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

FILED

December 6, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9510-CC-00329
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. D. Kelly Thomas, Jr., Judge
MICHAEL STREITZ,	)	
	)	(Theft Over $1000)
Appellant	)	

For the Appellant:

F. D. Gibson
Attorney at Law
116 E. Harper
Maryville, TN 7804

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Michael J. Fahey, II
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael L. Flynn
District Attorney General

Philip H. Morton
Asst. District Attorney General
363 Court Street
Maryville, TN 37804-5906

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Michael Streitz, was indicted by a Blount County Grand Jury for one count of theft of property over $1000. Subsequently, a jury found the appellant guilty as charged, and the trial court sentenced the appellant to six years incarceration as a multiple offender. The appellant now challenges this conviction for three reasons. First, he contends that the trial court erred in failing to dismiss the indictment for a violation of Tenn. R. Crim. P. Rule 8 (a). Second, he argues that the evidence is insufficient to support a conviction for theft of property over $1000. Third, the appellant alleges that the court imposed an excessive sentence.

After review of the record and the briefs submitted by both parties, we conclude that the appellant's contentions are meritless. The judgment of the trial court is affirmed.

I. Background

On July 16, 1994, Billy Beets parked his 1988 maroon GMC Sierra pickup in front of his residence in Alcoa, Tennessee. Beets inadvertently left his car keys in the ignition and the truck doors unlocked. At some point after 11:00 p.m., the truck was stolen from Beets' property.

During the early morning hours of July 17, 1994, Officer Sharon Borden of the Maryville Police Department "received a call regarding a possible intoxicated driver headed into town on 411 South." The driver "had been at the Smokehouse Restaurant and left without paying for the meal." Officer Borden received a description of the vehicle and the license plate number.

Shortly thereafter, Officer Borden located the vehicle and confirmed the registration number. She observed the vehicle for only a few seconds when the vehicle went through a raised median, almost causing an accident. When the driver regained control, Officer Borden turned on her blue lights, and the driver stopped the truck. When the driver exited the vehicle, Officer Borden observed that the driver appeared "highly intoxicated." Officer Borden asked the driver his name and he replied "Michael Greenwood." The driver admitted that he did not have any type of identification with him. Later, at the police station, Officer Borden learned that Michael Streitz and not "Michael Greenwood" was the driver's true identity. At this time, the appellant was charged with DUI.

The appellant told Officer Borden that the truck belonged to his "boss." The Officer "ran the tag" and determined that Beets was the owner. Beets testified that the appellant did not have his consent to operate his vehicle and that, on the day of the theft, the truck had a value of $8000. The appellant was then charged with theft over $1000. At trial, Beets stated that the appellant later contacted him and apologized for taking the vehicle. However, the appellant never communicated an intent to return the truck, nor was he able to explain why he took the truck. Rather, he stated that he had been drinking heavily and taking pills. Other than the sixty miles that the truck had been driven, Beets observed no other damage to the truck. The appellant's clothes were found in the truck bed.

In September 1994, the appellant pled guilty to DUI in General Sessions Court. In December 1994, the Blount County Grand Jury indicted the appellant for the theft offense. A jury later found him guilty of theft of property over $1000. He now appeals the theft conviction.

II. Joinder of Offenses

The appellant first contends that Tenn. R. Crim. P. 8(a) mandated the joinder of the DUI and theft charges, because both offenses resulted from the DUI stop. Consequently, he argues, the theft indictment should be dismissed, because he pled guilty to the DUI offense. We disagree.

The appellant pled guilty to DUI in the general sessions court. Probable cause was found for the theft charge, and the appellant's case was bound over to the grand jury. Approximately three months later, the Blount County Grand Jury returned an indictment charging the appellant with theft over $1000. Rule 8(a) provides, in part relevant to this issue:

> Two or more offenses shall be joined in the same indictment, presentment or information with each offense stated in a separate count . . . if the offenses are based upon the same conduct or arise from the same criminal episode and if such offenses are known by the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s) and if they are within jurisdiction of a single court. . . .

(Emphasis added). In State v. Pickett, No. 01C01-9301-CC-00026 (Tenn. Crim. App. at Nashville, Dec. 2, 1993), this court stated: "Rule 8(a) clearly applies procedurally only to two or more offenses that are prosecuted by indictment, presentment, or criminal information, and not to offenses triable before a magistrate of a municipal court or general sessions court." Accordingly, this court held that "Rule 8(a) - Mandatory Joinder, does not apply to criminal proceedings before the general sessions court." Id. See also State v. Curtis, No. 01C01-9002-CC-00049 (Tenn. Crim. App. at Nashville, Oct. 18, 1990). Since the appellant's DUI charge was disposed of in the general sessions court, leaving only one indictable offense, the theft charge, this issue is without merit. Moreover, adoption of the appellant's argument would produce an absurd result and clearly not one contemplated by Rule 8(a). Finally, the purpose of the rule is to prevent a prosecutor from "holding back," for additional prosecution, offenses

based upon the same conduct or arising from the same criminal episode if such offenses are known at the time the indictment is returned. This argument is factually inapplicable to the case before us.

III. Sufficiency of the Evidence

In his next issue, the appellant challenges the sufficiency of the convicting evidence. Specifically, he contends that the evidence fails to establish the requisite "intent to deprive the owner of the property" to sustain a conviction for theft of property over $1000. We disagree.

A jury conviction removes the presumption of innocence with which a defendant is initially cloaked and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). It is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offenses beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13 (e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In order to obtain a conviction in a prosecution for theft of property over $1000, the State must show, beyond a reasonable doubt, that "a person . . . , with intent to deprive the owner of property, . . . knowingly obtains or exercises control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103 (1991 Repl.). The testimony at trial revealed that the appellant was apprehended in Maryville driving Beets' pickup truck. Beets' lives in Alcoa. Articles of clothing, identified as belonging to the appellant, were found in the truck. Beets' testified that he did not give the appellant his consent to remove the truck from his property. Although the appellant did apologize to Beets, he did not offer an explanation as to why he took the truck, and he never mentioned any intent to return the truck. Finally, Beets testified that the truck had a value of $8000. Upon this evidence, a rational jury could and did find the appellant guilty beyond a reasonable doubt of theft of property over $1000. Tenn. R. App. P. 13(e). This issue is without merit.

IV. Length of Sentence

In his final issue, the appellant contends that the trial court erred in imposing a sentence of six years incarceration.[1] Specifically, the appellant argues that the trial court, in applying enhancement factors, did not follow the principles of the Sentencing Act. We conclude otherwise.

The evidence presented at the sentencing hearing revealed that the appellant's record includes multiple felony and misdemeanor convictions in

[1]The appellant does not contest his classification as a range II offender.

Florida and Tennessee.[2] The appellant verified that he has "at least four or five felony convictions." Additionally, the current offense was committed while the appellant was on probation for a Bradley County conviction for theft of property over $1000. The appellant, despite his prior criminal history, stated at the hearing that he felt he had served enough time for the current offense.[3] He also summarized the improvement he has made while incarcerated, including earning work release status and helping to collect litter from the banks of the Tennessee River. The appellant also stated that Billy Beets, the victim of the crime, offered him his old job back if he were released.

The trial court found that the appellant was a "multiple offender, that you have at least two previous felony convictions." See Tenn. Code Ann. § 40-35-106 (1990). Because he was convicted of a class D felony, the appellant was eligible for a sentence "not less than four years nor more than eight years." See Tenn. Code Ann. § 40-35-112(b)(4). The court imposed a sentence of six years confinement in the Department of Correction.

In arriving at its sentencing determination, the trial court applied two enhancement factors: "the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," Tenn. Code Ann. § 40-35-114(1)(1994 Supp.), and "the felony was committed while on felony probation," Tenn. Code Ann. §40-35-114(13)(B). The court also applied one mitigating factor, "the defendant's conduct neither caused nor threatened serious bodily injury." Tenn. Code Ann. §

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[2]At the sentencing hearing, the appellant objected to the introduction of six Florida convictions on the ground that these convictions were either not listed or inconsistent with those set forth in the State's notice of enhancement. We note, however, that the trial court agreed to grant the appellant a continuance if he wished to challenge the convictions. The record is clear that the appellant waived the trial court's offer of a continuance, and accordingly, waived any issue arising from the State's use of the convictions.

[3]On the date of the sentencing hearing, the appellant had spent approximately ten months in jail.

40-35-113(1) (1990). Moreover, in denying an alternative sentence, the court found that confinement is necessary to restrain a defendant with a long history of criminal conduct, and measures less restrictive than confinement have been recently applied unsuccessfully to the defendant. See Tenn. Code Ann. § 40-35-103 (1)(A), -103(1)(C) (1990). The court considered the community corrections program, but found that, since "there's been a flight; there's a long history of the same kind of conduct; there's his recent conviction in Bradley County, and now this one," this alternative was unavailable. Finally, the court remarked that the appellant could have been sentenced as a persistent offender, based upon his convictions for five or more felonies.

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 considered relevant sentencing principles. Accordingly, we apply the presumption.

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 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).

Upon *de novo* review, we conclude that the trial court appropriately applied enhancement factors (1) and 13(B) and mitigating factor (1). We would additionally apply enhancement factor (8), "the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in a community."[4] Thus, three enhancement factors are present, in addition to one mitigating factor. 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). 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). Applying the presumption of correctness to the trial court's determination, we conclude that a sentence of six years is justified in the present case. Accordingly, the appellant has failed to show that the sentence imposed by the trial court is improper. This issue is without merit.

V. Conclusion

After a review of the record and the briefs of both parties, we conclude that there is no evidence that preponderates against the findings of the trial

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[4]In addition to the appellant's probationary status in Bradley County, Tennessee, at the time of the offense, the record also reflects a prior probation violation in Broward County, Florida, resulting in a six year sentence.

court. Moreover, we find no error of law mandating reversal of the trial court's judgment. Accordingly, we affirm the judgment of the trial court.

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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