IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

November 8, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9511-CR-00383**
Appellee,	)	
	)	**SUMNER COUNTY**
VS.	)	
	)	**HON. JANE W. WHEATCRAFT,**
TERRANCE FRANKLIN,	)	**JUDGE**
a/k/a "BUBBA"	)	
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for attempted first-degree murder with a deadly weapon. He pled guilty to aggravated assault, a class C felony, and after a hearing was sentenced to six years in the Tennessee Department of Correction. This was the maximum sentence available for a Range I standard offender.[1] T.C.A. § 40-35-112(a)(3) (1990 Repl.). The defendant now appeals as of right, alleging that the sentencing court misapplied enhancing factors, failed to apply mitigating factors, erred by refusing to grant him an alternative sentence, and erred by continuing the determination of restitution to a later hearing. Finding no error, we affirm the sentence set by the court below.

Evidence adduced at the sentencing hearing established that the defendant had shot the victim once in the right cheek with a .25 pistol. The defendant testified that he had given the victim twenty dollars ($20) for drugs and the victim had refused to give him the drugs or to return his money, so he shot him. The victim denied that he and the defendant had been involved in a drug transaction.

The defendant admitted to three prior assault offenses and a drug offense, all misdemeanors. The presentence report also indicated a misdemeanor theft conviction and a criminal trespass arrest, about which the defendant was not questioned. He received probation on three or four[2] of these offenses, and admitted that he had failed

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[1]At the sentencing hearing, both the State and defense counsel described the defendant as a Range I standard offender. In its findings, the sentencing court does not state the defendant's classification other than to state that the sentencing range is three to six years. However, the defendant is designated on the judgment form as a "mitigated 30%" offender. We suggest the sentencing court issue an order correcting the judgment form as necessary.

[2]The defendant testified he had been put on probation "[a]bout three times." His presentence report indicates that he received probation on four of these offenses.

to comply with the terms of his probation each time, resulting in revocation.[3] The defendant admitted that he had a drug and alcohol problem; that he had attended a drug rehabilitation program but not successfully completed it; that he had dropped out of school in the ninth grade and had not obtained his GED; that he owned several guns; and that he was not employed and had not been employed at any one time for longer than a month.[4] His guilty plea in this case contains an order revoking his bond "due to the fact that the defendant has used cocaine while out on bond." The defendant was twenty-four or twenty-five years old at the time of the hearing.[5]

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4)

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[3]The presentence report further indicates that "probation is not recommended because of subject's total disregard of previous probation privilege."

[4]The presentence report indicates that the defendant had twice stated during interviews that he had never worked "at all."

[5]At one point, the defendant testified that he was twenty-four. Later, in response to a question by the court, he indicated that he was twenty-five.

> [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence for B, C, D and E felonies. 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. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

As enhancement factors, the sentencing court found that the defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range; the personal injuries inflicted upon the victim were particularly great; the defendant had a previous history of unwillingness to comply with the conditions of a

sentence involving release in the community; and that he had no hesitation about committing a crime when the risk to human life was high. T.C.A. § 40-35-114(1), (6), (8) and (10) (1990 Repl.). The court applied no mitigating factors, although defense counsel maintained that the defendant had acted under strong provocation and that the victim had been engaged in illegal activity at the time of the incident. T.C.A. § 40-35-113(2) and (13) (1990 Repl.).

The court below erred in applying as an enhancing factor either that the defendant had no hesitation about committing a crime when the risk to human life was high, or that the personal injuries inflicted on the victim were particularly great. Aggravated assault is committed when either the assault causes serious bodily injury to another or the perpetrator uses or displays a deadly weapon in the commission of the offense. T.C.A. § 39-13-102(a)(1) (1990 Repl.). However, the record in this case does not reflect to which of these versions the defendant pled guilty. The State contended at the hearing that the defendant's aggravated assault conviction was based upon his use of a deadly weapon, that is, a handgun. In support of this argument, the State relied on the language of the indictment, which references the defendant's use of a deadly weapon. The court below did not make a finding in this respect. Nevertheless, if the defendant was convicted of aggravated assault with the use or display of a deadly weapon, then application of the enhancing factor for committing the offense when the risk to human life was high was improper. This factor is inherent in the crime of aggravated assault with a deadly weapon. State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994). However, the infliction of particularly great bodily injury is not inherent in the offense of aggravated assault with a deadly weapon. Therefore, under this interpretation of the defendant's conviction, application of this enhancing factor was proper. The victim testified that he had been shot in the face, had to be life-flighted to Vanderbilt Hospital, underwent

surgery, spent several days in the hospital, and that the bullet in his head could not be removed. These facts support the application of this factor.

On the other hand, if the defendant was convicted of aggravated assault causing serious bodily injury to another, then the sentencing court's application of this factor was improper. State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994) (the enhancing factor for infliction of particularly great personal injury "is an element of the offense of aggravated assault causing serious bodily injury and cannot be used to enhance the defendant's sentence.") Application of the factor for no hesitation about committing the crime when the risk to human life was high is proper for this form of aggravated assault, however. Id. at 602-3.

In short, then, the sentencing court properly applied one of these two factors; the other one was not applicable because it is inherent in the offense of aggravated assault. Thus, a total of three enhancing factors was properly found and applied. We also find proper the sentencing court's refusal to apply the offered mitigating factors. Even if the defendant's version of the encounter is accepted, the victim's refusal to hand over either the requested drugs or the twenty dollars ($20) was hardly "great provocation." Nor do we accept as a mitigating factor that the victim may have been engaged in illegal activity at the time of the incident. Thus, the application of three enhancing factors and no mitigating factors supports the sentencing court's decision to impose the maximum sentence on this defendant. This issue is without merit.

The defendant next contends that he should have received an alternative sentence, specifically intensive probation or community corrections. T.C.A. § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not

a defendant should be incarcerated. These include the need “to protect society by restraining a defendant who has a long history of criminal conduct,” the need “to avoid depreciating the seriousness of the offense,” the determination that “confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses,” or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” T.C.A. § 40-35-103(1).

In addition, the legislature established certain sentencing principles which include the following:

> (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and
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> (6) A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

T.C.A. § 40-35-102.

After reviewing the statutes set out above, it is obvious that the intent of the legislature is to encourage alternatives to incarceration in cases where defendants are sentenced as standard or mitigated offenders convicted of C, D, or E felonies. However, it is also clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate.

Because he was convicted of a class C felony and sentenced to less than eight years,[6] the defendant is presumably entitled to probation, T.C.A. § 40-35-102(6) and -303(a), in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (1990 Repl.). However, the burden of establishing his suitability for probation rests with the defendant. T.C.A. § 40-35-303(b) (1990 Repl.). And, if "evidence to the contrary" establishes that the defendant has a long history of criminal conduct or that measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant, then incarceration may be deemed appropriate. T.C.A. § 40-35-103(1)(A) and © (1990 Repl.).

In determining whether the defendant should be granted probation, the court must consider the defendant's criminal record, social history, present physical and mental condition, the circumstances of the offense, the deterrent effect upon the criminal activity of the defendant as well as others, and the defendant's potential for rehabilitation or treatment. State v. Bonestel, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993). A crime involving violence, as this one did, may be a factor militating against probation. State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992). In the instant case, the sentencing court found as follows:

> [This defendant] has had three prior convictions for the offense of assault. One of them was an aggravated assault reduced down to simple assault. He has a drug and a theft conviction. While these are misdemeanors, it does show this Court a history of a propensity -- especially the assault convictions -- the propensity toward violence.
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> This defendant has a terrible social, educational, and employment history. He is a drug addict. He has previously been placed on probation, and he has been unsuccessful. Efforts to rehabilitate him have been offered, and it has been to no avail.

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[6] And because he was not convicted of any of the particular offenses which automatically render a defendant ineligible for probation. T.C.A. § 40-35-303(a).

The evidence supports these findings, and these findings overcome the presumption that the defendant is entitled to probation. See, e.g., State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App. 1994) (denial of probation proper on grounds that defendant's history indicated clear disregard for law and morals of society and failure of past efforts to rehabilitate where defendant had lengthy history of criminal conduct, was unemployed at time of sentencing hearing and had a sporadic work history, and had a history of drug and alcohol abuse). This issue is without merit.

Nor is the defendant entitled to community corrections. Persons convicted of violent felony offenses are not eligible for community corrections. T.C.A. § 40-36-106(a)(3) (1990 Repl.). Aggravated assault is a violent felony offense. State v. Birge, 792 S.W.2d 723, 725 (Tenn. Crim. App. 1990). However, "[f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter." T.C.A. § 40-36-106© (1990 Repl.). The defendant does not qualify for community corrections under this provision for two reasons. First, he is considered unfit for probation not solely because of his alcohol and drug abuse, but also because he has violated his probationary sentences in the past. Second, he has already failed one rehabilitation program and so has not established that his needs are treatable and could be served best in the community. Accordingly, we find the denial of community corrections to be proper. This issue is without merit.

Finally, the defendant complains about the sentencing court's decision to continue the sentencing hearing with respect to determining restitution. Unless and until

restitution is improperly ordered, we fail to see how the defendant was harmed by this decision. Any error in granting the continuance was therefore harmless. This issue is without merit.

The defendant's issues being without merit, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID H. WELLES, Judge