IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1995

FILED

February 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9405-CR-00188
	)	
	)	Cocke County
v.	)	
	)	Hon. Ben W. Hooper, II, Judge
	)	
STEVEN HUGHES,	)	Aggravated Robbery, 4 counts;
	)	Aggravated Assault, 2 counts
Appellant.	)	

For the Appellant:

Paul G. Whetstone
502 North Jackson St.
Morristown, TN 37814

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Hunt S. Brown
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

Alfred C. Schmutzer, Jr.
District Attorney General
301 Sevier County Courthouse
Sevierville, Tn 37862

Richard Vance
Assistant District Attorney General
339 East Main Street
Newport, TN 37832

OPINION FILED:_____

CONVICTIONS AFFIRMED,
SENTENCES VACATED, REMANDED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Steven Hughes, was convicted upon guilty pleas in the Cocke County Circuit Court of four counts of aggravated robbery, a Class B felony, and two counts of aggravated assault, a Class C felony. He received a twenty-year sentence for each aggravated robbery, the maximum available for a Range II, multiple offender. He received a fifteen-year sentence for each aggravated assault, the maximum required for a Range III, career offender. Save for one aggravated robbery sentence, the defendant is to serve all of the sentences consecutively, resulting in an aggregate sentence of ninety years in the custody of the Department of Correction.

In this appeal as of right, the defendant complains about the sentences he received relative to the trial court's failure to enforce claimed plea bargained sentences, improper enhancement of the sentences by range and within the range, improper rejection of mitigating factors, and improper use of consecutive sentencing. Although we agree with the trial court's conclusion that no plea bargain agreement existed or was enforceable relative to the sentences, we vacate the sentences. Also, this case comes to us with several encumbrances that, combined, lead us to remand the case for resentencing instead of our attempting to fashion sentences ourselves.

The record reflects that on or about October 23, 1993, the defendant and Gregory Scott Caudill undertook robberies at a grocery store in which six people were present. The defendant held a sawed-off shotgun and Caudill held a wooden club. The victims were required to lie on the floor while the two took over four thousand dollars cash, the cash register, a pocketbook, and handguns from the store and several of the victims. Several of the victims were hit on the head and suffered cuts resulting from what can be viewed as gratuitous violence or acts of intimidation. The victims who testified at the sentencing hearing were unable to say which of the two

assailants had struck the various victims, although Caudill was seen hitting three of them. The two were arrested later in another county.

We need not dwell upon the defendant's claim that he was entitled to enforcement of a plea agreement for a twenty-five-year sentence. The record totally belies the claim. It reflects that although the defendant's counsel sought such an agreement, none was ever reached and that the defendant proceeded to plead guilty anyway. This claim is without merit.

However, there are numerous problems with the sentences. Regarding range enhancement, the trial court did not make specific findings regarding what prior convictions it found to apply. Although the record contains certified copies of five Class E and two Class D felony convictions, four of the convictions, including a Class D one, were not obtained until after the present offenses were committed. Under the range enhancement statutes, see T.C.A. §§ 40-35-106--108, enhancement can only occur for offenses for which the defendant was convicted before the commission of the present offenses. As the Sentencing Commission Comments to T.C.A. § 40-35-106 explains:

> The prior felony convictions used to trigger the multiple offender status must have occurred prior to the commission of the offense for which the defendant is being sentenced. In this sense, the multiple offender classification is a recidivist provision designed to punish persons who have been previously convicted and then commit new crimes.

(Emphasis added); see State v. Blouvett, 904 S.W.2d 111, 113 (Tenn. 1995). Under the record before us, removal of these convictions from consideration alter the defendant's range status.

Next, the trial court stated that the defendant "qualified" for everything listed in the state's notice of enhancement factors, noting that it would not repeat them, but it gave "particular significance" to the fact that the defendant employed a firearm,

see T.C.A. § 40-35-114(9), and to the fact that the defendant had no hesitation about committing a crime when the risk to human life was high, see T.C.A. § 40-35-114(10). We believe that these limited findings are insufficient under the 1989 Sentencing Reform Act and reflect, as well, improper enhancement for some of the offenses.

Initially, we note that the trial court did not state for the record which enhancement factors applied to which offenses. Individual findings and determinations must be made for appropriate appellate review. See State v. James E. Winston, No. 01C01-9302-CR-00069, Davidson Co., slip op. at 9 (Tenn. Crim. App. July 28, 1994), app. denied (Tenn. Nov. 7, 1994); State v. Russell David Farmer, No. 03C01-9206-CR-00196, McMinn Co., slip op. at 15 (Tenn. Crim. App. July 8, 1993); State v. Thomas Patrick Henley, No. 12, Madison Co., slip op. at 3-4 (Tenn. Crim. App. Aug. 14, 1991). We also note that the state's notice of enhancement factors upon which the trial court relied was a checklist form that presented as "enhancement factors" not only the statutory enhancement factors contained in T.C.A. § 40-35-114, but the consecutive sentencing criteria, see T.C.A. § 40-35-115(b) and the criteria for considering confinement, see T.C.A. § 40-35-103(1), as well. However, sentencing within a range must be based upon explicit findings relative to only statutory enhancement and mitigating factors. State v. Dykes, 803 S.W.2d 250, 258 (Tenn. Crim. App. 1990), app. denied (Tenn. 1990). Under the record before us, we are unable to determine whether the trial court limited its sentencing enhancement for any given offense within the applicable range to the statutory factors.

Moreover, to the extent that the trial court specified the application of enhancement factors (9) and (10), we note that both are necessarily inherent in an aggravated robbery whose aggravating element is the use of the deadly weapon. See, e.g., State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994), app denied (Tenn. 1995). Similarly, the aggravated assault charges to which the defendant pled

guilty allege his use of a deadly weapon as the aggravating element. To the extent that enhancement factors in T.C.A. § 40-35-114 are inherent in the elements of an offense, as they are charged in the indictment, they cannot apply so as to enhance punishment within the applicable range. See State v. Jones, 883 S.W.2d 597 (Tenn. 1994).

In consideration of the foregoing, we affirm the defendant's convictions based upon his pleas of guilty, but the sentences are vacated and the case is remanded to the trial court for resentencing.

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Joseph M. Tipton, Judge

CONCUR:

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Joe B. Jones, Judge

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Walter C. Kurtz, Special Judge