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

FILED

December 5, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9509-CC-00287
Appellee	)	
	)	HUMPHREYS COUNTY
vs.	)	
	)	Hon. Allen W. Wallace, Judge
RANDY COTHAM,	)	
	)	(Attempted Voluntary Manslaughter)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

On February 28, 1995, the appellant, Randy Cotham,[1] was convicted by a Humphreys County jury of attempted voluntary manslaughter, a class D felony. Tenn. Code Ann. § 39-13-211 (1991); Tenn. Code Ann. § 39-12-101(a)(3) (1991). The trial court sentenced the appellant as a multiple, range II offender to eight (8) years imprisonment in the Tennessee Department of Correction, the maximum authorized punishment. Tenn. Code Ann. § 40-35-112(4) (1990). On appeal, the appellant contends that his sentence is excessive.

FACTUAL BACKGROUND

On the afternoon of July 29, 1994, the appellant's estranged wife, Sharon Cotham, was seated in her car in the parking lot of the Stetson Boot Company in Waverly, Tennessee. The appellant drove up beside his wife's vehicle, shot his wife two times with a twelve gauge shotgun, and fled the scene of the crime. He was subsequently apprehended by the police, whereupon the appellant confessed to shooting his wife and informed the police of the location of his weapon. Mrs. Cotham survived the shooting, and, on October 3, 1994, the Humphreys County Grand Jury returned an indictment against the appellant, charging him with attempted first degree murder. Tenn. Code Ann. § 39-13-202 (1994 Supp.); Tenn. Code Ann. § 39-12-101(a)(3). Following a trial by jury, the appellant was convicted of attempted voluntary manslaughter.

The trial court conducted a sentencing hearing on March 31, 1995. The appellant stipulated that he was a range II, multiple offender. The only issue at the sentencing hearing was the length of the appellant's sentence. The appellant testified at the sentencing hearing. He indicated that he met his wife in

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[1]The appellant is referred to in the record as "James R. Cotham," "James Randy Cotham," and "Randy Cotham." However, pursuant to the policy of this court, we use the name of the appellant as reflected in the indictment.

1992, shortly after being released from prison where he had been serving sentences for burglary and grand larceny. The appellant and the victim were married in 1993. According to the appellant, his relationship with the victim was somewhat tumultuous due to the victim's "numerous adulterous affairs."

In February, 1994, Mrs. Cotham separated from the appellant and, in March, 1994, moved in with a boyfriend, Danny McBride.[2] According to the appellant, Mrs. Cotham returned to her husband several times, but resumed her relationship with Mr. McBride following each reconciliation.[3] Finally, the appellant decided to confront Mr. McBride, who worked at the Stetson Boot Company in Waverly. However, when the appellant arrived at the parking lot of the Stetson Boot Company, he observed his wife in her car. The appellant stated that, when she informed the appellant that she was awaiting Mr. McBride, he "just lost it. I pulled a gun and I shot my wife twice." The appellant further testified:

> I'm just a man that was pushed to his limit. ...
>
> I know what I done was wrong, and I know I'll have to pay for it. And I have no objection to doing that. I'm flat guilty of shooting my wife, but I'm telling you there was circumstances that would drive any man to do what I done.
>
> Since that time, I've laid in my jail cell every night and I don't think about hatred toward my wife or toward Mr. McBride or toward anybody. I just pray to God that before anything else happens that she'll just see that what she was doing was wrong as I see what I done was wrong.

The appellant asserted that he regretted his actions.

The State introduced the testimony of Gene Headrick, the State Probation Officer assigned to Humphreys County. Mr. Headrick indicated that he had prepared the appellant's pre-sentence report and confirmed the accuracy of the

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[2]Mrs. Cotham testified at trial that she left the appellant, because he had assaulted her.

[3]At trial, Mrs. Cotham testified that, following the separation, she spoke with the appellant on the telephone several times and met with him twice. However, Mrs. Cotham asserted that she never attempted a reconciliation, nor did she communicate to the appellant a desire to resolve their differences. She explained that she did not pursue a divorce due to financial difficulties.

report. The appellant's pre-sentence report reflects prior criminal convictions for driving with a revoked license, driving under the influence of an intoxicant, joyriding, burglary, theft of property, harassment, and assault. Mr. Headrick testified that he had supervised the appellant previously. Moreover, Headrick confirmed that the appellant's convictions for assault and harassment in 1987 resulted from acts committed by the appellant against his first wife. He further proffered a certified copy of the appellant's conviction in Davidson County in June, 1994, for assault. In the Davidson County case, the appellant was charged with assaulting the victim in the instant case, Sharon Cotham. However, he was ultimately convicted of assaulting a police officer during a court hearing on the initial complaint. As a result of this conviction, the appellant was on probation at the time of the instant offense. Finally, in preparing the pre-sentence report in the instant case, Mr. Headrick spoke with the appellant once. Mr. Headrick stated at the sentencing hearing:

> I saw remorse in Randy ... shortly after the incident occurred. I'm not sure if it was remorse actually for what he did or the situation that he was involved in at the time.

At the conclusion of the sentencing hearing, in imposing a sentence of eight years confinement in the Department of Correction, the trial court applied the following enhancement factors as set forth in Tenn. Code Ann. § 40-35-114 (1994 Supp.):

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range.
> (6) The personal injuries inflicted upon ... the victim w[ere] particularly great.
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.
> (9) The defendant possessed or employed a firearm ... during the commission of the offense.
> (10) The defendant had no hesitation about committing a crime when the risk to human life was high.

The trial court declined to apply the mitigating factor that the defendant acted under strong provocation, Tenn. Code Ann. § 40-35-113(2) (1990), as the

appellant had already received the benefit of this factor from the jury's verdict. The trial court also found that there were no substantial grounds tending to excuse or justify the appellant's criminal conduct. Tenn. Code Ann. § 40-35-113(3). With respect to the assistance rendered by the appellant to authorities in recovering his weapon, Tenn. Code Ann. § 40-35-113(10), the trial court observed that the appellant only assisted authorities after he was captured following his flight from the scene of the crime. With respect to the appellant's remorse, Tenn. Code Ann. § 40-35-113 (13), the trial court entered the following findings:

> What I see, what this Court sees and those listening to Mr. Cotham testify, watching his demeanor throughout both trials, I don't get that from Mr. Cotham.
>
> Here is what the bottom line of Mr. Cotham's testimony is. I had a wife. She was mine. She stepped out of line. I drove up beside her with a shotgun and I put two holes in her ... . That's the bottom line. She deserved it. You listened to his testimony this morning and I really believe Mr. Cotham thinks in his mind today that, she was mine and she deserved what she got.
>
> Now, that's what I hear today. That's totally unacceptable in our society.

Finally, the trial court, applying general principles of sentencing, considered the seriousness of the crime and deterrence. See Tenn. Code Ann. § 40-35-102(1), (3)(A) (1994 Supp.); Tenn. Code Ann. § 40-35-103(1)(B), (2), (4) (1990).

ANALYSIS

The appellant contends that his offense does not warrant a sentence of eight years incarceration in the Department of Correction. Review, by this court, of the length of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court applies inappropriate factors or otherwise fails to comply with the 1989

Sentencing Act, the presumption of correctness falls. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992), perm. to appeal denied, (Tenn. 1993). In the instant case, the trial court made a general reference to deterrence in determining the length of the appellant's sentence. A finding of deterrence cannot be conclusory, but must be supported by the evidence. State v. Dockery, 917 S.W.2d 258, 261 (Tenn. Crim. App. 1995)(citing Ashby, 823 S.W.2d at 170). Accordingly, for the purposes of this appeal, the presumption of correctness does not accompany the sentence imposed.

Nevertheless, the appellant bears the burden of establishing that the sentence imposed by the trial court is erroneous. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995). In determining whether the appellant has met this burden, this court must consider the factors listed in Tenn. Code Ann. § 40-35-210(b)(1990) and the sentencing principles described in Tenn. Code Ann. § 40-35-102 and § 40-35-103.

Moreover, with respect to the length of a sentence, Tenn. Code Ann. § 40-35-210 provides that the minimum sentence within the appropriate range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. Id. If there are no mitigating factors, the court may set the sentence above the minimum in that range, but still within the range. Id. See also State v. Dies, 829 S.W.2d 706, 710 (Tenn. Crim. App. 1991). "[T]here is no particular value assigned by the 1989 Sentencing Act to the various factors and the 'weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved.'" State v. Marshall, 870 S.W.2d 532, 541

(Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993)(citation omitted). The weight assigned to any existing factor is generally left to the trial judge's discretion. Id.

The appellant argues that the trial court erroneously applied enhancement factors (6) and (10) in determining the length of his sentence, as these factors are inherent in the offense of attempted voluntary manslaughter. See Tenn. Code Ann. § 40-35-114. The 1989 Sentencing Act provides that an enhancement factor may be applied to increase the appellant's sentence within the appropriate range if the factor is not an "essential element" of the offense. Id. The test for determining if an enhancement factor is an essential element of an offense is whether the same proof necessary to establish the enhancement factor would also establish an element of the offense. State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994). Moreover, factors that are inherent in a particular offense, even if not designated as an element, may not be applied to increase the appellant's sentence. State v. Claybrooks, 910 S.W.2d 868, 872 (Tenn. Crim. App. 1994), perm. to appeal denied, (Tenn. 1995).

This court has previously applied factor (6), relating to the infliction of particularly great injuries, to enhance a sentence for attempted voluntary manslaughter. See State v. Jones, No. 01C01-9207-CC-00237 (Tenn. Crim. App. at Nashville, May 13, 1993). Indeed, in State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996), this court held that “[p]articularly great injuries are not essential to the commission of [attempted first degree murder], but prove greater culpability.” Similarly, this court in State v. Gibson, No. 01C01-9503-CC-00099 (Tenn. Crim. App. at Nashville, January 26, 1996), applied this factor to enhance a sentence for attempted first degree murder, noting that “murder may be attempted without actually causing any injury ... .” See also State v. Fox, 03C01-9503-CR-00061 (Tenn. Crim. App. at

Knoxville, June 21, 1996)(factor (6) may be applied where appellant was convicted of attempted first degree murder); State v. Brooks, No. 02C01-9411-CV-00261 (Tenn. Crim. App. at Jackson, July 19, 1995)(factor (6) applicable where appellant convicted of attempted second degree murder). In the instant case, the proof at trial established that the victim suffered two shotgun wounds to the neck and shoulder. The wound to the victim's shoulder was large enough that the hand of a treating nurse's assistant accidentally slipped into the wound. The victim remained in the hospital for two weeks following the shooting, and continued to receive treatment for several months thereafter. Accordingly, we conclude that the record supports the application of factor (6).

With respect to enhancement factor (10), relating to the high risk to human life, we agree that, generally, this factor would be inapplicable in determining the length of a sentence for attempted voluntary manslaughter. See, e.g., Nix, 922 S.W.2d at 903 (factor (10) inherent in attempted first degree murder); State v. Davis, No. 01C01-9507-CR-00226 (Tenn. Crim. App. at Nashville), perm. to appeal dismissed, (Tenn. 1996)(attempted second degree murder); State v. Denami, No. 01C01-9309-CR-00307 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1996)(attempted first degree murder); State v. Hester, 01C01-9410-CC-00352 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995)(attempted second degree murder); State v. Crow, 01C01-9310-CR-00348 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995)(attempted second degree murder). However, in State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994), this court held that factor (10) is not inherent in attempted murder when other people present at the scene of the crime could have been injured by the appellant's actions. See also State v. Smith, No. 01C01-9309-CR-00308 (Tenn. Crim. App. at Nashville, October 20, 1994). In the instant case, the proof established that, at the time of the shooting, there were several other people

sitting in the parking lot of the Stetson Boot Company or "milling around." In fact, the shooting occurred during the course of a change in shifts at the company. We conclude that the record supports the application of enhancement factor (10).

Finally, the appellant asserts that the trial court did not adequately consider mitigating factors in determining the length of his sentence. Specifically, the appellant contends that the trial court should have applied mitigating factors (2) and (3), relating to strong provocation and substantial grounds tending to excuse or justify the appellant's criminal conduct. See Tenn. Code Ann. § 40-35-113. However, in State v. Martin, No. 03C01-9412-CR-00448 (Tenn. Crim. App. at Knoxville, October 13, 1995), perm. to appeal granted, (Tenn. 1996), this court upheld the trial court's refusal to apply these factors when the appellant had been indicted for the first degree murder of his wife but convicted of voluntary manslaughter. The trial court reasoned that these factors had been taken into account by the jury in reaching the verdict. Id. This court noted that, although Tenn. Code Ann. § 40-35-113 does not prohibit "double mitigation," the decision to double mitigate is subject to the discretion of the trial court. Id.; State v. Clanton, No. 01C01-9302-CC-00072 (Tenn. Crim. App. at Nashville, December 30, 1993). See generally State v. Phillips, No. 03C01-9502-CR-00047 (Tenn. Crim. App. at Knoxville, March 25, 1996)("the trial court's giving little or no weight to various mitigating factors raised by the defendant is an act of discretion that will not be overturned on appeal so long as there is material or substantial evidence in the record to support it). The court in Martin, No. 03C01-9412-CR-00448, concluded:

> "[D]ouble credit" need not be automatically applied in voluntary manslaughter cases. And, while the proof of provocation may have been adequate to convince the jury to reduce the degree of culpability, the nature and circumstances of the killing do[] not necessarily demonstrate the kind of "strong provocation" required to mitigate a sentence.

In the instant case, as well, we must agree with the trial court that mitigating

factors (2) and (3) should be afforded little, if any, weight.

Likewise, we conclude that the record supports the trial court's refusal to accord significant weight to mitigating factor (10), relating to the appellant's assistance to authorities, and factor (13), which encompasses the appellant's military service and his expressions of remorse. Specifically, with respect to the appellant's military service, honorable military service may always be considered as a mitigating factor consistent with the purposes of the 1989 Sentencing Act. See State v. Yelloweyes, No. 01C01-9407-CC-00256 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1995). However, such service will be considered in the context of other applicable factors. Clearly, the applicable enhancement factors in the instant case heavily outweigh the appellant's past military service.

With respect to the appellant's expressions of remorse, "genuine, sincere remorse is a proper mitigating factor." State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995)(citing State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988)). However, "the mere speaking of remorseful words or a genuflection in the direction of remorse will not earn an accused a sentence reduction." Williamson, 919 S.W.2d at 83. Indeed, most persons facing a lengthy prison sentence feel or express remorse for their actions. State v. Garrison, 01C01-9407-CC-00236 (Tenn. Crim. App. at Nashville, September 20, 1995), perm. to appeal denied, (Tenn. 1996). The trial court concluded in the instant case that the appellant expressions of remorse for his conduct were not genuine and we cannot disagree.

> The finding of the presence or absence of remorse requires the weighing of evidence, which only the trial judge can do. Appellate courts cannot make that type of determination from the cold, written record, since remorse or the lack thereof is extremely subjective and dependent upon many factors besides the written word.

Denami, No. 01C01-9309-CR-00307.

Following a *de novo* review, we conclude that a sentence of eight years imprisonment is entirely appropriate in the instant case. Accordingly, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge