at the hearing that she received mail at her apartment in Kingsport and did not pay the bills in her name which were sent to the Defendant's home, and she maintained that she did not have money to pay them. McClain further admitted that she had been convicted of crimes in a number of counties[1] and was incarcerated at the time of the hearing. However, she insisted she had made no agreement with the prosecution to receive special consideration for her sentencing in return for her testimony against the Defendant.

Our standard for reviewing the factual determinations from the suppression hearing is whether the evidence preponderates against the trial court's findings. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Our supreme court has determined that

[1] It is unclear from the record what crimes Lynda McClain committed, although it appears that she was convicted for aiding the Defendant in committing similar crimes to those of which he was convicted in this case. It is also unclear whether McClain's convictions were the result of trials or guilty pleas. McClain did testify, however, that she pled guilty to at least one charge against her.

> [q]uestions 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 judge 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 of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

Id.

The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. Likewise, Article I, § 7 of the Tennessee Constitution provides "[t]hat the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ." Tenn. Const. art. I, § 7. Thus, both provisions protect against "unreasonable" searches and seizures. The exclusionary rule may operate to bar the admissibility of evidence directly or derivatively obtained from an unconstitutional search or seizure. See Wong Sun v. United States, 371 U.S. 471 (1963).

A warrantless search is generally presumed to be unreasonable. State v. Bartram, 925 S.W.2d 227, 229 (Tenn. 1996); State v. Michael D. Ashley, No. 01C01-9706-CC-00219, 1998 WL 498739, at *9 (Tenn. Crim. App., Aug. 20, 1998). However, there are many well-recognized exceptions to this rule, including consent to search. Id. "Persons having equal rights to use or occupation of the premises may consent to a search of them and such search will be binding upon the co-occupants. A joint user has authority to consent to a search." McGee v. State, 451 S.W.2d 709, 712 (Tenn. Crim. App. 1969) (citation omitted). The modern test concerning third-party consent searches, as enunciated by the United States Supreme Court,

> is that the consent of one who possesses common authority over premises or effects is valid as against the absent, non-consenting

> person with whom that authority is shared. The court defined common authority as the "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 has 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."

Bartram, 925 S.W.2d at 230-31 (citing United States v. Matlock, 415 U.S. 164, 171 (1974)).

In overruling the Defendant's motion to suppress, the trial court here accredited the testimony of Roger Bradley and Lynda McClain. With regard to McClain's testimony, the trial judge stated, in pertinent part,

> Miss McClain has been – been attacked as a witness, and this prior inconsistent statement concerns me. But, quite frankly, she made a good witness today. The deal is over. She's gotten her time. She doesn't have anything to gain it appears one way or the other. . . . [T]here's been no proof that the state has . . . coerced or pressured her; and when pushed regarding this prior inconsistent statement she showed quite honest indignation. That's the way she appeared to the court that – that, look, I was in the jail. I thought I was being arrested for all these burglaries. There were problems. I had kids to deal with as well as she says she's high on marijuana and LSD, and was virtually going to say anything to minimize her involvement apparently and get herself booked in and booked out as quickly as possible. The court's of the opinion she told the truth here today particularly when you look at the corroboration.

The trial judge also noted that although the fact that McClain did not have a key to the Defendant's residence was "strange," "her testimony . . . that the reason that apparently the window was unlocked was so she could have access that way when she couldn't get in any other way" was "very believable," especially considering her testimony and that of other witnesses that all of her clothing and that of her children was inside the Defendant's house on the day of the search.

After reviewing the record in this case, we conclude that the evidence does not preponderate against the trial judge's findings. Although Lynda McClain testified that she did not have a key to the Defendant's home, she maintained that she was a resident of the home and had been for approximately three months when officers conducted their search of the Defendant's house. Her

claims were supported by the testimony of Roger Bradley and by testimony of officers who searched the house. Bradley testified that the Defendant obtained his permission for McClain to move into the house, that he often saw McClain at the house with her two children, and that the utilities to the home were in McClain's name. The officers testified that they found women's and children's clothing and toys inside the house. This evidence indicates that McClain did have common authority over the premises, or, in other words, joint access or control of the property for most purposes such that other co-inhabitants of the house assumed the risk that she might allow the premises to be searched. Her lack of a key to the house is not dispositive. We therefore conclude that the trial court's denial of the Defendant's motion to suppress was not in error.

II. PRIOR BAD ACTS

The Defendant next complains that the trial court improperly allowed a police officer to testify at trial that he was suspected of other burglaries. Prior to trial, the trial court granted the Defendant's motion in limine prohibiting the State from inquiring into prior bad acts committed by the Defendant. At trial, defense counsel cross-examined Investigator Lawrence Brown concerning a recorded conversation which he had had with the Defendant while they drove to view the Whittimore home, from which the Defendant had admitted taking property. During cross-examination, defense counsel asked Brown a series of questions about a prior statement made by the Defendant, to which Brown eventually responded, "I'm back to a point here that I could clarify, but I'm afraid it would be in violation of the court order [prohibiting mention of the Defendant's prior bad acts]."

Shortly thereafter, the following exchange occurred between defense counsel and Investigator Brown:

> Q . . .[I]n asking the questions about the 908 Westview residence [the Whittimore home] that you were going to see, I guess, [the Defendant] asked you, did somebody break into the house, and you

said yes. He asked you if somebody broke into the house, did he not, referring to the 908 Westview residence?

A Okay. I'm going to have to clarify here in order to answer this question. There were several burglaries in question in which Mr. Horn said he did not remember them all. Said he would have to look at the house to be sure.

At this point, defense counsel objected, to which the trial court responded,

[The objection is] respectfully denied. You are asking him about certain parts of this conversation and it's clear to the Court that the only way that he's able to explain what you're talking to him about is - is the entire context. Now, you don't have to ask him any questions at all, but when you start getting into this, then he has the right to answer.

The cross-examination then resumed as follows:

A When we were referring to the house at 908 on this statement, we were still East of that location. There were other offenses in question and Mr. Horn stated he did not remember them all. So we were taking him to this house so he could look at it to see if he remembered the house.

THE COURT: All right. At this point I need to caution the jury. Mr. Horn is on trial here today for a burglary of one house and a theft that is alleged to have occurred at another house [sic]. Both of them are alleged offenses. And you are not to consider in reaching a verdict any other testimony regarding any other alleged offenses whatsoever.

The Defendant now argues that the trial court's decision to allow Investigator Brown's testimony in this regard contravenes its grant of his motion in limine requesting that a hearing be held outside the presence of the jury should the State seek to explore prior bad acts of the Defendant. He also complains that the testimony violates Tennessee Rule of Evidence 404(b). He asserts that "the only rationale for letting [this testimony] before the jury is to destroy the credibility of a defendant who could not rebut such testimony without waiving his right against self-incrimination."

Here, however, the State did not elicit the testimony of which the Defendant now complains. Rather, defense counsel brought forth Investigator Brown's

statements. Under these circumstances, we find no error, but we also observe that a party who participates in or invites error is not entitled to relief. Tenn. R. App. P. 36(a). This issue has no merit.

III. SENTENCING

Finally, the Defendant contends that the trial court erred by ordering his sentences for the convictions in this case to run consecutive to each other and to a ninety-year sentence which he had previously received. In imposing consecutive sentences, the trial court determined that the Defendant had an extensive criminal record.

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: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the

sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

We note that the trial judge in this case properly considered sentencing principles and relevant facts and circumstances. We therefore conclude that our review is de novo with a presumption of correctness.

A court may order multiple sentences to run consecutively if the court finds by a preponderance of the evidence that the defendant is an offender with an extensive criminal record. Tenn. Code Ann. § 40-35-115(b)(2).[2] In addition, prior to a recent decision by our supreme court, the trial court was apparently required to consider what are commonly referred to as the Wilkerson factors before imposing consecutive sentences. See State v. Wilkerson, 905 S.W.2d 933, 998-39 (Tenn. 1995). However, the Tennessee Supreme Court has quite recently clarified its holding in the Wilkerson case, ruling that Wilkerson applies only in cases involving consecutive sentencing of "dangerous offenders." State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999); see also Tenn. Code Ann. § 40-35-115(b)(4). Following the court's ruling in Lane, the relevant statutory provisions for a sentencing court to now consider, in addition to sentencing considerations under Tennessee Code Annotated § 40-35-115, "are that the length of the sentence must be 'justly deserved in relation to the seriousness of the offense' and [that the sentence] 'should be no greater than that deserved for the offense committed.'" Lane, 3 S.W.3d at 460 (citing Tenn. Code Ann. § 40-35-102(1), -103(2) (1997)).

In this case, the trial judge found that the Defendant's record of criminal activity was extensive. The trial judge also devoted much discussion to the Wilkerson factors. However, Wilkerson is no longer relevant to our analysis of the case because the trial judge did not find that the Defendant is a "dangerous offender."

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[2] For a complete list of factors which may support consecutive sentences, see Tenn. Code Ann. § 40-35-115(b)(1)-(7).

In discussing consecutive sentencing, the trial court stated,

> I've sentenced a lot of people for burglaries and theft. I have . . . never found anyone yet that deserved a consecutive sentence for the burglary and the theft. Mr. Horn's the first one. . . . [O]n this record if you let him out today, he'd go break into another house. If you let him out when he's a hundred years and has a cane, he'll go down the street with his cane and break into the first house he thinks he can get by with, and I have never seen anybody on property offenses where I thought it was worth the thirty to thirty-five thousand dollars ($35,000.00) a year to keep them in custody forever, but on this record that's the way it is.

The trial judge also concluded that "the only way . . . this Court or anybody will know [the Defendant is] not breaking into houses is when he's in jail . . . ."

We must agree. The Defendant was thirty-two years old at the time of sentencing. His adult criminal record,[3] which consumed nearly five pages of the Defendant's sentencing report, spanned twelve years, with numerous convictions for burglary, theft and other crimes. Quite simply, we conclude that the trial court's findings are more than adequately supported by the record and that consecutive sentences were "justly deserved" in this case. Id.

The judgment of the trial court is accordingly affirmed.

[3] The Defendant's sentencing report indicates that the Defendant also had a juvenile record.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
GARY R. WADE, PRESIDING JUDGE

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DAVID G. HAYES, JUDGE