IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	(	
	:	C.C.A. No. 03C01-9410-CR-00390
Appellee,	(	
	:	Hamilton County
v.	(	
	:	Hon. Douglas Meyer, Judge
	(	
JEFFREY LYNN CAMERON,	:	AFFIRMED, Sentence Modified
	(	
Appellant	:	

For The Appellant:

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OPINION FILED: _____

AFFIRMED, SENTENCE MODIFIED:

John A. Turnbull, Special Judge

O P I N I O N

The defendant, Jeffery Lynn Cameron, entered guilty pleas to eleven counts of aggravated burglary, one count of burglary, and eleven underlying counts of theft as a Range I offender.

This appeal is from the maximum consecutive sentences totalling 70 years ordered by the trial judge on the burglary counts.

The following issues are presented on appeal:

I. Whether the trial court erred in ordering maximum sentences on each aggravated burglary count and burglary count.

II. Whether the trial court erred in ordering consecutive sentences.

We find patent and serious error on both issues and modify the sentences.

F A C T S

Between June 9, 1993 and October 29, 1993, the defendant entered the dwellings of eleven people and a church and stole property. Three of the twelve burglaries were committed before the defendant's twenty-first birthday. The rash of burglaries, which were committed while defendant was addicted to crack cocaine, ended on October 29, 1993 when he was arrested for the aggravated burglary of the home of his sister, Lhea Morrow, which had occurred that day. Upon questioning, the defendant confessed not only to the Morrow burglary and theft, but also to the eleven other burglaries. Defendant showed Detective Mayes the houses which he and his cousin, Anthony Patten, had burglarized. At the time of his confession, defendant was not a suspect in the eleven other burglaries. His accurate confessions led the police to recover the portion of the property stolen which had not been disposed of and led to an investigation of a separate fencing operation conducted by others. Absent his confession and assistance to the police, Jeffery Lynn Cameron might only have faced one count of aggravated burglary and one count of theft under $500.00.

The defendant had a juvenile record. At age 16, he stole a car and

committed seven offenses of burglary, larceny and was found delinquent in juvenile court and placed on intensive probation. In addition, defendant was convicted in Chattanooga City Court on August 8, 1992 of passing two worthless checks and served one hundred and twenty days in jail. The balance of his eleven month and twenty-nine day sentence was suspended. The record does not reveal the nature or length of any probation, even though the trial judge assumed defendant was still on probation at the time three of the instant burglaries were committed.

Defendant completed the ninth grade, dropped out of school, and went to work. Considering his youth and education, defendant had an admirable employment record, mostly in restaurants. At the time of his arrest, defendant was in the process of being promoted to assistant manager of Tipps Seafood. His employer characterized him as an excellent employee and stands willing to hire him back upon release. Defendant completed a drug and alcohol treatment program. With the exception of his furlough for that purpose, defendant has been incarcerated since his arrest on October 29, 1993.

Defendant entered his guilty pleas on June 2, 1994. Although the state had offered a 12 year effective sentence, defendant trusted the trial judge to impose a less harsh sentence and entered an open plea, with the sentence to be set by the judge. In this, defendant made a serious error in judgment. Prior to the actual entry of the pleas of guilt, the trial judge found that the enhancing factor based on commission of a crime while on probation did not apply and so indicated to the defendant. However, after the sentencing hearing, the trial judge not only applied this as an enhancing factor on the length of each sentence but also as one of the factors justifying consecutive sentences.

Evidence at the sentencing hearing held on June 16, 1993 showed that of the eleven homes broken into by the defendant, one was owned by his sister and one was owned by one of defendant's former school teachers. Defendant

participated by either helping to plan or actually committing the burglaries. Some of the homes broken into sustained damage to locks and doors. A sick man was at home during one of the burglaries, and his brother testified that the sick man suffered "damage to his health" when he woke up and "saw them going out the back door." During the burglary of her home, Mrs. Margaret McQueen arrived and surprised the defendant inside the house. Mrs. McQueen talked at length with the defendant. During this time, the defendant took only what Mrs. McQueen gave him, never threatened or tried to harm her, asked Mrs. McQueen to pray for him, and expressed concern for her. Mrs. McQueen testified at the hearing on motion to reconsider that she felt the sentence was much too harsh.

Although one of the burglaries netted cash of over $1,000.00, the monies actually received by defendant from sale of the stolen goods barely supported his crack cocaine addiction. Defendant supported himself and his two step-children on his $600.00 per month income.

The trial judge stated that the following enhancement factors as enumerated in T.C.A. 40-35-114 applied as to the length of sentence for each separate offense:

> (1) The defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) Defendant was the leader in the commission of an offense involving two or more criminal actions;
>
> (3) The offense involved more than one victim;
>
> (4) The victim of the offense was particularly vulnerable because of age or physical or mental disability;
>
> (6) The amount of damages to property sustained by or taken from the victim was particularly great;
>
> (8) The defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release into the community; and
>
> (15) The defendant abused a position of private trust.

The trial court did not delineate which enhancement factors applied to each offense, but rather applied them in lump sum fashion to all offenses. In addition, the trial court made no finding nor did it allude to any mitigating factors which might have applied.

In determining that the sentences should be served consecutively, the trial judge found defendant to be [1] a professional criminal; [2] an offender whose record of criminal activity was extensive; and [3] an offender who had been on probation at the time of the commission of the offenses.

L E N G T H O F S E N T E N C E

In setting a sentence, the trial court is obligated to consider, [1] the evidence, if any, received during the plea and at the sentencing hearing; [2] the presentence report; [3] the principles of sentencing and arguments as to sentencing alternatives; [4] the nature and circumstances surrounding the criminal conduct; [5] any mitigating or statutory enhancement factors; [6] any statement that he defendant made on his behalf; and [7] the potential for rehabilitation or treatment. T.C.A. 40-35-102, 103 and 210; see, State v. Moss, 727 S.W.2d 229 (Tenn. 1986)

The 1989 Act, applicable here, requires that the sentence imposed be presumptively the minimum in the range unless there are enhancement factors present. The trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. 40-35-210 (c) (d) (e).

Since the sentence for any felony is presumptively the minimum in the range unless there are enhancement factors present, the sentencing court must set forth findings of fact and the enhancement and mitigation factors applicable to each sentence it imposes. T.C.A. 40-35-210(f), State v. Gaskell, No. 285 (Tenn. Crim. App., Knoxville, April 13,1 992). If the trial court fails to make such specific findings and to specifically apply the factors to each sentence, the appellate court is left on its own to decipher the trial court's basis for a particular sentence. Such failure negates the presumption of correctness ordinarily afforded the trial court's determinations in sentencing. State v. Gaskell, supra, 4.

Since the trial court here failed to delineate a separate finding for each offense, we must review the record de novo and apply appropriate enhancing and mitigating factors.

We find that enhancement factor (10) applies to this defendant as to each conviction. The record is clear that the defendant had a previous history of criminal behavior in addition to those necessary to establish the appropriate range. The car theft and seven burglaries committed when defendant was a juvenile together with his admitted possession and use of cocaine establish the enhancement factor.

The record does not establish by a preponderance of the evidence that enhancement factor (2) applies to all cases. There is a clear inference that the defendant was the leader in the burglary of his sister's home. (Case #199915) There is also a logical inference that he was a leader in the burglary of the home of his former school teacher. (Case # 199986). As to the other burglaries there is no evidence that this enhancement factor applies.

Enhancement factor (3) does not apply to any of the burglaries. The element of the crime of burglary which enhances the offense to aggravated burglary is that a habitation is entered. T.C.A. 39-14-401, 402 and 403. Habitations commonly have more than one person living in them and commonly contain property belonging to more than one person. The legislature has already provided for an increased sentence by classifying aggravated burglary as a Class C felony instead of a Class D felony. See, State v. Michael D. Cannon, No. 89-185-III, Dickson Co. (Tenn. Crim. App., Nashville, February 13, 1990). In addition, the record does not establish by a preponderance of the evidence that in any of the burglaries under consideration more than one person suffered property loss.

Enhancement factor (4) was applied by the trial judge to all cases. In only one case, (#199907), is there the remotest of evidence that a victim was particularly

vulnerable because of age or physical or mental disability. In that home, Mrs. Ashby's brother was described as "very ill" and "sick". According to Mrs. Ashby, he woke up and saw "em going out the door"; "... it really has done some damage to his health." From this meager proof we cannot find by the preponderance of the evidence that the brother was particularly vulnerable because of either physical or mental disability so as to justify applying enhancement factor (4).

Enhancement factor (8) does not apply for two reasons. First, the record contains no evidence that defendant has a previous history of unwillingness to comply with conditions of a sentence involving release into the community. His juvenile probation ended without any rule violation being noted. The Chattanooga City Court conviction for worthless checks is void ab initio. That court has no criminal jurisdiction. Howard Bankston v. State, No. 03C01-9306-CR-00179, Hamilton Co. (Tenn. Crim. App., Knoxville, April 26, 1994); Town of Carthage v. Barrett, 840 S.W.2d 895 (Tenn. 1992). Even assuming defendant was on probation for the worthless check charges when he committed the three of these burglaries committed before August 5, 1993, probation from a void judgment has no effect. Second, there is no proof in the record as to any "conditions of sentence involving release into the community." It is difficult to break a rule which has not been shown to exist.

The proof does establish that the defendant abused a position of private trust, enhancement factor (15) in one case. He planned and facilitated the burglary of his sister's home (#199915). The record does not establish a trust relationship with his former school teacher. Defendant had been out of school five or six years when the burglary took place, and a position of private trust cannot be inferred from the record.

Thus, three enhancement factors, (1) (2) and (15), apply to case #199915. Two enhancement factors apply to case #199986. One enhancement factors

applies to each of the ten remaining cases.

Defendant asserts that several mitigating factors apply under T.C.A. 40-35-113. We find that defendant did assist the authorities in detecting or apprehending other persons who had participated in the offense. This mitigating factor (9) applies to all cases except #199915. In some of the offenses defendant assisted the authorities in locating or recovering property taken (Factor 10). He is also entitled to mitigation for not causing or threatening bodily injury in case #199988 when he was surprised by Mrs. McQueen in her home (Factor 1). In addition, defendant has obtained drug treatment, has acknowledged responsibility for his actions, and has potential for rehabilitation (Factor 13).

Accordingly, after weighing and applying the enhancing factors, considering all the evidence, considering all appropriate criteria, and mitigating factors, we modify the Range 1 sentences as follows:

Case #199915 Aggravated Burglary - 4 years in D.O.C.

Case #199986 Aggravated Burglary - 4 years in D.O.C.

Nine remaining aggravated burglary cases - 3 years each

One Burglary case - 2 years

CONCURRENT -VS- CONSECUTIVE SENTENCES

The Sentencing Commission comments to T.C.A. 40-35-115 reflect the public policy applicable to consecutive sentences:

> Consecutive sentences should not routinely be imposed in criminal cases and the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved. [emphasis added]

There is no prohibition against using the same facts and circumstances as both enhancement factors on the length of sentence and as relevant factors

justifying consecutive sentences. State v. Meeks, 867 S.W.2d 361 (Tenn. Crim. App. 1993). The legislature set out in T.C.A. 40-35-115(b) the factors the presence of which would permit the trial court to order that sentences be served consecutively. These factors include the following circumstances found to exist by the trial court in these cases:

[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; and

[6] The defendant is sentenced for an offense committed while on probation.

We will examine them separately and in the above order.

This court addressed the issue of what constitutes a professional criminal in State v. Jimmy L. Desirey, No. 01-C-01-9210-CR-00319, Davidson Co., (Tenn. Crim. App. May 1, 1995). In Desirey, the court laid major emphasis on the terms "professional" and "major source of his livelihood." Desirey was held to be a professional criminal since his long-standing numbers operation took in $2,000.00 to $2,500.00 per day, had done over $200,000.00 a week in business and had paid employees as much as $15,000.00 a year. His weekly income of from $2,000.00 to $3,000.00 from illegal gambling, the extended length of time he had been in the numbers business and his leadership in the illegal enterprise justified a finding that Desirey was a professional criminal who derived a major source of his income from illegal gambling. The contrast with the facts in the case sub judice is marked. Here, although defendant and his cousin stole property of a value of $34,000.00 over a period of four months, the evidence does not establish how much money each participant received from this rash of burglaries. It appears that most of the items stolen were fenced for a small percentage of their worth. At the same time defendant was holding down a full time job from which he supported himself and his two step-children. We do not believe the legislature intended that such a brief episode of criminal behavior would require defendant be classified as a professional

criminal under these circumstances. We decline to so classify him.

Next, we must determine whether the defendant is an offender whose record of criminal activity is extensive. Defendant, as a 16 year old juvenile, committed one car theft and seven burglaries. It is questionable whether this juvenile record, standing alone, would permit classification as an "extensive record." State v. Adams, 864 S.W.2d 31 (Tenn. 1993) But that record of juvenile criminal activity does not stand alone. The series of twelve burglaries and eleven thefts which defendant committed over the four month period prior to his arrest and his juvenile record, taken together, compel us to find that defendant had an extensive record of criminal activity at the time of his sentencing. See State v. Adams, 864 S.W.2d 31 (Tenn. 1993).

We have above held that none of these crimes were committed while defendant was on probation.

This court therefore may, but is not required to, impose consecutive sentences. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). General sentencing requirements demand that the sentence imposed "should be no greater than that deserved for the offense committed" and "should be the least severe measure necessary to achieve the purposes for which it is imposed." T.C.A. 40-35-103(2)(3). Because defendant has completed drug treatment, is in the process of getting his General Education Diploma (G.E.D.), is a person of young age and has expressed deep remorse for his actions, we decline to run all sentences consecutively to each other. We do find that because of his extensive record of criminal activity the two four-year sentences in cases #199915 and 199986 must be served consecutively for an effective sentence of eight years. The remainder of the sentences are ordered to run concurrently.

P R O B A T I O N O R C O M M U N I T Y C O R R E C T I O N S

We hold that confinement in this instance is necessary to avoid depreciating the seriousness of the offenses. Defendant raises the excuse that he was addicted to crack cocaine and needed the money to support his habit. Society is replete with such excuses. What society needs is not excuses but persons taking responsibility for their own actions. The castles in society must be protected. The homes of eleven people were violated. The defendant must be held responsible for these intrusions into the sanctity of the home.

C O N C L U S I O N

As modified, the judgments are affirmed.

_____
JOHN A. TURNBULL, SPECIAL JUDGE

CONCUR:

_____
DAVID WELLES, JUDGE

_____
DAVID HAYES, JUDGE

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AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	(	
	:	C.C.A. No. 03C01-9410-CR-00390
Appellee,	(	
	:	Hamilton County 199899, 199900, 199901,
	(	199902, 199903, 199904, 199905, 199906,
	:	199907, 199908, 199909, 199910, 199911,
	(	199912, 199913, 199914, 199915, 199916
v.	:	
	(	Hon. Douglas Meyer, Judge
	:	
JEFFREY LYNN CAMERON,	(	
	:	AFFIRMED;
Appellant	(	SENTENCE MODIFIED

JUDGMENT

Came the Appellant, Jeffrey Lynn Cameron, by counsel, and also come the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Hamilton County; and upon consideration thereof, this Court is of the opinion that the sentences imposed by the trial judge must be modified.

In accordance with the Opinion filed herein, it is, therefore, ordered and adjudged by this Court that the case is remanded to the Criminal Court of Hamilton County for the execution of the judgment of this Court in accordance with the opinion filed herewith, and for the collection of the costs accrued below.

DAVID WELLES, JUDGE

DAVID HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE

Certification

Office of Clerk of Court of Criminal Appeals
for the Eastern Division of the State of Tennessee:

I, _____, Clerk of said Court, do hereby certify that the foregoing is a trust, perfect and complete coy of the Judgement of said Court, pronounced _____, 1995 in the case of State of Tennessee against Jeffrey Lynn Cameron as appears of records now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court at office in Knoxville, Tennessee on this the _____ day of _____, 1995.

_____
CLERK