IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 02-C-01-9409-CR-00208
APPELLEE,	)	
	)	Shelby County
v.	)	
	)	Joseph B. Dailey, Judge
CEDRIC E. STAMPLEY,	)	
	)	(Attempt to Commit First Degree Murder)
APPELLANT.	)	

FOR THE APPELLANT:

Cedric E. Stampley, pro se
#93293151/4-E
201 Poplar Avenue
Memphis, TN 38103

Samuel Perkins
22 North Second Street
Memphis, TN 38103
(Elbow Counsel)

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Ellen H. Pollack
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

John W. Pierotti
District Attorney General
201 Poplar Avenue, Suite 301
Memphis, TN 38103-1947

James C. Beasley, Jr.
Assistant District Attorney General
201 Poplar Avenue, Suite 301
Memphis, TN 38103-1947

OPINION FILED: _____

AFFIRMED

JOE B. JONES, Presiding Judge

O P I N I O N

The appellant, Cedric E. Stampley, was convicted of an attempt to commit murder in the first degree, a Class A felony, by a jury of his peers. The trial court found that the appellant was a standard offender and imposed a Range I sentence consisting of confinement for twenty-three (23) years in the Department of Correction. Six issues are presented for review. The appellant contends that the trial court committed error of prejudicial dimensions by (1) denying his motion for transcripts of the pretrial hearings and daily transcripts during the two-day trial, (2) denying him access to the courts by restricting his telephone privileges, (3) admitting the victim's pretrial identification when the photographs shown to the victim were suggestive and prejudicial, (4) denying his right to confront his accusers, (5) imposing an excessive sentence, and (6) denying his motion for arrest of judgment post-trial. After a thorough review of the record, the briefs of the parties, and the authorities which govern the issues, it is the opinion of this Court that the judgment of the trial court should be affirmed.

The appellant does not challenge the sufficiency of the convicting evidence. However, a succinct statement of the evidence is essential to an understanding of the issues presented for review.

The victim, Lonzo Nicks, a security guard, worked at an apartment complex in Memphis, Tennessee. His duties required that he man a guard station at the entrance to the apartment complex.

On the evening of October 13, 1993, James Richardson, a Memphis police officer, was investigating drug activity in the apartment complex. Officer Richardson advised Nicks that he should be wary of a group of individuals who had gathered near a fence surrounding the apartment complex. Nicks later described the clothing worn by one of the individuals in the group. The appellant was wearing the clothing described by Nicks.

Shortly after Officer Richardson left, a group of teenage girls walked past the guard station, stating: "We're going to kill us a security guard tonight because he don't know how to stay out of our business." When the group walked past the guard station a second time, they simply laughed.

The appellant was a passenger in a motor vehicle that left the apartment complex. The vehicle stopped at the guard station. The vehicle then exited, turned around after

traveling a short distance, and returned to the apartment complex. A passenger in the vehicle pretended that his hand was a gun, pointed his finger at Nicks, and pretended to shoot him. The occupants of the vehicle exited and congregated at the fence.

The appellant subsequently walked across the street, got into a motor vehicle, and rode a short distance before the vehicle stopped. The appellant walked back towards the guard station. When he was approximately ten feet from the guard station, he asked Nicks: "How are you doing?" Nicks responded: "Fine, and yourself?" The appellant responded: "No, you ain't doing so damn good. You just died." The appellant then opened fire with a gun. He shot Nicks seven times. The hand Nicks used to shield his face was struck by three projectiles fired from the weapon. His legs were also struck by three projectiles. The seventh projectile struck Nicks in the abdomen. The appellant began whistling as he turned and walked away from the guard station. As Nicks struggled across the street to obtain help, he heard a female telling the group gathered at the fence that Nicks had not died and someone should finish killing him. The group subsequently dispersed.

A Memphis police officer investigating the shooting showed Nicks several photographs. One of the photographs depicted the appellant. Nicks made a positive identification of the appellant as the perpetrator of the shooting. He also made a courtroom identification of the appellant.

This Court notes that the record does not contain a motion for a new trial. Under ordinary circumstances, issues one through four would be waived. Tenn. R. App. P. 3(e). Included among the pleadings, however, is an order denying a new trial. A portion of the transcript includes the grounds asserted. Thus, this Court will consider these issues on the merits.

I.

The appellant contends that the trial court committed error of prejudicial dimensions by denying his "motion for daily pretrial and trial proceedings transcripts." The motion was filed on September 23, 1994. The appellant argues that a "daily transcript of pretrial and trial proceedings would have been appropriate in aiding [the appellant] in briefing his

motion for a new trial, and preparing his brief." He cites State v. Elliott, 524 S.W.2d 473 (Tenn. 1975).

A.

The record reflects that the hearing on the appellant's pretrial motion to suppress was conducted on the 23rd day of August, 1994. The evidence contained in the transcript consists of twenty-two pages. The victim's testimony consumes ten pages of the transcript. The testimony of Sergeant Ronald R. Rogers, an investigating officer, consumes nine pages of the transcript. Given the length of the transcript, the suppression hearing lasted less than an hour.

The appellant filed the motion for daily transcription approximately one month after the suppression hearing had been completed. Nevertheless, the trial court ordered that the court reporter transcribe the suppression hearing. The appellant was provided with a copy of the transcript, and he used the transcript during the cross-examination of the victim. Therefore, the appellant cannot now complain that the trial court failed to provide him with a daily transcript of the suppression hearing when (1) he did not make a request for a daily transcript until a month after the suppression hearing had been completed, Tenn. R. App. P. 36(a), (2) he was provided with a transcript of the suppression hearing, and (3) he used the transcript in an effort to impeach the victim. The transcript is part of the record transmitted to this Court.

B.

The trial commenced on October 31, 1994, and concluded the next day, November 1, 1994. Jury selection consumed the first day of the trial. The state presented three witnesses, the victim and two police officers. The appellant presented four witnesses, two police officers and two lay witnesses. One of the officers testified as a prosecution witness. The testimony of the witnesses consumes 124 pages of the trial transcript.

When the appellant argued this motion, he did not give a reason why a daily transcription of the proceedings was necessary. He simply stated: "A review of daily

proceedings is essential to permit pro se indigent defendant to adequately prepare his case." The court stated that a daily transcript "is a luxury but not a necessity for the conducting of a fair trial." The court further advised the appellant that he would be supplied with ample paper and pencils to take notes during the trial.

There is no constitutional provision, statute, rule or decision which guarantees an accused the right to daily transcripts. State v. Stephenson, 878 S.W.2d 530, 541 (Tenn. 1994). Therefore, the burden is upon the accused to establish to the satisfaction of the appellate court that such transcripts were necessary to vindicate a legal right. Id. See State v. West, 767 S.W.2d 387, 402 (Tenn. 1989), cert. denied, 497 U.S. 1010, 110 S.Ct. 3254, 111 L.Ed.2d 764 (1990); State v. Elliott, 524 S.W.2d 473, 475-77 (Tenn. 1975). Furthermore, an accused is not entitled, as a matter of right, to a transcript of the proceedings before the hearing on the motion for a new trial. State v. Hill, 598 S.W.2d 815, 821 (Tenn. Crim. App.), per. app. denied (Tenn. 1980).

The appellant has failed to establish that the denial of daily transcripts prevented his right to assert a legal right or prejudiced him. See Stephenson, 878 S.W.2d at 541. The presentation of evidence took less than a day to complete. Assuming arguendo the appellant was entitled to daily transcripts, the trial would have been completed and the jury would have returned its verdict before a court reporter could have prepared the transcript.

This issue is without merit.

II.

The appellant contends that the trial court committed prejudicial error by restricting his telephone privileges. He argues that this denied him his constitutional right of access to the courts because he was not able to contact the clerk's office or witnesses essential to his defense. The only authority cited in support of this issue are the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The appellant was confined to the Shelby County Jail following his arrest. The trial court appointed the Shelby County Public Defender to represent the appellant. The lawyer

assigned to represent the appellant had a staff investigator look into the facts surrounding the allegations contained in the indictment. Subsequently, the appellant moved for and was granted the right to self-representation. The assistant public defender was relegated to elbow counsel. The staff investigator remained available to the appellant. When the appellant wanted research performed by the assistant public defender, the applicable cases were copied and given to the appellant along with a list of the cases that relied upon the cases furnished to the appellant.

The appellant obtained a telephone number that he thought was the victim's number. When the appellant called the number, he reached the victim's sister. The appellant advised the victim's sister that he was the person who shot her brother, her brother was mistaken in his identification of the appellant as the perpetrator, and her brother should consider changing his testimony. On August 25, 1994, the trial court was notified of the telephone call and the statement made by the appellant. The state moved to revoke the appellant's telephone privileges in the jail. On August 26, 1994, the trial court entered an order restricting the appellant's telephone privileges in the Shelby County Jail to the following telephone numbers: the appellant's home, the attorney serving as elbow counsel, and the staff investigator assigned to the appellant's case.

The factual findings made by the trial court, as outlined in the order of August 26, 1994, are binding on this Court unless the evidence contained in the record preponderates against the court's findings. In this case, the evidence does not preponderate against the findings made by the trial court. Moreover, the trial court did not abuse its discretion in limiting the number of telephone numbers that the appellant could call.

Contrary to the appellant's assertion, he was not denied access to the courts, access to the clerk's office, the right to prepare his defense, or any other due process or equal protection right. There was an attorney and investigator available to the appellant. If he wanted witnesses contacted, papers filed with the clerk, subpoenas issued, research of legal issues, or any other task necessary to prepare and present his defense, both the attorney and investigator were available to assist the appellant.

The appellant was not entitled to use the telephone to harass the victim or the victim's relatives. Nor was he entitled to make veiled threats in order to persuade the

victim to change his testimony regarding the identification of the appellant as the perpetrator of the crime in question.

This issue is without merit.

III.

The appellant contends that the trial court should have granted his motion to suppress the photographic identification and the victim's identification of the appellant during the trial. He argues that the photographs were suggestive and prejudicial.

The victim gave the officers a description of the person who shot him. The description included a clothing description as well as a physical description of the perpetrator. The victim testified that he had seen the appellant on two occasions running from the police. He also saw the appellant when he was a passenger in a motor vehicle that exited the apartment complex, and, a short time later, reentered the complex. He also saw the appellant as he approached the guard station. The appellant was approximately seven feet from the victim when he drew his weapon and began firing at the victim.

The transcript of the suppression hearing reveals that an anonymous person provided an officer with the name of the person responsible for shooting the victim, and the person gave the officer a detailed description of the appellant. An officer checked the computer to see if the person named, the appellant, had ever been arrested. The computer revealed that the appellant had been arrested, and a photograph of the appellant was ordered by the investigating officers. Later, the appellant's photograph and five additional photographs were presented to the victim. The victim immediately made a positive identification of the appellant as the perpetrator of the offense.

After the shooting, the victim's employer, a guard service, commenced an independent investigation. An investigator apparently developed the appellant as a suspect before the police. The investigator showed the victim a photograph of the appellant and asked if he could identify the person depicted in the photograph. The victim identified the person depicted as the person who shot him. The photograph presented by the investigator for the guard service was a different photograph than the photograph

included in the array of photographs the police showed the victim.

The victim testified that he had a photographic mind, and he did not forget matters. Moreover, his training during a career in the military emphasized the need to remember details. He testified that the lighting near the guard station was excellent. He did not hesitate when he identified the appellant.

This Court has viewed the photographs shown to the victim by a police officer. The photographs are mugshots taken from the files of the Memphis Police Department. The individuals depicted in the photographs have like or similar hair and facial features. If the victim was not sure of the perpetrator of the crime, he could easily have selected the photograph of another person.

The question of identification was of prime importance at the trial. The police officer and the victim were cross-examined in minute detail regarding this issue. The victim never wavered in his identification of the appellant as the person who shot him.

The appellant was not entitled to have counsel present when the photographs were shown to the victim. United States v. Ash, 413 U.S. 300, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973); Houston v. State, 567 S.W.2d 485, 488 (Tenn. Crim. App.), cert. denied (Tenn. 1978); Shye v. State, 506 S.W.2d 169, 174 (Tenn. Crim. App. 1973), cert. denied (Tenn. 1974). Furthermore, this Court agrees with the analysis of the trial court that based upon the totality of the circumstances the photographs exhibited to the victim were neither unreliable nor impermissibly suggestive. See Neil v. Biggers, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968);

It has long been established that a trial court's findings of fact made at the conclusion of a suppression hearing are afforded the weight of a jury verdict. State v. Davis, 872 S.W.2d 950, 955 (Tenn. Crim. App.), per. app. denied (Tenn. 1993). As a result, this Court is bound by these facts if the evidence contained in the record does not preponderate against the findings made by the trial court. Davis, 872 S.W.2d at 955. In this case, the evidence supports the ruling of the trial court.

This issue is without merit.

IV.

The appellant contends that he was denied his constitutional right to confront his accusers in violation of the United States and Tennessee Constitutions. He argues that a police officer testified that an unnamed informant provided the name of the appellant as the person who shot the victim, and the informant provided the officer with a detailed identification of the appellant.

The following colloquy occurred during direct examination:

> Q. Did you subsequently develop the name of a suspect?
>
> A. Yes, sir.
>
> Q. How did you develop that name, please, sir?
>
> A. After the shooting occurred, at the time before he [the victim] was transported, he told me there was a subject that he had talked to earlier in the night that was there when I had first talked to him, with a striped shirt. At first that's all I knew. Later, we developed a suspect from information that a person who didn't want to be named came up and told us what the name was.
>
> Q. Did you include that name in your report?
>
> A. Yes, sir.
>
> Q. What was the name of the suspect?
>
> A. Cedric Stampley.

When an accused opts to represent himself, the accused is bound by the record he created in the trial court. In Cole v. State, 798 S.W.2d 261, 264 (Tenn. Crim. App.), per. app. denied (Tenn. 1990), this Court stated that "one of the penalties of self-representation is that [the appellant] is bound by his own acts and conduct and held to his record." (quoting from United States v. Dujanovic, 486 F.2d 182, 188 (9th Cir. 1973)). See Faretta v. California, 422 U.S. 806, 836, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975). Here, the trial court provided the appellant with an experienced criminal defense lawyer as elbow counsel. Furthermore, the appellant was warned by the trial court that he would be expected to comply with the rules of procedure and the rules of evidence.

This issue has been waived. The appellant failed to interpose an objection to this

testimony when it was offered. Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1); State v. Hutchinson, 898 S.W.2d 161, 171 (Tenn. 1994); State v. Coker, 746 S.W.2d 167, 173 (Tenn. 1987), cert. denied 488 U.S. 871, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988); State v. McPherson, 882 S.W.2d 365, 375 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

V.

The appellant contends that the indictment returned by the Shelby County Grand Jury fails to state a crime. He predicates this contention on the theory that the indictment does not allege an overt act. The fallacy with this argument is that the indictment does not charge the appellant with conspiring to commit an offense. The indictment charges him with the commission of a substantive offense, attempt to commit murder in the first degree.

The indictment, which contains one count, alleges in part:

> On October 13, 1993, in Shelby County, Tennessee, and before the finding of this indictment, [Cedric E. Stampley] did unlawfully attempt to commit the offense of First Degree Murder, as defined in T.C.A. 39-13-202; in that he, the said CEDRICK E. STAMPLEY, did unlawfully, intentionally, deliberately and with premeditation attempt to kill LONZO NICKS, in violation of T.C.A. 39-12-101, against the peace and dignity of the State of Tennessee.

This language clearly alleges that the appellant committed the offense of attempt to commit murder in the first degree. The state introduced evidence that established the appellant's identity as the perpetrator of the offense as well as each essential element of the offense. The jury found that the appellant was guilty of this offense.

This issue is without merit.

VI.

The appellant challenges the length of the sentence imposed by the trial court. He argues that the trial court erroneously found three enhancement factors and used these factors to enhance his sentence within the range. Therefore, the appellant contends that he is entitled to the minimum sentence for the offense, and this Court should reduce his

sentence from twenty-three (23) years to fifteen (15) years.

A.

When the accused challenges the length of the sentence imposed by the trial court, 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 trial court from which the appeal is taken 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). 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 based upon uncontroverted facts or documents, such as the presentence report. 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. Keel, 882 S.W.2d 410, 418 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). However, this Court is required to give great weight to the trial court's determination of controverted facts since these determinations are predicated upon the witnesses' demeanor and appearance. In this case, the trial court encountered the appellant, who opted to represent himself, before, during, and after the trial.

The accused, as the person challenging the sentence imposed by the trial court, has the burden of establishing that the sentence imposed was erroneous. Tenn. Code Ann. §§ 40-35-103 and -210; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311. If the accused fails to overcome the presumption of correctness, it is the duty of this Court to affirm the sentence imposed by the trial court. This Court cannot change or modify a sentence without a clear showing that the sentence is excessive or the manner of serving the sentence is inappropriate. State v. Russell, 773 S.W.2d 913, 915 (Tenn. 1989).

B.

When conducting a de novo review of a sentence, this Court must consider (1) any evidence received at the trial and/or sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, if available to the accused, (5) the nature and characteristics of the offense, (6) any mitigating or enhancing factors, (7) any statements made by the accused in his own behalf, and (8) the accused's potential or lack of potential for rehabilitation or treatment. 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). In this case, the accused has focused on the enhancement factors used by the trial court to increase the sentence within the appropriate range.

The trial court found that three enhancement factors were established by the evidence. The factors found are: (1) the appellant treated the victim with exceptional cruelty during the commission of the offense, Tenn. Code Ann. § 40-35-114(5), (2) the personal injuries inflicted by the appellant were particularly great, Tenn. Code Ann. § 40-35-114(6), and (3) the appellant employed a firearm to commit the offense. Tenn. Code Ann. § 40-35-114(9). This Court finds that the trial court should have enhanced the appellant's sentence within the range because the appellant has a history of convictions for criminal offenses. Tenn. Code Ann. § 40-35-114(1).

(1)

The appellant has been convicted of selling a controlled substance, the unauthorized use of a motor vehicle, disorderly conduct, and murder. There was a charge of failing to appear pending against the appellant at the time of the sentencing hearing. This is sufficient to establish enhancement factor (1).

When the record establishes an enhancement factor that was not considered by the trial court when imposing sentence, this Court may consider the factor when conducting the de novo review mandated by law. See State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993); State v. Pearson, 858 S.W.2d 879, 885 (Tenn. 1993). Therefore, the appellant's record will be considered in conducting the de novo review.

(2)

The trial court properly used factor (5) to enhance the appellant's sentence within the range. This factor is not an element of attempt to commit murder in the first degree. The infliction of numerous wounds satisfies this factor. See State v. William R. Waters, Jr., Davidson County No. 01-C-01-9404-CR-00145 (Tenn. Crim. App., Nashville, December 22, 1994), per. app. denied (Tenn. May 1, 1995)(the firing of "several rounds" into the body of the victim sufficient); State v. Mallory Michael Roberts, Davidson County No. 01-C-01-9309-CR-00295 (Tenn. Crim. App., Nashville, August 4, 1994), per. app. denied (Tenn. December 12, 1994)(multiple stab wounds); State v. Terry Joseph Million, Jackson County No. 01-C-01-9303-CC-00100 (Tenn. Crim. App., Nashville, November 24, 1993)(multiple stab wounds sufficient).

In this case, the appellant shot the victim seven times. The victim was unarmed, and he did not threaten the appellant.

(3)

The trial court properly applied factor (6) when enhancing the appellant's sentence. This is not an element of attempt to commit murder in the first degree. An accused can attempt to murder another person without inflicting injury to the victim.

The victim sustained three gunshot wounds to his hand. As a result, he suffered permanent disability to the hand. He also was shot in the hip. This projectile was not surgically removed. It remains in the hip, and, when the weather changes, the victim begins to hurt. The abdominal wound caused nerve damage.

This incident has caused the victim to have a feeling he never previously experienced: fear. As the victim states in the "Victim Impact Statement:"

> For the first time in my life I've felt how it feels to be robbed of what I was willing to give my life for. Freedom! Personally, Mr. Stampley emotionally did something combat couldn't do. I never feared nothing until now. I don't go out at night nor do I walk through a group of young men on a corner. I'm hurt to know that I have to live in fear for the rest of my life. . . .

This psychological harm may very well be the greatest injury sustained by the victim. In short, it stripped him of his pride, his ability to persevere during difficult times, and has literally made the victim a prisoner in his own home at night.

(4)

The trial court properly applied factor (9) when enhancing the appellant's sentence. The use of a firearm or dangerous weapon is not an element of attempt to commit murder in the first degree. This Court has held that this factor may be applied when the accused is convicted of an attempt to commit murder. State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); see Butler, 900 S.W.2d at 312-13; State v. Raines, 882 S.W.2d 376, 385 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

C.

The trial court placed great emphasis on the circumstances of the offense, enhancement factors (5) and (6). This Court has held on numerous occasions that the weight to be given an enhancement factor rests within the sound discretion of the trial court. State v. Marshall, 888 S.W.2d 786, 788 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992), per. app. denied (Tenn. 1993). This Court will not interfere with the exercise of this discretion if the factors used to enhance the sentence (1) are adequately supported by the record and (2) comply with the purposes and principles contained in the Tennessee Criminal Sentencing Reform Act of 1989. Marshall, 888 S.W.2d at 788. The factors utilized by the trial court meet both criteria.

This Court places great emphasis upon the criminal record that the appellant has amassed in his twenty-five years of life and the use of a weapon to commit the offense. The dockets of this Court seemingly contain an inordinate number of homicides or attempts to commit a homicide. As a general rule, the person who committed the offense has a prior record. Often the record involves convictions for crimes of violence.

This Court adopts the sentence imposed by the trial court.

_____
JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE