IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9507-CR-00206
Appellee,	*	KNOX COUNTY
VS.	*	Hon. Mary Beth Leibowitz, Judge
ALLEN LEE CAMPBELL,	*	(Sentencing)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Allen Lee Campbell, entered a best interest plea of guilt to especially aggravated burglary without any recommendation by the state as to the manner and length of his sentence. The trial court imposed a Range I sentence of eleven years. The single issue raised on appeal is whether the sentence imposed was excessive.

We find the sentence warranted by the circumstances and affirm the judgment.

This court must first address a procedural issue. The state claims that the notice of appeal was not timely filed. See Tenn. R. App. P. 4. It appears, however, that the judgment was entered on March 16, 1995. The notice, which must be within thirty days thereafter, was filed on April 10, 1995, well within the required time. We must, therefore, address the merits of the defendant's claim.

The statement of the victim to the probation officer was relied upon as fact:

> Victim, Larry Landreth, ... stated that [he and] his wife ... came home and caught the defendant burglarizing their home and property. When Mr. Landreth attempted to stop the defendant, the defendant fought with Mr. Landreth cutting Mr. Landreth's left wrist and right hand with a knife. Mr. Landreth stated that stitches were required for the cut on his wrist, and he still suffers from some numbness on the top of his right hand. Mr. Landreth stated that he is not asking for restitution.
>
> When asked about sentencing, Mr. Landreth stated that the defendant should not receive probation due to the seriousness of the offense, the use of a weapon, the defendant's prior record, and his continued criminal activity. Mr. Landreth stated he would like to see the defendant receive the maximum sentence as he feels something needs to be done to stop these crimes.

The defendant claimed that he “was intoxicated the night of the offen[s]e, [he] didn’t know where [he] was [and he didn’t] know why [he] did what [he] did.”

Defense counsel argued in the trial court that the defendant’s criminal record was due to his long history of alcohol abuse. Counsel pointed out that the defendant, despite several prior brushes with the criminal justice system, had never received any form of treatment for alcoholism. He requested intensive probation as an alternative to incarceration. Although the trial court found the defendant to be sincerely remorseful for this crime, it denied probation and enhanced the length of the sentence above the minimum.

The defendant does not challenge his denial of probation, but only challenges the length of his sentence. 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. § 40-35-40l(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 l66, l69 (Tenn. l99l); 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 (l) 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-l02, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. l987).

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 trial court considered the possible enhancement factors at the same time it addressed the question of probation:

> First, ... you have ... more than sufficient history of previous criminal behavior ... [to] establish the range of punishment ....
>
> ... [I]n the past you have not been able to comply with the terms of probation .... [E]ven ... during ... these proceedings, ... you have ... picked up additional charges[,] ... you have continued to drink knowing full well what you were facing, [and] ... you did not voluntarily seek help.
>
> Instead, you have relied upon the people in this Court to provide you help for your situation. You said you can't afford help .... Had it [ever] been requested, I think, ... attempts would have been made to assist you with getting into ... [a] program.
>
> * * *
>
> [Another consideration] in this case is that ... I

have no doubt there is much redeeming value in you. You are a productive citizen when you are not out and under the influence of alcohol most of the time.

* * *

... [I]n this case, your level of intoxication and your level of your ability to control yourself has resulted in someone getting hurt, and you had little hesitation to do what you did. And the risk to killing someone was great as well.

I am impressed that you want help. But I think that in this circumstance we have a problem with at this point providing you help in this case ... in terms of getting you drug treatment ... when there were many ways that you could have gotten it, or tried to get it over the course of these years.

... [As] a habitual motor offender, even if a car was not in operation, you are a lucky man to be charged with public intoxication, because having the key to the car was a felony offense, that you could have been charged with.

I am not impressed with the fact that if I were to provide you probation ... we would have to guarantee that you did not drink. And I cannot do that without you and your family ..., [and] they couldn't control your drinking while you were pending these charges....

* * *

I think that we have got to the point where it is too dangerous to place you into the community.

I think, however, that you are absolutely sincere. I will attempt to get the penitentiary system to see to it that you get into GED classes, and you can go into AA....

...[Y]ou have never taken any responsibility to [get treatment] for yourself....

* * *

What if you fall off the wagon and I have given you intensive probation, and someone gets killed? I have to look at it that way, too.

The trial court relied upon three statutory enhancement factors in determining the length of sentence:

(1) the defendant had a previous history of criminal

> convictions or criminal behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(1);
>
> (2) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, Tenn. Code Ann. § 40-35-114(8); and
>
> (3) the defendant had no hesitation about committing a crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114(10).

The defendant concedes that the first two factors apply. He does, however, argue that his crime presented no increased risk to human life and claims that the trial court did not properly consider his alcohol abuse in mitigation. The defendant also argues that the trial court is not entitled to a presumption of correctness because it failed to properly consider the principles of the sentencing act in weighing the relevant factors.

Here, the trial court stated its reasons and findings on the record. The weight to be attributed to each factor is determined based on the relevant facts and circumstances of each case. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986). The presumption applies. Moreover, the defendant concedes that State v. Jones, 883 S.W.2d 597 (Tenn. 1994), would allow the application of Tenn. Code Ann. § 40-35-114 (10) to an especially aggravated burglary involving serious bodily injury.

In Jones, however, our supreme court ruled that "[t]he determinative language of this factor is 'the risk to human life was high.'" 883 S.W.2d at 602. While our high court found that the factor did not apply because there was insufficient evidence that Jones's crime "caused or increased risk either to human life in general or to the victim in particular," here, however, the defendant was intoxicated and was armed with a knife. See id. at 603. When confronted by the occupants during the course of the burglary, the defendant fought, cutting the left

hand and right wrist of the victim. Under these circumstances, there was considerable risk.

The trial court properly determined that the defendant's voluntary use of alcohol was not a proper consideration for mitigation. The defendant's criminal history was rather extensive; that factor was, in our view, entitled to substantial weight. So was his unwillingness to comply with conditions of a prior sentence involving release in the community. Even if the third factor was entitled to no weight at all, the eleven-year sentence, under all of the circumstances, was appropriate.

Accordingly, the trial court's judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

William M. Barker, Judge