IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1996

FILED

June 11, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9509-CC-00313
Appellee	)	
	)	RUTHERFORD COUNTY
vs.	)	
	)	Hon. J. S. DANIEL, Judge
JAMES EDWARD McKNIGHT,	)	
	)	(Theft under $500.)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

On May 10, 1995, the appellant pled guilty in the Rutherford County Circuit Court to theft of property under $500.00, a class A misdemeanor. On June 12, 1995, the trial court sentenced the appellant to 11 months and 29 days confinement in the Rutherford County Workhouse. The trial court set the percentage of the sentence to be served at seventy-five percent. The appellant now presents two issues for our review. First, he contends that a release eligibility percentage of seventy-five percent is excessive. Second, he contends that the trial court improperly ordered that his sentence in the instant case be served consecutively to two unserved sentences previously imposed pursuant to misdemeanor convictions for possession of cocaine and drug paraphernalia.

After reviewing the record, we affirm the sentence.

FACTUAL BACKGROUND

On December 14, 1994, in Murfreesboro, the appellant was driving his half brother, Jerry Lee Cantrell, and an acquaintance, Demont Smith, home at approximately 12:00 a.m. They had been drinking. Cantrell suggested that they stop at a local laundromat, "Duds 'N Suds." The appellant and Smith waited in the car while Cantrell entered the laundromat. Inside the laundromat, Cantrell grabbed a patron's purse. He then ran to the appellant's vehicle. Before he drove away, the appellant heard someone screaming and pounding on the side of his car. The offense report indicates that the victim's hand was injured during the incident.

A police officer observed the appellant and his companions fleeing the laundromat and pursued them. At some point, an occupant of the car threw the victim's purse from a window. Shortly thereafter, the appellant stopped his car.

He and his companions were arrested.

On December 12, 1994, two days prior to the commission of the instant offense, the appellant had been placed on probation for misdemeanor convictions for possession of cocaine and drug paraphernalia. For these convictions, the appellant received two consecutive sentences of 11 months and 29 days, which were suspended. The trial court fixed the percentage of the sentences to be served at seventy-five percent. The appellant had initially been granted diversion for these offenses. However, diversion was terminated after the appellant was convicted of a prohibited weapon offense committed during the diversionary period.[1] Finally, between the time of his arrest for robbery and his plea of guilty to theft under $500, the appellant failed two drug screens. [2] Moreover, following his conviction, the appellant admitted to a probation officer his continued use of marijuana.

On June 12, 1995, the trial court conducted a sentencing hearing in the instant case. Proof at the hearing consisted of the presentence report and the testimony of the appellant and his grandfather. At the time of the hearing, the appellant was twenty-one years old and lived with his grandmother. He was employed by his grandfather in the scrap metal business. For the year 1994, the appellant reported a net income of $600.[3] The appellant dropped out of high school in the tenth grade, and his record of employment is sporadic.

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[1]For the weapons conviction, the appellant received a suspended sentence of 60 days and a fine of $50.00.

[2]The appellant remained on supervised probation following his arrest for robbery.

[3]This information is contained in the "Uniform Affidavit of Indigency" completed under oath by the appellant.

At the conclusion of the hearing, in support of the sentence imposed, the trial court made the following findings:

> This defendant has a prior criminal record that involved both weapons and cocaine or drug related offenses ... because of his inability to follow the rules of ... diversion status, that diversion had been terminated, ... and he's failed drug screens in February of '95 and continues to admit usage of illegal drugs after these events. So I'm faced with an individual who, while on probation and then earlier, has not demonstrated a capacity to appreciate that probationary status.

With respect to consecutive sentencing, the trial court concluded, "The sentence should run consecutive to that of the prior sentences because he was on probation at the time of the event, two days into the probation ... ."

ANALYSIS

Appellate review of a sentence is *de novo*, with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d)(1990). The presumption, applicable in this case, is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles of the Criminal Sentencing Reform Act of 1989 and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The Tennessee Supreme Court recently outlined the procedure for sentencing misdemeanor offenders under the Sentencing Act of 1989:

> [T]he Criminal Sentencing Reform Act of 1989 requires three things of trial judges sentencing misdemeanor offenders. First, all misdemeanor offenders must be sentenced in accordance with the principles, purposes, and goals of the Act. It naturally follows, then, that the sentence must be within the penalty provided for the offense. Second, the court must either conduct a sentencing hearing or provide an opportunity for the parties to be heard on the length and manner of service of the sentence. Third, in addition to setting the sentence based on the principles, purposes, and goals of the Act, the court must set a release eligibility percentage which cannot exceed seventy-five percent of the imposed sentence. Alternatively, the court can grant probation immediately or after a period of split or continuous confinement.

State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995)(citations omitted). The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Nevertheless, a primary goal of the Sentencing Reform Act is that the "sentence imposed should be no greater than that deserved for the offense committed." Tenn. Code Ann. § 40-35-103(2) (1990). See also Tenn. Code Ann. § 40-35-102(1) (Supp. 1994). The Act also mandates that the sentence imposed "be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(4). Finally, "[t]he potential or lack of potential for the rehabilitation or treatment of the [appellant] should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5).

The appellant challenges the trial court's determination that he should serve seventy-five percent of his sentence. The Sentencing Act provides that, in determining the percentage of the sentence to be served by the misdemeanor offender, a court must consider the purposes of the Act, the principles of sentencing, and any enhancing or mitigating factors. Tenn. Code Ann. § 40-35-302 (d) (Supp. 1994). See also Creasy, 885 S.W.2d at 833.[4] Although a discussion of applicable enhancing and mitigating factors would be the better practice for purposes of appellate review, we acknowledge that in misdemeanor cases we have not required that trial judges explicitly list those factors on the record. State v. Baggett, No. 03C01-9401-CR-00031 (Tenn. Crim. App. at Knoxville, July 11, 1995). The purpose of the statute is to give the sentencing court greater flexibility in misdemeanor sentencing. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-302(d). Accordingly, the trial court has broad discretion in fixing the release eligibility percentage. Id.

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[4]A fixed percentage establishes only eligibility for release. It does not establish entitlement to release. Palmer, 902 S.W.2d at 393.

The record supports the trial court's finding of two enhancing factors: the appellant has "a previous history of criminal convictions or criminal behavior," Tenn. Code Ann. § 40-35-114(1) (1994 Supp.), and the appellant 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). See also Tenn. Code Ann. § 40-35-103(1)(C). Moreover, the appellant's continued use of illegal drugs reflects a lack of potential for rehabilitation. Tenn. Code Ann. § 40-35-103(5). Finally, the sentence imposed should "encourage respect for the law and prevent criminal conduct." State v. Gilboy, 857 S.W.2d 884, 889 (Tenn. Crim. App. 1993). We conclude that the trial court's imposition of a seventy-five percent release eligibility percentage was consistent with the principles, purposes, and goals of the Sentencing Act.[5]

The appellant also argues that the trial court improperly ordered consecutive service of his sentences. Specifically, the appellant contends that, in order to impose a consecutive sentence, a trial court must find that a defendant is a persistent offender, a professional criminal, a multiple offender, a dangerous mentally abnormal person, or a dangerous offender. Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976); State v. Chapman, 724 S.W.2d 378, 381 (Tenn. Crim. App. 1986). However, in State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995), our supreme court observed that § 40-35-115 of the Criminal

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[5]In support of his argument, the appellant alleges the following mitigating factors: he was not a leader in the commission of the offense, Tenn. Code Ann. § 40-35-113(4) (1990); he was under the influence of his older half brother at the time of the offense, Tenn. Code Ann. § 40-35-113 (12); the appellant did not personally injure or threaten to injure anyone during the theft, Tenn. Code Ann. § 40-35-113 (13); the appellant offered to testify against his co-defendants on behalf of the State, Tenn. Code Ann. § 40-35-113 (13); the appellant's criminal history is not extensive and does not include crimes of violence, Tenn. Code Ann. § 40-35-113 (13); and the appellant is not a "mean person" or otherwise a danger to the community, Tenn. Code Ann. § 40-35-113 (13). Assuming the presence of these mitigating factors, we conclude that the failure of prior lenient sentences to deter the appellant's involvement in criminal activity justifies the sentence imposed in this case.

Sentencing Reform Act of 1989 expanded the classifications of offenders for which consecutive sentencing should be reserved. Those classifications now include defendants sentenced for an offense committed while on probation. Tenn. Code Ann. § 40-35-115(b)(6) (1990). The record clearly supports the trial court's finding that the appellant was on probation when the instant offense was committed.

However, notwithstanding the presence of a statutory ground for the imposition of a consecutive sentence, we must also find that the aggregate sentence imposed reasonably relates to the severity of the offenses committed, is necessary to protect the public from further criminal conduct by the appellant, and is consistent with the sentencing principles set forth in the Sentencing Act. Wilkerson, 905 S.W.2d at 938-939. Based upon the facts of this case, the escalation of the appellant's criminal conduct, and the appellant's blatant and repeated refusal to conform his conduct to the conditions of prior lenient sentences, we conclude that the imposition of consecutive sentences was appropriate. This issue is without merit.

Accordingly, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JERRY L. SMITH, Judge

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WILLIAM S. RUSSELL, Special Judge