IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

EDWARD D. COKER,	)	NO. 01C01-9507-CC-00240
	)	
Appellant	)	WILLIAMSON COUNTY
	)	
V.	)	HON. DONALD P. HARRIS
	)	JUDGE
STATE OF TENNESSEE,	)	
	)	(Sentencing)
Appellee	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Edward D. Coker, was indicted on two counts of theft of services over $500, a class E felony, two counts of theft of services over $1,000, a class D felony, and two counts of criminal impersonation. He pled guilty to one count of theft of services over $500 and one count of theft of services over $1,000. The other charges were dismissed by the State in exchange for the plea. He was sentenced as a Range I standard offender to the maximum sentence for each conviction, two and four years, respectively. The sentences were ordered to be served consecutively. On appeal, the appellant complains that the sentences are excessive and that the court erred when it ordered the sentences to run consecutively. After a thorough review of the record on appeal, we affirm the judgment of the trial court.

The undisputed facts underlying the convictions in this case are that the appellant checked into the Studio Plus Motel in Brentwood, Tennessee, under the name James Strickland and remained at the hotel for approximately six weeks. The total bill for the appellant's stay was $1,662.40, which the appellant never paid. On March 16, 1994, the appellant checked into the Goose Creek Inn in Williamson County, Tennessee. The appellant left the inn owing over $500, which he never paid.

At the sentencing hearing the State did not present any testimony from witnesses, but instead relied on the presentence report which was introduced into evidence. The appellant testified on his own behalf. Much of the appellant's testimony centered on how he found himself in circumstances where he passed worthless checks to a variety of individuals for services and products. The appellant claimed that because of a head injury sustained in 1981 he was unable to recall checking into the Studio Plus Motel under a false name. However, he did recall that he spent approximately six weeks there and that he never paid to reside in that motel. The appellant recalled checking into the Goose Creek Inn and admitted that he never paid to stay at the inn. However, the appellant contended that the arrangement he

had with either the manager or the owner of the Goose Creek Inn was that he would live there without paying until he was able to find employment and then he would pay for his stay there. The appellant spent the remaining portion of his testimony explaining his myriad arrests, jailings, and convictions for various worthless check offenses.

The appellant has a lengthy history of criminal activity. The trial court found that there were some twenty-seven convictions for check-related theft noted in the presentence report. On appeal, the State acknowledges that according to the presentence report the appellant has been charged with twenty-three offenses over a thirteen year period.[1] The appellant has been placed on probation many times.

At the close of all the proof in the sentencing hearing, the trial court enhanced the sentence to the maximum allowable based upon his finding that the appellant 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) (1995 Supp.). There can be no doubt that this factor was applicable and deserving of great weight in this case. The trial court did not consider any mitigating factors.

In support of his contention that the sentences are excessive and that they should not have been ordered to run consecutively, the appellant argues that the trial court erred when it failed to apply or even consider certain mitigating factors.

When a defendant complains of his or her sentence, we must conduct a de novo review with the presumption of correctness. Tenn Code Ann. § 40-35-401 (d) (1990 Repl.). This presumption, however, 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). In

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[1] The State argues that eighteen (18) of the 23 offenses were theft related. Our review of the presentence report reveals that three of the eighteen offenses described by the state as theft offenses are offenses which are "undefined" in the report. In any event, the least number of the appellant's prior theft convictions is fifteen (15).

conducting a review of a sentence, this Court is to consider: (1) the evidence received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors in sections 40-35-113 and 40-35-114; and (6) any statements the defendant wishes to make in his own behalf about sentencing. Tenn. Code Ann. § 40-35-210 (1995 Supp.). The burden is on the defendant to show that the sentence imposed was improper. Tenn. Code Ann. § 40-35-401 (d) Sentencing Commission Comments; State v. Ashby, 823 S.W. 2d 166, 169 (Tenn. 1991).

We agree that certain mitigating factors should have been considered by the trial court in this case, and the record reveals that the court did not consider them. Accordingly, our review is de novo without the presumption of correctness. Ashby, 823 S.W.2d at 169.

The appellant argues that three (3) mitigating factors applied in this case. First he asserts that because his "criminal conduct neither caused nor threatened serious bodily injury" mitigating factor number one was applicable. Tenn. Code Ann. § 40-35-113(1) (1990 Repl.) We agree that this factor was applicable. Next, appellant contends that factor seven (7) was appropriate because the appellant's crimes were motivated by his desire to provide necessities for himself. Tenn. Code Ann. § 40-35-113 (7) (1990 Repl.) It is true that the appellant committed these crimes in order to acquire food and shelter for himself. Accordingly, this factor should have been considered by the trial court. Finally, the appellant contends that injuries sustained in two separate accidents left him mentally impaired and that mitigating factor eight (8) should have been used to reduce his sentence. Tenn. Code Ann. §40-35-113 (8) (1990 Repl.). We disagree. Although the record reveals that the appellant has sustained two apparently significant blows to the head, the record is devoid of any

proof that the injuries caused the appellant any lasting mental or physical impairment which would reduce his culpability for these offenses. We therefore decline to apply this mitigating factor.

As the appellant correctly argues, the minimum sentence within the range is the presumptive sentence. Where enhancement and mitigating factors are found, the sentence is to be increased by the appropriate enhancement factors and then reduced as appropriate by the mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1995 Supp.). The trial court gave great weight to enhancement factor one (1). The length of the appellant's criminal history which overwhelmingly consists of theft crimes of a similar nature to the instant convictions weighs heavily in determining the sentence. The appellant's criminal history justifies an initial increase to the maximum sentence. We decline to give great weight to the two mitigating factors applicable in this case. Even when we factor in a degree of mitigation relevant to the factors we determine to exist, we believe the weight of appellant's criminal history suffices for maximum sentencing.

With regard to the trial court's order that the sentences run consecutively, we affirm. Tennessee Code Annotated section 40-35-115 (b) (2), states that a court may order sentences to run consecutively if it finds by a preponderance of the evidence that "[t]he defendant is an offender whose record of criminal activity is extensive." There can be no doubt that the appellant's record of criminal activity is extensive. The trial court made the specific finding that the appellant was "an offender whose record of criminal activity is extensive" and stated that the sentence in this case was appropriate and necessary in order to protect society from the appellant's criminal behavior. The trial court's decision to order consecutive sentences in this case was entirely proper.

The judgment of the trial court is affirmed in all respects.

WILLIAM M. BARKER, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOSEPH M. TIPTON, JUDGE