IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9408-CR-00270
APPELLEE,	*	DAVIDSON COUNTY
VS.	*	Hon. Seth W. Norman, Judge
BRODERICK SAMUEL HAYES,	*	(Burglary and Theft)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED AND REMANDED

Gary R. Wade, Judge

OPINION

After being charged with a number of offenses in four separate indictments, the defendant entered pleas of guilt to five counts of burglary and three counts of theft of property valued between $10,000.00 and $60,000.00. The sentences were as follows:

Number	Offense	Sentence
93-D-1505	Burglary (four counts)	Range I, Three Years on each count
93-C-1130	Burglary	Range II, Six Years
93-C-1241	Theft	Range II, Nine Years
93-C-1140	Theft	Range II, Nine Years
93-D-1631	Theft	Range I, Four Years

The trial court ordered some of the sentences to be served concurrently and others consecutively. The apparent effect was that the six-year sentence for 93-C-1130, the nine-year sentence of 93-C-1140, and the nine-year sentence of 93-C-1241 were to be served consecutively to each other for an aggregate sentence of 24 years.[1]

In this appeal of right, the defendant complains that two of the sentences were excessive and that the trial court committed error by imposing consecutive sentences.

We affirm the judgment of the trial court as to the length of each sentence. Consecutive sentencing is warranted

[1]The defendant and the state agree that the trial court referred to the effective sentence as 20 years rather than 24 years. They also agree that the judgment forms do not comport with the sentences announced by the trial court. According to the appellant, the judgment documents establish an effective sentence of 27 years.

but we remand the cause to the trial court for a recalculation of the effective sentence.

The facts were stipulated at the submission hearing. In 93-D-1505, the defendant entered guilty pleas to four of several burglary counts. As to Count One, the defendant burglarized a business, taking a deep fryer, two sinks, a food warmer, and $1,000.00. In Count Three, the defendant burglarized a business, taking a fax machine, radio, tape deck, and drugs. In Count Five, the defendant burglarized a business, taking a Sony TV, food, and $80.00 in cash. In Count Seven, the defendant burglarized a business, taking "several items." Fingerprints taken at the scene of each burglary matched those of the defendant.

As to 93-C-1130, the defendant was found in a secured laundry room. Several washing machines had been pried open. In 93-C-1241, the defendant was found in possession of a stolen 1990 Nissan. Burglary tools were found inside the vehicle. In 93-C-1140, the defendant was found inside a stolen 1992 Ryder cargo truck. In 93-D-1631, the defendant was found in the possession of a stolen 1991 Nissan Pathfinder.

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 on a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). 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.

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 criteria[2] exist:

> (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;

[2]The 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.

> (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 defendant, age 34, and single, had a tenth grade education. He had a history of drug and alcohol addiction and, by the time of these offenses, had a cocaine habit which cost up to $300.00 per day to support. At age 27, he was convicted of four counts of passing worthless checks, each in excess of $100.00, and was sentenced to three years of probation. The probation was revoked in 1990 and the defendant served five months in custody of the Department of Correction. Thereafter, the defendant committed a number of relatively minor offenses including two separate thefts which resulted in jail sentences of 30 days and 45 days, respectively. The defendant also has six additionial misdemeanor convictions.

The defendant testified that he worked as a riveter at Avco-Textron for seven years between 1981 and 1987, making approximately $30,000.00 per year. Before his employment was

terminated, he went through a drug rehabilitation program at the behest of his employer. The defendant testified that when he lost his job, he began to steal to support his drug addiction. By the time of sentencing, the defendant, who did not make bail, had been in jail for ten months, had been involved in a Starting Point Program sponsored by the Public Defenders Office, and had participated in Alcoholics Anonymous and Narcotics Anonymous meetings. He had, however, a number of disciplinary problems in jail which resulted in periods of "lockdown."

I

The defendant first claims that the nine-year sentences were excessive in Nos. 93-C-1140 and 93-C-1241. In each of these cases, the defendant entered pleas of guilt to theft, first to the Ryder truck and secondly to the 1990 Nissan. Because the defendant qualified as a Range II, multiple offender, the trial court could consider a sentence of six to ten years. See Tenn. Code Ann. §§ 40-35-101, -106, -110, and -112. The defendant concedes that one enhancement factor is applicable to each offense but insists that the trial court should have found two mitigating factors. Tenn. Code Ann. §§ 40-35-113 and -114.

The trial court referred to one enhancement factor, that is, that the defendant had a "previous history of criminal convictions ... in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1). The defendant claims as mitigating factors that he was remorseful and that his "conduct neither caused nor threatened serious bodily injury." Tenn. Code Ann. § 40-35-113(1) and (13).

The trial court found no mitigating factors applicable. After a review of this record, we do not disagree. While the circumstances of the vehicle thefts were not particularly aggravated and the conduct of the defendant might not have threatened serious bodily injury, the record suggests that the expression of remorse, made during cross-examination by the state, was a bit contrived. Moreover, two

other enhancement factors appear to apply. After being convicted of passing worthless checks in 1988, the defendant violated the terms of his probation. Tenn. Code Ann. § 40-35-114(8). Moreover, the defendant committed one of these crimes after he had been released on bail for another. Tenn. Code Ann. § 40-35-114(13).

Because there is no affirmative showing in the record that the trial court considered each of the possible enhancement factors and each of the possible mitigating factors, our responsibility is to review the sentences without any presumption of correctness. State v. Ashby, 823 S.W.2d at 169. Nonetheless, we would give considerable weight to the defendant's prior criminal history, his violation of conditions of release, and his commission of a crime while he was on bail. Thus, we assign nine-year sentences on each of the two counts.

II

Next, the defendant asserts that the trial court should not have ordered partial consecutive sentencing. He argues that the trial court failed to state the basis for any consecutive sentencing and that he would not qualify under Tenn. Code Ann. § 40-35-115. He specifically claims he should not have received consecutive sentences based upon a classification as either a professional criminal or as an offender with an extensive record of criminal activity. Tenn. Code Ann. § 40-35-115(b)(1) and (2). He further argues that "it is impossible to determine [from the record] the exact

aggregate sentence imposed."

A professional criminal is "one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity." Gray v. State, 538 S.W.2d at 393. The defendant argues that one must have acquired significant wealth through criminal activity in order to qualify as a professional criminal. We simply disagree. Here, the defendant admitted that he supported a $300.00 a day cocaine habit by burglary and theft. He had not had gainful employment for approximately six years before the commission of these offenses. Based upon those assertions alone, we would agree that crime has been a "major source" of the defendant's income and that he therefore qualifies for consecutive sentences.

The defendant also suggests that the consecutive sentence should not have been based upon classification of the defendant as "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). He reasons that his criminal record was already utilized to establish his status as a Range II, multiple offender and relies State v. Daryl Anthony Jemison, No. 01C01-9303-CR-00107 (Tenn. Crim. App., at Nashville, March 31, 1994), perm. to appeal denied, (Tenn. 1994), as authority for his argument. Again, we disagree.

In Jemison, 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. 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 defendant's record of criminal activity, his failure to comply with conditions of release, and his unresponsiveness to conditions of incarceration warrant lengthy, consecutive sentences in order to "protect the public." See State v. Holland, 860 S.W.2d 53 (Tenn. Crim. App. 1993). Thus, we uphold the concept of partial, consecutive sentencing in this instance.

As the defendant argues, however, and the state concedes, the findings of the trial court and the judgments entered do appear to be in conflict. The transcript of the record indicates an effective sentence of 24 years. The trial court stated a belief that the sentence was 20 years. The judgment forms do not appear to correspond with either of the two other assessments. Because of the apparent conflict, the cause is remanded to the trial court to clarify the effective length of the sentence and to modify the judgments entered, if necessary.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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William S. Russell, Special Judge