IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1996

FILED

August 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
Appellee,)
VS.)
JOHN DAVID RANKIN, Jr.,)
Appellant.)

C.C.A. NO. 03C01-9511-CC-00369

SULLIVAN COUNTY

HON. ARDEN L. HILL
JUDGE

(Failure to Appear)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SULLIVAN COUNTY

FOR THE APPELLANT:

LAURA RULE HENDRICKS
Contract Attorney for the
District Public Defender's Office
for the 2nd Judicial District
810 Henley Street
Knoxville, TN 37902

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

TIMOTHY F. BEHAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

GREELEY WELLS
District Attorney General

EDWARD WILSON
Assistant District Attorney General
Blountville, TN 37617

OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Sullivan County Criminal Court jury convicted Appellant John David Rankin, Jr. of failure to appear at the Sullivan County jail on December 15, 1993, to serve sentences imposed for two theft convictions. As a Range II offender, Appellant received the minimum sentence of two years. The trial court ordered the sentence served consecutive to the sentences for theft. In this appeal, Appellant presents the following issues for review: (1) whether the evidence presented at trial is legally sufficient to sustain a conviction for failure to appear; (2) whether the trial court erred in refusing to allow Appellant to testify as to statements made by his attorney; (3) whether the trial court erred in conducting the sentencing hearing almost five months after conviction; and (4) whether the trial court erred in ordering the sentence served consecutive to the sentences for theft.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

On May 20, 1993, a jury convicted Appellant of theft of over $500 but less than $1,000. On July 19, 1993, another jury convicted Appellant of theft of over $10,000 but less than $60,000.[1] As a Range I standard offender, Appellant received concurrent sentences of one year for the first conviction and five years for the second conviction. The trial court suspended the sentences in favor of a

---

[1] On direct appeal, this Court modified Appellant's second theft conviction to theft of over $1,000 but less than $10,000 and remanded the case for proper sentencing. See Rankin v. State, No. 03C01-9408-CR-00300, 1995 WL 357816 (Tenn. Crim. App. June 15, 1995).

six-year period of probation. As a condition of the probation, the trial court ordered Appellant to serve six months in the Sullivan County jail. The period of confinement was to begin on December 15, 1993. According to Appellant, the reporting date was set for December 15 so that he could complete his fall semester at East Tennessee State University. However, as Appellant later learned, the fall semester exam schedule ran through December 17. On the appointed date of December 15, Appellant failed to report to the Sullivan County jail. In May of 1994, Appellant was arrested and charged with failure to appear in violation of Tennessee Code Annotated § 39-16-609. On June 13, Appellant's probation for the theft convictions was revoked, and he began serving his sentences for these convictions.

At his trial for failure to appear, Appellant maintained that he had relied on the assurances of his attorney J.D. Hickman that his reporting date would be changed. He argued that this reliance constituted a reasonable excuse for his failure to appear. In an effort to bolster his reasonable-excuse defense, Appellant attempted to show his state of mind by testifying as to exactly what his attorney had told him regarding the reporting date. However, the trial court sustained the State's objections that any statements made by Appellant's attorney were inadmissible hearsay. On January 3, 1995, the jury convicted Appellant of failure to appear.

At the conclusion of trial, the trial court set the sentencing hearing for May 5. Appellant filed a motion for a sentencing hearing date that complied with Tennessee Code Annotated § 40-35-209(a) which requires a sentencing hearing within forty-five days of conviction. Despite Appellant's motion, the sentencing

hearing was not actually held until May 30, 1995, almost five months after conviction. At the conclusion of the sentencing hearing, Appellant received a sentence of two years, to be served consecutive to his sentences for theft.

II. SUFFICIENCY OF THE EVIDENCE

Appellant first alleges that the evidence presented at trial is legally insufficient to sustain his conviction for failure to appear. When an appeal challenges the sufficiency of the evidence, the standard of review is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318 (1979); State v. Evans, 838 S.W.2d 185, 190-91 (Tenn. 1992), cert. denied, 114 S. Ct. 740 (1994); Tenn. R. App. P. 13(e). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). This Court will not reweigh the evidence, reevaluate the evidence, or substitute its evidentiary inferences for those reached by the jury. State v. Carey, 914 S.W.2d 93, 95 (Tenn. Crim. App. 1995). Furthermore, in a criminal trial, great weight is given to the result reached by the jury. State v. Johnson, 910 S.W.2d 897, 899 (Tenn. Crim. App. 1995).

Once approved by the trial court, a jury verdict accredits the witnesses presented by the State and resolves all conflicts in favor of the State. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984). The credibility of witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted exclusively to the jury

as trier of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). A jury's guilty verdict removes the presumption of innocence enjoyed by the defendant at trial and raises a presumption of guilt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The defendant then bears the burden of overcoming this presumption of guilt on appeal. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991).

In order to sustain a conviction for failure to appear in this case, the State had to prove beyond a reasonable doubt that Appellant knowingly failed to appear at the Sullivan County jail on December 15, 1993, as ordered by the Sullivan County Criminal Court. See Tenn. Code Ann. § 39-16-609(a)(2) (1990). Rather than alleging that the State failed to establish a specific element of the offense, Appellant argues that his reliance on the representations of his attorney regarding an extension of the reporting date constitutes both a reasonable excuse for his failure to appear and a defense to prosecution. See id. § 39-16-609(b)(2). At trial, Appellant testified that, at some point after the trial court assigned his reporting date, he realized that his fall semester exam schedule did not conclude until December 17. He further testified that, as a result of this conflict, he retained attorney J.D. Hickman to obtain an extension of his reporting date so that he could complete his exams. Appellant maintains that his failure to appear was due to the assurances of his attorney that the reporting date could be changed, testifying as follows: "Mr. Hickman told me not to worry about [an extension of the reporting date], he would take care of it. He said it would be no problem getting ninety days on it while he took over as my new attorney of record." Despite these alleged assurances, Appellant conceded that no one ever specifically told him that an extension had actually been granted or that he was

no longer required to report on December 15. He further conceded that he made no effort to contact anyone in order to determine the status of his reporting date.

Hickman testified that he was retained by Appellant to perfect an appeal of the theft convictions not to obtain an extension of the reporting date. Nevertheless, in response to his request, Hickman assured Appellant that, if he could obtain an extension, he would contact him to tell him so. Hickman testified that, although unsuccessful, he did discuss the possibility of changing the reporting date with the trial judge. He denied that he ever told Appellant “not to worry” about the extension, testifying instead that he told Appellant that an extension was “highly unlikely.” According to Hickman, Appellant never contacted him to inquire about his reporting date, and he never contacted Appellant to tell him that the reporting date had been extended.

The reasonableness of Appellant’s excuse for his failure to appear is a factual question to be decided by the jury based upon the testimony of both Appellant and his attorney. As stated previously, determining the credibility of witnesses and resolving conflicts in the proof are matters entrusted exclusively to the jury as trier of fact. Sheffield, 676 S.W.2d at 547. This Court may not substitute its evidentiary inferences for those drawn by the jury, even if it wished to do so. Carey, 914 S.W.2d at 95. In light of the guilty verdict returned against Appellant, it appears that the jury attributed greater credibility to the attorney’s testimony regarding an extension of the reporting date than to Appellant’s testimony on this point. Thus, we find that, when viewed in a light most favorable to the State, the evidence is legally sufficient to sustain Appellant’s conviction for failure to appear.

III. EVIDENCE OF STATEMENTS MADE BY APPELLANT'S ATTORNEY

Appellant next alleges that the trial court should have allowed him to testify as to the representations of his attorney regarding his reporting date. He argues that this testimony was not inadmissible hearsay because it was not being offered for the proof of the matter asserted. Instead, he contends that the testimony was being offered for proof of its effect on the hearer.[2]

According to the Tennessee Rules of Evidence, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Hearsay evidence is generally inadmissible. Id. 802. However, extrajudicial statements offered not to prove the truth of the matter asserted but to prove the effect on the hearer constitute nonhearsay evidence and are admissible. State v. Venable, 606 S.W.2d 298, 301 (Tenn. Crim. App. 1980).

Here, the testimony was offered not to prove the truth of the attorney's statements but to prove the effect that the statements had on Appellant as the hearer. Such testimony constitutes nonhearsay evidence and is admissible. See State v. Bailey, No. 01-C01-9101-CR-00010, 1992 WL 62018, at *4 (Tenn. Crim. App. Mar. 31, 1992) (citing Neil P. Cohen et al., Tennessee Law of Evidence §

---

[2] It should be noted that Appellant failed to make this argument at the hearing on the motion for a new trial. Instead, he argued that the statements of the attorney were admissible under the state of mind exception to the hearsay rule. See Tenn. R. Evid. 803(3). This exception permits the introduction of statements of the declarant's then existing state of mind. However, only the state of mind of the declarant is provable by this hearsay exception. See id. advisory commission comments. Appellant was attempting to show his own state of mind by introducing statements of his attorney. Clearly, this is an improper use of the state of mind exception, and the trial court was correct in dismissing such an argument.

801.6 (2d ed. 1990)). Thus, we conclude that the trial court's exclusion of Appellant's testimony regarding the representations of his attorney was error.

Upon a finding of error, this Court must reverse the conviction only if the error appears to have affected the outcome of the trial. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). Appellant argues that he was prejudiced by the trial court's hearsay ruling because he was not allowed to present to the jury what his attorney told him regarding an extension of his reporting date, a critical element in establishing his reasonable-excuse defense. However, it appears from a review of the record that Appellant was able to adequately present this defense to the jury. During his direct examination, Appellant testified that he relied on the representations of his attorney in deciding that he was no longer required to appear on December 15. Irrespective of what was actually said by his attorney, this testimony satisfactorily presented the nature and substance of Appellant's defense to the jury. Furthermore, during his cross examination, Appellant testified as follows: "Mr. Hickman told me not to worry about [an extension of the reporting date], he would take care of it. He said it would be no problem getting ninety days on it while he took over as my new attorney of record." Appellant was also afforded the opportunity to cross examine his attorney during the State's rebuttal proof. The attorney, during both direct and cross examination, addressed the issue of extending the reporting date. He testified that he never told Appellant that an extension had been or would be granted. He further testified that he never told Appellant not to appear on the appointed date of December 15.

The record shows that, in spite of the improper hearsay ruling, the nature and substance of Appellant's defense was adequately presented to the jury. Considering the record as a whole, we are of the opinion that the outcome of the trial was not affected by this erroneous evidentiary ruling. Thus, we conclude that the error was harmless beyond a reasonable doubt.

IV. TIMELINESS OF THE SENTENCING HEARING

Appellant also alleges that the trial court erred in conducting the sentencing hearing almost five months after conviction. Upon a verdict of guilt, the trial court "shall conduct a sentencing hearing without unreasonable delay, but in no event more than forty-five (45) days after the finding of guilt . . . ." Tenn. Code Ann. 40-35-209(a). Appellant was found guilty of failure to appear on January 3, 1995. The trial court conducted his sentencing hearing on May 30, 1995. The length of time between conviction and the sentencing hearing was well in excess of the statutorily-mandated forty-five days. At the hearing on the motion for a new trial, the trial court found that the delay was error but concluded that, because Appellant was not prejudiced in any way, the error was harmless.

We first recognize that, according to State v. Jones, 729 S.W.2d 683 (Tenn. Crim. App. 1986), the statutory time constraints placed upon a sentencing hearing are directory not mandatory. Id. at 685. However, in Jones, the delay was extremely minor. Given the excessiveness of the delay in this case, we agree with Appellant and the trial court that the failure to conduct a sentencing hearing in a timely fashion was error. We must now determine whether this error requires reversal.

Appellant argues that the trial court's failure to conduct a sentencing hearing in a timely fashion delayed his qualification for certain programs that would have reduced his length of incarceration. However, Appellant would not have received credit toward the reduction of his failure to appear sentence until he had actually begun serving that sentence. The record reveals that, during the five-month period between his conviction and his sentencing, Appellant was serving his sentence for theft, not his sentence for failure to appear. Therefore, because the sentences were consecutive and Appellant had not yet completed his sentence for theft, the error in sentencing did not delay his opportunity to receive credit toward the reduction of his incarceration period. Any credit toward the reduction of his failure to appear sentence begins accruing when Appellant actually begins serving that sentence, irrespective of the date of the sentencing hearing. Furthermore, while Appellant makes reference to certain Sullivan County jail programs that would have reduced his length of incarceration, the record is devoid of any offer of proof to substantiate these claims. We cannot take judicial notice of the existence of programs at the Sullivan County jail, nor of Appellant's alleged eligibility for them had he received a sentence within forty-five days of his conviction.

Appellant has failed to make a sufficient showing of prejudice resulting from the delayed sentence hearing. Thus, considering the record as a whole, we conclude that the error was harmless and does not require reversal. See Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). However, trial courts should note that, in cases wherein actual prejudice is demonstrated from a failure to comply with the forty-five day deadline for sentencing hearings pursuant to Tennessee Code Annotated § 40-35-209(a), reversal may be required.

V. SENTENCING

Finally, Appellant alleges that the trial court erred in ordering his sentence served consecutive to his sentences for theft. When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, the presumption of correctness is "conditioned upon the 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 the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant's sentence will be de novo with a

presumption of correctness. As a Range II multiple offender convicted of failure to appear, a Class E felony, Appellant received the minimum statutory sentence of two years. See Tenn. Code Ann § 40-35-112(b)(5).

When imposing a sentence for failure to appear, a trial court may order a consecutive sentence. Tenn. Code Ann. § 39-16-609(f); see also State v. Davidson, No. 03C01-9309-CR-00312, 1994 WL 615745, at *1 (Tenn. Crim. App. Nov. 7, 1994). Furthermore, when imposing a sentence for any offense committed during a probationary period, a trial court may order a consecutive sentence. Tenn. Code Ann. § 40-35-115(6); see also State v. McGuire, No. 01C01-9309-CC-00300, 1994 WL 179775, at *3 (Tenn. Crim. App. May 12, 1994). Thus, upon a conviction for failure to appear, it is left to the discretion of the trial court whether to impose a consecutive sentence or a concurrent sentence.

Here, the trial court determined that the sentence should run consecutively because Appellant committed the offense while enjoying the court's largess of being allowed to complete a semester of college. At the hearing on the motion for a new trial, the trial court noted that to impose the sentence concurrently would result in no punishment at all, creating a poor public policy with regard to court-ordered appearances for sentence service. In light of the trial court's reasoning and the aforementioned specific statutory authorization, we conclude that the trial court did not abuse its discretion by ordering a consecutive sentence.

Accordingly, the judgment of the trial court is affirmed.

____
JERRY L. SMITH, JUDGE

CONCUR:

____
JOHN H. PEAY, JUDGE

____
JOHN K. BYERS, SPECIAL JUDGE