

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1994

**FILED**

**January 22, 1996**

**Cecil Crowson, Jr.**

**Appellate Court Clerk**

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 )  
 v. )  
 )  
 )  
 STEVE LEBRON TALLEY, )  
 )  
 Appellant. )

No. 03C01-9402-CR-00047  
 Hamilton County  
 Hon. Joseph F. DiRisio, Judge  
 Assault with Intent to Commit  
 First Degree Murder

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

REVERSED AND REMANDED

Joseph M. Tipton  
 Judge

## OPINION

The defendant, Steve Lebron Talley, was convicted of assault with intent to commit first degree murder pursuant to a guilty plea in the Hamilton County Criminal Court. He received a sentence of eighteen years to be served in the custody of the Department of Corrections. In this appeal as of right he contends that his eighteen-year-sentence is excessive because the trial court failed to weigh properly the applicable enhancing and mitigating factors. The state also raises as an issue that the case should be remanded for resentencing in compliance with State v. Pearson, 858 S.W.2d 879 (Tenn. 1993), because the trial court failed to consider the defendant's sentence under both the 1982 and the 1989 sentencing acts and then impose the least harsh of the two.

After being charged with assault with intent to commit first degree murder causing bodily injury in December of 1988, the defendant pled guilty to the offense with an agreed sentence of nine years in May of 1990. The agreed sentence was conditioned upon the defendant's presence at the continued sentencing hearing in June of 1990. Should he fail to appear, it was agreed that the defendant would receive a twenty-five-year-sentence. The defendant failed to appear and the twenty-five-year-sentence was imposed. He was eventually apprehended and placed in the custody of the Department of Corrections.

In August of 1990, the defendant filed a post-conviction petition challenging the voluntariness of his plea. The state agreed to resentencing in exchange for the defendant abandoning all other post-conviction claims and a dismissal of the petition. In September of 1992, the defendant received the eighteen-year-sentence from which he now appeals. From our review of the record, we conclude that the trial court failed to consider the defendant's sentence under both the

1982 and the 1989 sentencing acts and remand the case for resentencing in compliance with Pearson.

T.C.A. § 40-35-117(b) states that "[u]nless prohibited by the United States or Tennessee Constitution, any person sentenced on or after November 1, 1989, for an offense committed between July 1, 1982 and November 1, 1989, shall be sentenced under the provisions of this chapter [the 1989 Sentencing Act]." The offense in this case occurred in December of 1988 and, after the state agreed to resentencing, the eighteen-year sentence was imposed in September of 1992. In Pearson, our supreme court imposed a constitutional requirement upon offenses committed prior to November 1, 1989, but sentenced after that date. The court concluded that, in order to avoid an ex post facto violation, the trial court must calculate the proper sentence under both the 1982 and the 1989 acts and then impose the least severe sentence. Pearson, 858 S.W.2d at 884.

We note that the defendant contends that the holding of Pearson should not be applied retroactively to this case because to do so would result in an ex post facto violation. As discussed in Pearson, one manner in which an ex post facto violation can occur is when a law "changes the punishment and inflicts a greater punishment, than the law annexed to the crime, when committed." Pearson, 858 S.W.2d at 882 (citing Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798)). The infliction of an increased punishment due to the passage of a harsher sentencing law after the commission of a crime is the very type of violation that Pearson seeks to prevent and we fail to see how Pearson's application to the present case could result in any such violation.

The record reflects that the trial court failed to consider the defendant's sentence separately under both acts and that all the parties were operating under a

great deal of confusion regarding the proper sentencing range. At one point, defense counsel argued that the proper sentencing range for the defendant would be between five and twenty-five years, the minimum under the 1982 act and the maximum under the 1989 act.<sup>1</sup> As noted in Pearson, "[t]he practice of commingling the two laws and allowing the defendant the benefit of the most favorable provisions of each is confusing and . . . could result in the defendant receiving a lesser sentence than is authorized by either Act in its entirety." Pearson, 858 S.W.2d at 884. Defense counsel also asked that the originally agreed upon sentence of nine years be imposed. The trial court did not make any findings relative to sentencing under either act but merely stated which enhancing and mitigating factors that it found applicable in imposing the eighteen-year sentence. Therefore, it is unclear what weight should be afforded the applicable factors and the case must be remanded for resentencing in compliance with Pearson. See Manning v. State, 883 S.W.2d 635, 638-39 (Tenn. Crim. App. 1994).

However, in order to assist the trial court at resentencing, we will address the defendant's contentions relative to the application of enhancing and mitigating factors. As enhancement, the trial court considered the defendant's criminal record, the particularly great injuries inflicted on the victim, the defendant's previous history of unwillingness to comply with conditions of release, the use of a firearm and the fact that a person other than the intended victim suffered serious bodily injury. T.C.A. § 40-35-114(1), (6), (8), (9) and (12). The trial court also gave "negligible weight" and "little weight" to the defendant's role as the leader in the commission of the offense and the fact that the offense involved more than one victim. T.C.A. § 40-35-114(2) and (3). As mitigation, the trial court considered the defendant's youth, T.C.A. § 40-35-113(6), but added that this factor "counts for very little when you consider all that he's done in his short time on earth in terms of criminal behavior and antisocial behavior."

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<sup>1</sup> Under the 1982 act, the defendant faces a sentence of five to thirty-two and one-half years as a Range I offender. T.C.A. §§ 39-2-103(b)(1982)(Repealed 1989) and 40-35-109(a)(1982)(Repealed 1989). Under the 1989 act, the defendant faces a sentencing range of fifteen to twenty-five years as a Range I offender. T.C.A. § 40-35-112(a)(1)(1990).

The defendant argues that the eighteen-year sentence is excessive and that the trial court should have imposed a sentence of nine years. The defendant contends that the trial court erred in applying enhancement factors (6), (9) and (12) because the factors are essential elements of the offense for which he was convicted. The defendant also contests the application of enhancement factors (1) and (8) because a presentence report was not prepared and the trial court improperly relied upon an unsubstantiated juvenile record contained in the defendant's classification report to support the application of the factors. The defendant also contends that juvenile adjudications cannot be used to enhance his sentence. Finally, the defendant contends that the trial court erroneously applied enhancement factors (2) and (3) because there is no proof to support their application.

The defendant was convicted of assault with intent to commit murder causing bodily injury. Assault with intent to commit first degree murder with bodily injury requires that the defendant feloniously and with malice aforethought assault the victim with the intent to commit first degree murder, causing the victim bodily injury. T.C.A. § 39-2-103(b) (1982) (repealed 1989). We conclude that factors (6), (9) and (12) are not essential elements of the offense and were correctly applied in this case. Factors (6) and (12), as applied in this case, enhance the defendant's sentence based upon the serious bodily injury suffered by someone other than the intended victim. Serious bodily injury is not an element of the offense of assault with intent to commit murder and the defendant's sentence could be enhanced based upon factors (6) and (12). State v. Hammons, 737 S.W.2d 549, 555 (Tenn. Crim. App. 1987). Likewise, assault with intent to commit murder does not require the use of a deadly weapon and factor (9) was applied properly.<sup>2</sup>

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<sup>2</sup> We also note that the 1982 Sentencing Act, T.C.A. § 39-6-1710(a)(1)(1982)(repealed 1989) provides for a five-year enhancement for the use of a firearm.

Relative to factors (1) and (8), the classification report<sup>3</sup> reveals an extensive history of juvenile adjudications. The defendant was only nineteen years old when the present offense was committed, yet he had a history of juvenile adjudications dating back more than four years relating to shoplifting, auto larceny, assault and sale of marijuana and cocaine. For almost two years, the defendant was involved in some sort of adjudication on a monthly basis and received suspended sentences several times only to be arrested again. Contrary to the defendant's assertions, juvenile adjudications can be considered for sentencing purposes as evidence of a defendant's criminal history and unwillingness to comply with conditions of release. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993); State v. Stockton, 733 S.W.2d 111, 112-13 (Tenn. Crim. App. 1986). Therefore, we conclude that the trial court applied factors (1) and (8) appropriately.

Relative to factors (2) and (3), we note that the trial court gave very little weight to their consideration as enhancement. While the defendant committed this offense in the presence of other co-participants, there is nothing in the record to indicate that he was the leader in the commission of the offense. Therefore, the trial court erroneously applied factor (2). In State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App.), app. denied (Tenn. 1994), this court limited the definition of victim under factor (3) to "a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime" when it held that factor (3) could not be applied in consideration of an individual who suffers the loss of a loved one to murder. In this case, the trial court applied factor (3) based upon its finding that the victim's son was the intended victim of the assault. However, the victim's son suffered no injury from the assault. Therefore, the trial court should not have applied factor (3) as enhancement in this case.

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<sup>3</sup> We note that the contents of a classification report are the same as those of a presentence report. See T.C.A. §§ 40-35-207 and -209(d)(1). A presentence report was not initially prepared in this case because the defendant pled guilty to an agreed sentence. T.C.A. § 40-35-205(d).

We conclude that the trial court erred in not considering the defendant's sentence separately under both the 1982 and the 1989 sentencing acts. Except for factors (2) and (3), which the trial court afforded little weight, the enhancement factors were applied appropriately. In consideration of the foregoing and the record as a whole, the judgment of conviction is reversed and remanded for resentencing in conformity with this opinion.

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Joseph M. Tipton, Judge

CONCUR:

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Jerry Scott, Presiding Judge

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John H. Peay, Judge