

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1996 SESSION

FILED
December 23, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee

vs.

WILLIE LEE BALLARD,

Appellant

)
) C.C.A. NO. 03C01-9602-CR-00063
)
) Hamilton Criminal
)
) Honorable Russell C. Hinson
)
) (Consecutive Sentencing)
)

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OPINION FILED _____

SENTENCE MODIFIED

WILLIAM M. DENDER, SPECIAL JUDGE

OPINION

On April 29, 1995, appellant was found guilty by a jury of two counts of aggravated assault. On April 27, 1995, appellant had pleaded guilty to the offenses of attempted especially aggravated robbery and attempted aggravated robbery of the same victims of the aggravated assaults. On June 30, 1995, the trial court sentenced appellant to eleven years for attempted especially aggravated robbery, five years for attempted aggravated robbery and six and five years respectively on the aggravated assaults. The trial court found that the appellant was a dangerous offender and ordered the five year sentence for attempted aggravated robbery to be served consecutively to the eleven year sentence for attempted especially aggravated robbery. The trial court ordered the sentences for aggravated assault to run concurrently with the first sentence. At the hearing on the Motion For New Trial, the trial court vacated the convictions for aggravated assault and ruled that those charges merged with the attempted robbery charges. This left appellant with a sentence of eleven years plus a sentence of five years to be served consecutive to the sentence of eleven years, for a net sentence of sixteen years. This is appellant's appeal as of right.

The sole issue is consecutive versus concurrent sentencing.

FACTS

Appellant and a co-defendant, Eric Brown, started riding around with no particular destination, listening to music on the car stereo. There was a semiautomatic 9mm carbine in the car near the driver, and appellant testified it was there because a car had been following him after he pulled over in front of it; but that the other car had later gone on about its business. They went to Hamilton Place Mall, where they saw appellant's cousin and a girl friend. According to appellant, his cousin asked him to take them to Martin Luther King Boulevard, and the two got in the back seat of appellant's car. Appellant testified that he had enough gas to get back home, but

that he did not have enough gas to go to Martin Luther King Boulevard; and that he decided to rob two young girls he saw in the parking lot, because he did not want to tell them he was broke. The two girls were Melissa Gray and Melissa Thach. Appellant admits that he pulled up alongside the girls and said, "Hey, give me that bag." The girls made no move to comply, and appellant testified he "brought the gun up"; and that the gun discharged accidentally. Ms. Gray fell to the ground, having been shot in the back part of the head. Appellant testified that he had no intention of harming the young lady, and that he heard one shot. Appellant left the scene and took nothing from the victims. Appellant turned himself in the next day and gave a statement.

On July 26, 1994, Melissa Dawn Gray and Melissa Thach, a.k.a. Mel, were leaving the pet store of Hamilton Place Mall, where they worked. Melissa and Mel were on their way to Mel's car, and Melissa was carrying a back pack and some cat supplies. Melissa Thach testified that as they were putting the supplies in Mel's car, a car "pulled up and there was a bunch of laughter and shouting and the driver of the car yelled at us to give us what you've got or you're going to be shot."

Ms. Gray testified that she remembered "putting something in and I remember seeing a car drive up and they were talking but I have no idea what anything was said. The next thing I remember is I was laying there or I heard sirens and people talking over me."

Asia Williams, the cousin's girl friend who was in the car, testified appellant told the girls, "Give me everything you got or I'm going to kill you."

Michelle Pascucci was employed in the mall, and while emptying the trash in the dumpster, she noticed two black men in a car. She testified "I didn't like the way that they looked at me, it just unnerved me." When she walked toward her car, the appellant and the co-defendant were driving in front of her. She saw the car drive "right up to the area where my car was parked and stopped and I was like great. And , let's see, I was waiting for them to drive away and the all

of a sudden I heard four shots." She further testified she "saw them turn out their lights and start off slowly and then speed up and then drive out of the parking lot." She further testified she noticed someone "lying on the ground but I didn't want to get too close because I didn't know who it was or what was going on." She recognized Mel as she came running toward the mall, and Mel informed her that Melissa had been shot.

The record establishes that the injuries of Ms. Gray were extremely serious, and that she suffered permanent and disabling injuries. In spite of her condition, she has made a tremendous recovery and maintains a good attitude, and we commend her for her stamina. These comments are not meant in any way to take away from the life threatening situation surrounding her injuries.

ANALYSIS

In examining the propriety of a sentence rendered against a criminal defendant, this Court must conduct a de novo review based on the record. This Court must presume that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d). If the review by this Court reveals that the trial court imposed a lawful sentence pursuant to the Tennessee Criminal Sentencing Reform Act of 1989, after having given proper consideration and weight to the relevant sentencing factors under the Act, and the sentence is based on findings of fact which are adequately supported by the record, then this Court may not disturb the sentence imposed by the trial court. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The appellant has the burden of establishing that the sentence imposed by the trial court was erroneous. Sentencing Commission Comments to T.C.A. § 40-35-401(d); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

The Sentencing Reform Act provides that the sentence imposed shall be one that is "justly deserved in relation to the seriousness of the offense." T.C.A. § 40-35-102(1). The Act also

mandates that the sentence be the least severe measure necessary to achieve the purposes of the Act and that inequalities should be avoided. T.C.A. § 40-35-103(3), (4); see Ashby, 823 S.W.2d at 168.

The record in this case does not include a presentence report, but there was a report filed in the jury conviction cases, which were dismissed as being merged into the offenses to which the appellant had pleaded guilty. Statements made during the sentencing hearing indicate that the only prior criminal record of the appellant was as a juvenile, and includes possession of alcoholic beverages by a minor and possession of an unloaded 25 caliber automatic gun. Appellant apparently has no criminal record as an adult.

State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), announced a four prong test to determine whether a defendant may be classified as a "dangerous offender" for consecutive sentencing purposes:

- (1) the defendant's behavior indicates "little or no regard for human life," and he did not hesitate "about committing a crime when the risk to human life is great;"
- (2) the circumstances surrounding the commission of the offense are aggravated;
- (3) confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to "lead a productive life and [his] resort to criminal activity in furtherance of [his] anti-social lifestyle;" and
- (4) the aggregate length of the sentences, if consecutive sentencing is ordered, reasonably relates to the offenses of which the defendant stands convicted.

State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), limited the applicability of the Woods decision somewhat by only requiring that the defendant meet the definition of a "dangerous offender," that there exist a need to protect the public or society, and that there be a reasonable relation between the nature of the offender's specific crimes and the total length of his sentences.

Gray v. State, 538 S.W.2d 391, 393, defined a "dangerous offender" as one whose crimes "for which he is convicted indicate that he has little or no regard for human life, and no hesitation

about committing a crime in which the risk to human life is high."

State v. Wilkerson, supra, states:

As stated above, the Act essentially codified the holdings of the Court in Gray and Taylor. Section 40-35-115 requires proof of particular facts defining an offender subject to consecutive sentences. The rationale for consecutive sentences stated in Gray and Taylor is that they be reasonably related to the severity of the offenses committed and serve to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct. This statement of principle cannot be separated into a set of discrete findings of fact which in every case would justify the imposition of consecutive sentencing. It does, however, recognize those limitations on consecutive sentencing established by the Court, that consecutive sentences cannot be imposed unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant.

Proof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; consequently, the provisions of Section 40-35-115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. In addition, the Sentencing Reform Act requires the application of the sentencing principles set forth in the Act applicable in all cases. The Act requires a principled justification for every sentence, including, of course, consecutive sentences. See Tenn. Code Ann. §§ 40-35-102(1); 40-35-103(1)(2); 40-35-113; 40-35-114 (1990 & Supp. 1994). Unfortunately for ease of application, "sentencing is inescapably a human process that neither can nor should be reduced to a set of fixed and mechanical rules."

...

As previously stated in this opinion, the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

The criminal conduct of the appellant clearly establishes that he is a "dangerous offender."

No evidence was offered in the sentencing hearing except for the testimony of Ms. Gray's mother and a statement by the appellant. There was no evidence concerning the requirement that an extended sentence is necessary to protect the public against further criminal conduct by the

appellant, and there was no finding by the trial judge that such a sentence was necessary. There was no evidence that the appellant was involved in any criminal conduct other than that involved in the cases sub judice. In discussing consecutive sentences at the end of the sentencing hearing, the trial judge stated:

The State feels that Mr. Ballard qualifies as a dangerous offender, Item 4, under 40-35-115. Item 4 is the only one that applies if any does. "The defendant 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 great."

While I still make no judgment about the jury verdict one way or the other, it is obvious that Mr. Ballard was engaging in - - well, complies with this, engaging in behavior indicating little or no regard, carrying a weapon like that, having a weapon like that. He had no business whatever carrying a gun like that and carrying it where he was carrying it or carrying it anywhere for that matter or ever owning a gun like that, whether he owns it or not doesn't enter into this, but carrying it like that. I think No. 4 does - - I said more than is included in No. 4 but I do find that he is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which risk to human life is great. I am going to follow the Attorney General's recommendation on that and make the 5 year sentence in case No. 202972 run consecutive to - - General?

We are unable to find any evidence in the record which we feel would support a finding that an extended sentence is necessary to protect the public against further criminal conduct by the appellant. Appellant's conduct was horrendous, but we do not find that such conduct qualifies appellant for consecutive sentences under the guidelines set forth in State v. Wilkerson, supra.

HOLDING

For the reasons stated herein, the sentence in Case No. 202971 is ordered to run concurrent with the sentence in Case No. 202975. These cases are remanded to the trial court for all necessary proceedings not inconsistent with this opinion.

William M. Dender, Special Judge

CONCUR:

Joseph B. Jones, Presiding Judge

David G. Hayes, Judge