

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

<p><b>FILED</b></p> <p>March 29, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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<b>STATE OF TENNESSEE,</b>	)
	) C.C.A. No. 01C01-9507-CR-00215
Appellee,	)
	) Wilson County
V.	)
	) Honorable Bobby Capers, Judge
	)
<b>DENNIS W. SPECK,</b>	) (Aggravated Sexual Battery)
	)
Appellant.	)

FOR THE APPELLANT:

Comer L. Donnell  
District Public Defender

Howard L. Chambers  
Assistant Public Defender  
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FOR THE APPELLEE:

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**PAUL G. SUMMERS,**  
Judge

**OPINION**

The appellant, Dennis Wayne Speck, pled guilty to aggravated sexual battery and was sentenced to ten years confinement. He contends that his sentence is excessive. We affirm.

The record reveals that the victim was seven months old at the time of the sexual assault. The appellant was her natural father. The victim suffered a vaginal tear requiring surgery. The injury was described as life threatening if left untreated. She was sutured from her vagina to her rectum. During surgery, she suffered a seizure and loss of blood. She was hospitalized three days.

At the time of the hearing, the victim was twenty-one months old and could not verbalize. A victim impact statement revealed that the victim was suffering from recurring nightmares and did not like to have her genital area cleaned. The victim's mother stated that following the incident, the victim would "cry and try to crawl away" from the appellant. Her mother is further concerned about the future psychological impact of this incident.

Appellant's sentence range as a Range I, standard offender was eight to twelve years. The trial judge found three enhancement factors: (1) the victim's vulnerability due to her age, (2) the appellant's abuse of a position of private trust, and (3) the victim's suffering serious bodily injury. The trial judge found, as a mitigating factor, that appellant had no prior criminal record. Based upon the finding of three enhancement factors and one mitigating factor, appellant was sentenced to ten years.

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an affirmative showing 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 of a defendant's sentence, this Court must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the pre-sentence report, (3) the principles of sentencing and arguments to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating and enhancement 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. §§ 40-35-210, -103, and -210 (1990); State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987).

In felony sentencing, the minimum sentence is presumed. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court increases the sentence within the range for enhancement factors and follows with a reduction for mitigating factors. Tenn. Code Ann. § 40-35-210(d) & (e). "[T]here is no particular value assigned by this statute to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Salazar, No. 02C01-9105-CR-00098, slip op. 4-5 (Tenn. Crim. App. Jan. 15, 1992) (quoting State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986)).

The appellant concedes to proper application of the abuse of a position of private trust factor. Tenn. Code Ann. § 40-35-114(15). The appellant, however, contends that the trial court erred in applying, as enhancement factors: (1) victim vulnerability due to age (Tenn. Code Ann. § 40-35-114(4)) and (2) personal injuries inflicted upon victim were particularly great (Tenn. Code Ann. § 40-35-114(6)). He, therefore, argues that he should have received the minimum sentence of eight years. We disagree.

Under Tenn. Code Ann. § 40-35-114(4), the relevant inquiry is "whether or not the victim was particularly vulnerable." Salazar, slip op. at 6. This Court has deemed this factor applicable to infants even when age is an element of the offense. State v. Burch, No. 130 (Tenn. Crim. App. Dec. 6, 1990); see also State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993) (upholding factor's applicability). The rationale is that infants are distinguishable from older children. Infants, from both a physical and mental standpoint, are "utterly defenseless," "unable to attempt to evade or rebuff an assault . . . incapable of resisting, summoning help or later testifying against the perpetrator." Salazar, slip. op at 6. Accordingly, T.C.A. § 40-35-114(4) is applicable when aggravated sexual battery is perpetrated against a seven month old infant.

With regard to the trial court's application of Tenn. Code Ann. § 40-35-114(6), the appellant argues that "the record is devoid of any evidence from which the Court could determine that the victim's injuries were 'greater than, less than, or equivalent to that which is ordinarily involved' in aggravated child sexual battery cases." Again, we disagree. The victim suffered a potentially fatal, if untreated, laceration from her vagina to her rectum which necessitated an emergency surgical procedure and hospitalization for three days. In addition, the victim still suffers apparent emotional manifestations from the assault. Furthermore, personal injury was not a part of the indictment language of appellant's crime. We find the trial court appropriately applied this enhancement factor.

We recognize the appellant's clean prior record. However, given the gravity of both the offense and injuries inflicted upon the victim, the evidence does not preponderate against the trial judge's findings. Accordingly, the appellant's sentence of ten years is affirmed.

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PAUL G. SUMMERS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID H. WELLES, Judge