

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

<p>FILED</p> <p>March 25, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 RONNIE DALE PHILLIPS,)
)
 Appellant.)

No. 03C01-9502-CR-00047
 Cumberland County
 Hon. Leon Burns, Jr., Judge
 (Voluntary Manslaughter)

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
 Judge

OPINION

The defendant, Ronnie Dale Phillips, appeals from a jury conviction in the Criminal Court of Cumberland County for voluntary manslaughter, a Class C felony. He received a sentence of four years and eight months as a Range I, standard offender to be served in the custody of the Department of Correction and a fine of five thousand dollars. In this appeal as of right he contends that the evidence is insufficient to support his conviction and that the trial court imposed an excessive sentence.

The facts of this case surround the February 24, 1993 shooting death of John Leonard Mullinax. Maxine Dannel testified that she went to the defendant's home on February 24th at around 8:00 p.m. to see about buying a dog. She said that the defendant and John Leonard Mullinax were both at the house and that they were sitting at a bar in the kitchen drinking when she arrived. She stated that it was apparent that the two men were drunk. She said that she stayed about an hour and saw no indication of a fight either in the appearance of the house or the condition of the defendant and victim. She said that she did not see any firearms in the house. On cross-examination, Ms. Dannel said that she was also pretty drunk that night. She said that she had heard that the defendant and the victim were best friends. She also said that when she left at about 9:00 p.m. there was no indication of any trouble between the defendant and the victim.

Claudine Downs testified that she and John Hassler went to the defendant's house on February 24th at around 11:00 or 11:30 p.m. She said that the defendant and the victim were sitting at the kitchen bar drinking and seemed fine when she arrived. She said that both of the men were really drunk but that there was no sign of any disturbance or argument. She said that as soon as she arrived she asked the defendant if she could use his bathroom. She stated that when she came out of the bathroom, she saw the victim on top of the defendant and that the victim was

threatening the defendant. She said that she and Mr. Hassler left and that she did not think anything would happen between the defendant and the victim because they were such close friends. She said that she did not see any firearms. On cross-examination, Ms. Downs admitted that she had never seen anyone drunker than the two men that night. She also stated that while she was in the bathroom, she heard the victim cursing. She described the victim as several inches taller and quite a bit heavier than the defendant. She said that neither the defendant nor the victim had any bruises and that they were not fighting, but the victim just had the defendant pinned down. She said that the defendant never said anything to the victim.

John Hassler testified that he and Ms. Downs arrived at the defendant's house sometime after 10:00 p.m. on February 24th. He said that while Ms. Downs was in the bathroom, the defendant picked up several car mats from the couch and announced that he was going to bed. He said that the victim told the defendant not to go to bed because they were going to drink some more. He said that the defendant walked over to the victim and hugged and kissed him after which the victim and defendant wrestled until the defendant ended up back on the couch with the victim pinning him down. Mr. Hassler said that there was nothing violent in their actions and that they were "just two drunks . . . wrestling around." He said that there was no evidence of a fight when he and Ms. Downs left. He said that he saw no injuries on the defendant or the victim and that he saw no firearms at the house. On cross-examination, Mr. Hassler said that the defendant was quiet that night and that he wanted to go to bed but the victim wanted to drink. He said that the last thing he saw was the victim on top of the defendant. He also stated that the victim was about five inches taller and considerably younger than the defendant.

Joe Thompson testified that he and the defendant lived on the same street on February 24th. He said that the defendant's home was about two hundred

and fifty yards from his home. He also stated that the victim was his uncle. He said that the defendant walked to his home around 11:45 p.m. on February 24th. He described the defendant as pretty drunk and staggering. He also said that the defendant had a bloody nose. Mr. Thompson said that the defendant told him that he had shot the victim and that he thought the victim was dead. He said that the defendant stayed at his house while his wife called an ambulance and he went to check on the victim. He said that he found the victim lying on his back on the front porch with his feet toward the door. He recounted that he checked for a pulse and found none. He said that he covered the victim with a blanket and went home to wait for the ambulance. On cross-examination, Mr. Thompson admitted that he saw blood running from the defendant's nose and on his mouth. He said that the defendant told him to call the police. He said that when he went inside the defendant's house, he saw that a table was turned over. He denied seeing blood all over the house. He also admitted that the victim and the defendant were good friends.

Deputy Bill Derrick of the Cumberland County Sheriff's Department testified that he was called to the defendant's house to investigate a shooting on February 24th. He remembered that he was dispatched to the scene at 11:49 p.m. He said that he arrived at Mr. Thompson's home first where he asked Mr. Thompson what had happened. Mr. Thompson told him that the defendant had shot his uncle. He testified that he approached the defendant who was very upset and emotional and appeared to have been in an altercation. He stated that he went to the defendant's home and found the victim on the front porch. He did not go inside the house until two other officers arrived to help secure the scene. He said that they secured the house and made sure no one was inside. He said that as he came out of the house, the emergency medical service arrived and were checking the body and the defendant was walking toward the house.

Deputy Derrick testified that he decided to take the defendant into custody and get him away from the scene before there was any trouble with the victim's family members. He frisked the defendant and asked the defendant if he had a gun because he remembered seeing a small semi-automatic pistol on the floor of the house. He stated that the defendant told him he did not have a pistol. He stated that he asked the defendant where the gun was that was used to shoot the victim and that the defendant told him it was inside the house. He stated that he asked the defendant if the gun was the .25 caliber lying on the floor and the defendant corrected him and said it was a .22 caliber. He said that he took the defendant straight to the justice center without any medical attention because the defendant did not ask for any medical attention and his injuries were minor. On cross-examination, Deputy Derrick identified a photograph of the defendant taken at the jail that shows some injuries to the defendant's nose and left cheek. He admitted that the house was out of order as if a fight had occurred. He said that the defendant cooperated fully with the investigation.

Investigator Benton Threet of the Cumberland County Sheriff's Department testified that he investigated the shooting. He stated that the victim was found on the front porch and that the pistol was found in the living room. He also stated that several spots of blood were found on the living room floor. Investigator Threet identified the pistol and said that it was found with two live rounds still in it. He said that a gun case was found on the living room couch. He stated that three spent casings were found -- one on the couch, one on the floor in front of the couch and one in the center of the living room floor. He identified photographs of the victim that showed a gunshot wound to the victim's torso and another to his hand. He also identified a photograph showing bruises on the victim's face.

On cross-examination, Investigator Threet testified that he arrived at the scene around 12:30 a.m. He stated that there was blood in the kitchen and on the couch. He stated that the blood was tested and was found not to be the victim's blood. He said that he first saw the defendant at the justice center at about 3:00 a.m. and that he could smell alcohol on the defendant indicating that the defendant had been drinking. He said that the defendant's nose and cheek were injured slightly and he appeared to have been hit. He said that he witnessed the defendant's interview and, although video and tape recording equipment was available, the defendant's statement was written down by Tennessee Bureau of Investigation (TBI) Agent Jim Moore. Investigator Threet could not recall whether the defendant had told the officers that he asked the victim to leave. He could not recall seeing any blood on the defendant. He admitted that the defendant said that he tried to carry the victim to the car to take him to the hospital, thereby explaining how the victim was found on the front porch. He also stated that the defendant told him that the defendant and the victim had fought about three times in the hour leading up to the shooting. On redirect examination, Investigator Threet testified that the defendant was not drunk when he gave his statement.

A stipulation of proof regarding the testimony of Dr. Charles Harlan, Chief Medical Examiner for the State of Tennessee, was entered into evidence that the victim had a .32 percent blood alcohol level and that a blood screen showed the presence of Darvon, a drug that affects the central nervous system. The stipulation also stated that the victim suffered two gunshot wounds -- one to the chest and one to the left hand and that the cause of death was the chest wound. Another stipulation of proof was entered regarding the testimony of TBI Serologist Dean L. Johnson that stated that the blood found on the carpet of the defendant's home was not that of the victim.

Robert Royce, a forensic scientist with the TBI Crime Lab, testified that he examined the pistol, spent casings and live bullets recovered from the defendant's home. He stated that the pistol is equipped with a safety that was in working order when he examined it. He stated that it was very possible that the bullets recovered from the victim's body were fired from the gun recovered at the scene.

TBI Investigator Jim Moore testified that he assists local law enforcement in the investigation of felony crimes by collecting crime scene evidence and interviewing witnesses. He stated that he found three spent casings at the scene and determined that the victim had suffered two gunshot wounds. He stated that he never found the third bullet. He said that the defendant had abrasions under both eyes and on his nose. He said that the victim suffered abrasions and cuts to his forehead, neck, eyes, ears and face. He stated that he compared the facial wounds of both men and determined that the victim had more visible wounds than the defendant.

Investigator Moore testified that he interviewed the defendant at approximately 3:37 a.m. on February 25th. The defendant's statement was read into evidence. In his statement to Investigator Moore, the defendant said that he and the victim had drunk whiskey and beer and smoked some marijuana. The defendant said that he and the victim fought about three times off and on in the hour preceding the shooting. He also told Investigator Moore that the victim had beaten him up and he wanted the victim to leave. The defendant told Investigator Moore that he was mad, got the gun from a desk drawer and shot the victim. Investigator Moore stated that the state of disarray in the house was consistent with the defendant's account of events. He also stated that it was his impression that the fight had taken place in the living room.

On cross-examination, Investigator Moore said that he never had an opportunity to do a second search for the third bullet because the defendant's house burned shortly after his arrest. He testified that while the video and audio taping equipment was available, he did not use it for the defendant's statement and did not feel that a videotape is a better investigative tool than the defendant's written statement. He explained that it was TBI policy not to use video and audio recordings for confessions and witness statements because they require extra support staff to transcribe. He also admitted that the defendant's booking photograph was taken eight hours after the fight between the defendant and the victim. He admitted that he testified at the preliminary hearing that the defendant had told him that he asked the victim to leave but the victim refused, although this statement is not included in the written version of the defendant's statement.

The defendant testified that he moved to Nashville while awaiting trial because his house was burned while he was in jail before making bail. He stated that he is forty-four years old, about five feet five inches tall and weighs one hundred forty-five pounds. He reported that he went to school through the eighth grade and could read but was unable to write well. He said that he has been self-employed as a painter or mechanic for most of his life. He said that he had known the victim for about fourteen years. He said that the victim was about ten years younger, taller and weighed more than he. He described his relationship with the victim as a close friendship and said that they would usually spend time together three or four times a week. He said that they often drank together and that, before the victim's death, the defendant would have considered himself an alcoholic.

The defendant testified that he woke up around 7:00 a.m. on February 24, 1993. He said that he did not go to work that day but began drinking around 9:00 a.m. He said that the victim came by early in the day and they sat around and drank

all day. The defendant stated that he could not remember everything that happened that day because he drank about a fifth of liquor. He admitted that he and the victim also smoked marijuana that day. He said they left his house to buy some beer sometime in the afternoon and returned to continue drinking. He could not recall Ms. Downs or Mr. Hassler stopping by that evening. He did recall that he and the victim fought but had no idea what started the fight.

The defendant testified that all he could recall was being on the floor with the victim beating him up. He said that the victim had him pinned and he could not fight back. He stated that he "squirmed" out from under the victim and was sure that he scratched the victim's neck in the process. He said that they fought twice. He said that he told the victim to get out of his house three or four times. He said that both of them were cursing each other and another fight began where he once again ended up pinned to the floor. He stated that when he was able to get up he went to the kitchen and got his pistol from the desk. He said that the victim was in the living room, about four or five feet away, and that the victim kept cursing him. He told the victim to leave and the victim cursed him. He said that the victim started to strike him and he shot him. He said that he thought he had only fired the gun once.

The defendant testified that the victim fell to the floor and he immediately pulled the victim out the front door in an attempt to get the victim to the car. Upon realizing that he was unable to lift the victim, the defendant went to Mr. Thompson's house and told him to call the police. The defendant said that he shot the victim because he had taken all the beatings he could stand and that he was afraid. He recalled talking to Investigator Moore but admitted that he was "pretty well drunk." He added that he was terribly upset when he gave the statement. He said that he sustained injuries to his nose, lip and both eyes in the fights with the victim. He said that he felt terrible about the victim's death and that they were very close friends.

On cross-examination, the defendant was confronted with his statement that he and the victim fought three times and said that he was mistaken and that they only fought twice. He admitted that he had nothing to drink in the four hours between the shooting and giving the statement. He could not recall talking to Deputy Derrick. He said that he and the victim had never fought before and that he had no idea whether he could have started the fight. He also acknowledged that the booking photograph showed his height as five feet six inches tall. He said that they smoked three or four joints that day. He denied hitting the victim and said that he only scratched at the victim's face in his efforts to get away from the victim. He said that he did not go to a doctor for the treatment of his injuries because he was in jail and did not ask for a doctor. He stated that he was in jail for forty-five days before making bail and that, in all that time, he never asked for a doctor. He could not recall any furniture being turned over. He said that the victim did not try to stop him as he went to get the gun. He admitted that he had intended to go to the kitchen and get the gun. He said that the gun was on the desk and if he told the police that it was in a drawer he was mistaken. When confronted with his statement that he had not said anything to the victim before shooting him, the defendant admitted that he lied to Investigator Moore because he was very upset and just wanted to finish the statement. He admitted that he could have pulled the victim back inside but left him on the porch in the cold. He said that he did not intend to shoot the victim and that he was hoping the victim would leave.

The defendant contends that the evidence is insufficient to support his conviction for voluntary manslaughter. He argues that there was no proof that he intentionally or knowingly killed the victim. He also argues that the proof showed that he acted in self-defense and in defense of his home.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Voluntary manslaughter is the unlawful "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." T.C.A. §§ 39-13-201(a), -211(a). In order to qualify as an intentional act, one must act "when it is the person's conscious objective or desire to engage in the conduct or cause the result." T.C.A. § 39-11-302(a). A knowing act requires one to be "aware of the nature of the conduct" and "aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b). A rational trier of fact could reasonably conclude that the defendant intentionally or knowingly killed the victim. The evidence shows that the defendant intentionally got his pistol from the kitchen desk and fired the pistol from a distance of four to five feet when the victim began to strike him.

As for the unlawful nature of the killing, the defendant also argues that the evidence is insufficient because the proof showed that he acted in self-defense and in defense of his home. The state has the burden of negating any defense raised by supporting evidence. See T.C.A. § 39-11-201. However, under our standard of review, we must presume that the jury has resolved all conflicts in the evidence in favor of the state. See Sheffield, 676 S.W.2d at 547. The defendant was indicted for first degree murder, but the jury convicted him of the lesser offense of voluntary manslaughter. In this respect, the evidence justifies the jury concluding that the victim's attacks on the defendant were adequate provocation to his actions, but that the severity of the defendant's response went beyond that necessary to defend himself or his home. We hold that the evidence was sufficient to convict the defendant of voluntary manslaughter and that the state sufficiently overcame the defendant's self-defense and claim of defense of his home.

II

The defendant contends that the trial court imposed an excessive sentence in that it "refused to utilize" or give weight to certain mitigating factors. Convicted of voluntary manslaughter, a Class C felony, he faced a range of punishment of three to six years as a Range I, standard offender. The trial court found for enhancement purposes that the defendant had a history of criminal convictions and that he used a firearm during the commission of the offense. T.C.A. § 40-35-114(1) and (9). Relative to mitigating factors, the defendant sought for the trial court to apply the following mitigating factors as listed in T.C.A. § 40-35-113:

(2) the defendant acted under strong provocation,

(3) substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense,

(11) the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct,

(13) the defendant has no history of violent offenses and he remained at the scene and voluntarily admitted that he shot the victim.

In this appeal, the defendant asserts that the trial court only used mitigating factor (3), but should have used all of the above. We disagree.

Actually, the record reflects that the trial court was not rejecting the existence of the defendant's claimed mitigating factors. Rather, it acknowledged the existence of the facts that the defendant asserted, but viewed them not to have any significant bearing on sentencing. That is, it commented that mitigating factors (2) and (11) would overlap somewhat and that the defendant's lack of violent criminal history and assistance to the authorities were insignificant given the circumstances of the case.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court follows the statutory sentencing procedure, makes findings of fact that are adequately supported by the record and gives due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action 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).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210 (c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169. For the purpose of review, the trial court must preserve in the record the factors it found to apply and the specific findings of fact upon which it applied the sentencing principles to arrive at the sentence. See T.C.A. §§ 40-35-210(f) and -209(c).

In this respect, the trial court's giving little or no weight to various mitigating factors raised by the defendant is an act of discretion that will not be overturned on appeal so long as there is material or substantial evidence in the record to support it. As we previously stated, the trial court acknowledged the existence of the circumstances that the defendant sought to use as mitigation. However, it effectively gave them nominal additional weight in determining an appropriate sentence.

At this point, we should note that whether we deem all of the defendant's claimed mitigating factors to apply or only one to apply, the sentencing would not necessarily change. The mere number of existing factors has little relevance -- the important consideration being the weight to be given each factor in light of its relevance to the defendant's personal circumstances and background and the circumstances surrounding the criminal conduct. See, e.g., State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App.), app. denied (Tenn. 1995). In this fashion, under the circumstances in this case, we believe that the evidence adequately supports the trial court's sentencing determinations.

We conclude that the defendant has not overcome the presumption of correctness that accompanies the trial court's sentencing decision. The judgment of conviction is affirmed.

Joseph M. Tipton, Judge

CONCUR:

John H. Peay, Judge

David G. Hayes, Judge