IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9507-CC-00225**
	)	
Appellee,	)	
	)	
	)	**COFFEE COUNTY**
VS.	)	
	)	**HON. JOHN W. ROLLINS**
JERRY GLENN NORRID,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF COFFEE COUNTY

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OPINION FILED _____

SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted at a jury trial of one count of theft of property over $10,000 and one count of theft of property over $1,000. He was sentenced as a Range II multiple offender to eight years for count one and six years for count two. The trial judge ordered these sentences to be served consecutively. The Defendant appeals his sentences. We reverse and modify the judgment of the trial court to reflect concurrent sentences.

The Defendant argues two issues in his appeal of his sentence. His first argument is that the trial court erred in relying on felony convictions out of Texas and Oklahoma to support a sentence as a Range II offender. His second argument is that the trial court erred in ordering the sentences to be served consecutively.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

I.

The Defendant first argues that he should not have been sentenced as a Range II offender. There was a stipulation to three previous convictions in states other than Tennessee. These convictions were not specifically designated as felonies or misdemeanors. Two were in Oklahoma, and one was in Texas. One of the Oklahoma convictions was unable to be verified by the jurisdiction from which it came. The trial court held that the out-of-state convictions were felonies and, therefore, the Defendant was a Range II offender because he had two or more previous felony convictions.

To be classified as a Range II multiple offender, a defendant must have "[a] minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes." Tenn. Code Ann. § 40-35-106(a)(1). In regard to the application of out-of-state convictions to determine the applicable range, the code states:

> Prior convictions include convictions under the laws of any other state, government, or country which, if committed in this state, would have constituted an offense cognizable by the laws of this state. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given.

Tenn. Code Ann. § 40-35-106(b)(5).

One of the Oklahoma convictions was for "Possession of Stolen Property Over $100.00." Although this conviction was not verified by testimony at the sentencing hearing, the parties all stipulated to this prior conviction in addition to two others. This prior conviction occurred in October of 1987. In 1987 under Tennessee law possession of stolen property under $200.00 was punishable as in petit larceny. According to the conversion chart at Tennessee Code Annotated section 40-35-118, this crime is considered a Class E felony for sentencing under the Criminal Sentencing Reform Act of 1989. Therefore, the Defendant has at least one prior felony within the two classes below his present convictions.

The Texas conviction and the other Oklahoma conviction were both styled as "Unauthorized use of an automobile." The Defendant apparently argues that the label or title of the crime should be the controlling factor when deciding the effect of an out-of-state conviction. He argues that the Tennessee crime of

unauthorized use of an automobile is the comparable crime to the Texas and Oklahoma convictions. The Tennessee crime of unauthorized use of an automobile is a misdemeanor. Tenn. Code Ann. § 39-14-106. Therefore, the Defendant argues, he should not be sentenced as a Range II offender because he does not have two previous felony convictions within the next two lower conviction classes.

The trial court held that the two convictions were indeed felonies and, therefore, enhanced the Defendant's range. The trial judge stated in his sentencing order that:

> [I]t is the opinion of the undersigned that it is not the label of the offenses that determines whether or not a conviction is a felony or misdemeanor but under Tennessee law the punishment designated for the offense. The break point in [sic] whether or not the punishment carries a sentence in excess of one year. It is the opinion of the undersigned that the State has proven beyond a reasonable doubt that the defendant was on parole from the state of Texas; that the prior convictions would constitute felony convictions in the state of Tennessee.

The proof of the Oklahoma conviction for unauthorized use of an automobile states:

> [Defendant] . . .did commit the crime of UNAUTHORIZED USE OF VEHICLE, by unlawfully, feloniously and willfully, not being entitled to its possession did take, use or drive a certain motor vehicle . . . belonging to and without the consent of [victim] with the unlawful and felonious intent on the part of said defendant then and there to deprive said owner temporarily or permanently of the possession of said vehicle.

(emphasis added). The Tennessee statute that the Defendant wishes us to use reads, "A person commits a Class A misdemeanor who takes another's automobile . . . without the consent of the owner and the person does not have

the intent to deprive the owner thereof." Tenn. Code Ann. § 39-14-106 (emphasis added). These two crimes cannot be said to be the same because one requires a different intent than the other.

The Oklahoma unauthorized use of an automobile conviction occurred in June of 1989. For this reason, we must look at the law in effect in Tennessee at the time of the conviction. In Tennessee the definition used for the Oklahoma offense is similar to the definition of joyriding. Tenn. Code Ann. § 55-5-104(a) (1988). According to the conversion chart at Tennessee Code Annotated section 40-35-119, this crime converts to a Class E felony. Therefore, the Defendant has two convictions in the next two lower classes which supports a sentence as a Range II offender as opposed to a Range I offender.

The 1991 Texas conviction is also for the unauthorized use of an automobile. Because this Texas felony is not a named felony in Tennessee, we must compare the elements of the Texas statute to Tennessee law. "In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used by the Tennessee court to determine what classification the offense is given." Tenn. Code Ann. § 40-35-106(b)(5)

According to the Texas statute, the unauthorized use of a vehicle is committed if a person, "intentionally or knowingly operates another's boat, airplane, or motor-propelled vehicle without the effective consent of the owner." Texas Penal Code Ann. § 31.07(a) (1994). This crime is a felony in the state of Texas. Texas Penal Code Ann. § 31.07(b) (1994). This definition lacks the

element of intent to deprive the owner of the property. In the misdemeanor crime of unauthorized use of an automobile in Tennessee, there is likewise a lack of such intent. For this reason, we conclude that the Defendant's Texas conviction cannot be relied upon to classify the Defendant as a Range II multiple offender.

The Defendant has two prior convictions within the next two lower felony classes. The judgment of the trial court in sentencing the Defendant as a Range II multiple offender is affirmed.

This issue is without merit.

II.

The second issue is whether the trial court erred in ordering the Defendant's sentences to be served consecutively. The trial court ordered the Tennessee sentences to be served consecutively to the Texas sentence from which the Defendant was on parole, and the Defendant does not argue that this was error. Although not clear, it appears that the trial court may have ordered the Tennessee sentences to be served consecutively to each other because the Defendant was on parole from his conviction in Texas when he committed the crimes he was convicted of in the case sub judice. If so, we believe this was error.

Our sentencing statutes set forth the criteria under which a trial court may order sentences for multiple convictions to be served consecutively. Tenn. Code Ann. § 40-35-115. The criteria that could possibly apply to the Defendant are,

"(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;" and "(2) The defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(1) & (2).

The Defendant has the previous convictions in Oklahoma and Texas. He does not have a prior record in Tennessee. He had a job for the four months prior to his sentencing report and worked part-time for the same business for a year before that. He also worked for his mother, although there is no time frame given for that work. With his limited previous record we cannot conclude that he meets either of the criteria. At the time of the Defendant's sentencing, he had several pending charges, but these charges cannot be relied upon to impose a consecutive sentence.

Therefore, we conclude that the Defendant should not have been sentenced to consecutive terms for his two Tennessee convictions. We conclude that the sentences in the case sub judice shall be served concurrently with each other.

The judgment of the trial court is affirmed in part and reversed in part. This case is remanded to the trial court for entry of an order consistent with this opinion.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

_____
JOSEPH M. TIPTON, JUDGE