

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1994 SESSION

**FILED**

May 28, 1996

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

MACK EDWARD BROWN,

Appellant.

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C.C.A. NO. 03C01-9307-CR-00223

KNOX COUNTY

HON. RAY LEE JENKINS ,  
JUDGE

(Sentencing)

FOR THE APPELLANT:

FOR THE APPELLEE:

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

**REVERSED AND REMANDED**

**PER CURIAM**

## OPINION

The defendant, Mack Edward Brown, appeals as of right from the sentence of twenty-five (25) years set by the Knox County Criminal Court. Initially, on May 22, 1989, a jury sentenced the defendant to death after having found him guilty of first-degree murder. In the same proceeding, the jury also convicted the defendant of child neglect, a misdemeanor for which he received a sentence of eleven months and twenty-nine days. After his trial, the defendant appealed only his murder conviction which the Tennessee Supreme Court reversed, finding that the defendant was guilty, instead, of second-degree murder. The Court then remanded the defendant's cause to the trial court which entered the twenty-five year sentence from which he now appeals.

In this appeal as of right, the defendant presents six issues for review. In his first issue he contends that the trial court erred in ordering this sentence to run consecutive to his previously imposed misdemeanor sentence. In his second, third, and fourth issues he contends that the trial court employed improper enhancing factors. In his fifth issue he complains that the trial court erred in failing to find any mitigating factors. Finally, he complains that his sentence is excessive. Finding that the trial court erred in sentencing, we reverse and remand for resentencing.

## **BACKGROUND**

This case arises out of the beating death of the defendant's four-year-old son, Eddie Eugene Brown. The facts underlying this offense were summarized in detail by our Supreme Court in State v. Brown, 836 S.W.2d 530, 531-37 (Tenn. 1992). At the sentencing hearing, neither the defendant nor the State presented any evidence. Each party argued its case, and a presentence report was entered into evidence. The trial judge stated that "[t]he court has had the benefit of the evidence received at the trial and

the sentencing hearing, [and] the presentence report." The court found that the following enhancement factors were applicable:

The defendant, first, has a previous history of criminal convictions; however, that is given little weight in the sentencing. The Court feels that the defendant was a leader in the commission of the offense involving two or more criminal actors. That the victim was particularly vulnerable because of age. The Court, also, finds that the defendant treated the victim with exceptional cruelty during the commission of the offense. Further, that the personal injuries were great -- particularly great. That the defendant had no hesitation about committing the crime when the risk to human life was high. That the defendant abused a position of trust, parental trust. And that the crime was committed under circumstances under which the potential for bodily injury was great.

With regard to mitigating evidence, the trial judge stated that he considered the defendant's allegation that he suffered from a mental or physical condition that significantly reduced his culpability. The court, however, did not feel that this mitigating factor was "borne out by the proof." The court also disagreed that the defendant's sentence should be mitigated because he assisted the authorities in locating or recovering property involved in the crime. The trial judge stated that this factor was "more directed toward the recovery of the fruits of a larceny or burglary or thing of that nature." After considering all of the enumerated factors, the court remained "[un]convinced that any of those factors apply in this case."

At the conclusion of the sentencing hearing, the trial court sentenced the defendant to the maximum sentence for second-degree murder-- twenty-five years.<sup>1</sup> This sentence was to be served consecutively to the misdemeanor sentence of eleven months and twenty-nine days.<sup>2</sup>

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<sup>1</sup>Under the 1989 sentencing reform act, the sentence range for second-degree murder is ten to twenty-five years. T.C.A. § 39-13-210 (1990); § 40-35-112 (1990).

<sup>2</sup>The trial court also directed the defendant to receive credit for the 2,223 days of jail time which he had already served.

## DOUBLE JEOPARDY

In his first issue the defendant contests the trial court's imposition of consecutive sentences. As previously noted, the trial court originally ordered the defendant to serve his death sentence concurrently to his sentence for misdemeanor child neglect. The defendant contends that by subsequently mandating consecutive sentencing, the court altered the terms of the misdemeanor sentence in violation of "the Double Jeopardy Provision of the Eighth Amendment to the United States Constitution and Article I, § 10" of the Tennessee Constitution.<sup>3</sup> The defendant emphasizes the fact that the misdemeanor sentence, imposed in 1989, was never appealed and was already completely served at the time that the court resentenced the defendant.

The defendant relies upon Tennessee case law which prohibits the modification of a criminal defendant's sentence occurring after his original sentence has been partially executed. See Tinker v. State, 579 S.W.2d 905 (Tenn. Crim. App. 1979). In Tinker, the trial judge realized "he had inadvertently sentenced the defendant from four to ten years and ordered him to return to court" after he had already begun serving his sentence. Id. at 906. The judge then resentenced the defendant to a five to ten year term as he had originally intended. This Court reversed on double jeopardy grounds and directed the trial court to reinstate the initial judgment. Id. at 906, 908.

The State argues that this authority is not applicable to the defendant's situation as he was not resentenced on an executed judgment. We agree. It is well-established that "[i]n those cases where an appeal requires a reversal of the punishment or there is a mistrial as to punishment, a new sentencing hearing does not constitute

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<sup>3</sup>The Eighth Amendment to the United States Constitution contains no double jeopardy provision. That provision is found in the Fifth Amendment to the U.S. Constitution.

double jeopardy." 9 Raybin, Tennessee Criminal Practice and Procedure § 16.188 (1984); see Harris v. State, 576 S.W.2d 588, 590 (Tenn. Crim. App. 1978). The defendant was merely resentenced for the charge of second-degree murder subsequent to the reversal of his first-degree murder conviction and death sentence. The fact that the new sentence for murder was to be served consecutively, rather than concurrently, did not amount to an alteration of the misdemeanor sentence. This issue is without merit.

### EX POST FACTO

We next turn to the defendant's ex post facto challenge. He argues that the trial court improperly applied enhancement factors which were not enacted until after the date of the commission of the offense. The trial court sentenced the defendant in accordance with the Tennessee Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-101, et. seq. (1990). In so doing, the following two enhancement factors were employed which were not included in the preceding 1982 Act:

(15) The defendant abused a position of public or private trust, or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense; [and]

(16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

T.C.A. § 40-35-114 (1990); see also T.C.A. § 40-35-111 (1982).

The Supreme Court addressed the question of "whether an enhancement factor-- created by the 1989 Sentencing Act-- to a criminal offense occurring before the Act's effective date violated the ex post facto prohibition of the United States and Tennessee Constitutions." State v. Pearson, 858 S.W.2d 879, 880 (Tenn. 1993). The court concluded that, in order to satisfy state and federal ex post facto laws,

[a] trial court imposing a sentence after the effective date of the 1989 statute for a crime committed before that date must calculate the

appropriate sentence under both the 1982 sentencing statute and the 1989 Criminal Sentencing Reform Act, and then impose the lesser sentence of the two.

Pearson, 858 S.W.2d at 880. The defendant in Pearson had been sentenced in 1990 after a plea of guilty for offenses committed in 1989 prior to the effective date of the 1989 Act. Our Supreme Court remanded the case to the trial court for a determination of the appropriate sentence under each Act so that the lesser could be imposed. Id. at 884.

In its brief, the State cited Pearson for the proposition that a sentence must be calculated entirely under either the 1982 or the 1989 statute. The State further declared that because "the possible maximum sentence for second-degree murder pursuant to the 1989 Act was considerably lower than under the 1982 Act[,] the trial court properly sentenced the defendant under the entirety of the 1989 Act. Accordingly, the trial court properly considered the enhancement factors which were only included in the 1989 Act." However, as this Court has held, "without calculating the defendant's sentence separately under both Acts, it is unclear how the different enhancement and mitigating factors might have been applied." Manning v. State, 883 S.W.2d 635, 638 (Tenn. Crim. App. 1994). Accordingly, we find that if State v. Pearson is applicable to this case, it must be remanded to the trial court for resentencing consistent with that case.

However, before we determine that the sentencing analysis of Pearson is required, we must first address the preliminary issue of whether the 1989 Act is involved at all.<sup>4</sup> While the defendant in Pearson was convicted and sentenced for the first time in 1990, the defendant's conviction and initial sentencing occurred on May 22, 1989, prior to the November 1, 1989, effective date of the 1989 Act. Application of the 1989 Act was not possible until after the Supreme Court reversed the defendant's first-degree murder

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<sup>4</sup>Although neither party raises the issue of the applicability of the 1989 Act, we think it is an issue worthy of some discussion.

conviction and ordered a new sentencing hearing which was held on October 26, 1992.

In an attempt to address issues engendered by the enactment of a completely new sentencing law, the legislature included the following provision in the 1989 Act:

Unless 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 provisions of this chapter.<sup>5</sup>

T.C.A. § 40-35-117(b) (1990). However, the legislature also enacted the following provision which was not codified because of its temporary effect:

This act shall not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

Public Acts 1989, Ch. 591, § 115 (emphasis added).

Relying in part upon the latter provision, our Supreme Court held that the 1982 Act remained applicable to a defendant sentenced initially under the 1982 Act but whose sentence had become subject to partial modification subsequent to the effective date of the 1989 Act. State v. Polk, 845 S.W.2d 171, 173 (Tenn. 1992). The Court stated that resentencing for the purpose of partially modifying the original sentence "constitutes a continuation of the original procedure subject to the 1982 act." Polk, 845 S.W.2d at 173. Significantly, the Court qualified its holding with the following language:

If the entire sentence had been set aside due to a substantive or procedural flaw in the original sentencing hearing or to lack of

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<sup>5</sup>Clearly, this provision was drafted to include a situation with the procedural history like that in State v. Pearson.

jurisdiction, and if the case had then been remanded for an entirely new penalty hearing, a different result might well follow.

Id.

Following Polk, our Court recently held that "when an original sentence under the 1982 act includes a Range II, especially aggravated offender status which was correctly determined, a requirement of resentencing to address an invalid persistent offender determination and invalid enhancement within Range II constitutes only a modification of the original sentence." Sills v. State, 884 S.W.2d 139, 144 (Tenn. Crim. App. 1994). These were not circumstances in which "an entirely new sentencing hearing was required and an entirely new sentence had to be imposed." Id.

On the other hand, this case required an entirely new sentencing hearing. This is precisely the situation to which the Polk holding was referring in the restrictive language quoted above. The Supreme Court set aside the original conviction "due to a substantive flaw"-- insufficient evidence. The court then remanded the case to the trial court for a new sentencing hearing. Since the 1989 Act is implicated here, the ex post facto concerns which were discussed earlier are present.

The defendant complains that the trial court improperly applied other enhancing factors in addition to the two based on his ex post facto challenge. The State concedes that the trial judge improperly applied the factors involving prior criminal history and the fact that the injuries inflicted were particularly great. T.C.A. § 40-35-114(1),(6). We agree that these should not have been employed. Other factors used were not elements of the offense and may or may not be supported by the proof.

Therefore, we remand this case for imposition of a sentence in compliance



with State v. Pearson, 858 S.W.2d 879 (Tenn. 1993).<sup>6</sup>

PER CURIAM  
(SCOTT, PEAY & COLTON, S.J.)

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<sup>6</sup>We will not discuss the remaining sentencing issues, however, in order to assist the trial court in resentencing the appellant, we merely point out that the State conceded the improper application of two of the enhancement factors: "(1) [t]he defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and (6)[t]he personal injuries inflicted upon . . . the victim was particularly great." T.C.A. § 40-35-114(1),(6) (1990).