IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9408-CR-00297
APPELLEE,	*	DAVIDSON COUNTY
VS.	*	Hon. J. Randall Wyatt, Jr., Judge
WALTER E. KENDRICK,	*	(Felony Murder)
APPELLANT.	*	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Walter E. Kendrick, entered Alford best interest pleas of guilt to two counts of felony murder, for which he was found guilty. He entered pleas of guilt to one count of especially aggravated kidnapping, and one count of especially aggravated robbery. The trial court imposed consecutive life sentences on each murder conviction and concurrent 40-year sentences, also concurrent with the two life sentences, for each of the two remaining offenses.

The single issue presented for review is whether the trial court erred by the imposition of consecutive life sentences for each of the two felony murder convictions.

We find no error and affirm the judgment of the trial court.

On March 9, 1992, the defendant, John Woodruff, John Rucker, and Jermaine Ferguson, went to a room in the Twelve Oaks Motel in Nashville occupied by the victims, Derrick Grant and Reba Benford. The defendant had planned to rob Grant of money and cocaine and had asked Rucker to bring his .45 automatic.

According to Rucker, the defendant searched the motel room in vain for money or drugs but did find some jewelry. The defendant tied Grant, choked him, and injected him with a solution of soap and shampoo. Rucker remembered the defendant saying, "[W]e've got to kill him, because if we

don't kill him, he's going to put a hit out on us." Rucker claimed that while the defendant searched the bedroom, he went to the bathroom where he received oral sex from the victim Benford. Woodruff and Ferguson were present. Rucker testified that when he and the others emerged from the bathroom, Grant was not moving. Authorities later determined that Grant had been strangled to death.

The four men drove away from the motel with the victim Benford. According to Rucker, the defendant assured her that they would not kill her. The men let her out of their vehicle in Reservoir Park in south Nashville, drove away, but returned after Ferguson said, "I thought we were going to kill her." Rucker claimed that he and Woodruff, the driver of the vehicle, remained in the car while the defendant and Ferguson looked for the victim. Within a few minutes, Rucker heard two or three shots. Upon his return to the automobile, the defendant said, "That felt good. Let's do it again." Later, Rucker told police that Ferguson admitted having fired the fatal shots; he claimed he did so at the direction of the defendant.

The trial court found that the defendant had been convicted of armed robbery on four previous occasions and had received three ten-year sentences and one twenty-five-year sentence. The defendant was on parole for those crimes at the time of these offenses. The trial court held that the defendant qualified for consecutive sentences under either of two statutory classifications: he had an extensive criminal

record and was a dangerous offender. See Tenn. Code Ann. § 40-35-115(b)(2) and (4).

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, 599 (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).

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 routinely be imposed ... and ... the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

State v. Taylor, 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[1] 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;
>
> (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

[1]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.

> 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." State v. Wilkerson, slip op. at 13-14 (footnote omitted).

In our view, the defendant clearly qualifies for consecutive sentencing. By the time he was 21 years of age, the defendant had committed a drug-related offense and had been sentenced to prison on four separate armed robbery convictions to an effective term of twenty-five years. After he was granted parole in April of 1990, he was arrested on three occasions prior to being charged in this case. Thirty-two years of age at the time of his plea in 1993, the defendant had spent most of his adult life in jail or prison. The circumstances here were aggravated. The nature of the crimes warranted the aggregate sentences. In our view, the public requires protection from the defendant. Under the facts in this record, the defendant qualifies as "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2).

Moreover, we think the defendant also qualifies as a dangerous offender. See Tenn. Code Ann. § 40-35-115(b)(4). While the trial judge found that the defendant had

demonstrated little or no regard for human life and did not hesitate about committing a crime in which the risk to human life is high, that is only one factor to consider. The presumptive correctness of a sentence is conditioned upon the full consideration of all the statutory sentencing principles and all other relevant factors. See State v. Ashby, 823 S.W.2d 166 (Tenn. 1991); State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992). Thus, on the issue of whether the defendant also qualified as a dangerous offender, our scope of review is de novo. The ultimate test is whether the defendant meets all of the criteria set out in Gray and confirmed in Wilkerson.

We begin with the determination that the defendant meets the definition of a dangerous offender; certainly, the defendant demonstrated little regard for human life during the commission of these crimes. Secondly, the circumstances of each murder, particularly that of the victim Grant, were aggravated. Thirdly, a life term for each of the two murders reasonably relates to the seriousness of the offenses; stated simply, there is no greater crime than that of first degree murder. Finally, the aggregate length of the two life sentences appears to be necessary to protect the public. The defendant, while on parole for four prior armed robberies, not only committed the same type of offense but also murdered each of the two victims. The state had asked for the death penalty but had withdrawn that request in exchange for the guilty pleas. The defendant's social history does not suggest amenability for rehabilitation. In fact, we have found

nothing in this record to indicate that the defendant might be released into society, at least without unreasonable risks, at anytime in the near future.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

_____
John H. Peay, Judge

_____
Rex H. Ogle, Special Judge