

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1995

FILED

September 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellant,)

VS.)

LUTHER E. FOWLER,)

Appellee.)

C.C.A. NO. 03C01-9409-CR-00334

HAMILTON COUNTY

HON. DOUGLAS A. MEYER
JUDGE

(Sentencing)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CRIMINAL COURT OF HAMILTON COUNTY

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OPINION FILED _____

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

This case is here on appeal by the State pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. For the second time, this court is called upon to review the sentence ordered by the trial court. For the second time, this court is compelled to reverse the judgment of the trial court and remand for a new sentencing hearing.

The Defendant was found guilty on a jury verdict of felonious assault with a firearm with the intent to commit first degree murder, causing personal injury, as proscribed by Tennessee Code Annotated section 39-2-103 when this crime was committed on December 28, 1988. For this Class A felony, the Defendant was originally sentenced as a career offender to the maximum sentence of sixty years.

On appeal, this court affirmed the Defendant's conviction but remanded the case to the trial court for a new sentencing hearing.¹ The judgment of the trial court sentencing the Defendant was reversed because the court erroneously considered information contained on the Federal Bureau of Investigation record of prior arrests and convictions at the sentencing hearing in order to establish the Defendant's sentencing range as a career offender.

The following is this court's specific instructions to the trial court concerning the remand for resentencing:

Because there apparently was an off the record agreement between counsel at the time of the sentencing hearing that sufficient valid priors existed to support the judgment, we will not hold that the State failed to make out a case for sentencing as a career offender and reduce the sentence. We are, however, remanding the case for a sentencing hearing at which the State will have an opportunity to properly prove what

¹State v. Luther E. Fowler, No. 03C01-9207-CR-00249, Hamilton County (Tenn. Crim. App., Knoxville, filed July 27, 1993).

seems rather obvious, i.e., that the appellant is a career offender. The F.B.I. record is simply insufficient evidence, because our Supreme Court has said rather forcefully that computer print-outs from the N.C.I.C. are not admissible as a substitute for certified copies of court convictions nor for any other purpose. State v. Buck, 670 S.W.2d 600 (Tenn. 1984).

The felonious assault conviction will be the subject of a new sentencing hearing at which the State must present competent evidence to support the sentence. The defendant-appellant will have the opportunity to present competent evidence, if he chooses to do so. The felonious assault case is affirmed as to the conviction, but remanded for a sentencing hearing.

State v. Luther E. Fowler, No. 03C01-9207-CR-00249, Hamilton County, slip. op. at 10-11 (Tenn. Crim. App., Knoxville, filed July 23, 1993).

At the resentencing hearing, however, the trial judge ruled that because the State did not properly prove the Defendant's record of prior convictions at the original sentencing hearing, the court was not going to consider evidence of the prior convictions at the resentencing hearing because "I'm holding that they're too late." The trial court thus refused to consider any prior convictions of the Defendant for the purposes of establishing his sentencing range and sentenced the Defendant as a Range I standard offender.

In ruling that additional evidence of the prior convictions would not be considered in resentencing the Defendant, the trial court relied upon this court's opinion in State v. Charles Eberhardt, No. 03C01-9307-CR-00230, Hamilton County (Tenn. Crim. App., Knoxville, filed Feb. 17, 1994).

In Eberhardt, this court noted that the State has the burden of proving beyond a reasonable doubt the requisite number of prior felonies to establish the Defendant's sentencing range. This court noted that "the record reflects that the Defendant was seeking to put the State to its burden of proof." Id. at 4. The State introduced no evidence of prior convictions and acknowledged that it had not filed anything other than

the required notice of intent to seek enhanced punishment. See Tenn. Code Ann. § 40-35-202. The trial court sentenced Eberhardt as a career offender and stated it would allow the State to "supplement the record with certified copies of all the various documents." Eberhart, slip. op. at 3. This court held that there was no evidence submitted to the trial court from which it could find beyond a reasonable doubt that the Defendant had prior felony convictions requiring him to be sentenced as a career offender. Id. at 4. This court therefore held that the evidence at the sentencing hearing was insufficient to justify sentencing the Defendant except as a Range I offender. Id. at 5.

Based on Eberhardt, the trial court in the case sub judice ruled that it could not consider any additional evidence of prior convictions but instead, that it must sentence the Defendant as a Range I standard offender. In so doing, the trial court made no reference to this court's opinion remanding this case for resentencing. However, this court specifically stated "because there apparently was an off the record agreement between counsel at the time of the sentencing hearing that sufficient valid priors existed to support the judgment, we will not hold that the State failed to make out a case for sentencing as a career offender and reduce the sentence." This court further specifically stated that on remand, the State would have an opportunity to prove the prior convictions.

This court's prior opinion in the case sub judice and this court's opinion in Eberhardt are not inconsistent. In Eberhardt, the Defendant was "seeking to put the State to its burden of proof." In the case sub judice, because there "apparently was an off the record agreement between counsel at the time of the sentencing hearing that sufficient, valid priors existed to support the judgment," this court determined that a new sentencing hearing was warranted.

This case is remanded to the trial court for resentencing. At the resentencing hearing, the burden shall be upon the State to establish the Defendant's sentencing range. The sentencing hearing shall otherwise be conducted in accordance with the applicable sentencing law, principles and rules.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE