

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

FILED

March 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. NO. 03C01-9503-CR-00099
APPELLEE,	*	MCMINN COUNTY
VS.	*	Hon. Mayo L. Mashburn, Judge
JAMES MCCULLEY,	*	(Two Counts of Aggravated
APPELLANT.	*	Robbery)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, James McCulley, was convicted in separate trials of two counts of aggravated robbery. The trial court imposed a Range III sentence of thirty years for each count and ordered the sentences to run consecutively.

The following issues have been presented for review:

(1) whether the evidence was sufficient to support the convictions of aggravated robbery;

(2) whether the trial court erred by failing to suppress the identification testimony of Ronald Avery Robinson in the first trial and Viola Sherwood in the second trial;

(3) whether the trial court erred by ordering the sentences to be served consecutively.

We affirm the convictions and sentences.

In 1990, the defendant pled guilty to sixteen (16) separate counts of various crimes, twelve (12) of which were felonies, and was sentenced to an aggregate sentence of forty-five years. State v. James Scott McCulley, No. 03C01-9101-CR-00024 (Tenn. Crim. App., at Knoxville, August 13, 1991), perm. to appeal denied, (Tenn. 1991). On appeal, the sentence was modified to an aggregate term of fifteen years. Id. The defendant was released on parole on July 1, 1993. Within months of the release, he was charged with two separate counts of aggravated robbery.

First Trial

On December 12, 1993, the defendant, while in the company of James Longwith and Jessie Jefferies, said, "Let's go rob a store." The three men drove to a Conoco convenience market and, as Longwith and Jefferies waited in the car, the defendant committed the robbery.

The clerk at the market, Ronald Avery Robinson, testified that just after midnight, he noticed someone putting on a jacket hood over his head as he approached the door. The robber entered the store, pointed a gun, and demanded "all the money in the register."

At that point, the robber demanded the "bag under the register." The victim explained that there was no such bag. The defendant still insisted and the victim handed over a bag containing tickets of some sort. When the robber then clicked his gun, the victim "thought [he] was gonna die."

The defendant ordered the victim to jerk the phone off the wall in order to prevent any calls to the police. When the victim complied, the robber left.

Later, the victim was able to contact police, answer their questions, and attempt to identify the robber by looking at over 600 photographs. The victim made a photo identification, which later proved to be erroneous. Over a week later, the victim observed a line-up and, again, pointed out the man he had previously misidentified in the photographic line-up.

After this second misidentification, Detective Bill Matthews, received information implicating Longwith and Jefferies. Each confessed to the crime and confirmed that the defendant was the person who actually committed the robbery. Based on this information, Detective Matthews asked the victim to view a series of photographs which included one of the defendant. The victim then identified the defendant as the robber. At trial, the victim was again able to identify the defendant as the robber.

Second Trial

On the morning of December 26, 1993, the defendant, Longwith, and Jefferies drove from Cleveland to Athens. The defendant suggested they rob a store. Longwith and Jefferies waited in the car while the defendant robbed a Jiffy Mart.

The victim of the robbery, Viola Sherwood, testified that she turned her back to the door when the robber, whose face was partially covered by a hood, entered the store. When she turned around, she saw that he had a weapon. As the victim walked to the register, the robber told her to "quit looking at him."

The victim gave the defendant the contents of the cash register and, after he demanded the money under the counter, gave the robber a red tackle box which contained some change and food stamps. The defendant then directed the victim to disable the phone. She pulled out the cord; as soon as the defendant left, however, the victim reconnected the

phone and called 911.

Officer Ron Young responded to the call. The victim viewed several photographs but was unable to make an identification from those she had been shown. Her viewing of a second array also failed to produce an identification. The defendant's photograph was not in either array. In a third session sometime later, she was able to identify a photograph of the defendant and informed officers that he was the robber.

I

The defendant first argues that the evidence was insufficient to support either conviction for aggravated robbery. On appeal, however, the state is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question for the appellate court is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

A jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in the evidence in favor of the theory

of the state. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of disputed facts are matters entrusted exclusively to the province of the jury. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978).

"Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). Aggravated robbery occurs when the robbery is "[a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon." Tenn. Code Ann. § 39-13-402(a)(1).

In each of the trials, there was evidence of the essential elements of aggravated robbery. Both victims testified that the defendant, armed with a deadly weapon, intentionally took the contents of their respective cash registers. Here, the jury chose to accredit the testimony of the victims, including the identification testimony, and resolved conflicts in the testimony in favor of the state. It was entitled to do so. Thus we find that the evidence was sufficient for a rational trier of fact to have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307 (1979).

Next, the defendant asserts the trial court erred by denying motions to suppress the identification testimony of the victims Robinson and Sherwood. In our view, the facts surrounding each identification support the admission of the evidence even though the procedure used in the first trial qualified as suggestive.

The victim in the first trial viewed an array of over 600 photographs immediately after the incident; the defendant's photograph was not included among those shown. The victim mistakenly named Robert Rogers as the robber. A few weeks later, he again misidentified Rogers in an in-person line-up. Rogers was arrested but was soon released. When Longwith and Jefferies implicated the defendant, Detective Matthews then showed the victim a line-up comprised of six photographs. It did not include Rogers' photograph. The line-up contained six photos of white males with facial hair. The victim recanted his previous identification and identified the defendant as the robber.

The defendant asserts that the procedures which led to his identification were impermissibly suggestive. He argues that the victim knew he had made a mistake and, therefore, needed to identify someone else. The defendant complains that the six photographs were selected in such a manner as to implicate the defendant as the robber. The background of the defendant's photograph is, in fact, darker than the background for the other photos. Also, the defendant's is the only photo which depicted a measurement of

height similar to that the victim provided in the original description.

The victim in the second trial looked at three different photo arrays before making her identification. When she could not identify the robber from the various photographs, the police eventually showed her the same six photos that the victim of the first robbery had seen. Upon seeing those additional photographs, she identified the defendant.

To be admissible as evidence, an identification procedure must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification. Simmons v. United States, 390 U.S. 377, 384 (1968); State v. Philpott, 882 S.W.2d 394, 399 (Tenn. Crim. App. 1994). An identification procedure may be unlawful if it is unnecessarily suggestive and "conducive to irreparable mistaken identification." State v. Philpott, 882 S.W.2d at 399 (citing Stovall v. Denno, 388 U.S. 293 (1967)).

Even if the circumstances in which pretrial identifications occur are suggestive, the out-of-court and in-court identification may still be admissible. "The inquiry is whether the identification was reliable even though the procedure was suggestive." State v. Philpott, 882 S.W.2d at at 400 (citing Neil v. Biggers, 409 U.S. 188, 199 (1972)). Under Biggers, the controlling factors are as follows:

- (1) the opportunity of the witness to view the criminal at the time of the offense;
- (2) the witness' degree of attention;
- (3) the accuracy of the witness' prior description of the individual;
- (4) the level of certainty demonstrated by the witness at the confrontation; and
- (5) the time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. at 199. Our state has adopted these guidelines. Forbes v. State, 559 S.W.2d 318, 322-23 (Tenn. 1977); Bennett v. State, 530 S.W.2d 511, 514 (Tenn. 1975).

Each victim had the opportunity to view the defendant. Robinson testified that he was able to see the defendant's face several times. Ms. Sherwood also had the opportunity to see the defendant's face, as evidenced by the defendant's admonition, "Quit looking at [me]." Neither of the witnesses was a "casual observer." See Neil v. Biggers, 409 U.S. at 199. Each was the victim of a potentially violent crime.

Each witness provided the police with a fairly accurate description of the defendant. Robinson told the police the defendant was a "white male, about five' six", around 130 pounds, light brown hair, very short, light beard and mustache, several days growth but not a full beard yet." Ms. Sherwood described the defendant as approximately 5'6" in height having a moustache, a low voice, and dark eyes. The photo used in the identification process showed the defendant to be 5'9", brown eyes, brown hair and with facial hair.

Although Robinson's initial misidentification weighed favorably for the position argued by the defense, both witnesses demonstrated a high level of certainty when ultimately making the identification. Robinson declared "That's the face I've been looking for. . . . That's the face I see every night when I wake up." Ms. Sherwood had "no doubt" that the defendant was the robber.

The final factor is the length of time between the offense and the confrontation. Approximately a month had elapsed between the robbery and the photo identification. In Forbes, our court held a span of 98 days to be within close proximity and thus favoring admissibility. State v. Forbes, 559 S.W.2d at 323. The record does not reflect how much time lapsed between the second robbery and the Sherwood identification. This factor does not weigh in favor of either side.

In summary, the procedures described in the first trial most likely qualified as suggestive. That implemented in the second robbery trial was certainly less so. By application of the Neil v. Biggers factors, however, we find that the two identifications were sufficiently reliable for admission as evidence. See also State v. Davis, 872 S.W.2d 950, 956 (Tenn. Crim. App. 1993) (photo array not impermissibly suggestive where defendant's photo was slightly larger than all of the others). Moreover, the defendant was identified by Longwith and Jefferies as the robber. While they qualified as accomplices, there was adequate

corroboration of their testimony in each of the two trials. Thus any error by the admission of the Robinson and Sherwood identifications would have likely qualified as harmless.

III

The defendant's final contention is that the trial court erred by ordering the sentences to be served consecutively. 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).

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 criteria¹ 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

¹The 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;

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court 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, 905 S.W.2d 933, 938 (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 (society) from further criminal acts by those persons who resort to aggravated criminal conduct." 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, 905 S.W.2d at 938.

To summarize, in addition to fitting into one of the seven statutorily mandated classifications, the record must also establish that the aggregate sentence reasonably relates to the severity of the offenses and the total sentence is necessary for the protection of the public from further crimes by the defendants. State v. Wilkerson, 905 S.W.2d at 938; Gray v. State, 538 S.W.2d at 392. The record must show that the sentencing principles and all relevant facts and circumstances were considered before the presumption of correctness applies.

We first address the issue of whether the defendant may properly be placed in one of the seven statutorily mandated classifications. The trial judge found the defendant met three of the classifications: (1) the defendant has an extensive record of criminal activity; (2) the defendant is a professional criminal; and (3) the defendant is a dangerous offender.

It is unlikely, at least at the time of these convictions, that the defendant qualified as a dangerous offender.² While an armed robbery is a serious crime, the circumstances of the offense must be aggravated before this classification may apply. "The decision to impose consecutive sentences when crimes inherently dangerous are involved should be based upon the presence of aggravating circumstances and not merely on the fact that two or more dangerous crimes were committed." Gray v. State, 538 S.W.2d at 393.

Clearly, however, this defendant has an extensive record of criminal activity. In 1990, he pled guilty to sixteen different crimes, ranging from misdemeanor theft to aggravated robbery. State v. James Scott McCulley, No. 03C01-9101-CR-00024 (Tenn. Crim. App., at Knoxville, August 13, 1991), perm. to appeal denied, (Tenn. 1991). Here, the defendant had been convicted of aggravated robbery in the first trial before the second jury returned a guilty verdict. This, in our view, is a sufficient basis for the determination that the defendant has "an extensive record of criminal activity."

There is also evidence that the defendant is a professional criminal. Gray defines a professional criminal as "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

²Since his convictions for the two aggravated robberies, the defendant has been convicted on two counts of first degree murder and two counts of attempted second degree murder. State v. James Scott McCulley, No. 03C01-9506-CR-00165 (Tenn. Crim. App., at Knoxville) (appeal pending).

criminal activity." Gray v. State, 538 S.W.2d at 393. In the earlier appeal, we ruled that the defendant was not a professional criminal. State v. James Scott McCulley, No. 03Co1-9101-CR-00024, slip op. at 3. Thereafter, however, the defendant did not find a job when he was released on parole. Instead, he committed two aggravated robberies within months of his release from custody. Only twenty-two years old at the time of sentencing, the defendant has held only two prior jobs; one was for fourteen days in the spring of 1990 and the other was for an unspecified period of time prior to that. In each instance, the defendant was fired by his employer. The record demonstrates that the defendant has not supported himself by honest labor. His lengthy criminal record, predominately burglaries and thefts which began in 1987 and continued until 1994, suggest that as his livelihood. We concur in the trial judge's determination that the defendant qualified as a professional criminal.

When a defendant falls within the statutory classifications for eligibility to be considered for consecutive sentencing, the only remaining considerations are whether (1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) "the terms are reasonably related to the severity of the offenses." State v. Wilkerson, 905 S.W.2d at 938.

In our view, consecutive sentences are necessary to protect the public. Despite his youth, the defendant has shown little promise of rehabilitation, as these crimes were

committed only months after he was released on parole. Over a period of six years, the defendant has committed at least fourteen (14) felonies. "Further misconduct" by the defendant appears to be likely, unless the defendant is incarcerated. Due to his lengthy record and his failure to demonstrate any rehabilitative qualities, the terms are reasonably related to the severity of the offenses. The defendant was the leader in two armed robberies committed within weeks of each other. The presumption that the trial court imposed a lawful sentence prevails in this instance.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

Joe D. Duncan, Special Judge