

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1996 SESSION

FILED
September 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

GREGORY MUSE,

Appellant.

)
) C.C.A. No. 03C01-9508-CC-00212
)
) Blount County
)
) Honorable D. Kelly Thomas, Jr., Judge
)
) (Aggravated Assault)
)
)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

A jury convicted the appellant, Gregory Muse, of aggravated assault. He was sentenced to four years with all but the first thirty days suspended. On appeal, he argues that:

1. The trial court committed reversible error by impaneling the jury without his presence, and
2. That his sentence was excessive.

We affirm.

FACTS

The appellant and his wife were involved in a domestic dispute. The appellant apparently found out that his wife was having an adulterous affair. He threatened her with a shotgun and held her captive until the police arrived. She sustained bruises as a result of the appellant's prodding her with the barrel of his shotgun.

JURY IMPANELING

The appellant's first issue has been waived. It was incumbent upon the appellant to prepare a record that included all materials necessary for proper disposition of his appeal. Tenn. R. App. P., Rule 24(b). The record before us does not contain: (1) the motion for new trial, (2) a transcript of the voir dire proceedings, (3) a transcript of a motion for new trial hearing, (4) any exhibits, or (5) copies of pretrial motions. We are troubled by this transmission of such an inadequate record. A large portion of the record is included, but what we have is not germane to the issues raised. Moreover, the appellant's failure to include a copy of a timely filed motion for new trial constitutes waiver. Tenn. R. App. P., Rule 3.

Pursuant to Rule 52(b), however, we can review for "plain error." Tenn. R. Crim P., Rule 52(b). However, since we have no transcript of the jury's impaneling, the record fails to clearly establish what occurred in the trial court.¹ We are, therefore, unable to invoke a Rule 52(b) review.² This issue is waived.

SENTENCING

The appellant's last issue challenges his sentence. He argues that: (1) the trial court erred in denying full and immediate probation, and (2) he should have received a minimum range sentence. We disagree.

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an affirmative showing 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 conducting a de novo review of a defendant's sentence, this Court must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments to

¹The circumstances of this case and the appeal are disconcerting. On January 17, 1995, the appellant's counsel motioned the trial court for a continuance. Trial was, at that time, set for January 19, 1995. The appellant's counsel conveyed that he wished to attend an inauguration event on the night of the trial. The trial court attempted to accommodate counsel's request. Due to conflicting schedules and a busy docket, the trial court was unable to reset the case. The court did, however, inform counsel that he could either call some of his witnesses on January 18, 1995 or impanel the jury on the 18th to expedite the case, thereby affording counsel the opportunity to attend the inauguration.

Our concern is that after accommodating his own personal schedule, counsel apparently failed to notify his client, the appellant, of the changes. As a result, the appellant was not present when his jury was impaneled. Furthermore, the appellant's trial counsel is also handling this appeal. Due to counsel's failure to conform to the Tennessee Rules of Appellate Procedure, any errors at trial have been waived.

²Although the record before us does not indicate whether the appellant waived his presence requirement by motion, it is possible that the issue was fully addressed via oral motion during the impaneling process. See Tenn. R. Crim. P., Rule 43(a) (stating "[u]nless excused by the court upon defendant's motion, the defendant shall be present at the arraignment [and] at every stage of the trial including the impaneling of the jury . . ."). If, however, the matter was not properly resolved at trial, the appellant may seek remedy in a collateral proceeding.

sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating and enhancement factors, (6) any statements made by the defendant in his/her own behalf, and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210, -103, and -210 (1990); State v. Smith, 735 S.W.2d 859, 862 (Tenn. Crim. App. 1987).

DENIAL OF PROBATION

The trial judge found the appellant to be a proper candidate for alternative sentencing and ordered split confinement.³ We find that both the nature and the circumstances of the offense⁴ support the trial judge's conclusion. The trial judge had a much greater vantage point with which to assess the appellant, his attitude, and his potential for rehabilitation. We, therefore, affirm the denial of full probation.

LENGTH OF SENTENCE

The appellant's sentence range, as a Range I standard offender, was three to six years. The trial judge applied one enhancement factor: The offense was committed without hesitation when the risk to human life was high. In mitigation, the trial judge found that the appellant had no criminal record. The trial judge, however, apparently found that the enhancement factor outweighed the mitigating factor and ordered a four year sentence.

In felony sentencing, the minimum sentence is presumed. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court increases the sentence within the range for enhancement factors and follows with a reduction for mitigating factors. Tenn. Code Ann. § 40-35-210(d) & (e). "[T]here is no particular value

³The trial court suspended all but the first thirty days of the appellant's four year sentence. In addition, the appellant was to be eligible for work release.

⁴The appellant repeatedly threatened his wife with a shotgun in the presence of their children.

assigned by this statute to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Salazar, No. 02C01-9105-CR-00098, slip op. 4-5 (Tenn. Crim. App. Jan. 15, 1991) (quoting State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986)).

ENHANCEMENT FACTORS

The appellant argues that the trial court erred in enhancing his sentence pursuant to Tenn. Code Ann. § 40-35-114(10). Factor (10) permits enhancement when a defendant has no hesitation about committing a crime involving a high risk of human life. Id. He maintains that the factor is inapplicable because it is inherent in the offense.

The state asserts that the relevant inquiry is not whether the factor is inherent but whether the factor was an essential element of the indicted offense. In addition to factor (10), the state argues that Tenn. Code Ann. § 40-35-114(16) should have also been applied. Factor (16) permits enhancement for crimes "committed under circumstances under which the potential for bodily injury to a victim was great." Id.

Aggravated assault is assault coupled with either serious bodily injury or use of a deadly weapon. Tenn. Code Ann. § 39-15-401, 402 (1995 Supp.). The appellant was convicted of aggravated assault by employing a deadly weapon. Although elements of the indicted offense, factors (10) and (16) may be applicable if the facts demonstrate a culpability distinct from and appreciably greater than that incident to the convicted offense. State v. Jones, 883 S.W.2d 596 (Tenn. 1994). Separate and distinct culpability may arise when individuals other than the victim are present and subject to peril. See State v. Makoka, 885

S.W.2d 366, 373 (Tenn. Crim. App. 1994) (holding factor (10) applicable when other possible victims are present).

The appellant's children were in danger since they were in close proximity to the victim. The victim testified that her son was sitting beside her, and her daughter was crawling around when the appellant threatened her with his shotgun. This conduct demonstrated a culpability distinct from that of the indicted offense. Accordingly, we find factors (10) and (16) applicable.

MITIGATING FACTORS

The appellant argues that the trial court erred in refusing to apply Tenn. Code Ann. § 40-35-113(11). This factor permits mitigation for offenses committed under such unusual circumstances that it is unlikely a sustained intent to violate the law motivated the offender's conduct. Id.

The appellant has waived this issue by failing to present argument or cite authority. Tenn. R. Ct. Crim. App., Rule 10(b). Notwithstanding waiver, we find the issue devoid of merit.

CONCLUSION

The record supports application of enhancement factors (10) and (16). In mitigation, we find that the appellant had no prior criminal record. The evidence does not preponderate against the four year sentence imposed by the trial judge. The split confinement sentence, as adjudged, is affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

JOE B. JONES, Presiding Judge

DAVID G. HAYES, Judge