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

FILED

March 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9502-CR-00040
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. **D. KELLY THOMAS, JR.**, Judge
MARY FRANCES POWELL,	)	
	)	(Aggravated Burglary and Theft
Appellant	)	of Property over $1,000)

For the Appellant:

Mack Garner
District Public Defender
318 Court Street
Maryville, TN 37804

(AT TRIAL AND
ON APPEAL)

For the Appellee:

Charles W. Burson
Attorney General and Reporter

John P. Cauley
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael L. Flynn
District Attorney General

Philip H. Morton
Asst. District Attorney General
363 Court Street
Maryville, TN 37804-5906

OPINION FILED: _____

SENTENCES MODIFIED

David G. Hayes
Judge

OPINION

The appellant, Mary Frances Powell, appeals from the imposition of consecutive sentences entered in the Circuit Court of Blount County. The appellant contends that the trial court, in ordering that her sentences be served consecutively, failed to apply appropriate sentencing principles.

After a careful review of the record, we modify the judgment of the trial court.

FACTUAL BACKGROUND

On November 27, 1994, the appellant entered pleas of guilty to aggravated burglary and theft of property over $1,000.00. Trial counsel stipulated that the appellant is a range III persistent offender. The trial court, accordingly, imposed concurrent sentences of eleven years for the burglary conviction and eight years for the theft conviction. The trial court was then advised that the appellant was currently serving outstanding sentences from Knox County. The appellant testified that she was convicted in Knox County of fraudulent use of credit cards and obtaining a controlled substance by fraud. According to the appellant, the court in that case imposed two consecutive sentences of twelve years and four years.[1] The appellant stated that she was placed on community release status in Knox County, which was revoked following her arrest for the instant offenses in Blount County. At the time of the sentencing hearing, the appellant was serving her Knox County sentence in the

[1]The presentence report does not include the appellant's prior criminal history. No proof was introduced by the State to establish her prior convictions. The appellant testified, at the hearing, that she has "probably twenty" convictions going back to 1979. Additionally, the appellant provided the trial court with a "Tomis offender sentence letter," confirming two class D convictions from Knox County for the offenses of obtaining drugs by fraud and fraudulent use of a credit card.

Johnson City jail, due to overcrowded conditions in the Women's State Prison. The appellant also testified that she was ashamed and very sorry for the crimes which she has committed. She indicated that she provided information to assist the authorities in recovering the stolen property.[2] She related that she committed the instant offenses in order to obtain money for her drug habit. The appellant is thirty-seven years of age and began using drugs on a regular basis at age sixteen. At the time of her arrest, she was "doing anywhere from ten to fifteen dilaudids a day." She admitted that she was forging prescriptions, stealing, and doing anything else she could do in order to obtain money to satisfy her drug addition.

At the conclusion of the sentencing hearing, the trial court ordered that the concurrent sentences of eleven years for the instant offenses be served consecutively with the outstanding sentences from Knox County of sixteen years. The appellant, thus, received an effective sentence of twenty-seven years as a range III persistent offender. The trial court found that consecutive sentencing was appropriate because the appellant committed the instant offenses while she was on probation. In announcing its decision, the trial court recited the following finding:

> I don't think that when a person is on a form of release, whether it's probation or parole or whatever, and commits another offense, that it shouldn't be added to what they have. If she had served more time on this, then you could run it concurrent and it would add some more time to the end of her current sentence. But she's not even served a year on it and it probably, as the attorney general said, would amount to next to nothing if done that way.

LAW AND ANALYSIS

[2]The trial court ordered total restitution of $6,060.00 to the victim.

The State argues that consecutive sentences were authorized pursuant to Tenn. Code Ann. § 40-35-115(b)(6) (1990). This statute provides:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> (6) The defendant is sentenced for an offense committed while on probation. . . .

Contrary to the appellant's assertion, the provisions of section 40-35-115 are applicable to the facts of this case. While consecutive sentences should not be routinely imposed, Sentencing Commission Comments, Tenn. Code Ann. § 40-35-115, Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976), when one or more statutory criteria are present, the imposition of consecutive sentences is within the discretion of the trial court. State v. Taylor, 739 S.W.2d 227, 228 (Tenn. 1987); Sentencing Commission Comments, Tenn. Code Ann. § 40-35-115. Although the trial court correctly applied section 40-35-115(b)(6) in ordering consecutive sentences, our review of the appellant's sentences is not at an end. In determining whether the trial court providently exercised its discretion, "the overriding concern" is the fairness of the resulting sentence under all the circumstances. State v. Harold Hayward McGuire, No. 01C01-9309-CC-00300 (Tenn. Crim. App. at Nashville, May 12, 1994) (citing Gray, 538 S.W.2d at 391). Under our supreme court's recent decision in State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995), we must determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the appellant; and (3) are congruent with general principles of sentencing.

The appellant contends that her life of crime has been largely motivated by her need for money to support her drug addiction. Although the record of the appellant's prior criminal history before us is undocumented, it appears to support her allegation. Her offenses, by her own admission, include fraudulent use of credit cards, attempting to pass forged prescriptions, and forgery and

theft. In the instant case, the appellant burglarized her friend's house and stole jewelry. The jewelry was sold to a pawn shop for $200.00 - $300.00.

"The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(4) (1990). Therefore, the proof must establish that the appellant's sentence is reasonably related to the severity of the offense and is necessary to protect the public from further criminal acts by the offender. Wilkerson, 905 S.W.2d at 938. These criteria are supported by the record. However, we conclude that the appellant's aggregate sentence of twenty-seven years, for the instant offenses and the Knox County convictions, is excessive in light of the goals of the Sentencing Act. Conversely, to order that the sentences be served concurrently would, in effect, grant an undeserved benefit under the principles of consecutive sentencing. Thus, a sentence appropriate to the facts of this case and consistent with the principles and purposes of the Sentencing Act must be imposed. See, e.g., State v. Marshall, 888 S.W.2d 786, 788 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Accordingly, we conclude that the appellant's eleven year sentence for the burglary conviction is to be served consecutively with her eight year sentence for the theft conviction. This results in an effective sentence of nineteen years. This sentence is to run concurrently with the appellant's outstanding sixteen year sentences from Knox County.

CONCLUSION

The appellant's sentences are modified to reflect that her concurrent sentences of eleven years for the aggravated burglary and eight years for theft

are ordered to be served consecutively. This effective sentence of nineteen years is ordered to run concurrently with the outstanding sentences from Knox County. This case is remanded for entry of judgments of conviction consistent with this opinion.

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David G. Hayes, Judge

CONCUR:

_____
John H. Peay, Judge

_____
Joseph M. Tipton, Judge