

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

FILED

May 24, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 02C01-9503-CC-00064

Appellee,

*

MADISON COUNTY

VS.

*

Hon. John Franklin Murchison, Judge

ELTON DONALD BOWERS,

*

(Aggravated Robbery)

a/k/a RESHID QAWWI,

*

Appellant.

*

For Appellant:

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For Appellee:

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Elton Donald Bowers, was convicted of aggravated robbery and possession of a deadly weapon. The trial court imposed concurrent, Range III sentences of thirty and six years respectively. Thereafter, the defendant filed a motion for a new trial which, among other things, sought a dismissal of the possession of a weapon conviction. The Minute Order on the motion for a new trial indicates that the trial court dismissed the possession conviction. In this appeal of right, the defendant claims that the evidence is insufficient to support the aggravated robbery conviction and argues that the sentence is excessive.

We affirm the judgment of the trial court.

At approximately 11:30 P.M. on March 7, 1992, a man armed with a knife robbed the Savings Oil convenience store. The clerk on duty, Diane Minor Deberry, who had never seen the defendant before, later identified the defendant as the robber. Ms. Deberry testified that she had observed the defendant standing in the store's parking lot for about ten minutes when he walked toward the back of the building outside of her line of vision. She related that he then entered the store, pulled a hairnet down over his face, and pointed a knife in her direction. Ms. Deberry stated that she could see the defendant's face despite the hairnet and clearly noticed a gap in his teeth. She testified that the defendant jumped on the counter and took money from the register and the night box. When the defendant left the store, Ms. Deberry called the police.

The investigating officers testified that they found a hairnet near the store and that the victim was able to identify it as that worn by the robber. A week later, Ms. Deberry identified a photograph of the defendant, but asked to see one

showing his teeth. The next day, Ms. Deberry identified a second photograph of the defendant.

I

The defendant claims that the only eyewitness was impeached by her conviction for passing a bad check. He argues that portions of her testimony were so inconsistent as to require a reversal.

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Here, the jury chose to accredit the testimony of the victim. That was their prerogative. The victim testified that the defendant robbed the victim by knife point. That alone established each of the requisite elements for aggravated robbery. Under these circumstances, a rational trier of fact could have easily concluded that the crime was committed by the defendant beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979).

II

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The defendant also argues that the trial court should not have sentenced the defendant separately on the possession charge when the possession of a weapon was an element of the offense of aggravated robbery and contends that it was error to classify the defendant as a persistent offender.

It is true that the trial court sentenced the defendant separately on the offenses of possession of a weapon and aggravated robbery. Later, however, the trial court set aside the weapons conviction upon motion of the defense. Because of that corrective action, this issue, which would ordinarily have merit, has been rendered moot.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing 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. §§ 40-35-102, -103, and -

210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The defendant was convicted of aggravated robbery, a Class B felony. Tenn. Code Ann. § 39-13-402(b). "[A] 'persistent offender' is a defendant who has received ... [a]ny combination of five (5) or more prior felony convictions within the conviction class or higher, or within the next two (2) lower felony classes." Tenn. Code Ann. § 40-35-107(a)(1). One with three prior Class B felony convictions may also qualify as a persistent offender "if the defendant's conviction offense is a Class A or B felony." Tenn. Code Ann. § 40-35-107(a)(2).

Here, the following prior felonies were presented for range enhancement purposes:

- (1) Aggravated Robbery, a class B felony (1993);
- (2) Armed Robbery (No. 83-466), a class B felony (1983);
- (3) Armed Robbery (No. 83-465), a class B felony (1983);

- (4) Aggravated Assault (No. 83-466), a class C felony (1983);
- (5) Robbery, a class C felony (1979);
- (6) Burglary, (No. 8118), a class D felony (1977);
- (7) Burglary, (No. 8119), a class D felony (1977); and
- (8) Burglary, (No. 8120), a class D felony (1977).

On appeal, the state concedes that the defendant's 1993 conviction for aggravated robbery does not qualify as a prior conviction for range enhancement purposes because it had not yet been adjudicated at the time of this offense. See State v. Blouvet, 904 S.W.2d 111 (Tenn. 1995). Thus, the defendant does not qualify as a persistent offender under subsection (a)(2).

Tenn. Code Ann. § 40-35-107(b)(4), provides that "[c]onvictions for multiple felonies committed as part of a single course of conduct within twenty-four (24) hours constitute one (1) conviction for the purpose of determining prior convictions: however, acts resulting in bodily injury or threatened bodily injury to the victim or victims shall not be construed to be a single course of conduct." The defendant argues that the three prior 1977 burglary convictions were committed within a twenty-four (24) hour period and as part of a single course of conduct. He claims that the same rule requires that his three 1983 convictions for armed robbery and aggravated assault be treated as only two convictions.

We disagree. Assuming that the defendant's 1977 burglary convictions qualify as only one conviction for range enhancement purposes, the defendant still qualifies as a persistent offender under Tenn. Code Ann. § 40-35-107(a)(1). The 1983 convictions include two armed robberies and one aggravated assault. Once it is established, as here, that at least two of the prior felonies from a single course of conduct involved threatened bodily injury to a victim, each

conviction "would be treated as separate convictions for range enhancement purposes." State v. Horton, 880 S.W.2d 732, 736 (Tenn. Crim. App. 1994).

Because the defendant had at least five prior class B, C, or D felony convictions, the trial court properly classified the defendant as a persistent offender. Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Jerry L. Smith, Judge