IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1993

STATE OF TENNESSEE,	)	
	)	No. 03C01-9112-CR-00414
Appellee,	)	
	)	Cocke County
v.	)	
	)	Hon. J. Kenneth Porter, Judge
DONNIE WEBB,	)	
	)	(Reckless Endangerment)
Appellant.	)	

For the Appellant:

Gordon Ball
Suite 750, Sovran Center
550 Main Street
Knoxville, TN 37902

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
C. Anthony Daughtrey
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0485

Al Schmutzer, Jr.
District Attorney General
and
Edward Bailey
Assistant District Attorney General
Main Street
Newport, TN 37821

AFFIRMED IN PART, VACATED IN PART

OPINION FILED _____

PER CURIAM

O P I N I O N

The defendant, Donnie Webb, appeals his convictions of two counts of reckless endangerment, for which he received concurrent sentences of two years in the state penitentiary and fines totaling three thousand dollars. All but ninety days of the sentences were suspended.

The defendant has presented three issues for review. First, he contends that the trial court erred in admitting his confession because it was obtained in violation of his Sixth Amendment right to counsel. In his second and third issues, he contends that the trial court erred in imposing the maximum two-year sentence and in denying him full probation.

Initially, although not raised by either party, we hold that plain error exists pursuant to Rule 52(b), Tenn. R. Crim. P., that requires one conviction to be vacated in order to do substantial justice. Reckless endangerment occurs when one "recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." T.C.A. § 39-13-103(a). Felony reckless endangerment is committed with a deadly weapon. T.C.A. § 39-13-103(b). In this case, there was one act -- the firing of one bullet from the pistol. The state alleged and apparently proved to the jury's satisfaction that both Roger Hooper and Robert Williamson, Jr., were placed in imminent danger of death or serious bodily injury by the firing of a single shot. However, this does not justify separate convictions under the reckless endangerment statute, given the facts in this case. See State v. Ramsey, 903 S.W.2d 709 (Tenn. Crim. App. 1995). For example, if an individual fires a gun into a crowded stadium, striking no one, he would not be guilty of hundreds of acts of reckless endangerment, but would only be guilty of one single act that placed the stadium spectators in danger. Similarly, in this case, the defendant committed a single act of reckless endangerment and the trial court should have merged the counts and entered only one judgment of conviction for reckless endangerment.

On December 21, 1990, the defendant fired a hand gun at Roger Hooper. The bullet missed Mr. Hooper and hit the windshield of Mr. Williamson's truck as Mr. Williamson approached an exit from Interstate 40. Glass from the windshield struck Mr. Williamson on the

forearm. Mr. Williamson then pulled off to the side of the road. When he opened the door of his truck he discovered a bullet. He gave the bullet to Ross Elbert Haynes, an agent of the Tennessee Bureau of Investigation.

On the same day, Roger Hooper charged the defendant with reckless endangerment in the General Sessions Court of Cocke County, Tennessee. The charge was voluntarily dismissed on December 24, 1990. Later, in February 1991, the defendant and Mr. Hooper exchanged words during a high school basketball game and Mr. Hooper had the warrant reissued on February 8, 1991.

The defendant was notified of this development and went to the Cocke County Sheriff's Office on February 9, 1991, at which time the warrant was executed by Daryll Nichols. During the course of making bond arrangements, and after joking about another matter, the defendant told the dispatcher, Lorene Hartsell, "I want a lawyer." Ms. Hartsell then telephoned the general sessions judge's office and got the bond approved. A preliminary hearing date was set for February 26, 1991, and the defendant was released on bond without being questioned about the incident.

On February 22, 1991, Roger Hooper was murdered. On that date the defendant, his wife and child were en route to Washington, D.C. The Sheriff of Cocke County, Tunney Moore, telephoned the defendant in Virginia at one or two o'clock in the morning and told the defendant that he was in "big trouble" and that he should go immediately to the sheriff's office upon returning to Cocke County.

The defendant returned to Cocke County on February 24, 1991, and telephoned the sheriff's office. He was asked to report to the sheriff's office "right then" and he did so. He was questioned by Agent Haynes, who was investigating the murder of Mr. Hooper.

Agent Haynes testified that he was aware of the reckless endangerment charge pending against the defendant. He stated that he knew that his interview with the defendant

would involve questions about the reckless endangerment charge because he needed to explore the defendant's relationship to Mr. Hooper to determine whether the defendant had a motive for killing Mr. Hooper.

The defendant testified that Agent Haynes told him that he would not discuss the pending reckless endangerment charges but only wanted to ask questions about the homicide. The defendant said that when Agent Haynes informed him of his Miranda rights, he told Agent Haynes, "I need, I guess I need a lawyer." To this he said Agent Haynes replied that he did not need a lawyer if "you've not done anything." Agent Haynes denied that either of these statements were made. The defendant admitted that he never told Agent Haynes directly that he wanted an attorney.

During the interview, the defendant admitted that he shot a pistol on the entrance ramp to I-40 at the Wilton Springs exit. Later, the defendant filed a motion to suppress the statement, asserting that it was obtained in violation of his Sixth Amendment right to counsel that he asserted on February 9, 1991 to Ms. Hartsell.

The trial court found that the defendant's request for counsel on February 9th came in the context of "casual conversation" and held that it could not be considered an assertion of the right to counsel because the statement was made in "somewhat of a light vein." It also found that the defendant understood his right to counsel at the February 24th interrogation, that he was aware of the scope of the interview and that he voluntarily subjected himself to questioning regarding the reckless endangerment charges. It concluded that the defendant knowingly and voluntarily waived his right to counsel.

The trial court's findings of fact at a hearing on a motion to suppress have the weight of a jury verdict and will not be disturbed on appeal unless the evidence preponderates against the findings. State v. Tate, 615 S.W.2d 161, 162 (Tenn. Crim. App. 1981). We conclude that the evidence in this case does not preponderate against the trial court's findings.

Our supreme court has recognized that the right to counsel attaches when an arrest warrant is "taken out" on a person because it is "a decisive commitment to prosecute." State v. Mitchell, 593 S.W.2d 280, 283 (Tenn. 1980). In this case an arrest warrant was issued for the defendant. The warrant was a decisive commitment to prosecute him. Thus, the defendant's Fifth and Sixth Amendment rights to counsel had attached. Mitchell, 593 S.W.2d at 283.

When the defendant was making bond, he told the dispatcher that he wanted a lawyer. However, this request was made during a time when the defendant was not about to be interrogated and during a time that he, by his own testimony, was joking around with law enforcement officers. By the defendant's own admission, the statement was not a serious request and was not made at a time when any interrogation was pending. Had it been a serious request for counsel, the authorities would have been precluded from initiating further communications with the defendant. See Michigan v. Jackson, 475 U.S. 625, 106 S. Ct. 1232 (1986). Nevertheless, because the defendant's Sixth Amendment right to counsel had attached relative to the reckless endangerment charges and there was no request for counsel, we must determine whether the defendant knowingly and intelligently waived his right to counsel at the February 24th interrogation initiated by Agent Haynes. See Patterson v. Illinois, 487 U.S. 285, 291-92, 108 S. Ct. 2389, 2394 (1988). In Patterson, the Supreme Court concluded that giving full Miranda warnings is ordinarily sufficient in the context of postindictment questioning to apprise the accused of the nature of his Sixth Amendment rights, and the consequences of abandoning those rights, so that a waiver will be considered a knowing and intelligent one for both Fifth and Sixth Amendment purposes. Id. at 2397.

After making bond on February 9th and before the defendant's preliminary hearing on February 26th, authorities contacted the defendant in Virginia and asked him to report promptly to the sheriff's office upon his return to Cocke County. The defendant voluntarily reported to the sheriff's office two days later. The defendant was asked to talk to Agent Haynes who was investigating the defendant as a suspect in Mr. Hooper's murder based upon his knowledge of the reckless endangerment charge.

Agent Haynes testified that he knew that the interview with the defendant would involve questions about the reckless endangerment charge because he needed to explore the relationship between the defendant and Mr. Hooper in order to determine if the defendant had a motive for murder. Agent Haynes testified that he knew that he would have to ask questions about the shooting incident. Agent Haynes also stated that he advised the defendant that questions would be asked regarding the shooting incident. Agent Haynes testified that he read the defendant his Miranda rights because of the pending reckless endangerment charges. The interrogation of the defendant was neither recorded nor transcribed. The questioning lasted for about one and one-half hours, then the defendant's answers were reduced to paragraph form, read to the defendant and initialed and signed by him.

The record supports the trial court's factual findings. Therefore, we conclude that the defendant's Sixth Amendment right to counsel had attached upon the issuance of the arrest warrant. However, there was no request for counsel when the defendant made bond on February 9th. Furthermore, the record shows that the defendant fully understood the scope of the February 24th interview and that he knowingly and voluntarily waived his right to counsel.

In his second and third issues, the defendant contends that the trial court erred in sentencing him to the maximum term within the applicable range and in denying his request to be allowed probation without serving any time in jail at all. The state argues that the sentence was not excessive.

Sentencing issues are reviewed de novo by this court, with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). The presumption of correctness is conditioned upon an affirmative showing in the record that the trial court considered the statutory sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review, this court must consider: (a) any evidence received at the trial and the sentencing hearing, (b) the presentence report, (c) the principles of

sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating and/or statutory enhancement factors, (g) any statement made by the offender on his own behalf and (h) the offender's potential for rehabilitation or treatment. Id.

The trial court considered all of the factors outlined above and concluded that the defendant should be sentenced to two years on each count. The defendant contends that, in light of his background and the circumstances of the offense, he should have been sentenced at the lower end of Range I and considered for full probation.

Enhancement of the defendant's sentence is appropriate in this case because the offense involved more than one victim. T.C.A. § 40-35-114(3). The fact that the defendant intentionally shot the pistol at another person establishes a culpability beyond that necessary to sustain a conviction for reckless endangerment and is significant in assessing the weight of this enhancement factor.

With respect to the defendant's contention that he should have been granted full probation, the state argues that the defendant is not a favorable candidate for alternative sentencing because his actions involved a serious offense, and confinement is necessary to avoid depreciating the seriousness of the offense and to deter others who might act similarly. T.C.A. § 40-35-103(1)(B). In support, the state asserts that shooting at someone is equivalent to attempted homicide and that the defendant's conduct created a substantial danger to others, as evidenced by the fact that another person's truck was hit. The state also asserts that in view of the ease with which the defendant's inability to control his anger could have escalated into the killing of an innocent victim, confinement is particularly suited to deter others.

Absent evidence to the contrary, the defendant is a presumptive candidate for alternative sentencing options. T.C.A. § 40-35-102(5) and (6). However, given the potentially dangerous consequences and the intentional nature of the defendant's actions, we conclude that

the record supports the trial court's denial of full probation and the imposition of ninety days confinement.

In consideration of the foregoing, the judgment of conviction for reckless endangerment under count one of the indictment is vacated and the offense is merged into the judgment of conviction for reckless endangerment under count two of the indictment. The judgment of conviction for count two is affirmed in all respects.

PER CURIAM
(Scott, Tipton and White, JJ.)