IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE	)	
	)	C.C.A. NO. 02C01-9502-CC-00052
Appellee,	)	
	)	Fayette County Circuit No. 3967
V.	)	
	)	Hon. Jon Kerry Blackwood, Judge
	)	
SHAWN PHILLIP YEAGER,	)	(Aggravated Kidnapping,
	)	Aggravated Rape)
Appellant.	)	

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

MARY BETH LEIBOWITZ,
Judge

O P I N I O N

This is an appeal as of right by the Defendant, Shawn Phillip Yeager, of a sentence of the Circuit Court for Fayette County, following the Defendant's plea of guilty to the indictment charging, in count one, aggravated rape and, in count two, aggravated kidnapping. A sentencing hearing was had and the Defendant was sentenced to sixteen (16) years as to count one and nine (9) years as to count two, as a Range I, Standard Offender, both sentences to run concurrently. The Defendant presents one issue for review: whether the trial court erred in sentencing him to an enhanced punishment within the sentencing range based on the proof before the trial court. In effect the issue is whether or not the court could use as an enhancing factor, T.C.A. 40-35-114 (1): that the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. The Defendant admits that he has one set of prior convictions, for rape and robbery, which arose out of a incident occurring after the date of the offense in the present case, but for which he was convicted several months prior to the conviction in this case. Those convictions occurred in the State of Mississippi.

The Defendant cites as his case law State v. Newsome, 798 S.W.2nd 542 (Tenn. Crim. App. 1990), which says that the sentencing act does not say anything about prior arrest, where no conviction occurs, being used in the sentencing scheme. However, in this case not only was there an arrest prior to the conviction in the Tennessee cases, but there was also a conviction prior to the the conviction in the Tennessee cases. Further, criminal behavior is also permitted to be considered by the court. Although in State v. Newsome this Court agreed with the Defendant that the trial judge should not use mere arrest in determining what sentence to impose, it was clear in this case that the trial judge did not do so. On appeal, the review of the sentence is de novo on the record with the presumption that the trial court's determinations are correct. T.C.A. 40-35-401(d).

The weight afforded to an existing enhancing factor is left to the trial court's discretion based upon the record before it, State v. Moss, 727 S.W.2nd 229 (Tenn. 1986) and State v. Davis, 825 S.W.2nd 109 (Tenn. Crim. App. 1992). Our review of the sentencing hearing, the presentence report, and the principles of sentencing, and in addition the nature and characteristics

of the offense, and enhancing factors set forth, all support the trial court's sentence.

This issue is therefore without merit.

Accordingly the judgment of the trial court is affirmed.

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MARY BETH LEIBOWITZ, SPECIAL JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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WILLIAM M. BARKER, JUDGE