

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1995 SESSION

FILED

November 15, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

APPELLEE,

VS.

DONALD MITCHELL BOSHEARS,
and
RONALD DEWAIN MORROW, III

APPELLANTS.

* C.C.A. # 01C01-9412-CR-00402

* DAVIDSON COUNTY

* Hon. J. Randall Wyatt, Jr., Judge

* (Three Counts of Aggravated

* Robbery and One Count of

* Especially Aggravated Robbery)

For the Appellants:

For Appellant Boshears:

Lionel R. Barrett, Jr.
Attorney
Washington Square Two
Suite 417
222 Second Avenue North
Nashville, TN 37201

For Appellant Morrow:

William P. Griffin, IV
Attorney
301 Realtors Building
306 Gay Street
Nashville, TN 37201

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Eugene Honea
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Ms. Katrin Miller
Asst. District Attorney General
Washington Square, Suite 500
222 Second Avenue South
Nashville, TN 37201

OPINION FILED: _____

JUDGMENTS AFFIRMED; SENTENCE OF BOSHEARS MODIFIED

Gary R. Wade, Judge

OPINION

The defendants, Donald Mitchell Boshears and Ronald Dewaine Morrow, III, were each indicted on eight separate felony counts. Each entered negotiated pleas of guilt to three counts of aggravated robbery and one count of especially aggravated robbery. The trial court imposed Range I sentences of ten years for each of the three counts of aggravated robbery; those sentences were to be served concurrently. A 20-year Range I sentence was imposed for the especially aggravated robbery, to be served consecutively. The effective sentences were, therefore, 30 years.

Boshears, who was 15 years old at the time of the offenses, and Morrow, who was 17, both claim the trial court committed error in the sentences: first, by imposing excessive sentences within the range and second, by imposing consecutive sentences. The judgments are affirmed, as modified.

One count involved the July 7, 1993, robbery of the Budgetel Inn. Gabriel McDade, an older friend of the defendants, supplied them with a gun for the purpose of robbing a Walgreen's Drugstore. When the defendants noticed a police car in the Walgreen's parking lot, they decided to rob the motel instead. During the course of the robbery, the defendant Morrow fired the weapon at a video camera in the motel lobby.

A second count involved the July 11, 1993, robbery of the Bell Road Cinema. McDade planned the robbery and

provided the weapon. The defendants executed the plan. The money taken was divided three ways.

A third count involved the July 18, 1993, robbery of the Lions Head Cinema. McDade planned the robbery, provided defendants with a weapon, and waited near the getaway car. During the course of the robbery, the defendant Morrow shot Lions Head employee Jason Kirby. The bullet passed through his left arm and lodged in his side.

The fourth robbery took place at a Subway restaurant on July 18, 1993. A woman named "Bonnie," her boyfriend Morris Wright, and the two defendants participated. The proceeds taken in the course of the robbery were split four ways. The defendant Boshears and Wright were armed. After leaving the restaurant, both Wright and the defendant Boshears fired their weapons.

Each of the defendants complains that their sentences are excessive within the range and that consecutive sentencing should not have been imposed. The state argues that each defendant merits their respective 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 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for felony convictions, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute effective July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-

210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id. The presumptive sentence for a Class A felony is now the midpoint of the range. Tenn. Code Ann. § 40-35-210.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case, our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not be routinely imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria¹ exist:

(1) The defendant is a professional criminal who has knowingly devoted himself

¹The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

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 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).

In Gray, our supreme court had ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

More recently, in State v. Wilkerson, _____ S.W.2d _____ (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." Slip op. at 13. The Wilkerson decision, which modified somewhat the strict, factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as "a human process that neither can nor should be reduced to a set of fixed and mechanical rules." Slip op. at 13-14 (footnote omitted).

The state insists that the mitigating factors alleged by defendants were considered by the trial court and that consecutive sentencing was warranted. The defendant Morrow filed eight possible mitigating factors. The defendant Boshears filed seven.

At the conclusion of the sentencing hearing, the focus of the trial court was primarily upon the serious nature of the offenses and whether consecutive sentencing was appropriate. While acknowledging "the youth of these young men" and the "psychological problems that one of them, if not both of them, have" may have qualified as mitigating factors, the trial court made no reference to the other mitigators claimed and found the following enhancement factors, neither

of which have been challenged by the defendants:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; [and]

(16) The crime was committed under circumstances under which the potential for bodily injury to the victim was great.

Tenn. Code Ann. § 40-35-114(1) and (16).

The trial court applied the first enhancement factor to all four offenses and the second to the three robberies which did not involve bodily injury. The trial court also found that another enhancement factor, "the offense involved more than one victim," applied in one of the three robberies which had not involved bodily injury. Tenn. Code Ann. § 40-35-114(3).

Having heard all of the claims of the defendants, having reviewed the presentence report, and having considered the circumstances of the crime and the testimony given at the sentencing hearing, the trial court determined that the sentences should be "within the midrange on all of these offenses." As to the first three counts, the possible sentences were 8 to 12 years. Each of the sentences imposed was 10 years. As to the especially aggravated robbery, a Class A felony, the possible range was 15 to 25 years. A 20-year sentence was imposed.

It is true, as the defendants allege, that the trial court did not specifically address each of the claimed mitigating factors. Individual consideration of the enhancing

factors claimed by the state or the mitigating factors claimed by the defense is always preferable. A direct, rather than an indirect, finding upon any applicable mitigating factors is also preferable. The statute, however, only requires a determination on the record of "what enhancement or mitigating factors it found, if any" Tenn. Code Ann. § 40-35-210(f). While the findings here might have been made in a more explicit fashion, the ruling clearly implies that those remaining mitigating factors claimed by each of the defendants were considered and rejected. In our view, the trial court substantially complied with the mandate in Ashby in this regard. Thus, the length of each sentence is entitled to the presumption of correctness. The defense concedes that there were enhancement factors. The trial court obviously gave considerably greater weight to the enhancement factors than to the mitigating factors and, in our view, had a sound basis for the imposition of midrange sentences. Tenn. Code Ann. § 40-35-210(e).

Next, the defendants complain that the trial court should not have imposed consecutive sentences. They claim that the trial court erroneously used the same factors designed to enhance the sentence within the range to impose consecutive sentencing. The defendants also argue that they did not qualify as dangerous offenders. See Tenn. Code Ann. § 40-35-115(b)(4).

Initially, in State v. Daryl Anthony Jemison, No. 01C01-9303-CR-00107 (Tenn. Crim. App., at Nashville, March 31,

1994), perm. to appeal denied, (Tenn. 1994), a panel of this court acknowledged that "there is no bar to a trial court considering the same criminal activity to enhance sentences and to order them to be served consecutively." Id. at 16. Any argument by the defendants to the contrary is, therefore, without merit. The opinion did, however, underscore the importance of specific findings by the trial court "which [would] warrant the use of the combined sentencing actions in terms of being the least severe measure for protecting the public." Id.

Here, the trial court concluded that the defendants were dangerous offenders based upon the circumstances of the four offenses and the injuries suffered by the shooting victim; it reasoned, therefore, that each defendant qualified for consecutive sentences.

The statute defines the dangerous offender as one "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...." Tenn. Code Ann. § 40-35-115(4). These several crimes, committed over an eleven-day period, warranted that threshold characterization. We read the supreme court decisions in Gray and Wilkerson, however, to require more for the imposition of consecutive sentences. In order to merit the presumptive correctness of the consecutive sentences, the trial court must have also found that the circumstances of the crimes were aggravated; the aggregate sentence must reasonably relate to the severity of the

offenses; and the total sentence must be necessary for the protection of the public from further crimes by the defendants. Amenability to rehabilitation relates directly to protection of the public factor and may, on occasion, be determinative of whether the concurrent or the consecutive sentence should be imposed. See Tenn. Code Ann. § 40-35-103. Gray requires that consecutive sentences never be routinely ordered. Here, the trial court did not specifically consider the other factors.²

The Ashby decision requires that the record must show that "the sentencing principles and all relevant facts and circumstances" were considered before the presumption of correctness applies. Because some of the criteria first enumerated in Gray and later confirmed in Wilkerson were not specifically addressed, we must consider the consecutive sentencing issue on a de novo basis. State v. Ashby, 823 S.W.2d at 169. To do so, we must review the particular circumstances of each defendant.

Boshears was 15 years old at the time of these offenses and 16 at the time of sentencing. Morrow, age 17 at the time of the offenses, was 18 by the date of the sentencing hearing. By comparison, Wright, age 18 at the time of the crimes, and McDade, age 19 at the time of the crimes, entered pleas of guilt to two counts of robbery and received concurrent ten-year sentences. Boshears had a prior juvenile

²State v. Wilkerson, _____ S.W.2d _____ (Tenn. 1995), had not been decided at the time of this decision; until Wilkerson, State v. Woods, 814 S.W.2d 378 (Tenn. Crim. App. 1991), had been the lead case on what qualified one as a dangerous offender.

record which consisted of 1991 convictions for misdemeanor breaking and entering and possession of marijuana in Franklin, North Carolina. He successfully completed a probationary period of one year. Morrow had been charged in juvenile court at age 13 with forgery; he made restitution of \$20.00 and the charge was dropped. At the same time, he was found guilty of arson, placed on probation, and required to undergo counselling. While apparently living in Texas, Morrow had been considered a runaway and was charged with burglary, burglary of a motor vehicle, theft, criminal mischief, and forgery; he was 15 at the time and the record does not indicate what disposition, if any, was made on any of these charges.

Boshears had finished the eighth grade and had been promoted to the ninth by the time of his arrest in this case. Morrow was apparently in the tenth grade at the time of his arrest. Boshears reported a history of alcohol and drug abuse. He began to drink everyday by the time he was 13 years old. At age 11, he began to use drugs. By the time of his arrest, he had used marijuana, cocaine, LSD, acid, PCP, and speed. Boshears had been diagnosed as having depression and had been prescribed medication while he was in jail. He had been treated at Vanderbilt Children's Psychiatric Hospital. Morrow had also experienced psychiatric problems and had been hospitalized at the Woods Psychiatric Institute in Abilene, Texas, for about ten months in 1990 and 1991. Morrow had apparently been sexually molested by a neighbor when he was eight years old. Morrow, himself, later committed a sexual

assault upon his older sister's son. While denying use of alcohol or other illegal drugs, Morrow admitted having used marijuana for a period of about four years.

Boshears' parents were divorced. His mother is remarried and he has a seven-year-old sister. He resided with his mother and stepfather in Nashville at the time of his arrest. Boshears' mother claimed that her son had been improperly influenced by Gabriel McDade.

Morrow's parents were also divorced. His father, who had legal custody, had been married three times; Morrow was born during the first marriage. Morrow had not had any contact with his biological mother for about five years and resided with McDade and others at the time of his arrest.

The officer who conducted the presentence report acknowledged that incarceration was mandated on each of the two defendants. She recommended that both Boshears and Morrow receive counselling for their depression.

As to the offenses themselves, Boshears, who had been suspended from junior high school due to unexcused absences, was armed with a gun during the robberies of the Lions Head Cinema and the Subway restaurant. He fired a shot into the air during the latter robbery. The record suggests that McDade, who was four years older than Boshears and three years older than Morrow, planned the crimes. Boshears claimed that McDade was his role model. Boshears, in jail for about a

year by the time of sentencing, had been a good inmate since his arrest. He received prescription medication for his depression, had plans to work on his graduate equivalent diploma, and had regularly participated in drug and alcohol rehabilitation programs. A therapist at the Vanderbilt Psychiatric Hospital testified that Boshears had a mental age of about 11-1/2 years, had an IQ of 79, and was in need of continuous psychiatric care and treatment for chemical dependency. An officer employed at the Criminal Justice Detention Facility testified that Boshears had not presented any disciplinary problems during his time in custody. She described Boshears as having been receptive to suggestions and "a very good inmate."

Apparently, Morrow's mother suffered from manic depression and had suicidal tendencies. Morrow ran away from his father's residence in June of 1993, only weeks before the robberies. Dr. William Kenner, a licensed psychiatrist, described Morrow as suffering from a "mental illness, affective disorder." Dr. Kenner measured Morrow's verbal IQ at 100 and his performance IQ at 141. He characterized the defendant as "almost in the genius range" and stated that "he could have a Ph.D. in engineering or architecture...." He described Morrow as remorseful, in internal pain [and] motivated to change...." He described the prison atmosphere as a possible advantage, explaining that his father's "rigid, military control" had been a problem in Morrow's psychological development. Dr. Kenner estimated five years to be the time necessary for Morrow's rehabilitation. Morrow's father

testified that he had prosecuted his son for vandalism in the juvenile court in Texas; he claimed he used the prosecution as a means of getting his son treatment. He explained the arson charge involved damage to the floor of a garage while his son "was playing with matches when he was a child." A juvenile detention supervisor rated Morrow as "above average in behavior." Morrow had not violated disciplinary rules during his period of incarceration.

This type of case is a good illustration of how difficult a task trial judges have in determining appropriate sentences. Boshears and Morrow, only 15 and 17 years old at the time of their 11-day crime spree, each suffered, in varying degrees, from some form of mental illness. Boshears, with an IQ near mild retardation, had abused drugs and alcohol since he was 11 years old. He was a victim of sexual abuse. Morrow, whose performance IQ was in the near-genius category, had a more serious juvenile record and a seriously unstable home environment. Experts characterized each of the defendants as having suicidal tendencies. Both committed grave offenses. Morrow fired a weapon at a video camera during one robbery and seriously injured the robbery victim in another. Morrow left the home he had available and chose to share a residence with the 20-year-old McDade, the 19-year-old Wright, and Wright's girlfriend; Boshears also spent much of his time at the same residence.

Because confinement is clearly warranted, the defendants' best hope for a worthwhile future is through the

rehabilitative programs offered by the Department of Correction. Mental experts testifying for the defendants and the state presentence investigator were convinced that each of the defendants possessed some rehabilitative qualities.

By use of the Gray/Wilkerson standards, we do not hesitate, in our de novo review, to characterize the defendants as dangerous offenders; they unhesitatingly committed crimes in which the risk to human life was high. Secondly, at least one of the four crimes, that which involved the unnecessary shooting, involved aggravating circumstances. The aggregate term of 30 years reasonably relates to the severity of the offenses. That these offenses took place over such a short period of time, however, and that the defendants were so incredibly young, makes us question whether there will be a need to protect the public for the duration of the aggregate sentences.

As indicated, amenability to rehabilitation is an important factor in the assessment of how long the public should be protected. See Tenn. Code Ann. § 40-35-103(5). The uncontroverted evidence here is that each of the defendants has benefitted somewhat by counselling and treatment and has shown a relatively sustained desire to restructure the direction of their young lives. In the context of the general statutory purposes and principles and because it is our responsibility to consider the consecutive sentencing issue without any presumption of correctness, we are persuaded that an aggregate sentence of 20 years for Boshears, rather than 30

years, may be sufficient for the protection of the public. Because Morrow is older, is of significantly greater intelligence, and has had more serious prior "brushes" with the law, his record is less favorable. A greater sentence may be warranted due to his present inability to adapt his behavior. Moreover, Morrow used a deadly weapon in two of the robberies in a purposeful manner--shooting out a security camera in one and seriously wounding an innocent victim in another -- and appears to have assumed a leadership role in the crimes. We therefore approve consecutive sentences for Morrow. The aggregate term of 30 years, while lengthy, is appropriate under all of the circumstances.

Because these crimes are particularly serious, and our review is de novo, it is perhaps appropriate to review portions of the basic sentencing guidelines of the 1989 Act:

40-35-102. Purposes. -- The foremost purpose of this chapter is to promote justice, [and] ... the following principles are hereby adopted:

(1) Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;

(2) This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;

(3) Punishment shall be imposed to prevent crime and promote respect for the law by:

(A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;

(B) Restraining defendants with a lengthy history of criminal conduct;

(C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional

programs that elicit voluntary cooperation of defendants; and

(D) Encouraging restitution to victims where appropriate;

(4) Sentencing should exclude all considerations respecting race, gender and social status of the individual;

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, 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....

40-35-103. Sentencing considerations. --
To implement the purposes of this chapter, the following principles apply:

(1) Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant;

(2) The sentence imposed should be no greater than that deserved for the offense committed;

(3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;

(4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

(5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence

(Emphasis added). All of the quoted portions of the statutes apply generally to these sentences. The parts emphasized by underlining more specifically apply. Individualized sentencing is required by legal precedent. The record demonstrates some differences in the defendants which warrant different treatment.

Accordingly, the sentences for Boshears are modified to be served concurrently. The sentences for Morrow are affirmed.

Gary R. Wade, Judge

CONCUR:

John H. Peay, Judge

David H. Welles, Judge