IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
AUGUST SESSION, 1996

FILED

December 3, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9509-CR-00292
Appellee	)	
	)	KNOX COUNTY
vs.	)	
	)	Hon. Richard R. Baumgartner, Judge
JERRY KEITH IVEY,	)	
	)	(Vehicular Homicide)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jerry Keith Ivey, pled guilty to one count of vehicular homicide, a class C felony, in the Criminal Court of Knox County. Following a sentencing hearing, the trial court imposed a sentence of five years in the Department of Correction. On appeal, the appellant contends that (1) the sentence imposed by the trial court is excessive and that (2) he should have received probation or another alternative to incarceration.

After a review of the record, we affirm the judgment of the trial court.

I. Background

At the sentencing hearing, the appellant testified that, on May 14, 1994, after drinking two beers at home around 6:00 p.m., he traveled to Tarwater Road in Knoxville to remodel a trailer. At approximately 11:00 p.m., he left the trailer, planning to visit a co-worker, L.V. Colbert. On his way to Colbert's residence, the appellant stopped at a Fina service station. According to the appellant, he met a woman, later identified as Tammy Moody. Moody and the appellant began talking. The appellant stated that the two drove around Knoxville for approximately ten to twenty minutes discussing "their problems." When the appellant returned Moody to the service station, she demanded payment for "her time." The appellant refused to pay her.[1] Ms. Moody returned to her car and left the service station. The appellant testified that he returned to his truck and started toward Colbert's residence.

At this time, it began to rain heavily. The appellant testified that "my

[1]The State stipulated at the sentencing hearing that Ms. Moody is a prostitute and that she and the appellant were arguing over her $50 fee.

heater wasn't working that good [sic], and my defogger wasn't blowing real [sic] hot air. And I came up on a stop sign, and I automatically slammed on my brakes and slid through it. And that's when the accident occurred with Melissa Hawkins." Miss Hawkins, the twenty-three year old driver of the second vehicle, died later that day in a hospital. A passenger in Miss Hawkins' vehicle was injured. A traffic reconstruction expert determined that the appellant's truck was traveling "at least forty-five miles an hour" at the time of impact. The posted speed limit at the site of the accident is thirty miles per hour. Miss Hawkins' test results were negative for the presence of drugs or alcohol; the appellant's blood alcohol level was .04 percent.

The State's proof highlighted the inconsistencies in the appellant's version of the facts.[2] First, L.V. Colbert's statement established that, although he worked with the appellant, he never socialized with him and was not expecting the appellant on the night of the offense. Second, Moody's statement indicates that the appellant approached her and solicited her for prostitution. She rebuffed him, and he began pursuing her in his vehicle at an accelerated rate of speed.[3] Statements from two eyewitnesses confirmed Moody's testimony regarding the vehicle chase. Both witnesses also confirmed that the vehicles were moving at a high rate of speed: "I mean it was like - it was a blast across the intersection."

Additional proof at the sentencing hearing revealed that, on the date of the hearing, the appellant was thirty-three years old, divorced, and had a fourteen year old daughter.[4] Prior to this offense, the appellant was employed at Goddard Guttering and had been so employed for the previous ten years. The

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[2]The State and defense counsel stipulated to the admissibility, but not to the accuracy, of statements previously obtained from the witnesses, L.V. Colbert, Tammy Moody, Officer Brian Lafollette, Patrick Lynn Cowan, and Anthony Devon Branner.

[3]The appellant later admitted to soliciting sex from Moody, but he denied following her car.

[4]The record indicates that the appellant's wife divorced him after the circumstances of this offense were revealed. The appellant pays $365 a month child support.

record indicates that the appellant was considered a good father and husband and a model employee. The appellant has no prior criminal history. With respect to his physical and mental condition, the appellant explained that, since the accident, he has been having "nightmares every night." He expressed remorse for his actions by stating, "I'm deeply sorry it happened, and I would change places with her if I could if there was anyway I could."

After reviewing the evidence presented at the sentencing hearing, the trial court sentenced the appellant as a Range I offender to five years incarceration. The court denied probation and ordered that the sentence be served in the Department of Correction.

II. Sentencing

Review, by this court, of the length, range, or manner of service 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 relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the case before us, the record indicates that the trial court failed to consider any alternative sentence other than probation. Consequently, we do not apply the presumption.

In conducting our review, this court must consider the evidence heard at the sentencing hearing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the defendant's statements, and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-102, -103(5), -210(b) (1990); see also

State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citing Ashby, 823 S.W.2d at 168). The burden is on the appellant to show that the sentence imposed was improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

A. Length of Sentence

In light of his conviction as a standard offender for a class C felony, the appropriate sentencing range for the appellant is three to six years. The appellant contends that the trial court erroneously sentenced him to five years. Specifically, he argues that the court erred in applying two enhancement factors. The trial court found three enhancement factors and one mitigating factor in imposing a five year sentence. As enhancement factors, the trial court found that "the offense involved more than one victim," Tenn. Code Ann. § 40-35-114(3) (1994 Supp.); that "the defendant had no hesitation about committing a crime when the risk to human life was high," Tenn. Code Ann. § 40-35-114(10); and 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). Although the trial court did not apply an enumerated mitigator, the court acknowledged, pursuant to Tenn. Code Ann. § 40-35-113(13) (1990), the appellant's lack of criminal history, steady employment, and family responsibility.

While the appellant concedes that there is no error in the application of Tenn. Code Ann. § 40-35-114(3), he challenges the trial court's application of the remaining two enhancement factors. The State concedes that enhancement factor (16), "potential for bodily injury," was erroneously applied. See State v. Bingham, 910 S.W.2d 448, 452 (Tenn. Crim. App. 1995). With respect to enhancement factor (10), the focus of the factor is whether the risk to human life

is high, and not whether the defendant hesitated in committing the offense. Id. at 452 (citing State v. Jones, 883 S.W.2d 597, 601 (Tenn. 1994)). "Where the proof necessary to establish an element of the offense would establish that the 'risk to human life was high,' the enhancement factor is an essential element of the offense and thus inapplicable." Id. "However, where a risk to human life is established with facts separate from those necessary to establish an element of the offense, the enhancement factor is not an essential element of the offense and may be applied if supported by the facts." Id. Accordingly, in the case of a vehicular homicide involving recklessness, where the proof establishes that the defendant creates a high risk to the life of a person other than the victim, the facts establishing the enhancement factor would be separate from the facts necessary to establish a high risk of death to a person. Id. Conversely, if there is no risk to the life of a person other than the victim, the proof necessary to establish enhancement factor (10) will be encompassed by the proof necessary to establish an essential element of vehicular homicide. Id. at 453. The appellant was pursuing a prostitute through the streets of Knoxville at an accelerated rate of speed on a rainy night. We conclude that enhancement factor (10) is not an essential element of the offense committed by the appellant, and the record supports its application.

Finally, we conclude that the facts clearly support some consideration of the combination of the appellant's lack of criminal history, good employment history, and family social activity as a mitigating factor.[5] Bingham, 910 S.W.2d at 453. Moreover, we reject the appellant's argument regarding the applicability of mitigating factor (11), that "the defendant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct." This court, in State v.

[5]We reject the appellant's argument that the court cannot combine these factors as one mitigator. These factors are nonenumerated non-statutory mitigators which are left to the discretion of the sentencing court.

Upman, No. 03C01-9402-CR-00052 (Tenn. Crim. App. at Knoxville, Aug. 2, 1994), held that, since most vehicular homicides inherently involve this mitigator, mitigating factor (11) is to be given little or no weight. Thus, two enhancement factors and one non-statutory mitigating factor are applicable.

In determining the appropriate sentence for a felony conviction, Tenn. Code Ann. § 40-35-210(c) (1990) instructs the sentencing court that "[t]he presumptive sentence shall be the minimum sentence in the range if there are no enhancement or mitigating factors." If there are enhancement and mitigating factors, the court must start at the minimum sentence in the range, then enhance the sentence in accordance with the enhancement factors, then reduce the sentence in accordance with the mitigating factors. Tenn. Code Ann. § 40-35-210(e). Moreover, there is no mathematical process of adding the sum total of enhancement factors present then subtracting from this figure the mitigating factors present for a net number of years. Rather, "the weight to be afforded mitigating and enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances of the case involved." State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986). While our review is *de novo* without the presumption of correctness, we conclude that, even absent one enhancement factor, a sentence of five years is justified in the present case.

B. Alternative Sentencing

The appellant also contends that the trial court should have imposed an alternative sentence.[6] The process for deciding whether a defendant should

[6]The trial court denied probation due to the victim's death, the need for deterrence, the seriousness of the offense, and the appellant's lack of candor.

have been granted an alternative sentence necessarily begins with a determination of whether the defendant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. Bingham, 910 S.W.2d at 453 (citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). In order for the presumption of alternative sentencing to apply, the defendant must be an especially mitigated or standard offender, must be convicted of a C, D, or E felony, and must not have a criminal history evincing a clear disregard for the laws and morals of society or a failure of past efforts at rehabilitation. Tenn. Code Ann. § 40-35-102(6) (1990); § 40-35-102(5). The appellant is a first time offender of a class C felony. The presumption applies.

However, this presumption may be rebutted by evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). Guidance as to what constitutes evidence to the contrary must be found in Tenn. Code Ann. § 40-35-103(1)(A)-(C). Bingham, 910 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 169). Thus, a sentence should involve confinement when confinement is necessary to protect society from a defendant who has a long history of criminal conduct; to avoid depreciating the seriousness of the offense or to provide an effective deterrence to others likely to commit similar offenses; or when measures less restrictive have failed. Tenn. Code Ann. § 40-35-103(1)(A)-(C). In the present case, the appellant has no prior criminal record. Thus, we only need to consider evidence showing that confinement is necessary to avoid depreciating the seriousness of the offense or necessary to provide a deterrent to others. There was no evidence presented at the sentencing hearing supporting the need to deter others likely to commit a similar offense, thus deterrence is not applicable to this case. See Bonestel, 871 S.W.2d at 169 (holding that there must be evidence in the record that the sentence imposed will have a deterrent effect within the jurisdiction).

To deny alternative sentencing based upon the seriousness of the

offense, the "'circumstances of the offense must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,'" and the nature of the offense must outweigh all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 454 (citing State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)). The circumstances of the present case demonstrate the appellant's callous indifference to the safety of motorists and pedestrians alike on the night of May 15, 1994. While the loss of life may not overcome the presumption favoring alternative sentencing, the loss of an innocent person's life and the injury to another, coupled with the selfish and reckless nature of the appellant's conduct in "chasing a prostitute," clearly make the circumstances of this offense both reprehensible and offensive. See Bingham, 910 S.W.2d at 455 (the existence of death cannot by itself constitute sufficient evidence to the contrary under Tenn. Code Ann. § 40-35-102(6)).

Additionally, the appellant's potential or lack of potential for rehabilitation is a relevant factor in determining whether the appellant is entitled to an alternative sentence. See Tenn. Code Ann. § 40-35-103(5). It is well established that a defendant's truthfulness is probative of his attitudes towards society and prospects for rehabilitation and is thus a factor in the sentencing process.[7] State v. Duff, No. 02C01-9307-CR-00152 (Tenn. Crim. App. at Jackson, June 28, 1995), perm. to appeal denied, (Tenn. Nov. 6, 1995) (citing Grayson, 438 U.S. at 50, 98 S.Ct. at 2616). See also State v. Williamson, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); State v. Dowdy, 894 S.W.2d 301, 306

[7]The Supreme Court, in United States v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, (1978), citing Morissette v. United States, 342 U.S. 246, 250, 72 S.Ct. 240, 243 (1952), held:

> A "universal and persistent" foundation stone in our system of law, and particularly in our approach to punishment, sentencing and incarceration, is the "belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil." Given that long accepted view of the "ability and duty of the normal individual to choose," we must conclude that the defendant's readiness to lie under oath -- especially when, as here, the trial court finds the lie to be flagrant -- may be deemed probative of his prospects for rehabilitation.

(Tenn. Crim. App. 1994); State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993). In other words, a defendant's credibility and willingness to accept responsibility for the offense are circumstances relevant to determining his rehabilitative potential. Dowdy, 894 S.W.2d at 306 (citing State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992)). Despite overwhelming proof to the contrary, the appellant, in this case, persistently refused to acknowledge the wrongfulness of his conduct involving a prostitute and that this conduct resulted in the tragic death of an innocent person. The appellant fabricated a story in order to avoid detection of the circumstances which led to his reckless behavior. His failure to acknowledge his wrongful acts reflects adversely against him. A person who pleads guilty to an offense and then consistently and adamantly offers perjured testimony to the court denying any wrongdoing is not a person who can immediately return to his community and assume a role as a functioning, productive, and responsible member of society. Dowdy, 894 S.W.2d at 306. Thus, the appellant's persistent lack of candor with the court weighs against his suitability for an alternative sentence. See State v. Clanton, No. 01C01-9503-CC-00050 (Tenn. Crim. App. at Nashville, July 14, 1995).

The Sentencing Reform Act intends that sentences should be considered on a case by case basis. State v. Russell, 773 S.W.2d 913, 915 (Tenn. Crim. App. 1989). Accordingly, the punishment should not only fit the offense, but the offender as well. Dowdy, 894 S.W.2d at 305. Therefore, we conclude that, due to the appellant's lack of candor with the court and the reprehensible and offensive nature of this offense, the presumption favoring alternative sentencing has been rebutted. See. e.g., State v. Clanton, No. 01C01-9503-CC-00050.

III. Conclusion

Upon *de novo* review, we conclude that, in order to avoid depreciating the seriousness of the offense and in view of the appellant's lack of potential for rehabilitation, confinement is necessary. Moreover, we conclude that a sentence of five years under the facts of this case is proper. Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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PAUL G. SUMMERS, Judge