

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1996 SESSION

<p><b>FILED</b></p> <p><b>September 19, 1996</b></p> <p><b>Cecil W. Crowson</b> <b>Appellate Court Clerk</b></p>
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STATE OF TENNESSEE, )  
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 APPELLEE, )  
 )  
 v. )  
 )  
 TIMOTHY R. POWELL, )  
 )  
 APPELLANT. )

No. 01-C-01-9508-CR-00276  
 Davidson County  
 James R. Everett, Jr., Judge  
 (Sentencing)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

Joe B. Jones, Presiding Judge

## OPINION

The appellant, Timothy R. Powell, was found guilty of vehicular homicide by intoxication, a Class C felony, and reckless endangerment, a Class E felony, by a jury of his peers. The trial court, finding that the appellant was a standard offender, imposed a Range I sentence consisting of confinement for six (6) years in the Department of Correction for vehicular homicide and confinement for two (2) years in the Department of Correction for reckless endangerment. The two sentences are to be served consecutively. The effective sentence imposed is eight (8) years. In this Court, the appellant contends that the trial court committed error of prejudicial dimensions by ordering the two sentences to be served consecutively. After a thorough review of the record, the briefs submitted by the parties, and the law that controls the issue presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

On November 6, 1993, at approximately 2:30 a.m., Mindi Adams was travelling east on Interstate 40 east of Nashville. She reached a speed of 80 mph. Ms. Adams noticed a vehicle that was also travelling eastbound, but the vehicle was in the westbound lanes. The vehicle passed Ms. Adams as if she were sitting still. She saw the vehicle collide with a vehicle being driven by Lynette Reed, who was travelling west in the westbound lanes. Ms. Reed expired at the scene of the crash. The cause of her death was multiple injuries sustained as a result of the impact between the two vehicles.

The ensuing investigation revealed the appellant was driving the vehicle that collided with the Reed vehicle. The right front of the appellant's vehicle struck the right front of the Reed vehicle. The appellant's vehicle maintained contact with the Reed vehicle along the passenger side of her vehicle. Both vehicles were destroyed beyond recognition. It is evident from viewing the photographs that one of the vehicles was travelling at an excessive rate of speed.

There was a strong odor of an intoxicating beverage inside the appellant's vehicle. When an officer was near the appellant at the hospital, he detected a strong odor of an intoxicating beverage on the appellant's breath. A blood alcohol analysis of the appellant's blood sample revealed an ethyl alcohol content of .24%.

The appellant was 35 years of age when he was sentenced. He was arrested twice in Nashville, once in South Carolina, and once in North Carolina for driving while under the influence. He admitted that he was guilty of all four offenses. He also had convictions for simple possession of marijuana and shoplifting. He admitted that he began driving while under the influence when he was 18 years of age, and that he had been engaged in this conduct for "a long time." The evidence revealed that he has driven a vehicle while under the influence approximately 100 times during his life. He has driven a vehicle after the consumption of a case of beer.

The alcohol addiction caused the appellant to engage in barroom brawls. On one occasion he stabbed a man. He denied starting the brawls. He stated he had the type of face that caused people to "pick on" him.

Alcohol was not the appellant's only addiction. He candidly testified he had been "drinking and drugging" for approximately twenty-one years. When asked what drug or drugs he had used, the appellant stated he had used "just about everything." When he was released from the hospital after treatment of the injuries sustained in the collision, he quit drinking alcoholic beverages. However, he became addicted to cocaine. His addiction escalated to \$200 worth of cocaine per day. He admitted he ingested cocaine in his home, and he drove while under the influence of cocaine "very few times."

The appellant refused to talk to the presentence officer on two separate occasions. He testified he did not know who the presentence officer was and told the officer to contact his attorney. As a result, there is very little personal information contained in the report.

The trial court found that the appellant was a professional criminal,<sup>1</sup> his record of criminal activity was extensive,<sup>2</sup> and he was a dangerous offender.<sup>3</sup> The evidence contained in the record does not support the trial court's finding that the appellant was a professional criminal. However, the record is replete with evidence that the appellant has a record of extensive criminal activity and he is a dangerous offender.

When an accused challenges the manner in which he is required to serve

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<sup>1</sup>Tenn. Code Ann. § 40-35-115(b)(1).

<sup>2</sup>Tenn. Code Ann. § 40-35-115(b)(2).

<sup>3</sup>Tenn. Code Ann. § 40-35-114(b)(4).

sentences, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct."<sup>4</sup> 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."<sup>5</sup> The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts.<sup>6</sup> However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and vocal inflection.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or 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 or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment.<sup>7</sup>

The party challenging the sentences imposed by the trial court has the burden of establishing that the sentences imposed by the trial court were erroneous.<sup>8</sup> In this case, the appellant has the burden of establishing that the consecutive sentences were erroneous in the context of this case.

The appellant's consumption of illicit narcotics, his prior convictions, and his admission that he has driven a motor vehicle under the influence of an intoxicant on approximately 100 occasions, under the influence of cocaine on a few occasions, are sufficient to justify consecutive sentencing. In short, the appellant's "record of criminal

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<sup>4</sup>Tenn. Code Ann. § 40-35-401(d).

<sup>5</sup>State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

<sup>6</sup>State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993).

<sup>7</sup>See Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

<sup>8</sup>Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

activity is extensive."<sup>9</sup>

The record also establishes that the appellant is "a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high."<sup>10</sup> This case is controlled by the Supreme Court's decision in State v. Wilkerson.<sup>11</sup>

In Wilkerson, the appellant drove his motor vehicle "in the wrong direction on a heavily travelled divided highway while intoxicated."<sup>12</sup> A collision ensued and a person was killed. The appellant was convicted of two counts of vehicular homicide. In finding that Wilkerson was a dangerous offender within the meaning of the statute, the Supreme Court said:

The defendant's conduct in this case demonstrated an indifference to the high probability of calamitous consequences to himself and the motorists whom he was certain to encounter as he drove in the wrong direction on a heavily travelled divided highway while intoxicated. He created a high risk of death or serious bodily injury to every motorist on that road. Death or serious bodily injury was almost inevitable. His conduct clearly satisfies the condition stated in Tenn. Code Ann. § 40-35-115(b)(4) and defines the defendant as a dangerous offender.<sup>13</sup>

This Court finds that consecutive sentencing is warranted to protect the public from the appellant's future criminal conduct. It is obvious the appellant has no respect for the law or his fellow man. He has driven a vehicle while under the influence of alcohol and illicit narcotics with impunity. He never sought assistance for his addiction. If the appellant is released, there is every indication that he will revert to drinking alcoholic beverages, ingesting illicit narcotics, and operating a motor vehicle while under the influence of either alcohol or drugs. This conduct may result in the loss of another innocent life or an entire family.

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<sup>9</sup>Tenn. Code Ann. § 40-35-115(b)(2).

<sup>10</sup>Tenn. Code Ann. § 40-35-115(b)(4).

<sup>11</sup>905 S.W.2d 933 (Tenn. 1995).

<sup>12</sup>Wilkerson, 905 S.W.2d at 937.

<sup>13</sup>905 S.W.2d at 937-38.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID G. HAYES, JUDGE