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

STATE OF TENNESSEE,	)	
	)	No. 03C01-9509-CC-00261
Appellee	)	
	)	WASHINGTON COUNTY
vs.	)	
	)	Hon. Lynn W. Brown, Judge
CHARLES N. KILGORE,	)	
	)	(Assault with intent to commit
Appellant	)	murder; Shooting into occupied dwelling)

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OPINION FILED: _____

AFFIRMED IN PART; MODIFIED IN PART

David G. Hayes
Judge

OPINION

The appellant, Charles N. Kilgore, appeals the sentences imposed by the Washington County Criminal Court following revocation of his community corrections sentence. After a review of the record, the appellant's sentence of twelve years for assault with intent to commit murder is affirmed; his sentence of seven years for shooting into an occupied dwelling is modified to reflect a sentence of three years.

I. Background

The present appeal arises from the appellant's 1990 guilty pleas to assault with intent to commit murder and shooting into an occupied dwelling. The incident leading to these convictions occurred on May 5, 1989. On this date, the appellant, admittedly intoxicated from a combination of pain medication and alcohol, wantonly fired his weapon into a neighbor's residence. Several bullets penetrated the interior of the dwelling, narrowly missing the occupants inside who were watching television. After responding to the call, police officers found the appellant, at his residence, drinking a quart of beer. When confronted by the officers, the appellant produced a .357 magnum revolver and aimed the weapon at a police officer. Another officer immediately reached for the revolver and prevented its discharge by placing his hand between the hammer of the pistol and the firing pin.

On September 21, 1990, the trial court sentenced the appellant to concurrent five year sentences, suspending all but 120 days with the remainder to be served on probation.[1] In granting probation, the trial court concluded that

[1]The offenses were committed prior to the effective date of the 1989 Criminal Code.

the conduct resulting in the appellant's convictions appeared to be “out of character." Additionally, the appellant "promised the court that he would never consume alcoholic beverages again" and that this incident was an "unusual occurrence." During this 120 day period of incarceration, the appellant escaped from custody while receiving treatment at a hospital.[2] This escape resulted in a misdemeanor conviction.

The record reflects that, on September 8, 1992, the trial court revoked the appellant's probation and placed him in a community corrections program for a term of eight years. Within one month of his placement in the program, the appellant was arrested for DUI. Consequently, the appellant's eight year sentence was revoked, and, on March 24, 1993, a resentencing hearing was held to determine whether enlargement of his sentence was appropriate. At the hearing, the appellant explained that he only drank alcohol "for [his] kidneys." Moreover, he added that he complied with all rules pertaining to community corrections including reporting to his case officer. He conceded that he stopped calling when his "phone [was] cut off." However, his case officer testified that the appellant was noncompliant with the telephone monitoring required on community corrections. At the conclusion of the hearing, the trial court revoked the appellant's placement in the community corrections program and enlarged his sentence to nine years in the state penitentiary.[3] The appellant appealed this sentence and this court remanded the case due to the trial court’s failure to enter findings of facts supporting enlargement of the appellant’s sentences. See State v. Kilgore, No. 03C01-9308-CR-00272 (Tenn. Crim. App. at Knoxville, May 23, 1994).

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[2]Apparently, while at the hospital, the appellant discovered a white doctor's coat, put on the coat, and impersonated a doctor in order to escape from the hospital. The appellant contends, however, that he only put on the doctor's coat because his own clothing was wet.

[3]The record does not indicate whether the nine year sentence imposed was for the assault with intent to commit murder conviction, the shooting into an occupied dwelling conviction, or both.

On May 3, 1995, a new sentencing hearing was held. It is this hearing which forms the basis for the present appeal. The principal matters addressed at this hearing involved the appellant's continued abuse of alcohol and his noncompliance with the conditions of his sentence relating to release in the community. The appellant's testimony offered little assistance in resolving these issues, as it was contradictory and, most often, non-responsive. When questioned about his drinking problem, the appellant stated that "four cans [of beer] ain't (sic) going to make you drunk." He testified that "[i]t's not difficult to get alcohol in prison. You can get dope and everything up there. I can prove it." However, the appellant asserted that he has abstained from the use of alcohol and attends Alcoholics Anonymous meetings.[4] In response to the trial court's inquiry as to whether he could live by the rules if given probation, the appellant replied, "That phone contact is something else. Kept me awake all night and everything else." Further, when specifically asked about community corrections, the appellant stated "I could go back on it, but that phone deal. . . . . Well, if I have to stay on that phone call for twenty four hours a day, I'd rather go back up to the prison and stay." At the conclusion of the hearing, the trial court imposed concurrent sentences of twelve years for assault with intent to commit murder and seven years for shooting into an occupied dwelling.

II. Analysis

The appellant challenges the length of the sentence imposed by the trial court. Specifically, he contends that the trial court failed to apply mitigating factors despite their presence in the record. The appellant argues that the

[4]However, when questioned by the trial court, the appellant could not correctly answer the court's inquiry as to the first two steps in AA recovery.

following mitigating factors should have been applied: (1) the defendant, because of his old age, lacked substantial judgment in committing the offense, Tenn. Code Ann. § 40-35-110(7) (replaced by Tenn. Code Ann. § 40-35-113(6) (1990)); (2) the defendant was suffering from a mental and/or physical condition that reduced his culpability, Tenn. Code Ann. § 40-35-110(9) (replaced by Tenn. Code Ann. § 40-35-113(8)); and (3) the offense was committed under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct, Tenn. Code Ann. § 40-35-110(12) (replaced by Tenn. Code Ann. § 40-35-113(11)). We disagree.

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 trial court correctly applied sentencing principles, thus, the presumption applies.

In making 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 or enhancement factors. 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).

The offenses resulting in the appellant's convictions occurred prior to the enactment of the 1989 Sentencing Act. Although Tenn. Code Ann. § 40-35-

117(b) (1994 Supp.) provides that "any person sentenced on or after November 1, 1989, for an offense committed between July 1, 1982, and November 1, 1989, shall be sentenced under the provisions of this chapter," "[b]ecause of *ex post facto* provisions of the Tennessee and United States Constitutions, a defendant sentenced after November 1, 1989, for an offense committed between July 1, 1982, and November 1, 1989, may not receive a greater punishment than he would have received under the prior law." Sentencing Commission Comments, Tenn. Code Ann. § 40-35-117. Accordingly, the trial court, under the rule announced in Pearson, must calculate the defendant's sentences under both the 1989 Act and the 1982 Act, and then impose the lesser sentence of the two. State v. Pearson, 858 S.W.2d 879, 884 (Tenn. 1993)). The record reflects that the trial court reviewed both the 1982 Act and the 1989 Act in its sentencing decision.[5]

At the conclusion of the sentencing hearing the trial court found that: (1) the appellant has a previous history of criminal convictions or criminal behavior, Tenn. Code Ann. § 40-35-111(1) (1982) (replaced by Tenn. Code Ann. § 40-35-114(1) (1990)), based upon numerous misdemeanor offenses; (2) the offense involved more than one victim, Tenn. Code Ann. § 40-35-111(3) (replaced by Tenn. Code Ann. § 40-35-114(3)), commenting upon the danger not only to the appellant's neighborhood, but also to the police officers present when the

[5]At the time these offenses were committed, the sentence for assault with intent to commit first degree murder was five to twenty-five years; the sentence range for a range one offender was, therefore, five to fifteen years. See Tenn. Code Ann. § 40-43-109(a) (1982). The sentence for shooting into an occupied dwelling was one to five years; the sentence range for a range one offender was, therefore, one to three years. Under the 1989 Sentencing Act, assault with the intent to commit first degree murder is classified as a class A felony, thus, the sentence range is fifteen to sixty years; the sentence for a range one offender is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1). Shooting into an occupied dwelling is classified under the 1989 Act as a class C felony which provides for a sentence of three to fifteen years; the sentence range for a range one offender is three to six years. Tenn. Code Ann. § 40-35-112(a)(3). Thus, the appellant was properly sentenced under the 1982 Act for assault with intent to murder. However, the court erroneously calculated the appellant's sentence range for shooting into an occupied dwelling at three to nine years, with a resulting sentence of seven years. The lesser sentence, as calculated above, falls under the 1982 Act with a sentence range of one to three years.

appellant pointed a weapon at one particular officer; and (3) the appellant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, Tenn. Code Ann. § 40-35-111(8) (replaced by Tenn. Code Ann. § 40-35-114(8)), based upon the appellant's revocations from probation and community corrections, in addition to his statements at the sentencing hearing. The trial court also considered the fact that the appellant "possessed and employed a firearm during the commission of the offense." Tenn. Code Ann. § 40-35-111(9) (replaced by Tenn. Code Ann. § 40-35-113(9)). However, the court noted that "considering [the] elements of the offense, I don't think the Court can put more than moderate weight for enhancement on that enhancement factor." Regarding mitigating factors, the court found that "they just don't fit." As to the appellant's age, the court stated that "[h]e is a man of some age, [the presentence report indicated that the appellant was fifty-five at the time of the sentencing hearing], . . . and his physical condition is in a state of deterioration, but . . . there's no indication that's affected his judgment." Moreover, the court found that, "number nine," "suffering from a mental of physical condition," "[the new law specifically . . . excludes . . . intoxication."

Upon *de novo* review, we conclude that the trial court did not err by failing to apply these requested mitigators. Additionally, the court correctly applied the appropriate enhancement factors. Although there may be error in the application of the appellant's use of a firearm during the commission of the offense, any error is harmless, because the factor was properly considered for the offense of assault with intent to commit murder, although it was incorrectly applied to shooting into an occupied dwelling. Moreover, the court afforded little weight to this enhancement factor. Accordingly, the record clearly supports the trial court's finding and application of three or four enhancement factors and no mitigating factors in arriving at the appellant's sentence. We conclude that the appellant's sentence of twelve years for assault with intent to commit murder is justified.

However, the trial court's enlargement of the appellant's sentence to seven years for shooting into an occupied dwelling must be modified. The appellant's sentence for this offense must be determined under the 1982 Sentencing Act. See, *supra* note 5. Under the 1982 Act, the appellant's sentence range, as a range I offender, is one to three years. Due to the presence of three enhancement factors and no mitigating factors, we conclude, upon *de novo* review, that the maximum sentence of three years is appropriate for the appellant's conviction for shooting into an occupied dwelling.

III. Conclusion

The appellant's sentence of twelve years for assault with intent to commit murder is affirmed. The sentence of seven years for shooting into an occupied dwelling is modified to reflect a sentence of three years. These sentences are to run concurrently. This case is remanded for entry of a judgment of conviction consistent with this opinion.

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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