IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9510-CC-00315**
	)	
Appellee,	)	
	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. FRANKLIN MURCHISON**
ROCKY SHANE BOLTON,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant entered a plea of guilty to a reduced charge of second degree murder, with sentencing left to the discretion of the trial judge. He was sentenced to twenty-five years in the Department of Correction, the maximum penalty authorized for a Range I standard offender. On appeal, the Defendant argues that his sentence is excessive.

We will briefly address the facts surrounding the killing of the victim. The Defendant and a group of his friends were angry with another individual. The animosity grew out of the competing romantic interests that two of the young men had in the same young woman. The Defendant accompanied a group that went to a residence where the other individual was located. The victim was also in the residence. The Defendant was armed with a high-powered rifle and at least one other member of the Defendant's group was armed with a shotgun. The Defendant fired approximately eight to ten rounds from the rifle into the house where the other individual, the victim and several other people were located. The victim was a friend of the Defendant and was seated on the couch. One of the rounds from the rifle struck the victim in the head, and he died as a result of the wound. The victim was not the person with whom the Defendant and his friends were angry.

The Defendant was charged in a one-count indictment with first degree murder. After plea negotiations with the State, he entered a plea of guilty to

second degree murder. There was no plea agreement concerning the sentence to be imposed. After conducting a lengthy sentencing hearing, the trial judge sentenced the Defendant as a Range I standard offender to twenty-five years in the Department of Correction. This was the maximum punishment authorized by law for this Defendant's second degree murder conviction. It is from the sentence ordered by the trial court that the Defendant appeals.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and

proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The presentence report reflects that at the time of sentencing the Defendant was approximately twenty-three years old and was a high school graduate. He had been regularly employed as a painter in business with his father since his graduation from high school. He was unmarried. His prior record consisted of a misdemeanor assault conviction, misdemeanor convictions for possession of marijuana and drug paraphernalia, a DUI conviction and a conviction for driving on a revoked license.

The Defendant testified that on the day of the killing, he had started drinking alcoholic beverages at about 11:30 that morning. Later in the day he smoked some marijuana. He was with a group of people who were angry with another individual. He said that he fired the rifle into the house some seven or eight times "just to scare them." He stated that he did not intend to hurt anyone. He testified that the person who was killed was a friend of his and that he did not even know his friend was present at the time he fired the rifle into the house.

At the conclusion of the proof at the sentencing hearing, the trial judge began his assessment of the sentence by stating "in this case, the court is of the opinion that the maximum sentence is appropriate, and I want to state why, and that's twenty-five years . . . that the maximum penalty is appropriate arises out of the circumstances of the offense and the situation that we have here."

The trial judge then began his consideration of the enhancement and mitigating factors. Although the trial judge found the existence of factors which could be considered in mitigation as being consistent with the purposes of the sentencing laws,[1] the judge stated, "the court is of the opinion that the plea bargain agreement in which this was reduced to second degree murder is enough consideration for the Defendant and any mitigating factors and any circumstances that there may be here in his favor."

We cannot conclude that the record in the case sub judice affirmatively shows that the trial court properly considered the sentencing principles and all relevant facts and circumstances. It appears that the trial judge may have first decided that the Defendant should be sentenced to the maximum term and then began a discussion of the various enhancement and mitigating factors. In addition, the trial judge expressed his opinion that because the Defendant was allowed the benefit of a plea bargain, no further consideration of any mitigating factors was appropriate. We do not believe that this is an accurate application of our sentencing principles and laws. See State v. Jerry Smallwood, Sumner Co., No. 89-24-III (Tenn. Crim. App., Nashville, June 7, 1989). For these reasons, we will review the Defendant's sentence de novo without a presumption that the determinations made by the trial court are correct.

The trial court found as enhancement factors the following as set forth at Tennessee Code Annotated section 40-35-114: (1) That the Defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. This factor is clearly established

[1]Tenn. Code Ann. § 40-35-113(13).

by the evidence. (2) The Defendant was a leader in the commission of an offense involving two (2) or more criminal actors. Several individuals were with the Defendant when he fired the fatal shot. The Defendant was the only individual armed with a high-powered rifle. It appears that at least one other person had a shotgun. We believe the record establishes the finding that the Defendant was "a leader," and justifies the application of this enhancement factor. (3) The offense involved more than one victim. This factor is established by the fact that several people were in the house at the time the shots were fired. Additional people could have been injured or killed. See State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). (7) The offense involved a victim and was committed to gratify the Defendant's desire for pleasure or excitement. The Defendant testified that he fired the shots "to scare somebody." The only other reason for the attack suggested by evidence found in this record was the anger which the Defendant and his companions had for another individual located in the house into which they shot. While this was clearly a senseless crime, we do not believe the record supports the finding that the Defendant committed the crime to gratify his desire for pleasure or excitement. (9) The Defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense. This is clearly supported by the evidence. (10) The Defendant had no hesitation about committing a crime when the risk to human life was high. This factor is also justified by the fact that several other individuals were in the house into which the Defendant shot. State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

Although not found by the trial court, we believe the record further establishes a finding that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. Tenn. Code Ann. § 40-35-114(16). We believe this factor is applicable because the Defendant fired seven to ten rounds from a high powered rifle into a residence in which several people were located. There was certainly the potential that more than one person would be killed or injured. See State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1995).

The trial court found no mitigating factors other than certain factors not specifically listed as mitigating factors, but which could be considered as being consistent with the purposes of our sentencing laws and principles. Tenn. Code Ann. § 40-35-113(13). We also agree that the record does not support the finding of any specific mitigating factors as set forth in the statute. The trial judge noted that the Defendant was a high school graduate and had been steadily employed; that he had been incarcerated for about twenty-two months at the time of his sentencing and had been a model prisoner; that he was remorseful for his crime; that he had a good reputation and there was the potential for rehabilitation. We agree that these factors could be considered in mitigation, but we do not believe that these mitigating factors are entitled to great weight.

The sentencing range for the Defendant was from fifteen to twenty-five years. The presumptive sentence for the Defendant is the minimum sentence in the range before enhancement or mitigating factors are considered.[2]

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[2]Tenn. Code Ann. § 40-35-210. The crime occurred on August 11, 1993. The Defendant was sentenced on June 19, 1995. Effective July 1, 1995, the presumptive sentence for a Class A felony is the mid-point of the range if there are no enhancement or mitigating factors.

Based upon our de novo review of the Defendant's sentence, we believe the record clearly dictates a sentence in the upper end of the range. As we have stated, the sentence set by the trial judge in the case sub judice carries no presumption of correctness. Nevertheless, we believe the sentence of twenty-five years is reasonable and appropriate.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

_____
CORNELIA A. CLARK, SPECIAL JUDGE