

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

FILED
October 8, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

TAYLOR J. HARRISON,

Appellant.

)
)
)
)
)
)
)
)
)
)

C.C.A. NO. 010019910 CR 00527

MACON COUNTY

HON. J. O. BOND
JUDGE

(Aggravated Assault)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF MACON COUNTY

FOR THE APPELLANT:

COMER L. DONNELL
District Public Defender

BOBBY JAMES ELLIS
Assistant Public Defender
P.O. Box 192
Gainesboro, TN 38562

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

MARY ANNE QUEEN
Legal Assistant

MICHAEL J. FAHEY, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

TOM P. THOMPSON, JR.
District Attorney General

JOHN D. WOOTTEN, JR.
Assistant District Attorney General
P.O. Box 178
Hartsville, TN 37074

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant brings a delayed appeal from his conviction from a Macon County jury verdict for Aggravated Assault.¹ The trial court sentenced him to five years imprisonment as a Range I standard offender. The Defendant appeals his conviction and his sentence. We affirm the judgment of the trial court.

The Defendant argues six issues in his delayed appeal: (1) That the trial court erred by admitting uncertified documents of a prior conviction to support an enhancement factor for sentencing; (2) that the trial court misapplied the use of a deadly weapon as an enhancement factor for aggravated assault; (3) that the trial court should have recognized several mitigating factors; (4) that the Defendant's sentence was excessive and unreasonable; (5) that the indictment was ineffectively amended and, therefore, invalid; and (6) that the Defendant was denied effective assistance of counsel because counsel failed to raise, pretrial, that the Defendant was illegally extradited to Tennessee.

We begin with a brief summary of the facts, which are best explained by noting the prior history between the Defendant and the victim. Approximately two months before the assault, Paul Cook, the victim in this case, found the Defendant, Taylor Harrison, dove hunting on Cook's property without permission. Cook had words with the Defendant, ordering him off the property. The conversation was apparently fueled by animosity generated from an earlier incident in which the Defendant had an argument with Cook's father. Cook

¹ Tenn. Code Ann. § 39-13-102.

confronted the Defendant, asking whether he had previously mistreated an elderly man. Cook then hit the Defendant in the eye, knocking him to the ground. The Defendant had a shotgun and pointed it at Cook, but he was disarmed by Cook's son, Stacy. After that incident, the Defendant heard rumors that Cook bragged about it and was "packing a gun" for the Defendant.

On November 19, 1990, the Defendant was attending an equipment auction in Macon County, Tennessee, which Cook also attended. The building was open and an estimated fifty to one hundred people were present at the auction. The Defendant and a companion ended up standing next to Cook. Witnesses observed the Defendant holding a claw hammer at his side. The Defendant suddenly raised the hammer and hit Cook at least once, injuring his eye. The Defendant cursed at Cook, said "I'm going to kill you", and chased Cook, who took refuge in his truck.

Immediately after the attack, Cook was transported by ambulance to the hospital, where he underwent surgery to repair a torn tear duct. A tube was inserted in his eye to drain fluid and remained there for six months. As a result of the assault, his retina was detached and Cook suffers a permanent loss of vision in the injured eye.

The Defendant was indicted on January 18, 1991, but that indictment was dismissed due to a defect. The Defendant was re-indicted on February 6, 1992, on the same charges. Apparently, a change was made on the second indictment to correct an error in citing the proper section of the Tennessee Code. At the time of the second indictment, the Defendant was in Florida. He was arrested in

March, 1992 and released on a \$15,000 bond. The Defendant failed to appear in court as required in June, 1992 and was later located and arrested by the F.B.I. in Texas in September, 1992.

The Defendant posted a bond in Texas, but refused to waive extradition. He was extradited to Tennessee in December, 1992. The Defendant was tried on February 8-9, 1993 and was sentenced on April 5, 1993. He did not pursue an appeal at that time. He was incarcerated in the Riverbend Maximum Security Facility and on December 7, 1993, the Defendant filed a petition for post-conviction relief. He requested that counsel be appointed to represent him and subsequently filed two amended petitions for post-conviction relief, alleging illegal extradition and bias of the trial court. The Defendant filed a motion to recuse the trial judge and the district attorney involved in his trial because he had a federal 42 U.S.C. § 1983 action pending against them.

At the post-conviction hearing, a special judge found that the Defendant was denied his right to appeal because the trial judge did not inform him of the right and he did not waive his right to appeal in writing. The Defendant filed a motion for new trial, which was denied, and he now takes this delayed appeal.

I.

We first address Defendant's issues five and six, that the indictment was improperly or ineffectively amended and that his counsel rendered ineffective assistance by not raising as a pretrial issue that the Defendant was illegally extradited to Tennessee. We note that the Defendant has not provided the complete record in this case. The Defendant bears the burden to "convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24(a). This court may not make a ruling when the record is incomplete. State v. Richardson, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993), perm. to appeal denied, id. (Tenn. 1994). This court may only review what is contained in the record on appeal, and must not presume facts or create inferences from a partial record. See Id. As we are unable to adequately determine these issues without the complete record, the Defendant's issues five and six have been waived. However, we will briefly address each one.

The Defendant alleges that the indictment was invalidly amended because the statutory section cited in the indictment was changed without following the proper procedure.² He claims that the indictment for a violation of Tennessee Code Annotated section 39-12-101(Criminal Attempt) was crossed out in pencil and replaced by section 39-13-102(Aggravated Assault). This court has held that an indictment, improperly drafted as to the substantive Code section citation, was

² Rule 7(b) of the Tennessee Rules of Criminal Procedure allows amendment of an indictment only with the consent of the defendant or "[i]f no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches." The Committee Comment to Rule 7 clarifies subsection (b) as the limit by which "non-consensual amendments may constitutionally be made without re-submitting the matter to the grand jury."

an unintentional error and did not prejudice the defendant. State v. Beal, 614 S.W.2d 77, 79 (Tenn. Crim. App.), perm to appeal denied, id. (Tenn. 1981). In the case sub judice, there is no record of the indictment, an amendment, or any other related proceedings because the technical record for Defendant's original trial was not provided. With an inadequate record, we are unable to assess the circumstances around the indictment or the amendment and cannot determine whether the Defendant was prejudiced by the change.

The Defendant also argues that he was denied the effective assistance of counsel because counsel did not raise the issue of illegal extradition before trial. As a result, the Defendant asserts that he was denied a hearing as to the conduct of the state officials.

In determining whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable

probability must be “sufficient to undermine confidence in the outcome.” Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel’s actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel’s tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel’s alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

After a Defendant is brought into the jurisdiction in which he is charged with a crime, neither the jurisdiction of the court nor the validity of the trial may be challenged based on defects in the extradition process if the trial is conducted in accord with constitutional procedural safeguards. Elliot v. Johnson, 816 S.W.2d 332, 338-39 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1991). However, the Defendant is not denied a remedy if the procedure by which the Defendant was extradited to this state was challenged in advance of trial and was so “illegal and outrageous as to shock the conscience of the court,” depriving the court of jurisdiction. Sneed v. State, 872 S.W.2d, 930, 937 (Tenn. Crim. App. 1993).; Elliott, 816 S.W.2d at 339.

Because the record is incomplete, we are unable to review either prong of the ineffective assistance of counsel claim. Again, we have not been provided with a record that reveals counsel’s pretrial strategy or failure to pursue the Defendant’s claim. The Defendant contends that he was denied his right to an evidentiary showing of outrageous behavior by the state officials procuring his extradition because counsel did not raise the issue. Without the complete record,

we are unable to assess whether counsel's actions fell below the level of competence required.

The Defendant and his wife testified at trial that he was denied a hearing in Texas. In an affidavit executed by Defendant's counsel in Texas, dated after the trial, counsel states that the Defendant was illegally extradited without a hearing. The Defendant has not specified which of his counsel denied him effective assistance. He was represented by attorneys in both Texas and Tennessee.

We have also been supplied with incomplete facts and cannot surmise whether the Defendant was prejudiced as a result of counsel's alleged failure to raise this issue. Therefore, the Defendant has waived this issue.

II

The Defendant challenges several aspects of his sentence. 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).

First, the Defendant asserts that the trial court erred by admitting uncertified documents from the F.B.I.'s N.C.I.C. printout listing a conviction for a felony in Mississippi. In sentencing the Defendant, the trial court used prior criminal convictions or behavior as an enhancement factor. Tenn. Code Ann. § 40-35-114(1). N.C.I.C. reports have been held to be inadmissible hearsay and cannot substitute for certified copies of convictions. State v. Buck, 670 S.W.2d 600, 607 (Tenn. 1984).

There is evidence, through the Defendant's own testimony, that he was convicted of a felony in Mississippi. Inaccuracies or unreliability in the N.C.I.C.

printout were nullified by the Defendant's admission to and description of his previous criminal behavior in Mississippi. See State v. Foster, No. 01C01-9501-CC-00008, Wilson County, slip op. at 3 (Tenn. Crim. App., Nashville, Nov. 21, 1995). Certified copies of other convictions were introduced that could support the application of factor (1). Also, enhancement factor (1) may be supported by evidence of "criminal behavior." Tenn. Code Ann. § 40-35-114(1). This allows a broader application than merely criminal convictions proved by certified records. The totality of the evidence in the record adequately supports the application of this factor, and therefore, the trial court correctly applied enhancement factor (1).

Defendant's second sentencing issue is that the trial court misapplied enhancement factor (9), that the Defendant used a deadly weapon in commission of the crime. See Tenn. Code Ann. § 40-35-114(9). He claims that the use of a deadly weapon is an element of the crime and cannot also be used to enhance the sentence. See Tenn. Code Ann. § 40-35-114.

Tennessee Code Annotated section 40-35-114 provides that "enhancement factors, if not themselves essential elements of the offense as charged in the indictment" may be applied. The crime of Aggravated Assault consists of two alternative elements by which a Defendant may be convicted. Tenn. Code Ann. § 39-13-102. A Defendant may commit Aggravated Assault by either (1) causing serious bodily injury to another or (2) using or displaying a deadly weapon. Tenn. Code Ann. § 39-13-102(a)(1)(A)-(B).

The definition of serious bodily injury includes "[p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty."

Tenn. Code Ann. § 39-11-106(a)(33)(E). Here, the victim suffered a serious injury to his eye, resulting in a permanent impairment of his vision.

A deadly weapon includes “[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury.” § 39-11-106(a)(5)(B). A pillow, sock, telephone wire, hairbrush, and a long-handled flashlight have all been held to constitute deadly weapons because of the manner in which they were used. See State v. Crow, No. 01C01-9310-CR-00348, Davidson County, slip op. at 6 (Tenn. Crim. App., Nashville, May 11, 1995), perm. to appeal denied, id.; State v. Winston, No. 01C01-9302-CR-00069, Davidson County, slip op. at 2 (Tenn. Crim. App., Nashville, July 28, 1994), perm. to appeal denied, id.; State v. Ratcliffe, No. 01C01-9103-CC-00068, Williamson County, slip op. at 2 (Tenn. Crim. App., Nashville, March 26, 1992), perm. to appeal denied, id. Using a claw hammer to hit the victim in the eye is consistent with use as a deadly weapon.

As the Defendant has not provided a complete record that contains a copy of the indictment, it is impossible to determine on what alternate grounds the Defendant was charged and subsequently convicted. From the record provided, however, the facts would support the existence of both elements. See State v. Eldridge, 888 S.W.2d 457, 462 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). It is appropriate to apply as an enhancement factor, an alternate element contained in the offense not used to charge and convict the Defendant. See State v. Foster, No. 01C01-9506-CC-00186, Wilson County, slip op. at 2 (Tenn. Crim. App., Nashville, March 22, 1996); Eldridge, 888 S.W.2d at 462. If the Defendant in the case sub judice was convicted of aggravated assault by use

of a deadly weapon, then it was improper to apply enhancement factor (9). In that situation, however, the trial court could have properly applied enhancement factor (12), that “the actions of the defendant resulted in the death of or serious bodily injury to a victim or person other than the intended victim.” Tenn. Code Ann. § 40-35-114(12). Thus, because the facts of this case clearly support the existence of both serious bodily injury and the use of a deadly weapon, any error in applying enhancement factor (9) is harmless.

The Defendant’s third sentencing issue is that the trial court erred in not applying mitigating factors when determining the Defendant’s sentence. The Defendant contends that the court should have applied mitigating factors (2), that “[t]he defendant acted under strong provocation” and (3), that “[s]ubstantial grounds exist tending to excuse or justify the defendant’s criminal conduct.” Tenn. Code Ann. § 40-35-113(2)-(3).

Here, the prior incident between the Defendant and the victim occurred two months before the assault for which the Defendant was convicted. He had time to plan a retaliation and attacked the victim without notice. The only evidence of provocation, at most, was that the victim spoke to him and smiled. This does not constitute adequate provocation. See State v. Johnson, 909 S.W.2d 461, 465 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1995). The trial court did not err in declining to apply factor (2).

The Defendant contends that he was justified in his assault of the victim as per mitigating factor (3). He points to the fact that he had been previously assaulted by the victim and that he feared future harm. There is nothing in the

record that suggests the Defendant was immediately at risk of being harmed by the victim. Retaliation does not justify the Defendant's actions. The trial court did not err.

Finally, the Defendant contends that his sentence was excessive and unreasonable because the trial court did not correctly apply the enhancement and mitigating factors. Because we have found that the trial court correctly applied the enhancement factors and found no mitigating factors, we cannot conclude that the Defendant's sentence was inappropriate.³ We defer to the presumption of correctness and affirm the sentence.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

WILLIAM M. BARKER, JUDGE

JERRY L. SMITH, JUDGE

³ Aggravated Assault is a Class C Felony. The sentencing range is from three to six years for a Range I offender. The Defendant was sentenced to five years with credit for 217 days already served.