IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 03-C-01-9507-CC-00200
APPELLEE,	)	
	)	Hawkins County
v.	)	
	)	James E. Beckner, Judge
SHANE WENDALL YANKEE,	)	
	)	(Vehicular Homicide and Leaving the
	)	Scene of an Accident)
APPELLANT.	)	

FOR THE APPELLANT:

Donald A. Bosch
Bosch, Silvey & Lusk
2000 First Tennessee Plaza
Knoxville, TN 37929
(On Appeal)

Herbert A. Holcomb
101 Church Street
Rogersville, TN 37857
(At Trial)

FOR THE APPELLEE:

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

Darian B. Taylor
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

H. Greeley Wells, Jr.
District Attorney General Pro Tem
P. O. Box 526
Blountville, TN 37617-0526

John Douglas Godbee
Assistant District Attorney General
Hawkins County Courthouse
Rogersville, TN 37857

OPINION FILED: _____

AFFIRMED

JOE B. JONES, Presiding Judge

O P I N I O N

The appellant, Shane Wendall Yankee, was convicted of vehicular homicide, a Class C felony, and leaving the scene of an accident involving death, a Class E felony, by a jury of his peers. The trial court found that the appellant was a standard offender and imposed Range I sentences consisting of a fine of $10,000 and confinement for six (6) years in the Department of Correction for vehicular homicide, and a fine of $3,000 and confinement for two (2) years in the Department of Correction for leaving the scene of an accident involving death. Three issues are presented for review: the appellant contends that the trial court committed error of prejudicial dimensions by (a) admitting photographs that were prejudicial, (b) excluding testimony regarding law enforcement's policy on high speed chases, and (c) imposing excessive sentences and refusing to sentence him to an alternative sentence. After a thorough review of the record, the briefs of the parties, and the authorities governing these issues, it is the opinion of this Court that the appellant's convictions and sentences should be affirmed.

During the early morning hours of August 13, 1994, Chip Whitaker, a Hawkins County deputy sheriff, was on patrol in Rogersville. He saw a Corvette traveling at a high rate of speed. The Corvette's speed and the manner in which the Corvette was being driven forced Deputy Whitaker to drive into a parking lot. The deputy lost sight of the Corvette. However, a few minutes later Deputy Whitaker saw the Corvette pull from the driveway of a service station in a reckless manner. The license plate on the Corvette said: "IT BE BAD."

When the deputy activated the emergency lights on the patrol car and the siren, the Corvette took off "like a rocket." Although Deputy Whitaker was traveling 130 miles per hour, he lost sight of the Corvette. As Deputy Whitaker drove along the highway, he found a pickup truck lying on its top. The driver of the pickup truck, Tommy Joe Yount, had died before Deputy Whitaker arrived at the scene of the crash. The investigation revealed that the pickup truck was traveling in the right-hand lane and the Corvette was traveling in the same direction in the left lane. The driver of the Corvette went from the left lane into the right lane and struck the truck. The driver of the Corvette did not stop, but continued to a

nearby store. The Corvette struck another vehicle and came to a stop. The driver and a passenger exited the Corvette and fled on foot.

The Corvette was registered to the appellant. When law enforcement officials began searching for the appellant, he and the passenger returned to the situs of the second collision. The appellant was arrested by the officers. His blood alcohol level was .18 percent. The appellant admitted that he drank approximately ten beers prior to the collision. He admitted that he was driving the Corvette and he was driving fast to avoid being stopped by Deputy Whitaker. He asked one of the officers if the driver of the pickup truck had been killed in the crash. When the officer responded in the affirmative, the appellant stated: "I want to go to jail." He repeated this several times while he was at the hospital.

The state established that the appellant had made a U-turn after colliding with the pickup truck and drove past the truck. The fact that the victim had died in the collision would have been obvious to the appellant. The driver's side door was sheared away during the crash. The victim was lying upside down in the cab of the truck because he was wearing a seatbelt. His legs were protruding into the roadway. When the appellant passed the pickup truck after the collision, it would have been obvious that the victim had sustained fatal injuries.

The appellant testified in support of his defense. He denied that he almost struck Deputy Whitaker and that he was driving recklessly. According to the appellant, he fled from Deputy Whitaker because he was afraid of law enforcement officers. He blamed the victim for the collision. He testified that the victim drove his pickup truck into the appellant's lane of traffic. He also claimed that Deputy Whitaker chased him until he struck the pickup truck. The appellant stated he ran from the Corvette after the second collision because he was afraid it was going to catch fire.

I.

The appellant contends that the trial court committed error of prejudicial dimensions by permitting the state to introduce two photographs. The first photograph depicted the victim's overturned pickup truck with the victim inside the truck. The second photograph depicted the appellant's personalized license plate. He argues that the danger of unfair prejudice outweighed the probative value of these photographs.

This issue has been waived. The appellant did not interpose an objection when these photographs were introduced by the state. Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(1). State v. Hudson, 631 S.W.2d 716, 719 (Tenn. Crim. App. 1981), per. app. denied (Tenn. 1982); see In re Estate of Armstrong, 859 S.W.2d 323, 328 (Tenn. Ct. App.), per. app. denied (Tenn. 1993).

It is parenthetically noted that if this issue were considered on the merits, this Court would hold that it is without merit. The trial court did not abuse its discretion in admitting the photographs. The photographs were relevant to the issues which the jury was required to resolve; and the probative value of these photographs outweighed any prejudicial effect.

This issue is without merit.

II.

The appellant contends that the trial court committed error of prejudicial dimensions in ruling that defense counsel could not elicit from Deputy Whitaker the “police department’s general orders with respect to high-speed chases” when a suspect has committed a misdemeanor offense. The assistant district attorney general objected when defense counsel attempted to elicit this information. The trial court sustained the state’s objection on the ground that the information was not relevant to the issues which the jury would be required to decide.

When the trial court sustained the state’s objection, the appellant did not make an offer of the proof he sought to elicit from Deputy Whitaker. Consequently, this issue has been waived. Tenn. R. App. P. 36(a); Tenn. R. Evid. 103(a)(2); State v. Rhoden, 739

S.W.2d 6, 12 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). Tenn. R. Evid. 103(a)(2) states that "[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected," and, when the issue involves the exclusion of evidence, "the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the record."

It is parenthetically noted that if this issue were considered on the merits, this Court would find that it is without merit. The Hawkins County Sheriff's Department policy regarding chasing vehicles based upon a misdemeanor offense was not relevant to the issues that the jury was required to decide. Tenn. R. Evid. 401.

III.

As his final issue, the appellant complains that the court erred in sentencing the appellant to the maximum allowed under the ranges and erred in denying him an alternative sentence.

When an accused challenges the length and manner of service of a sentence, 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 which are predicated upon uncontroverted facts. 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). 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 and appearance.

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. 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).

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

The appellant was a Range One standard offender qualifying for a sentence between three (3) and six (6) years for vehicular homicide and one (1) and two (2) years for leaving the scene of an accident involving death. The trial court found that the evidence established two enhancement factors allowing an increase in the appellant's punishment within the appropriate range. The enhancement factors found by the trial court were: (a) the defendant had a previous history of criminal behavior, Tenn. Code Ann. § 40-35-114(1) and (b) the defendant had no hesitation about committing the crime when the risk to human life was high, Tenn. Code Ann. § 40-35-114(10). The judge found no mitigating factors.

The appellant argues that the trial court erred (a) in applying the enhancing factors, (b) in refusing to apply mitigating factors, and (c) in refusing to impose an alternative sentence.

A.

The trial court found that the evidence established two enhancement factors: (a) the appellant had a previous history of criminal convictions or criminal behavior, Tenn. Code Ann. § 40-35-114(1), and (b) the appellant "had no hesitation about committing a crime when the risk to human life was high." Tenn. Code Ann. § 40-35-114(10). This Court finds that the evidence supports both enhancement factors, and the trial court properly used these two factors to enhance the appellant's sentences within Range I since

the appellant was a standard offender.

(1)

The evidence establishes that the appellant had been convicted of four speeding violations and driving a motor vehicle after his license had been revoked. This Court has found that such offenses are sufficient to support the use of Tenn. Code Ann. § 40-35-114(1) to enhance an accused's sentence. See State v. Ruane, 912 S.W.2d 766, 784 (Tenn. Crim. App. 1995)(driving while license revoked among other convictions); State v. Curtis Anthony Miller, Davidson County No. 01-C-01-9309-CR-00329 (Tenn. Crim. App., Nashville, June 2, 1994), per. app. denied (Tenn. September 12, 1994)(driving while license revoked); State v. Jerome D. Upman, Hamblen County No. 03-C-01-9402-CR-00052 (Tenn. Crim. App., Knoxville, August 2, 1994)(speeding); State v. Michael S. Hurt, Marshall County No. 01-C-01-9306-CC-00189 (Tenn. Crim. App., Nashville, December 9, 1993)(speeding infractions among others); State v. Mike Boswell, Weakley County No. 2 (Tenn. Crim. App., Jackson, January 16, 1991)(speeding among other acts of criminal behavior).

(2)

The appellant argues that Tenn. Code Ann. § 40-35-114(10) should not be used to enhance a sentence involving vehicular homicide. This Court has held that this enhancement factor should not be applied if the only risk to life was that of the victim. State v. Norris, 874 S.W.2d 590, 601 (Tenn. Crim. App.), per. app. denied (Tenn. 1993). See State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). However, when the lives of other people are at risk due to the offense committed by the accused, this factor is applicable. State v. Dockery, 917 S.W.2d 258, 263 (Tenn. Crim. App. 1995); Makoka, 885 S.W.2d at 373. More particularly, this enhancement factor has been applied in vehicular homicide cases when the accused places the life of a third party at risk. State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995) (other citizens using the same highway as the accused); State v. Lambert, 741 S.W.2d 127, 134

(Tenn. Crim. App.), per. app. denied (Tenn. 1987) (other citizens using the same roadway as the accused); State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App.), per. app. denied (Tenn. 1995) (other citizens using the same roadway as the accused); State v. Upman, supra (passenger in the accused's vehicle); State v. Crawford C. Young, Franklin County No. 01-C-01-9301-CC-00001 (Tenn. Crim. App., Nashville, November 18, 1993) (other citizens using the same roadway as the accused). See Dockery, 917 S.W.2d at 263 (this factor applied in DUI case due to the fact there was a passenger in the accused's vehicle).

There are two reasons which justified the trial court's use of this enhancement factor to enhance the appellant's sentence. First, the appellant had a passenger in his vehicle from the time Deputy Whitaker saw the Corvette until the Corvette struck the second vehicle, and the appellant and the passenger abandoned the Corvette. The life of the passenger was at risk due to the manner in which the accused drove his motor vehicle. Second, the appellant would have struck the patrol car being driven by Deputy Whitaker if he had not driven the patrol car into a parking lot to avoid the collision. Thus, Deputy Whitaker's life was at risk.

B.

The appellant also contends that the trial court should have found the existence of three mitigating factors pursuant to Tenn. Code Ann. § 40-35-113(13). He argues that his sentence should be reduced because of the "lack of a serious prior criminal record, . . .his exemplary work history, and status as provider for his family."

This Court has held that the lack of a felony conviction and a stable work history do not entitle an accused to a reduction in the sentence imposed by the trial court. State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). Furthermore, the fact that an accused has the "status of a family provider" does not entitle an accused to a reduction in sentence.

Every person who resides in this state is expected to obey the laws enacted by the General Assembly. However, there is another reason why the appellant should not be

entitled to a reduction on this ground. The appellant has been repeatedly convicted of the very offense that contributed to the death of the victim, driving a motor vehicle in excess of the posted speed limit.

Every person who resides in this state is expected to maintain employment and have a stable work history. Of course, there are exceptions to this rule. A person who is disabled, retired, self-employed, independently wealthy, or otherwise cannot work cannot be expected or required to maintain employment or have a stable work history. Today, the Congress and state legislatures are limiting the length of time that a healthy person may receive welfare. The legislation provides for funds to train people to perform the duties of particular occupations. The purpose of this training is to have these individuals obtain and maintain employment. In short, public policy expects that an able-bodied person obtain employment and eventually a stable work history.

C.

The appellant contends that the trial court should have imposed an alternative sentence to confinement in the Department of Correction. This Court respectfully disagrees with this contention.

As previously noted, the appellant testified in this case. He either stated or implied that every witness called by the state testified falsely. Obviously, the jury did not believe the appellant given its verdicts. The trial court had the opportunity to listen to the appellant's testimony and to observe the appellant's demeanor and mannerisms while he testified. The trial court did not believe the appellant's version of the evidence.

It is well-established that the lack of candor is probative of an accused's prospects for rehabilitation. United States v. Grayson, 438 U.S. 41, 50-2, 98 S.Ct. 2610, 2616, 57 L.Ed.2d 582, 589-91 (1978); State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984); Williamson, 919 S.W.2d at 84; State v. Dowdy, 894 S.W.2d 301, 305-06 (Tenn. Crim. App. 1994); State v. Dykes, 803 S.W.2d 250, 259-60 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Thus, the trial court properly considered this factor when sentencing the appellant.

The appellant's willingness to violate the laws of this state and his cavalier attitude towards law enforcement were properly considered by the trial court. As previously noted, the appellant had four prior speeding violations. Yet the appellant did not hesitate to violate this same law on the morning in question. It is obvious to this Court that if Deputy Whitaker reached 130 miles per hour during the pursuit, and the appellant was able to disappear from Deputy Whitaker's sight, the appellant's speed must have approximated 150 to 160 miles per hour. Moreover, the appellant was traveling at this speed while under the influence of an intoxicant. The trial court was correct in considering this factor in sentencing the appellant. This factor also justifies the trial court's need to deter the appellant as well as protect the citizens of this state from the appellant's reckless conduct in operating a motor vehicle. If the appellant is not deterred, he may very well drive his motor vehicle at a high rate of speed while intoxicated and cause the death of an innocent citizen who just happens to be in harm's way.

The appellant's failure to take responsibility for his conduct was properly considered by the trial court when sentencing the accused. Williamson, 919 S.W.2d at 84-5. He blamed Deputy Whitaker for the fatal collision because he chased the appellant. While the physical facts established the appellant veered into the victim's lane of traffic and struck the truck, the appellant testified that the victim drove his truck into the lane of traffic he was occupying. This factor is also probative of the appellant's amenability to rehabilitation. State v. Dowdy, 894 S.W.2d at 306.

Based upon the circumstances of the offense, the enhancement factors found by the trial court and the weight given these factors by the trial court, the appellant's lack of candor and willingness to accept responsibility for his conduct, and his cavalier attitude towards law enforcement officers, the trial court properly sentenced the appellant to confinement in the Department of Correction. Furthermore, these factors justify the imposition of the maximum sentences for these offenses. Several principles of sentencing justify this result. First, confinement is necessary to protect society from the appellant's operation of a motor vehicle on the highways of this state. He had four prior speeding violations, the offense which contributed to the death of the victim. Tenn. Code Ann. § 40-35-103(1)(A). Second, confinement is necessary to avoid depreciating the seriousness of

the offenses. Tenn. Code Ann. § 40-35-103(1)(B). While the General Assembly passes legislation practically every session to deter the operation of a motor vehicle while under the influence of an intoxicant, the problem persists and it seems to multiply. The trial court noted the many cases involving the use of alcohol that are on his docket. This Court has seen a remarkable increase in vehicular homicide cases during the last five years. Practically every docket has one or more vehicular homicide cases. Third, this Court is convinced that the appellant does not possess the attributes necessary to rehabilitate himself. This opinion is replete with factors that illustrate this consideration. Tenn. Code Ann. § 40-35-103(5).

In conclusion, the appellant has failed to overcome the presumption of correctness that accompanies the findings of the trial court. Tenn. Code Ann. § 40-35-401(d). Therefore, this Court affirms the judgment of the trial court.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID H. WELLES, JUDGE