IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9502-CR-00043
Appellee,	)
	) Davidson County
V.	)
	) Hon. Ann Lacy Johns, Judge
	)
JOHN DERRICK MARTIN,	) (Sale of Cocaine - 3 counts;
	) Possession of Cocaine and Drug
Appellant.	) Paraphernalia; Driving on a
	) Suspended License)
	)

FOR THE APPELLANT:

John E. Herbison
2016 Eight Avenue South
Nashville, TN 37201
(On Appeal)

George Thompson
Stahlman Building, Suite 112
Nashville, TN 37201
(At Trial)

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Eugene J. Honea
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

Victor S. Johnson, III
District Attorney General

Cheryl Blackburn
Dan Hamm
Asst. Dist. Attorneys General
500 Washington Square
222 Second Avenue North
Nashville, TN 37201

OPINION FILED: _____

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AND MODIFIED IN PART; REVERSED AND REMANDED AS TO FINES.

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, John Derrick Martin, was convicted by a jury of two counts of sale of .5 grams or more of cocaine, one count of sale of twenty-six grams or more of cocaine, one count of possession of cocaine with the intent to sell or deliver, one count of possession of drug paraphernalia and one count of driving on a suspended license. He received consecutive ten year sentences in the first four counts along with fines of ten thousand dollars ($10,000.00) per count, a consecutive six month sentence in count five and a consecutive three month sentence in count six. These sentences were also ordered to run consecutively to an unfinished Kentucky sentence.

In this appeal, the appellant raises seven issues for review. He contends that:

1. The admission of audio recordings containing the voice of a deceased informant violated his right to confrontation;

2. The admission of these declarations violated the hearsay rule;

3. The admission of evidence of a prior drug offense in another state was error pursuant to Tenn. R. Evid. 404(b);

4. The admission of evidence of a prior drug offense in another state violated his due process guarantees;

5. The trial court was without jurisdiction to impose any fine in excess of fifty dollars;

6. The enhancement of sentences within the applicable range as to felony counts is excessive; and

7. The imposition of consecutive sentences as to all counts is inappropriate.

Following our review, we affirm the convictions but modify the incarceration period. We also remand to restore the appellant's right to have the jury set the fines.

The proof presented at trial revealed that Officer Gene Donegan of the narcotics section of the Dickson Police Department conducted four "controlled" drug buys from the appellant using a confidential informant. At the first buy on March 19, 1993, the informant was wired and instructed to purchase one ounce of cocaine from the appellant. Officers Gene and John Donegan and Officer Johnny Brew followed the informant and observed the appellant getting into the informant's vehicle. Via the transmitter, the officers heard the conversation regarding the drug transaction which was recorded both on the device on the informant's person and on the recorder in the police car. When the appellant left the area, the informant produced a potato chip bag which contained the cocaine purchase.

Following the same procedure, a second buy from the appellant occurred on March 23, 1993. Officers Donegan and Brew along with ATF Agent Mark Bender, watched the informant climb into the appellant's vehicle and listened as the drug buy occurred. Again, the informant surrendered the drug purchase to the officers.

The third drug buy came on April 9, 1993, and took place inside the informant's home. The officers had installed a transmitting device and caller identification box inside the informant's home. When the appellant called the informant to arrange the sale, the caller identification box indicated that the call was "out of area" which the officer testified likely indicated that the call was placed from a cellular phone. When the appellant arrived, Officers Gene and John Donegan watched him enter the informant's home and listened to the drug transaction via the transmitter. The informant purchased another ounce of cocaine and paid an additional $150 as a down payment for a quarter kilogram of cocaine. When the officers saw the appellant exit the home, they entered to find an ounce of cocaine.

The final buy was scheduled for April 14, 1993, and would have involved the quarter kilogram of cocaine on which the informant had paid the $150 down payment. However, the appellant was arrested in a grocery store parking lot while on his way to meet the informant. During a search of the appellant's vehicle, the officers recovered thirteen (13) one ounce bags of cocaine, four thousand four hundred twenty dollars ($4,420.00) in cash, a cellular phone and a bottle of Manitol, an additive used in "cutting" cocaine. Laboratory tests confirmed that the substances taken in each buy contained cocaine.

At trial, the jury heard a redacted version of the tape recorded conversations between the informant and the appellant. The informant died prior to the trial in this cause; however, the respective officers testified at trial and confirmed the events surrounding the drug buys. Each officer identified the voices on the tapes as those of the informant and the appellant.

Initially, we note that the appellant failed to timely file a motion for a new trial. “A motion for a new trial shall be made in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered.” Tenn. R. Crim. P. 33. The appellant was sentenced on September 8, 1994, and filed a notice of appeal on October 7, 1994. Almost two months later, he filed a motion to amend the notice of appeal to include a motion for a new trial. Without question, the appellant failed to follow the mandates of Rule 33. Therefore, all issues with the exception of the challenges to his sentences, are waived.[1] Notwithstanding the waiver, we have chosen to address the issues but find only one issue that has merit.

---

[1]The trial court heard the late-filed motion for a new trial, which it subsequently denied. However, as cited by the state, the thirty day requirement of the rule is mandatory and jurisdictional. Massey v. State, 592 S.W.2d 333 (Tenn. Crim. App. 1979). Because the appellant failed to file his motion for a new trial within the parameters of the rule, the trial court had no jurisdiction to consider the motion. State v. Givhan, 616 S.W.2d 612 (Tenn. Crim. App. 1980).

In his first and second issues the appellant challenges the admission of the audio tapes depicting the conversation between himself and the deceased informant. He claims that the admission violated both his right to confrontation and the rules against hearsay. We disagree. Our review of the transcript reveals that the statements made by the now deceased informant are not hearsay. The remarks made by the informant were merely conversational and depicted one side of a drug buy. They were not offered to prove the truth of the matters asserted. See State v. Harless, No. 03C01-9203-CR-00105 (Tenn. Crim. App. Aug. 11, 1993).

As to the confrontation issue, we acknowledge both the United States and Tennessee constitutional right of a criminal defendant to face those who testify against him in court. In this case, however, we do not find that the confrontation issue comes into play. The evidence is neither substantive nor is it offered to prove what was being said. Instead, the tapes reveal that a drug deal took place and nothing more. Each officer present testified that the voices on the tape were those of the informant and the appellant. Although they did not actually observe the transactions, they were present to observe the entrance and exit of the defendant and to simultaneously hear the drug deal taking place. Because the deceased informant's statements were not offered as substantive evidence and are not hearsay, we find no confrontation issue. Issues one and two are without merit.

Next, the appellant contends that the admission of evidence regarding a prior drug offense in another state was reversible error under Tenn. R. Evid. 404(b).[2] Rule 404(b) provides that character evidence, although inadmissible to show action and conformity therewith, is admissible to show identity and intent. The conditions which must be satisfied before admission of such evidence are:

---

[2]The appellant did not raise this issue in his untimely motion for a new trial but argues that the issue should be reviewed as plain error. In any event, we find no merit in this issue.

> (1) The court upon request must hold a hearing outside the jury's presence;
> (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and
> (3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

The brief testimony regarding the events surrounding appellant's guilty plea for possession of cocaine in Kentucky in 1991 was offered during rebuttal to counter both the cross-examination and direct proof presented by defense counsel. The defense hoped to convince the jury that the officers had not observed the appellant at these transactions and that the evidence failed to establish that the appellant possessed the cocaine with the intent to sell or deliver. The state argued that the rebuttal evidence of the Kentucky drug transaction was necessary to rebut the issues of identity and intent raised by the appellant.

As required by the rule, the court conducted a jury-out hearing prior to admission of the evidence to determine that a material issue existed as to identity and intent and concluded that the probative value outweighed the danger of unfair prejudice. Further, the trial court's contemporaneous limiting instruction reduced the likelihood that the jury would draw improper conclusions from the evidence. We agree that the evidence was admissible for this limited purpose. This issue has no merit.

In his fourth issue, the appellant maintains that pursuant to TENN. CONST., art. VI, § 14 (1995), the trial judge was without jurisdiction to impose a fine in excess of fifty dollars ($50). While it is true that a fine exceeding fifty dollars ($50) must be imposed by the jury, an appellant may waive this provision to allow the judge to impose the fine. Tenn. Code Ann. § 40-35-301 (1990); State v.

Durso, 645 S.W.2d 753 (Tenn. 1983); State v. Harless, 607 S.W.2d 492 (Tenn. Crim. App. 1980). Here, no written waiver is contained in the record and neither party alleges that a written waiver was ever executed. However, the state argues that a short colloquy between the prosecutor and the trial judge prior to sentencing constituted waiver even though defense counsel remained silent.[3] We disagree.

The relinquishment of certain constitutional rights will not be presumed from a silent record. State v. Pearson, 858 S.W.2d 879, 887 (Tenn. 1993). "A knowing and voluntary waiver includes the intentional relinquishment or abandonment of known rights." Id. at 887. In the present case, we find neither an indication of the appellant's awareness of his right to waive the jury imposition of any fine nor his "knowing and voluntary" waiver of such a right. "A waiver ... will not be presumed where there is no evidence ... to indicate that the appellant was made aware of the issue." Id. We do not find that the appellant waived this right. Therefore, we remand to the trial court to permit the appellant to exercise his constitutional right to have the jury impose the amount of the fine.

The appellant's final two challenges are to the sentences imposed. He argues that the felony sentences were improperly enhanced and that the trial court erred in ordering all sentences to run consecutively. Our review of the sentence imposed by the trial court is de novo, with a presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d)

---

[3]The following portion of the sentencing hearing transcript reflects the discussion the state asserts constitutes waiver:

Court (to the prosecutor):	But you waived fines; didn't you say?
General Blackburn:	Well, no I said I -- I didn't waive the fine. I'm sorry. He [the defendant] waived the jury setting it.
Court:	Oh, okay, so we are looking at fines?
General Blackburn:	Yes.
Court:	And it is judicial imposition?
General Blackburn:	Yes.

(1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness which attaches to the trial court's action is conditioned upon an 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). In conducting our review, we consider the evidence presented at the sentencing hearing, the presentence report, the sentencing principles, arguments of counsel, statements of the defendant, the nature and characteristics of the offense, mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (1990); Ashby, 823 S.W.2d at 168; Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

In counts one through three the appellant was convicted of sale of cocaine, a Schedule II controlled substance. In count four, he was convicted of possession of cocaine with the intent to sell. Sentenced as a Range I offender in the Class B felonies, the potential range of punishment for these convictions was from eight (8) to twelve (12) years. Tenn. Code Ann. §§ 39-17-417 (c)(1) (1995 Supp.) & 40-35-101.

The trial judge considered as enhancement factors the appellant's: previous history of convictions for criminal behavior, previous unwillingness to comply with the conditions of a sentence involving release into the community, and commission of these felonies while on probation from a prior felony conviction. Tenn. Code Ann. §§ 40-35-114(1), (8) & (13)(C). The appellant does not specifically challenge the enhancement factors as inapplicable but suggests that the court should have considered Tenn. Code Ann. § 40-35-113(1) in mitigation because his conduct neither caused nor threatened bodily injury. We disagree. This Court has previously held that this mitigating factor does not apply where the facts support a finding that large amounts of cocaine were being sold. See Arwood v. State, No. 335 (Tenn. Crim. App. May 9, 1991, Knoxville).

Finding no mitigating factors, the trial court used these enhancement factors to impose ten-year sentences in counts one through four. We find that the record supports these factors, and therefore, that these sentences are not excessive. This issue is without merit.

The appellant's final issue is that the trial judge errantly ordered all sentences to run consecutively including her decision to run these sentences consecutively to a prior Kentucky sentence. The court made the explicit finding that the appellant was a professional criminal as he has no valid means of support other than crime. Further, the appellant committed the offenses while on probation. We conclude that the appellant qualifies as a professional criminal and did in fact commit the offenses while on probation. However, "the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." State v. Taylor, 739 S.W.2d 227, 230 (Tenn. 1987); see also Tenn. Code Ann. § 40-35-103(2).

We cannot say that forty years for the drug offenses is reasonably related to the severity of these four crimes. Because these were controlled buys, the officers dictated the number of counts. As such, the severity of the crimes could vary significantly depending upon the specific number of buys the officers chose to conduct and the amounts purchased in each buy. For this reason, we are of the opinion that a total sentence of twenty years for the drug cases is appropriate. Therefore, we modify the consecutive nature of the sentences such that the two ten-year sentences on similar counts one and two will run concurrently with each other and concurrently with all of the other counts including the two misdemeanor offenses. The remaining sentences will run consecutively to each other.

For purposes of clarification, the sum total of appellant's prison and jail terms will be twenty years and nine months under our modification. These

sentences will also run consecutively to the Kentucky sentence as adjudged by the trial judge.

We affirm the convictions and the prison and jail sentences. However, we modify the consecutive nature of the prison sentences as indicated by the foregoing. We remand for a new trial as to the fines to permit the appellant to exercise his right to a jury imposition of fines.

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AND MODIFIED IN PART; REVERSED AND REMANDED AS TO FINES.

_____
PAUL G. SUMMERS, Judge

CONCUR:

_____
JOHN H. PEAY, Judge

_____
DAVID H. WELLES, Judge