IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

October 17, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9511-CC-00372**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**HON. CORNELIA A. CLARK,**
STEVE MCCAIN,	)	**JUDGE**
	)	
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 on two counts of aggravated robbery and one count of theft of property valued over one thousand dollars ($1000). He pled guilty to one count of aggravated robbery, a class B felony, with sentencing left to the court. After a hearing, the court below sentenced the defendant as a Range I standard offender to ten years incarceration. A Range I sentence for a class B felony is not less than eight and not more than twelve years. T.C.A. § 40-35-112(a)(2) (1990 Repl.). The defendant appeals as of right, complaining that his sentence is excessive. Finding no error, we affirm the sentence set by the trial court.

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) [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. 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.

In this case, the court below heard testimony from a co-defendant and considered the presentence report and proof of a prior conviction. Based upon the evidence presented, the court below found three enhancement factors: that the defendant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range; that he was a leader in the commission of the offense that involved at least two criminal actors; and that the offense was committed under

circumstances under which the potential for bodily injury to a victim was great. T.C.A. § 40-35-114(1), (2) and (16) (1990 Repl.). The court below specifically found that no mitigating factors applied.

The defendant now argues that the court erred when it did not apply as mitigating factors that, because of his youth, he lacked substantial judgment in committing the offense, and that he committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct. T.C.A. § 40-35-113(6) and (11) (1990 Repl.). However, in response to the defendant's offer of these factors at the sentencing hearing, the court below found "that there is [no] proof in the record that this crime was committed under such unusual circumstances that it might never happen again. And although this defendant is young, this appears to have been a carefully thought out and preplanned offense which went wrong only because the inside man, so to speak, didn't cooperate as fully as anticipated." The evidence does not preponderate against these findings by the court below. The defendant's contention that these mitigating factors should have been applied is therefore without merit.

The defendant also contends that the sentencing court erred in finding as an enhancing factor that he was a leader in the commission of the offense. However, the sentencing court heard testimony from a co-defendant that he had done most of the planning for the crime. There was no testimony or other proof refuting this statement. The sentencing court did not err in applying this factor.

Finally, the defendant complains that the court below gave too much weight to his prior criminal history as an enhancing factor. The proof at the sentencing hearing established that the defendant had assaulted a corrections officer while he was

incarcerated for the instant charge. In referring to this conviction, the court below stated that "it is especially of concern to this court because it is a conviction for assault on a correctional officer while he was incarcerated in jail on this offense. If anything, that suggests a lack of rehabilitation and a situation where it's not simply a youthful lack of judgment or an unlikelihood that this kind of offense might occur again." We see no abuse of discretion in the weight given this enhancing factor by the court below.

The defendant concedes in his brief that the sentencing court properly applied as an enhancing factor that the crime was committed under circumstances where the potential for bodily injury to a victim was great. However, we find that the sentencing court erred in applying this factor because it is an essential element of the offense of aggravated robbery. State v. King, 905 S.W.2d 207, 213 (Tenn. Crim. App. 1995); State v. Claybrooks, 910 S.W.2d 868, 873 (Tenn. Crim. App. 1994). Nevertheless, no reduction in the defendant's sentence is required by this error because the sentencing court properly applied two other enhancing factors. Because no mitigating factors were applicable, the defendant's midrange sentence is proper.

We note the State's argument that the defendant waived his right to appeal his sentence because, as part of his agreement to plead guilty, he agreed that "the court will determine, following a sentencing hearing, all issues of sentencing, including without limitation the following: (1) the length of sentence, (2) the amount of any fine, and (3) the amount of any restitution." We fail to see how this agreement includes an agreement by the defendant to waive his statutory right to appeal the sentencing decision by the sentencing court. This argument is baseless.

The defendant's contentions 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