IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1996 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 03C01-9508-CR-00230
Appellee,	)
	) Knox County
V.	)
	) Hon. Richard R. Baumgartner, Judge
	)
JEROME DAJUAN HILL,	) (Sentencing)
	)
Appellant.	)

FOR THE APPELLANT:

Gerald L. Gulley, Jr.
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(On Appeal)

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(Plea Submission & Sentencing)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Jerome Dajuan Hill, pled guilty to three counts of aggravated robbery. Following a hearing, the appellant received an eighteen year sentence in each count as a Range II offender. The sentences in counts one and two were ordered to run consecutively with the third sentence running concurrently with the second. The appellant appeals this effective thirty-six year sentence claiming: (1) that the trial court improperly imposed consecutive sentences and (2) that the trial court improperly enhanced the sentence within the sentencing range. We affirm the sentences imposed by the trial court.

The stipulated proof established at the guilty plea submission and sentencing hearing reveals that Cathy Watson, Ronnie Solomon, and John Bradley were gathered at the Watson residence. Solomon is Ms. Watson's son. Bradley responded to a knock at the garage door. Two individuals asked if Bud Watson, Cathy Watson's husband, was home. One of these men had a piece of paper covering his face. When Bradley told them Mr. Watson was not at home, the appellant appeared from the garage armed with a pistol. The appellant told Mr. Bradley to get back in the house or he was going to "blow [Bradley's] damn head off." The three men forced the individuals into the residence. At gunpoint, Solomon and Bradley were forced to lie down in the living room while Ms. Watson was forced into the kitchen. All three individuals were tied up with phone cords and blindfolded. The appellant put the gun to Ms. Watson's head and said, "Bitch, you were told to get down." Some time later when Ms. Watson looked up, the appellant raised a hammer as if to hit Watson. He said, "Bitch, you were told not to look."

The robbers took the hammers from the tool belts worn by Solomon and Bradley and threatened them. The victims were then tapped on the head with

the hammers. Bradley heard the men say that they were going to bust Solomon's head with the hammer.

The three men began to ransack the house calling each other by number rather than by name. All three victims indicated that the appellant appeared to be the leader. When the three individuals left the residence, the victims freed themselves and ran outside. A neighbor, who had noticed a suspicious van near the Watson's residence, alerted the police. Detective Tim Cristol spotted the van and saw it drive away as he approached. It was later determined that the van was driven by a fourth codefendant, Melissa Sadler.

The robbers took Bradley's car keys, a gold ring, and three thousand dollars from his pocket. From Ms. Watson, they took jewelry valued at over ten thousand dollars, her television, VCR, and stereo. In addition, Bradley's van was taken by two of the men and Ms. Watson's vehicle was taken by the third individual. These vehicles were abandoned in the general vicinity as the three individuals fled on foot. Sadler was later arrested in the van which had brought the four of them to the Watson residence. The other three perpetrators were also arrested within hours.

The appellant challenges the sentences imposed by the trial court. Our review of the sentences is de novo with a presumption that the determinations of the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). This presumption is conditioned upon an 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).

I

In his first issue the appellant claims that the trial court erred when it ordered consecutive sentences in counts one and two. Further, he argues it was error to run the effective sentence in this case consecutively with Illinois sentences.

The court may order sentences to run consecutively if it finds by a preponderance of the evidence either of the following:

> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;...

Tenn. Code Ann. § 40-35-115(b)(2) & (4) (1991). Here, the trial court found support for consecutive sentences under both subsections. The appellant argues, however, that neither basis has been proven by a preponderance of the evidence. We disagree.

Because we find subsection (b)(4) to be dispositive of this issue, we address it first. In State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), our Supreme Court held that the trial court must first find that the defendant is a dangerous offender. Pursuant to Tenn. Code Ann. § 40-35-115(b)(4) cited above, the defendant's behavior must indicate little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. Here, the trial court made the following finding:

> I don't think there is any question that he is a dangerous offender and has little regard for human life.... he has managed to personally confront and personally threaten in an intimate situation five separate individuals.

We agree that the record evidences little or no regard for human life. Further, we see no hesitation on the appellant's part in committing these crimes. As indicated in the proof, the appellant and his codefendants put guns to the victims' heads and threatened to "bust their heads" with a hammer. These threats continued throughout the course of the robbery. The appellant is a dangerous offender.

Once such a determination is made, Wilkerson concludes that the proof must also show that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. Id. at 939. The trial court held that "less restrictive measures in [appellant's] case have failed." The court noted the appellant was on parole from an Illinois conviction when this offense occurred. Further, the appellant previously violated his Illinois probation for which he was on parole. We conclude that the sentences imposed are reasonably related to the severity of the present offenses. Further, we find them necessary to protect the public from likely future criminal acts by this appellant.

Because we find that the proof supports consecutive sentencing under this subsection, it is unnecessary to address the additional ground for consecutive sentencing. This issue is without merit.

II

In his second and final issue, the appellant claims that the trial court improperly enhanced the sentence within the sentencing range. More specifically he challenges the court's consideration of certain enhancement factors.

The presumptive sentence shall be the minimum within the range if no enhancement or mitigating factors exist. Tenn. Code Ann. § 40-35-210(c)

(1990). If enhancement factors exist but there are no mitigating factors, then the trial court may set the sentence above the minimum in that range but still within the range.

In this case, the trial court found no mitigating factors but found the following enhancement factors as set forth in Tenn. Code Ann. § 40-35-114:

> (1) the defendant has a previous history of criminal behavior in addition to that necessary to establish the appropriate range;
>
> (2) the defendant was a leader in the commission of an offense involving two or more criminal actors;
>
> (5) the defendant treated or allowed the victims to be treated with exceptional cruelty during the commission of the offense;
>
> (6) the amount of property taken was particularly great;
>
> (8) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;
>
> (13) the felony was committed while the defendant was on parole;
>
> (16) the crime was committed under circumstances under which the potential for bodily injury was great.

Tenn. Code Ann. §§ 40-35-114(1), (2), (5), (6), (8), (13) & (16) (1990). The appellant's only contest is to factors five and sixteen. We agree that factor sixteen was inappropriately considered by the trial court. This Court has held that this factor requires the same proof as that necessary to establish the elements of the offense of aggravated robbery. State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994); see also State v. Brooks, No. 02C01-9411-CV-00261 (Tenn. Crim. App. July 19, 1995). Thus, this factor should not have been considered.

However, as to enhancement factor five, proof exists in the record to support the trial court's finding of "exceptional cruelty." In State v. Goodwin, 909

S.W.2d 35, 45-46 (Tenn. Crim. App. 1995) this Court held that, when applying enhancement factor five, the trial judge "should state what actions of the [d]efendant, apart from the elements of the offense, constituted 'exceptional cruelty.'" The trial judge did so in the instant case.

The transcript of the sentencing hearing reveals that in considering enhancement factor Tenn. Code Ann. § 40-35-114(5), the trial judge found that :

> I think that Mr. Hill displayed conduct out there that was much greater in its sense of cruelty during the commission of this offense than needed to accomplish his goal. He threatened on a number of occasions -- he threatened two particular individuals by pointing a gun at their head and threatening to shoot them. He used a hammer at one point in time and threatened the victim with that hammer while she was down on the floor, obviously not in a position to do anything to harm him.

Aggravated robbery encompasses "the intentional or knowing theft of property from the person of another by violence or putting the person in fear ... [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon...." Tenn. Code Ann. §§ 39-13-401(a) & -402(a)(1) (1991). Ms. Watson testified that at one point she thought she was going to be killed. She said she hoped they shot her before shooting her son. The continual threats could have constituted exceptional cruelty. This factor justifiably carried some weight in the trial judge's enhancement consideration.

Although factor sixteen was inappropriately applied, we find that the strength of the remaining factors justifies the sentence imposed.

The sentences are affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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CHARLES LEE, Special Judge