IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

STATE OF TENNESSEE, Appellee,	*	C.C.A. # 03C01-9509-CC-00256
	*	ROANE COUNTY
VS.	*	Hon. E. Eugene Eblen, Judge
	*	(Rape of a Child)
JEFF WHITAKER, Appellant.	*	

For Appellant:

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(on appeal)

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Jeff Whitaker, waived his right to a jury trial and pled guilty to eight counts of rape of a child. The trial court imposed a Range I sentence of fifteen years for each count and ordered concurrent sentences except for counts one, eleven, and sixteen which are to be served consecutively. The effective sentence is 45 years.

In this appeal of right, the sole issue presented for review is whether the trial court erred by ordering the sentences to be served consecutively. We find no error and affirm the judgment.

Each rape occurred between July and December of 1993 at the home of the defendant. There were three separate sexual penetrations of AD[1]; three sexual penetrations of BS; one sexual penetration of VB, the daughter of the defendant; and one sexual penetration of LG. The ages of the victims were between six and eleven. In accordance with Tenn. Code Ann. § 39-13-523, the defendant is required to serve the entire sentence undiminished by any reduction credits.

During the course of the investigation, the defendant gave a statement to the police. Audio tape recordings were transcribed and introduced as evidence at the sentencing hearing. The defendant claimed to authorities that the young girls initiated the sexual contact. He contended that his fingers and penis would accidentally slip inside only because the victim's state of arousal included vaginal secretions. The defendant claimed that he tried to rebuff their advances but, due to the number of girls involved, was unable to physically resist.

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[1] It is the policy of the court not to mention minor victims by name.

An unaltered statement written by the defendant appears in the presentence report:

> I am vary deeply saden and hurt from the thangs that has taken place. I didn't have a chance. . . . I was took advandage of from the people that investgated this case because I was going through alot of emotional stress, grief and suffered from depression. . . . I was promised to get help but when I talked to them they didn't understand that the things (said above) is what blinded me from being more responsible. . . . To ese the stress but all it did was to give those kids a way to take advandage of me and I'm sorry so sorry. . . . Nobody cares how bad I feel about this. The only thing I did was lay with them to watch movies I rented. Nothing wasn't ment to happen. . . . I realy don't know what exactly happened because I was asleep and been on drugs and not fully conscience and mixted up with dreams and past things but I can't denie the facts that I because I was lying there and may have been up close to me but wasn't like this all the time. . . . Two of the girls . . . provoked the things that happened. Its not fair that I touch that didn't mean to and I be touched 3 times . . . and I'm in this much trouble they did this when I was asleep. . . . Them kids know what is right and wrong but it was the way thay was brought up my own kids know what is right and wrong. . . . I know there was some things I couldn't have done but everybody makes stupid mistakes. This has been blowed up to fare and a to big a price to pay. . . . I'm not sex crazed for young girls. It just was a bad time but I didn't see it and realy notice it. This is about one sided nobody didn't understand me at all with all the problems I been suffering. . . . I didn't hurt anyone for life or nothing.

The defendant had two prior convictions for contributing to the delinquency of a minor and two for indecent exposure. As a result of these offenses, he had received a suspended sentence, fines and mandatory counseling.

In exchange for the guilty pleas in this case, the state agreed to dismiss eighteen other counts in the indictment involving rape of a child and sexual battery. Before the sentencing hearing, the state filled notice of four enhancing factors. The defendant filed notice of five mitigating factors. At the sentencing hearing, the mothers of two of the victims testified about the effects the incidents

had on their daughters. The mother of BS testified that her daughter became aggressive after the sexual abuse began; she was fearful, would cry often, and began to wet her bed. Each of the mothers claimed that the rape had an adverse emotional impact on the rest of the family. The mother of AD testified that her daughter had to sleep with her, cried continuously and, during emotional outbursts, purported to hate herself and others. Evidence indicated that AD blamed herself for the crimes. She will apparently require several years of counseling; her parents had marital problems after learning of the rapes.

The defendant contends that the trial court erred by ordering three of the sentences to be served consecutively. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution: "[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved." State v. Taylor, 739 S.W.2d at 230. The Sentencing Commission Comments adopted the cautionary language. Tenn. Code Ann. § 40-35-115. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria[2] exist:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
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> (2) The defendant is an offender whose record of criminal activity is extensive;
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> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a

[2]The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

> pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
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> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
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> (6) The defendant is sentenced for an offense committed while on probation;
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b).

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, as now defined by subsection (b)(4) in the statute, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses.

More recently, in State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public (society) from further criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." State v. Wilkerson, 905 S.W.2d at 938.

To summarize, in addition to fitting into one of the seven statutorily mandated classifications, the record must also establish that the aggregate sentence reasonably relates to the severity of the offenses and the total sentence is necessary for the protection of the public from further crimes by the defendants. State v. Wilkerson, 905 S.W.2d at 938; Gray v. State, 538 S.W.2d at 392. The record must show that the sentencing principles and all relevant facts and circumstances were considered before the presumption of correctness applies.

Here, the defendant was convicted of two or more statutory offenses involving sexual abuse of a minor. In imposing consecutive sentences, the trial court gave special consideration to the relationship between the defendant and victim of the crimes, the time span of the undetected sexual activities, the nature and scope of the sexual acts, and the extent of the residual, physical, and mental damage to the victims. When a defendant falls within the statutory classifications for eligibility to be considered for consecutive sentencing, the only remaining considerations are whether (1) the sentences are necessary in order to protect the

public from further misconduct by the defendant and (2) "the terms are reasonably related to the severity of the offenses." State v. Wilkerson, 905 S.W.2d at 938.

Because the trial court considered the appropriate factors, the judgment is entitled to the presumption of correctness. In our view, the record supports the imposition of consecutive sentences. The defendant has shown little remorse. He has blamed youthful victims for his unlawful conduct. The defendant portrayed the victims in graphic detail as the sexual aggressors. His failure to accept responsibility suggests a lack of amenability for rehabilitation. That the defendant continued his crimes for such a long period lends credence to the trial court's determination that the public required protection. Further misconduct appears to be likely unless the defendant is incarcerated. One of the rape victims was six years old and another was his own daughter. In our view, the sentence is reasonably related to the severity of the offenses.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Paul G. Summers, Judge