IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
APRIL SESSION, 1996

FILED

August 1, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9507-CC-00229
Appellee	)	
	)	WILLIAMSON COUNTY
vs.	)	
	)	Hon. Henry Denmark Bell, Judge
BILLY RAY SMITHSON,	)	
	)	(Theft of Property Over $500;
Appellant	)	Theft of Property Over $1000; 2 Counts Failure to Appear, Class E felonies)

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OPINION FILED: _____

REVERSED AND REMANDED FOR RESENTENCING

David G. Hayes
Judge

OPINION

The appellant, Billy Ray Smithson, appeals as of right from sentences imposed by the Criminal Court of Williamson County. Pursuant to a plea agreement, the appellant pled guilty to one count of theft of property over $500, a class E felony; one count of theft of property over $1000, a class D felony; and two counts of failure to appear, class E felonies.[1] The trial court effectively sentenced the appellant, as a range II multiple offender, to twelve years incarceration in the Department of Correction. The appellant now appeals the trial court's sentencing decisions, contending that the court's sentence for each offense was excessive and that the court erred in imposing consecutive sentences. For the reasons cited herein, we remand this case for resentencing.

BACKGROUND

The appellant's convictions arose from multi-count indictments and presentments which were returned during three separate terms of the Williamson County Grand Jury.

On March 27, 1995, a consolidated sentencing hearing was held on the

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[1]These convictions resulted from the following charges:

(1) Presentment # II-794-185, returned July 11, 1994, charging the appellant, in count three, with theft over $500 by exercising control.

(2) Presentment # II-1294-356, returned December 12, 1994, charging the appellant, in count two, with theft over $1000 by exercising control.

(3) Presentment # II-1294-357, returned December 12, 1994, charging the appellant, in count one, with failure to appear in case II-694-158 (see *infra* note 2) and, in count two, with failure to appear in case II-794-185.

The convictions were consolidated for sentencing purposes and are the focus of this appeal.

four cases (#II-794-185, II-1294-356, II-1294-357, II-694-158).[2] The proof at the sentencing hearing consisted of the testimony of the appellant and the pre-sentence report. The appellant is thirty-six years old and obtained his GED while previously incarcerated in the Department of Correction, Turney Center. He admits to an extensive history of drug abuse, including the illegal use of Dilaudid and marijuana. Prior to his arrest, he was employed by his brother as a brick mason. The appellant has a lengthy criminal history dating back to 1977.[3] This history includes five prior felony convictions and seven prior misdemeanor convictions. The appellant's felony convictions involve the sale of marijuana and conspiracy to sell marijuana. His misdemeanor convictions are primarily alcohol related. The appellant admits that he was on probation resulting from felony drug convictions when he was arrested on the charge of theft of property over $500.[4] The appellant also admits and the record reflects that he was on bail for the theft of property offense over $500 when he committed the offense of theft of

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[2]Indictment # II-694-158, returned on June 13, 1994, charged the appellant with four offenses, but resulted in two misdemeanor convictions (driving on a revoked license and simple possession of marijuana), following a bench trial. The trial court acquitted the appellant of the charges of possession of a controlled substance in a county jail and introduction of a controlled substance into a county jail. At the sentencing hearing, the trial court imposed a six month sentence for each conviction. The appellant does not appeal those sentences.

[3]In addition to a prior criminal history, the record indicates that, at the time of the sentencing hearing, the appellant had a pending burglary charge in Williamson County, a pending shoplifting charge in Davidson County, and a pending theft charge in Hamilton County.

[4]On March 1, 1993, in case # 1292-342-A, the appellant received four concurrent sentences for felony drug convictions resulting in a jail term followed by a two year period of supervised probation. The record reflects that the driving on a revoked license and simple possession offenses occurred on "November 1, 1993;" the theft over $500 offense occurred in "January-February-March 1994;" the theft over $1000 offense occurred in "October-November 1994;" and the two failure to appear offenses occurred on "November 9, 1994." The record is not dispositive as to whether the appellant remained on supervised probation during the period November 1993 through November 1994. The pre-sentence report indicates that probation was revoked on September 14, 1994; the autolog (videotape log) indicates that probation was revoked on February 27, 1995. Neither of these proceedings were included in the record.

property over $1000 and the two offenses of failure to appear.[5]

At the consolidated sentencing hearing, the trial court relied upon three enhancement factors in determining the length of the sentence for each of the appellant's four convictions:

> (1) The defendant 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);
>
> (2) The felonies were committed while on any of the following forms of release status if such release is from a prior felony conviction:
>
> > (A) Bail, if the defendant is ultimately convicted of such prior felony. Tenn. Code Ann. § 40-35-114(13)(A); or
> >
> > (C) Probation. Tenn. Code Ann. § 40-35-114(13)(C); and
>
> (3) The offense involved more than one (1) victim. (Tenn. Code Ann. § 40-35-114(3).[6]

At the conclusion of the sentencing hearing, the trial court imposed the following sentences:

> (1) Presentment No. II -794-185, count 3, theft of property over $500 - sentence: 4 years, range II.
>
> (2) Presentment No. II -1294-356, count 2, theft of property over $1000 - sentence: 6 years, range II.
>
> (3) Presentment No. II -1294-357, count 1, failure to appear, class E felony - sentence 3 years, range II; count 2, failure to appear, class E felony - sentence: 3 years, range II.

Following a determination of the length and range of the sentences, the trial court ordered that the sentences imposed under counts one and two in case No. II-1294-357 run consecutively and that these sentences be served consecutively

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[5]The record indicates that the appellant was released on bail on July 5, 1994, following his indictment for this offense in June, 1994.

[6]The State concedes that the trial court erred in applying this enhancing factor.

to the six year sentence imposed in No. II-1294-356, resulting in an effective twelve year sentence.[7] The trial court also ordered that the four year sentence imposed in case No. II-794-185 be served concurrently with the effective twelve year sentence. No explanation was offered by the trial court in imposing consecutive sentences.

ANALYSIS

The appellant argues that his sentences are excessive and that the trial court erroneously imposed consecutive sentences.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d)(1990). 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). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement

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[7]We note that the judgments of conviction are inconsistent with an effective twelve year sentence. The judgment in case # 11-1294-356 directs that the six year sentence imposed in that case run consecutively to "all other cases." This results in an effective sentence of sixteen years. Thus, this sentence does not correspond to the twelve year sentence presented in the record. Upon remand, the judgment must reflect the correct sentence.

factors; (6) any statements made by the defendant on his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103(5), and -210(b) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citing Ashby, 923 S.W.2d at 168).

A. Length of Sentences

In calculating the sentence for a felony conviction, the presumptive sentence is the minimum within the range, if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c).[8] If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The record supports the trial court's application of enhancement factor (1), previous criminal convictions beyond those necessary to establish the range, to all four sentences. Tenn. Code Ann. § 40-35-114(1)(1994 Supp.). However, the record only supports application of enhancement factor 13(C), concerning his probationary status, to the appellant's sentence for theft of property over $500 in case No. II-794-185. But see *supra* note 4. Upon *de novo* review, we find that the record does support application of enhancement factor 13(A) to the remaining three convictions, because these felonies were committed while the appellant was on bail for a felony offense, # II-794-185: theft over $500, of which he was convicted. Tenn. Code Ann. § 40-35-114(13)(A).The trial court imposed

[8]The 1995 Tenn. Pub. Acts ch. 493 has amended the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a class A felony the midpoint in the range.

mid-range sentences for the appellant's conviction for theft of property over $1000 and the two convictions for failure to appear. The court imposed the maximum sentence within the range for the offense of theft of property over $500. The court properly relied upon enhancement factors (1), 13(A), and 13(C), finding that the appellant has a previous history of criminal convictions and that the resulting convictions occurred while the appellant was on bail or probation.

Clearly, the appellant's criminal history is long-standing and extensive, and, in our opinion, is entitled to substantial weight. The weight to be attributed to each factor is determined based on the relevant facts and circumstances of each case. State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986). Accordingly, we conclude that the sentences imposed by the trial court were appropriate. This issue is without merit.

B. Consecutive Sentencing

The appellant next contends that the imposition of consecutive sentences was improper. Specifically, the appellant contends that "his effective sentence of twelve years in these four consolidated cases is too severe and should be modified downward." The State, on the other hand, contends that the issue of consecutive sentences in the cases before us is controlled by the mandatory consecutive sentencing provisions of Rule 32(c)(3), Tenn. R. Crim. P., Tenn. Code Ann. § 40-20-111(b)(1990), and this court's ruling in State v. Fox, No. 01C01-9402-CC-00050 (Tenn. Crim. App. at Nashville, May 18, 1995). We agree. Rule 32(c)(3) of the Tennessee Rules of Criminal Procedure provides in relevant part as follows:

> Where a defendant is convicted of multiple offenses from one trial or where the defendant has additional sentences not yet fully served as the result of the convictions in the same or other court and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply: (c) To a sentence for a felony where the defendant

> was released on bail and the defendant is convicted of both offenses.

In State v. Fox, No. 01C01-9402-CC-0005, this court held: "When an accused has been released on bail after being charged with the commission of a criminal offense, the trial court is required to order consecutive sentencing for that offense and all felony offenses that were committed following his release, if the accused was subsequently convicted of the offenses." See also Tenn. Code Ann. § 40-20-111(b).

In this case, the appellant was on bail for the offense of theft of property over $500 (No. II-794-185) when he committed the offense of theft over $1000 (No. II-1294-356) and the two offenses of failure to appear (No. II-1294-357). All four charges resulted in felony convictions. Therefore, the four year sentence for theft over $500 must be served consecutively to the appellant's sentence for theft over $1000, for an aggregate sentence of ten years and consecutively to each of the three year sentences imposed for failure to appear, for aggregate sentences of six years. The State contends, however, that Rule 32(c)(3), Tenn. R. Crim. P., requires that all four sentences in this case be served consecutively for an effective sentence of sixteen years. Our interpretation of the statute or the rules does not lead us to this result. In a similar factual scenario a panel of this court recently held:

> We agree that the sentences in the post-bail cases must be run consecutively with the sentences in the pre-bail cases. However, we find no defining requirement that all of the post-bail felonies must be served consecutively to each other. We conclude the judge may, with appropriate reason, run all of the pre-bail and post-bail sentences consecutively. . . . Neither do we find the trial court must run all of the sentences for the post-bail offenses consecutively to each other. The trial judge may run each of these sentences concurrently. The trial judge must, however, in accordance with the cited statute, rule, and case run the sentences imposed in post-bail cases -- be they fixed to be served concurrently or consecutively to each other -- consecutively to the sentences imposed in pre-bail cases.

State v. Foster, No. 03C01-9510-CC-00337 (Tenn. Crim. App. at Knoxville, June 27, 1996).

In the consolidated cases before us, the trial court failed to recite any reason for its imposition of consecutive sentences.[9] Because the sentences in the post-bail cases do not mandate imposition of consecutive sentences and in view of the trial court's failure to run the post-bail sentences consecutive to the pre-bail sentence, we must remand this case for resentencing.[10]

Upon remand, the trial court is instructed to review, in its determination of consecutive sentencing, where not mandated, the statutory provisions of Tenn. Code Ann. § 40-35-111(b), § 40-35-115, and the principles announced in State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). Before imposing the effective sentence, the trial court must determine if the aggregate sentence imposed reasonably relates to the severity of the offenses committed, is necessary to protect the public from further criminal conduct by the appellant, and is consistent with the sentencing principles set forth in the Sentencing Act. Wilkerson, 905 S.W.2d at 938-939.

For the reasons stated above, we reverse and remand the four cases to the trial court for resentencing consistent with this opinion.

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DAVID G. HAYES, Judge

[9]"If the court orders that the sentences be served consecutively or concurrently, the order shall specifically recite the reasons for such ruling and such judgment is reviewable on appeal." Tenn. R. Crim. P. 32(c)(1).

[10]Under similar factual circumstances, our supreme court held: "As a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final." State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978).

CONCUR:

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JOE B. JONES, Presiding Judge

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JOHN H. PEAY, Judge