IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
OCTOBER SESSION, 1995

FILED

March 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9503-CR-00070
Appellee	)	
	)	ROANE COUNTY
vs.	)	
	)	Hon. E. Eugene Eblen, Judge
ANTHONY RAYMOND BELL,	)	
	)	(Vehicular Homicide;
Appellant	)	Revoked License)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Anthony Raymond Bell,[1] pled guilty in the Criminal Court of Roane County to the offenses of vehicular homicide as a proximate result of the appellant's intoxication, a class C felony, and driving on a revoked license, a class B misdemeanor. The trial court sentenced the appellant to four years incarceration for vehicular homicide and six months incarceration for driving on a revoked license. The court further ordered that the sentences be served consecutively. The appellant now appeals his sentence, contending that the trial court should have granted him the minimum sentence of three years for vehicular homicide. The appellant also argues that his sentences should be concurrent.

After reviewing the record, we affirm the judgment of the trial court.

I. Factual Background

On March 15, 1994, the appellant was involved in a two car collision on Interstate 40 in Roane County. The collision tragically resulted in the death of James Basim, the driver of the second car. The investigating officer detected a strong odor of alcohol about the appellant's person. A subsequent test revealed a blood alcohol content of .23 percent, confirming the officer's suspicion of intoxication. Moreover, on the date of this offense, the appellant's driving privileges were revoked due to a recent conviction for driving under the influence.

The appellant did not testify at his sentencing hearing. However, he made

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[1] Pursuant to the policy of this court, we refer to the appellant by the name indicated on the indictment, and on the judgment of conviction. However, in the record, the appellant asserts that his correct name is "Raymond Anthony Bell."

the following statement to the probation officer who prepared the presentence report:

> I don't know why I awas [sic] on Interstate where I live is not on my way home. Randy Kirby Deputy Sheriff said I hit a truck that was already in a wreck on interstate, but won't say anything else about it. A hospital nurse said I had a diabetic black out, don't remember anything else at all. Was only a [sic] bar from 9:45 p.m. [un]til 11:45 p.m. Only had 4 beers in that time frame. I'm not a mean or violent person. Never been in any trouble or any other feloney [sic] carges [sic] or no kind of trouble at all.

II. The Length of the Sentence

The appellant first contends that his sentence of four years for vehicular homicide is excessive. Vehicular homicide is a class C felony. Tenn. Code Ann. § 39-13-213(b) (1991). Because the appellant was sentenced as a range I standard offender, he was potentially subject to a sentence of not less than three nor more than six years incarceration. Tenn. Code Ann. § 40-35-112(a)(3) (1990).

Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). The presumption of correctness 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 also State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). In other words, if the trial court follows the statutory sentencing procedures, gives due consideration to and properly applies the factors and principles that are relevant to sentencing, and makes findings of fact that are adequately supported by the record, we may not disturb the sentence, even if a different result is preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In the instant case, for reasons

subsequently discussed in this opinion, we are unable to afford the presumption of correctness to the trial court's determination.

Generally, in conducting a *de novo* review of a sentence, we must consider the following: (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and any 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 on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Ashby, 823 S.W.2d at 168; Tenn. Code Ann. § 40-35-102 (1994 Supp.); Tenn. Code Ann. § 40-35-103 (1990); Tenn. Code Ann. § 40-35-210 (1994 Supp.). The burden is upon the appellant to demonstrate the impropriety of the sentence. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995).

The appellant argues that he should have received a minimum sentence. Tenn. Code Ann. § 40-35-210(c) provides that the presumptive sentence is the minimum sentence within the appropriate range. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210 (d) and (e). For the purpose of review, the trial court must place on the record any applicable factors and also include the specific findings of fact underlying its application of sentencing principles. See Tenn. Code Ann. § 40-35-209(c)(1994 Supp.); Tenn. Code Ann. § 40-35-210(f). See also State v. Chrisman, 885 S.W.2d 834, 839 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994); State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). Although the trial court in this case failed to comply with this requirement, the record is adequate for review. State v. Pearson, 858 S.W.2d

879, 884-885 (Tenn. 1993); State v. Kyte, 874 S.W.2d 631, 633 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993).

The record indicates that the trial court applied the enhancement factor set forth in Tenn. Code Ann. § 40-35-114(1)(Supp. 1994), which encompasses defendants "with a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." The record supports the application of this factor. The presentence report reflects that, on September 24, 1993, the appellant drove under the influence of an intoxicant in Roane County. He was convicted of this offense on November 29, 1993, and was sentenced to 48 hours incarceration, followed by a probationary period of 11 months and 29 days. The record also indicates that, on September 24, 1993, the appellant was driving on a revoked license. Although the appellant was not convicted of this offense until April 18, 1993, approximately one month following the commission of the instant offenses, a court may consider the underlying conduct in applying enhancement factor (1). State v. Massey, 757 S.W.2d 350, 352 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); State v. Bunn, No. 01C01-9311-CC-00401 (Tenn. Crim. App. at Nashville, November 22, 1994).[2]

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[2] We note that the trial court improperly considered two 1984 Georgia convictions for driving under the influence and driving on a revoked license. The presentence report and the probation officer's testimony at the sentencing hearing reflect that the probation officer's only source of information concerning these convictions was an N.C.I.C. report. Our supreme court has held that N.C.I.C. reports are not admissible at a sentencing hearing for any purpose. State v. Buck, 670 S.W.2d 600, 607 (Tenn. 1984). "The information in such reports is pure hearsay, of a dubious degree of accuracy, prepared for purposes other than court use ... ." Id. Moreover, this court has implicitly held that a sentencing court may not rely solely upon information contained in a presentence report if there is a showing that the information was obtained from an unreliable source, such as an N.C.I.C. report, or is otherwise inaccurate. State v. Crossman, No. 01C01-9311-CR-00394 (Tenn. Crim. App. at Nashville, October 6, 1994), perm. to appeal denied, (Tenn. 1995). See also State v. Hines, No. 01C01-9406-CC-00189 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995).

The trial court did not apply any mitigating factors. The appellant argues that the trial court should have considered his "ill health" as a mitigating factor. The record reveals that the appellant is diabetic and requires regular medication. However, the appellant fails to explain why his "ill health" should reduce the length of his sentence. The burden of proving applicable mitigating factors rests upon the appellant. State v. Moore, No. 03C01-9403-CR-00098 (Tenn. Crim. App. at Knoxville, September 18, 1995), perm. to appeal denied, (Tenn. 1996). Therefore, while Tenn. Code Ann. § 40-35-113(8) (1990) allows a court to consider any physical condition that significantly reduced the appellant's culpability, the appellant has not sufficiently established a causal link between his physical ailment and the instant offense. Moreover, it is unclear how the reduction of a sentence because of the ill health of a defendant is consistent with the purposes of the Sentencing Act. Tenn. Code Ann. § 40-35-113 (13). Indeed, we have previously suggested that, in general, special consideration in sentencing because of ill health frustrates the purpose of the Act, to prevent crime and promote respect for the law by providing an effective general deterrent to those likely to violate the criminal laws of this state. State v. McIntosh, No. 85-27-III (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1986); Tenn. Code Ann. § 40-35-102(3)(A).[3] Thus, the appellant's ill health is not an appropriate mitigating factor.

Having found the presence of one enhancing factor and no mitigating factors, we conclude that a sentence of four years is justified.

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[3] A defendant's poor health may be relevant to the imposition of an alternative sentence. See, e.g., Ashby, 823 S.W.2d at 170; State v. Cunningham, No. 02C01-9406-CC-00122 (Tenn. Crim. App. at Jackson, April 12, 1995) (the defendant required medical attention more easily and cheaply obtained outside of prison). The appellant does not contest the trial court's denial of an alternative sentence.

III. Consecutive Sentencing

The appellant contends that the trial court should not have ordered consecutive service of the appellant's sentences. First, the appellant argues that the trial court failed to state on the record the rationale for consecutive sentencing. Second, the appellant asserts that there is no statutory basis for the imposition of consecutive sentences.

We agree that the trial court is required to articulate its reasons for imposing consecutive sentences.[4] In this case, the trial court failed to do so. Nevertheless, upon *de novo* review, absent of course the presumption of correctness, we conclude that the record supports the trial court's determination. Pearson, 858 S.W.2d at 884-885; Kyte, 874 S.W.2d at 633; Mallard v. State, No. 02C01-9412-CC-00291 (Tenn. Crim. App. at Jackson, July 26, 1995).

Initially, Tenn. Code Ann. § 40-35-115(b)(6) (1990) provides that a court may impose consecutive sentences if "[t]he defendant is sentenced for an offense committed while on probation." The record reflects that, at the time of the instant offenses, the appellant was on probation pursuant to his prior DUI conviction. Moreover, Tenn. Code Ann. § 40-35-115(b)(4) provides that consecutive sentencing is appropriate when a 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." See also Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). The record supports a

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[4] Tenn. R. Crim. P. 32(c)(1) provides, “If the court orders that the sentences be served consecutively or concurrently, the order shall specifically recite the reasons for such ruling and such judgment is reviewable on appeal.” Additionally, Tenn. Code Ann. § 40-35-209(c) provides: “A record of the sentencing hearing is kept and preserved in the same manner as trial records. The record of the sentencing hearing is part of the record of the case and shall include specific findings of fact upon which application of the sentencing principles was based.”

finding that the appellant is a dangerous offender.

Our conclusion that the appellant is a dangerous offender is based upon the appellant's operation of a vehicle on an interstate highway with a blood alcohol content of .23 percent less than four months after a conviction for DUI and the consequent revocation of his license. Additionally, the appellant's refusal to acknowledge that he may have a problem with alcohol abuse indicates that consecutive sentencing is necessary to protect the public from further criminal conduct by the appellant. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). Finally, the appellant's aggregate sentence is reasonably related to the severity of the offenses and is consistent with general principles of sentencing. Id.

Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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JOSEPH M. TIPTON, Judge