

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

**FILED**

June 20, 1996

**Cecil W. Crowson  
Appellate Court Clerk**

STATE OF TENNESSEE, \* C.C.A.# 01C01-9502-CC-00033  
APPELLEE, \* COFFEE COUNTY  
VS. \* Hon. Gerald L. Ewell, Sr., Judge  
WAYNE L. HUGHES, \* (Felony Reckless Endangerment  
and Evading Arrest)  
APPELLANT. \*

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

AFFIRMED

Gary R. Wade, Judge

## OPINION

The defendant, Wayne L. Hughes, appeals from his Coffee County convictions for felony reckless endangerment and evading arrest. The trial court imposed a Range I sentence of two years for felony reckless endangerment to be served concurrently with the eleven month, twenty-nine day sentence imposed for evading arrest. The sentences were to be suspended after the service of seven months in jail. \_\_\_\_\_

\_\_\_\_\_ In this appeal of right, the defendant presents the following issues for our review:

- (1) whether the trial court erred by denying the defendant's motion for judgment of acquittal as to the charge of evading arrest;
- (2) whether the trial court erred by denying the defendant's motion to dismiss the indictment on double jeopardy grounds;
- (3) whether the trial court erred by denying the defendant's motion to exclude the testimony of Trooper Rick Smith;
- (4) whether the sentences were excessive.

The defendant's convictions and sentences are affirmed.

On July 2, 1993, the defendant, Wayne L. Hughes, led officers on a high speed chase through three counties. Trooper Ricky D. Smith, of the Tennessee Highway Patrol, noticed a 1976 Pontiac LeMans which appeared to have been abandoned in a large ditch near the interstate in Rutherford County. Suspecting that the vehicle might have been involved in an accident, Trooper Smith focused his spotlight on the car and saw the defendant inside. The defendant then started his vehicle, ignoring Trooper Smith's demand to stop, and drove onto the

interstate. Trooper Smith, who followed the defendant at speeds up to 115 miles per hour, described the pursuit as especially dangerous because of the heavy Fourth of July weekend traffic. Several cars had to be driven off the road in order to avoid the defendant's vehicle. At one point, the defendant slammed on his brakes and Trooper Smith narrowly avoided a rear-end collision. At another point, the defendant forced Trooper Smith into the median.

Trooper Robert Beard joined the pursuit. He drove his vehicle into the emergency lane next to two tractor trailers which were traveling side by side in the two lanes of traffic--an attempt to form a "rolling roadblock." The defendant was still able to pass the three vehicles, coming within inches of colliding with Trooper Beard's vehicle. The chase continued into Grundy County, where the defendant wrecked his vehicle. When Trooper Smith got to the defendant's car, the defendant claimed that he wanted to die and asked the trooper to kill him.

Officer Charles Taylor of the Manchester Police Department joined in the pursuit shortly before the arrest. He estimated that the defendant ran more than twenty-five vehicles off of the roadway during that limited amount of time.

When Trooper Smith arrested the defendant at Vanderbilt Hospital a couple of weeks later, the defendant declared that the trooper had saved his life the night of this incident because he had been trying to commit suicide. The defendant had received intensive psychiatric care during his hospital stay.

A twenty-two-year-old father of three, the defendant testified that he was employed by the Trinity Lane Exxon as an auto mechanic. He did not deny that he had engaged officers in a high speed chase. The defendant explained that he

was despondent because he had been fired from his construction job that morning and was already behind on his bills. He stated that he and his wife, who did not work, had argued on the day of the wreck and that he had attempted to kill himself earlier in the day by inhaling carbon monoxide. Unsuccessful in that effort, he then ingested half a bottle of Tylenol, wrote a suicide note, and drove away with the intent of driving off a cliff. When he began to feel dizzy and sick at his stomach, however, he parked in a large ditch near the interstate, hoping that no one would notice his car. The defendant testified that he was writing a second suicide note when he passed out. He awoke when a light was turned onto his vehicle and claimed that he fled only when someone approaching his car refused to leave him alone. The defendant contended that he did not realize that he was being pursued by officers and asserted that his ultimate goal was to drive off Monteagle Mountain.

The defendant's wife, Tina Jo Hughes, confirmed that he was not "acting like himself" on the night of this incident. While acknowledging that she had said "some pretty mean things" to the defendant, she noted that the defendant was especially distraught when his parents refused to discuss his discharge from employment. Ms. Hughes found both of the suicide notes the defendant had written and confirmed that the defendant had left the car running in their enclosed garage for a substantial period of time.

Probation Officer Joyce Day, who had prepared the defendant's presentence report, testified that the defendant admitted that he "ran" from the police.

I

The defendant claims that the evidence was insufficient to support the

evading arrest conviction because the state had failed to prove that he knew the police were attempting to arrest him. We disagree.

On appeal, 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 exclusively 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).

Evading arrest is defined as follows:

- (a) It is unlawful for any person to intentionally flee from anyone the person knows to be a law enforcement officer and the person:
  - (1) Knows the officer is attempting to arrest the person;
  - or
  - (2) Has been arrested.
- (b) It is a defense to prosecution under this section that the attempted arrest was unlawful.

Tenn. Code Ann. § 39-16-603(a) & (b).

The defendant claims that he was so emotionally distraught that he was never cognizant of the fact that law enforcement officers were attempting to make an arrest. He reasons that the state was unable to prove that he had "intentionally" fled and contends that he only remembered seeing "lots of bright lights." He also claims that because the officer had no basis for arrest prior to the pursuit, there was no way that the defendant could have known that the officers

were attempting to arrest him.

The facts surrounding the pursuit belie these assertions. Trooper Smith was in uniform when he first approached the defendant, his blue lights were flashing, and his spotlight was aimed at the defendant's car. While the defendant was still within earshot, the trooper shouted for him to stop. The defendant refused to stop and identify himself. When the defendant sped off, the officer followed. Many, if not all of several law enforcement vehicles which were in pursuit, used blue lights and sirens as they traversed three counties, a distance of approximately 60 miles. Trooper Beard testified that his marked car was actually in front of the defendant during portions of the chase. Finally, the presentence investigator testified that the defendant acknowledged that he had attempted to evade the police. All of this evidence supports the jury's conclusion that the defendant had intentionally fled from the officers and that they were attempting to make an arrest.

## II

Next, the defendant contends that his prior conviction for misdemeanor reckless endangerment in Rutherford County barred the same charge in Coffee County. We disagree.

The double jeopardy guarantees of the fifth amendment to the United States Constitution and article I, section 10 of the Tennessee Constitution protect individuals against a second prosecution for the same offense after either acquittal or conviction. Ohio v. Johnson, 467 U.S. 493, 498 (1984). Moreover, the safeguards noted also protect against the imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969); see State v. Black, 524 S.W.2d 913 (Tenn. 1975).

The defendant asserts that, because he had previously pled guilty to the reckless endangerment of "Trooper Rick Smith and others" on I-24 in Rutherford County, he cannot now be convicted of the reckless endangerment of Trooper Robert Beard in Coffee County. The defendant contends that Trooper Beard qualified as one of the "others" on I-24 and thus, there can be no second conviction. We disagree.

The actions which give rise to a conviction for any offense must have, at least in part, occurred in the county in which the defendant is convicted. In consequence, the defendant's guilty plea to endangering "others on I-24" included only those in Rutherford County. The endangerment of Trooper Beard was in Coffee County. There was testimony that the defendant pulled behind Trooper Beard's vehicle and accelerated, even though Trooper Beard was traveling in the emergency lane and both of the other lanes were occupied by tractor trailers. Had Trooper Beard not accelerated quickly enough, the defendant's car would have struck his vehicle.

In resolving double jeopardy cases, Tennessee courts have focused in large part on whether the crime involves a specific victim. In order to sustain a conviction in a reckless endangerment case and cases involving similar charges, our courts have shown a tendency to uphold separate convictions for different victims. In State v. Irvin, 603 S.W.2d 121 (Tenn. 1980), for example, our supreme court upheld multiple homicide convictions which resulted from a single automobile accident. Similarly, in State v. Clarence Ray Gober and Clarence Gober, No. 89-130-III (Tenn. Crim. App., at Nashville, November 14, 1989), perm. to appeal denied (Tenn. 1990), this court upheld four separate assault convictions when guns were pointed in the direction of four police officers. Most recently, in State v. Arnold V.

Porter, No. 01C01-9410-CC-00353 (Tenn. Crim. App., at Nashville, January 5, 1996), this court held that in a single high speed chase, the evidence was sufficient to support two convictions for reckless endangerment where there were specific facts to support offenses as to different victims.

Reckless endangerment requires that a specific individual be placed in imminent danger by the defendant's reckless acts. See Tenn. Code Ann. § 39-13-103(a). Here, both Trooper Smith and Trooper Beard were, by distinguishable acts of the defendant, placed in such danger. Separate convictions for each victim were, therefore, appropriate. See State v. Arnold V. Porter, supra.

The defendant contends that his evading arrest conviction should have also been barred because it qualified as a lesser included offense of reckless endangerment. Again, we disagree.

In Wright v. State, 549 S.W.2d 682 (Tenn. 1977), our supreme court confirmed the test to determine whether an offense is lesser and included in the greater offense. Quoting the late Justice Weldon White in Johnson v. State, 217 Tenn. 234, 243, 397 S.W.2d 170, 174 (1965), the court ruled as follows:

The true test of which is a lesser and which is a greater crime is whether the elements of the former are completely contained within the latter, so that to prove the greater the State must first prove the elements of the lesser.

Wright v. State, 549 S.W.2d at 685-86.

Two years later, our supreme court again addressed the subject:

We believe that the better rule, and the one to be followed henceforth in this State, is the rule adopted



implicitly by this court in Wright v. State, *supra*, that, in this context, an offense is necessarily included in another if the elements of the greater offense, as those elements are set forth in the indictment, include, but are not congruent with, all the elements of the lesser. If there is evidence to support a conviction for such a lesser offense, it must be charged by the trial judge. T.C.A. § 40-2519 [now T.C.A. § 40-18-118(a)]; Whitwell v. State, 520 S.W.2d 338 (Tenn. 1972).

Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979).

These principles were recently reaffirmed in State v. Trusty, \_\_\_\_\_ S.W.2d \_\_\_\_\_, slip op. at 10 (Tenn. 1996), wherein our supreme court clarified the distinction between lesser grades/classes of offenses and lesser included offenses:

[A]n offense qualifies as a lesser included offense only if the elements of the included offense are a subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense.

Our statute defines the crime of reckless endangerment as follows:

(a) A person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury.

Tenn. Code Ann. § 39-13-103(a).

Here, in order for the defendant to be convicted of evading arrest, Tenn. Code Ann. § 39-16-603(a), the state had to prove not only that the defendant intentionally fled from a law enforcement officer by driving in a reckless manner, but also that he knew Trooper Beard and other law enforcement officers were attempting to make an arrest. Proof of specific intent or knowledge of the attempt to arrest was not necessary for a reckless endangerment conviction--only that the defendant operated his vehicle recklessly and placed Trooper Beard in danger of death or injury as he did so. Because the state had to prove an element in addition to those essential to a reckless endangerment conviction, the evading arrest

conviction would not have qualified as a lesser included offense in these circumstances. Howard v. State, 578 S.W.2d at 85.

### III

The defendant also submits that the trial court erred by denying his motion in limine to exclude the testimony of Trooper Smith. Because he previously pled guilty to evading arrest and recklessly endangering Trooper Smith in Rutherford County, he claims that the trooper's testimony in this case permitted the jury to retry the defendant on his prior conviction. While the trial court denied the defendant's motion to exclude Trooper Smith's testimony, it was agreed that his testimony would be limited to those events which occurred in Coffee County.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Relevant evidence may only be "excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

On direct examination, the state elicited from Trooper Smith only information about the defendant's conduct in Coffee County. His testimony was highly relevant because he saw the defendant's vehicle narrowly miss the car driven by Trooper Beard. He could more accurately describe the event than Trooper Beard.

The defendant offers no reason why Trooper Smith's testimony was

unfairly prejudicial. Had the state attempted to introduce evidence of what happened outside Coffee County, specifically how the defendant had collided with the trooper's vehicle, the argument of substantial prejudice may have been more persuasive. Moreover, during cross-examination defense counsel asked Trooper Smith to testify to those events which occurred outside Coffee County, he waived his right to complain of any possible error by the admission of the response. See State v. Estes, 655 S.W.2d 179 (Tenn. Crim. App. 1983).

#### IV

The defendant contends both that the trial court failed to properly weigh mitigating and enhancing factors and that he should have been granted immediate probation on his sentences.

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). 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, 862 (Tenn. Crim. App. 1987). Among the factors determinative on the issue of probation are the circumstances of the offense, the defendant's criminal record, social history, present condition, his potential for rehabilitation or treatment, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 287 (Tenn. 1978), cert. denied, 439 U.S. 1077 (1979); Stiller v. State, 516 S.W.2d 617, 619-20 (Tenn. 1974). Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a) & (b). The ultimate burden of establishing suitability for probation, however, is still upon the defendant. Tenn. Code Ann. § 40-35-303(b).

Alternative sentencing issues must be determined by the facts and circumstances of the individual case. State v. Moss, 727 S.W.2d 229, 234-35 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). Misdemeanor sentences must be specific and in accordance with the principles, purposes, and goals of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §§ 40-35-104, -117, and -302; State v. Palmer, 902 S.W.2d

391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinative sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than 75% of the sentence should be fixed for a misdemeanor offender. Palmer, 902 S.W.2d at 393-94 (but DUI offenders may serve 100%) . In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Id.

Upon service of that percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. The trial court retains the authority to place the defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f). The governing statute is designed to provide the trial court with continuing jurisdiction in misdemeanor cases and a wide latitude of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

The trial court found the following enhancement factors applicable without reference to which offense they would apply to: (1) that the defendant had a previous history of criminal convictions or behavior; (2) that the offense involved more than one victim; (3) that the defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release into the community; (4) that the defendant had no hesitation about committing a crime when the risk to human life was high; and (5) that the crime was committed under circumstances in

which the potential for bodily injury was great. See Tenn. Code Ann. § 40-35-114(1), (3), (8), (10), & (16).

The presumption of correctness given to the trial court in its sentencing determinations 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 (Tenn. 1991). Where the trial court applies inappropriate factors or fails to follow the provisions of the sentencing act, the presumption fails. State v. Shelton, 854 S.W.2d 116 (Tenn. Crim. App. 1992). Here, the trial judge found numerous enhancement factors generally applicable to the offenses. It failed, however, to state whether each of the factors applied to each of the convictions. Because this failed to comport with the requirements of Ashby, the sentences are not entitled to the statutory presumption of correctness.

The defendant argues that because he had only one prior offense, passing a worthless check, he should not be considered as having a prior history of criminal behavior or convictions. Tenn. Code Ann. § 40-35-114(1). We disagree. Initially, a lengthy criminal history is not necessary for this factor to apply. See State v. Mike Wayne Tate, 03C01-9204-CR-127 (Tenn. Crim. App., at Knoxville, March 4, 1993), perm. to appeal denied, (Tenn. 1993). Moreover, the defendant had also been required to make restitution on two other worthless check charges; in addition, he performed community service and paid a fine for shoplifting. Under all of these circumstances, application of the factor to both offenses was warranted.

The defendant also argues that the trial court erred by finding that the offense involved more than one victim. See Tenn. Code Ann. § 40-35-114(3). Again, we disagree. The chase took place on an interstate crowded with holiday

traffic. The defendant narrowly avoided collisions with several other vehicles. Officer Taylor testified that the defendant ran at least twenty-five cars off the road in Coffee County alone. That is sufficient to warrant application of the factor to each conviction.

Next, the defendant claims that the trial court erred by finding that he had a history of unwillingness to comply with conditions involving release into the community. See Tenn. Code Ann. § 40-35-114(8). At the sentencing hearing, however, the defendant acknowledged that he had failed on occasion to meet with his probation officer during the last third of a prior probationary period. In addition, he failed to pay his court costs as ordered. While these may qualify as relatively minor infractions, the trial court was nonetheless entitled to give limited consideration to this factor on each offense.

The defendant next contends that the enhancement factor of "no hesitation about committing a crime in which the risk to human life was high" is inapplicable because it qualified as a necessary element of the offense. See Tenn. Code Ann. § 40-35-114(10). We agree on the reckless endangerment conviction. State v. Arnold V. Porter, slip op. at 10. This factor, however, would apply to the evading arrest conviction.

The defendant further asserts that the risk of great bodily injury is inherent in a conviction for reckless endangerment. See Tenn. Code Ann. § 40-35-114(16). The state concedes that the trial court erred by applying this factor to the reckless endangerment conviction. Again, we agree. See State v. Arnold V. Porter, slip op. at 10. This factor, however, would apply to the evading arrest conviction.

There was one mitigating factor applicable to both offenses, that the defendant was suffering from a mental condition that substantially reduced his culpability for the offense. See Tenn. Code Ann. § 40-35-113(8). The trial court considered the factor to have little weight. The defendant argues that three additional mitigating factors were also applicable: (1) that the defendant acted under strong provocation; (2) that substantial grounds existed tending to justify the defendant's conduct; and (3) that the defendant, although guilty of the crime, committed it under such unusual circumstances that it is unlikely that he had a sustained intent to violate the law. See Tenn. Code Ann. § 40-35-113(2), (3), & (11).

\_\_\_\_\_ The trial court did not specify its reasons for refusing to apply the other three mitigating factors. The defendant argues very generally that they should be applied because he was mentally ill at the time of the offense, he had taken a large amount of Tylenol, and he had inhaled large amounts of carbon monoxide in a suicide attempt earlier that evening.

Without further recitation of the testimony at trial, we reject outright the contention that the defendant acted under strong provocation. See Tenn. Code Ann. § 40-35-113(2). Equally apparent is that there were no substantial grounds to justify the defendant's endangerment of the various individuals involved or his attempt to evade arrest. Id. at (3). It may have been, however, that the defendant, while guilty of the crimes, did in fact lack a sustained intent to violate the law. Certainly, the circumstances which triggered this offense were "unusual." Id. at (11).

In sum, the trial court improperly applied two enhancement factors, but properly applied three enhancement factors and one mitigating factor to the felony



offense. Numerous enhancement factors were applicable to the evading arrest conviction. The mitigating factor was given only slight weight. One more mitigating factor could have applied to both offenses. The range of sentence on the misdemeanor was up to eleven months and twenty-nine days and on the felony was one year at a minimum and two years maximum. Tenn. Code Ann. § 40-35-112. Because the enhancement factors clearly outweigh the mitigators, we concur in the maximum sentence on each offense.

Finally, the defendant argues that he should have been granted full and immediate probation. To the defendant's credit, he had been gainfully employed for approximately five months by the time of the sentencing hearing. His employer testified that he was doing well in his position and was under consideration for promotion to management. The defendant and his wife, who had one child, both related that their relationship had improved significantly since his psychiatric treatment.

The trial court, however, was troubled by the defendant's prior criminal record and his inability to accept full responsibility for his actions. The defendant had not fully complied with the conditions of a prior probation. Each of these concerns reflected upon his potential for rehabilitation. Also weighing against probation was the fact that the defendant had a sporadic employment history. Finally, the trial court emphasized the seriousness of the offense committed by the defendant. Of greatest concern was the defendant's disregard for the lives of others traveling on the roadway at the time of the offense. Under all of these circumstances, a jail sentence of some duration is warranted. The requirement that the defendant serve seven months before being granted probation is supported by the record.

Accordingly, the judgment of the trial court is affirmed.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Robert E. Corlew, III, Special Judge