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

FILED

January 9, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9510-CC-00338
Appellee	)	
	)	COCKE COUNTY
vs.	)	
	)	Hon. Ben W. Hopper II, Judge
GREGORY SCOTT CAUDILL,	)	
	)	(Four Counts Agg. Robbery;
Appellant	)	Two Counts Agg. Assault)

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OPINION FILED: _____

AFFIRMED AS MODIFIED

David G. Hayes
Judge

OPINION

The appellant, Gregory Scott Caudill, was indicted by a Cocke County Grand Jury on four counts of aggravated robbery and two counts of aggravated assault.[1] On December 1, 1994, the appellant pled guilty to all charges. After a sentencing hearing, the court sentenced the appellant to twelve years on each aggravated robbery conviction and to six years on each aggravated assault conviction. The court ordered two of the aggravated robbery convictions and one aggravated assault conviction to run consecutively, for a total effective sentence of thirty years. In this appeal, the appellant contends that the trial court erred by imposing the maximum sentence within the range on all counts and by imposing consecutive sentences.

After a review of the record, and for the reasons set forth below, we modify the sentences imposed by the trial court to reflect an effective sentence of twenty-four years. The trial court's determination regarding consecutive sentencing is affirmed.

I. Background

On October 23, 1993, the appellant, armed with a club, and his co-defendant, Jimmy Hughes, armed with a sawed-off double barrel shotgun, entered the Briar Thicket Grocery Store.[2] Once inside the store, Hughes aimed the gun at the owner of the store, Betty Samples, and the other occupants in the building, Helen Moore, Herbert Sawyer, Henry Clay Fox, LeeAnn Samples, and

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[1]Counts one through four of the indictment charged the appellant with the aggravated robbery of Betty Samples, Helen Moore, Herbert Sawyer, and Henry Clay Fox, respectively. Counts five and six of the indictment charged the appellant with the aggravated assault of LeeAnn Samples and Joan Fox, respectively.

[2]Jimmy Hughes was the boyfriend of the appellant's sister, Sheila. The proof suggests that Hughes has an extensive history of felony convictions.

Joan Fox.[3] These victims were then ordered to "lay down in the floor." The perpetrator, wielding a club, "struck Betty Samples as she lay in [the] floor." Helen Moore, Herbert Sawyer, and Henry Clay Fox were also struck with a weapon. Although none of these victims saw the person who struck them, the proof in the record suggests that the appellant committed the assaults.[4] Both Betty Samples and Helen Moore received injuries requiring stitches as a result of blows to the head. The appellant and Hughes proceeded to rob Betty Samples, Helen Moore, Henry Clay Fox, and Herbert Sawyer of their "monies, purses, wallets, and personal belongings." Also stolen were three pistols and the store's cash register. The two perpetrators then fled the building. Several days later, the appellant and Hughes were apprehended. In their possession was a large amount of cash[5] and two pistols, later identified as belonging to Betty Samples. The appellant confessed, in an unsigned statement, that he and Hughes committed the robberies at the grocery store.

On November 15, 1993, a Cocke County Grand Jury indicted the appellant on four counts of aggravated robbery and two counts of aggravated assault. Pursuant to the appellant's motion, on January 10, 1994, the court ordered an evaluation of the appellant's mental status by Cherokee Mental Health Center. Based upon the recommendation of the mental health center, the appellant was transferred to Middle Tennessee Mental Health Institute, on March 9, 1994, for a determination as to whether he was competent to stand trial. After further evaluation at MTMHI, the staff concluded that the appellant was not competent to stand trial because he was unable to understand the charges pending against him and he was unable to participate in his own

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[3]One of these victims was a six or seven year old child. However, the record does not indicate which victim was the child.

[4]One of the victims observed the appellant with the club attempting "to strike one of the men." Also, the appellant conceded, in his unsigned statement to the police, that "I could have hit the woman."

[5]Approximately $4000.00 in currency was taken during the robbery.

defense. The staff, however, did conclude that, on the date of the offenses, the appellant was sane. The examining psychiatrists also recommended judicial commitment of the appellant because of the probability that the appellant would attempt suicide or otherwise try to harm himself.[6] The appellant was then transferred, on May 25, 1994, to Lakeshore Mental Health Institute. Four months later, the appellant was found competent to stand trial.

On December 1, 1994, the appellant pled guilty to all charges. On May 9, 1995, a sentencing hearing was held[7]. At the time of the offenses, the appellant was twenty years old, unemployed, and resided with his mother.[8] The appellant left school after the eighth grade. Mental evaluations of the appellant revealed that he had an IQ of 68 and functioned on the level of an eight or nine year old child. The combination of his low IQ level and a hearing impairment led to extreme difficulty in communicating with others. In fact, staff members opined that the appellant "would guess a great deal of the time as to what you said to him."

The presentence report revealed prior convictions for misdemeanor alcohol offenses, including DUI, public intoxication, and underage consumption. Additionally, the appellant admitted to a long standing abuse of alcohol and a variety of illegal drugs. Moreover, he has a history of inhaling volatile substances, e.g., paint, glue, gasoline, and solvents.[9] The appellant experiences

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[6]The appellant remained in jail from October 1993 until his hospitalization in March 1994. Prior to his admission to the hospital, the appellant attempted to hang himself in his jail cell.

[7]At the hearing, the trial court considered the presentence report, the testimony of a psychiatric social worker, and the appellant's various psychiatric evaluations and reports.

[8]The record indicates that the only employment ever held by the appellant was as a dishwasher in the restaurant where his mother works. However, this employment only lasted two days because "he would get nervous and could not stand the pressures of job responsibilities."

[9]"[The appellant] reportedly has huffed one can of paint per day since he was 14 years old, and has smoked marijuana since 15 years old. [He] began drinking alcohol at 8 years of age, . . . use of cocaine and valium also." Another report indicates that, at the time of the instant offenses, the appellant stated that "he was under the influence of liquor, cocaine, acid."

"visual and auditory hallucinations" from "huffing paint" and "blackouts" from drinking alcohol and smoking marijuana. The record further indicates that the appellant has been treated for his substance abuse without any success. Additionally, the evidence suggests that the appellant's father, maternal uncle, and sister, Sheila, abuse alcohol and other drugs. The appellant's father and grandmother "state that the [appellant's] mother is an alcoholic."

The most recent mental evaluation of the appellant, September 9, 1994, concluded that the appellant was competent to stand trial. The appellant was found not to be threatening, violent, or suicidal, although he continues to be mildly depressed. Moreover, the staff completing the evaluation opined that, through the continued use of medications, the appellant would be able to maintain a level of competence. However, the appellant's psychiatric social worker testified that "I do believe, due to [the appellant's] mental and physical deficiencies, and his capacity to be easily led by others, that [he] did not have the intent to commit a crime, or an awareness that a crime was being perpetrated."

Before the court determined the appellant's sentence, the appellant, in his own behalf, expressed his remorse for "what he had done." The appellant also requested the court to "give me another chance, you know, to be somebody." The trial court sentenced the appellant to the maximum sentence for each count, stating "the overall nature of this case far outweighs any suggestion by the law that he is entitled to anything less than the sentence that I've just indicated." Moreover, without stating its reasons, the court imposed consecutive sentences for three of the appellant's six convictions.

II. Review of Sentence

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 failed to pronounce reasons for imposing consecutive sentencing.[10] Thus, the presumption fails. Moreover, this court may modify a sentence only if, in the court's opinion, the sentence is excessive or the manner of service is inappropriate. State v. Russell, 773 S.W.2d 913, 915 (Tenn. 1989).

In making our review, this court must consider the evidence heard at trial and at sentencing, 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, 923 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. Enhancement and Mitigating Factors

The trial court found six enhancement factors applicable and considered three statutory mitigating factors along with several non-enumerated mitigators in arriving at the maximum sentence allowable for each conviction. The appellant contends that, in view of the maximum sentences imposed, the trial court arbitrarily afforded no weight to any of the mitigating factors in its sentencing

[10]Tenn. R. Crim. P. 32(c)(1) provides: "If the court orders that the sentences be served consecutively or concurrently, the order shall specifically recite the reasons for such ruling and such judgment is reviewable on appeal."

determination. Moreover, the State concedes, on appeal, that the trial court misapplied four of the six enhancement factors.

I. Enhancement Factors (6), (9), (10), and (16)

Initially, we note that enhancement factors cannot be elements of the offense charged. Tenn. Code Ann. § 40-35-114. Thus, enhancement by Tenn. Code Ann. § 40-35-114(6), that the injuries inflicted upon the victim were particularly great, is inapplicable to offenses where "serious bodily injury" is an element of the offense.[11] See Jones, 883 S.W.2d 597, 602 (Tenn. 1994); State v. Crowe, 914 S.W.2d 933, 939 (Tenn. Crim. App. 1995); State v. Chadwick, No. 01C01-9501-CC-00014 (Tenn. Crim. App. at Nashville, Oct. 4, 1995). In the present case, "serious bodily injury" was not alleged as an element in any of the four counts of aggravated robbery counts or the two counts of aggravated assault. Rather, the indictment predicated the commission of these offenses upon the "use of a deadly weapon." Thus, contrary to the State's position on appeal, application of factor (6) to these offenses would not constitute double enhancement. However, only two of the indicted offenses for aggravated robbery involved "serious bodily injury."[12] Thus, factor (6) was properly applied to these two counts of aggravated robbery. In absence of any proof supporting the finding of this factor to the remaining counts, we conclude that the trial court misapplied factor (6) to the two remaining counts of aggravated robbery and to the two counts of aggravated assault.

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[11]The facts necessary to prove "serious bodily injury" are the same as those necessary to prove "particularly great injury." Jones, 883 S.W.2d at 602.

[12]Betty Samples and Helen Moore were the only victims to sustain injuries. See *supra* note 1.

The trial court also improperly applied the appellant's use of a deadly weapon during the commission of an offense as an enhancing factor for both aggravated robbery and aggravated assault. Tenn. Code Ann. § 40-35-114(9). Again, the indictment was predicated upon the use of a deadly weapon as an element of the offenses. Considering that the charges stem from the appellant's use of a weapon, the weapon cannot be used to enhance the sentence for each offense further. State v. Davis, No. 01C01-9507-CR-00226 (Tenn. Crim. App. at Nashville, Feb. 29, 1996) (citing State v. Stewart, No. 01C01-9102-CR-00342 (Tenn. Crim. App. at Nashville, Aug. 30, 1991)); see also State v. Gaiter, No. 01C01-9407-CC-00245 (Tenn. Crim. App. at Nashville, Mar. 22, 1996); State v. Relford, No. 02C01-9504-CR-00111 (Tenn.Crim. App. at Jackson, Mar. 14, 1996); State v. Ward, No. 03C01-9401-CR-00007 (Tenn. Crim. App. at Knoxville, May 9, 1995).

Whenever an offense is committed with a deadly weapon, it is inherent within the offense that there was a high risk to human life and that the potential for injury is great. State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App. 1994); Tenn. Code Ann. § 40-35-114(10), -114(16). Naturally, this factor is inherent in the offenses of aggravated assault and aggravated robbery when committed with a deadly weapon. Id. See also Relford, No. 02C01-9504-CR-00111; Davis, No. 01C01-9507-CR-00226; State v. Kelso, No. 03C01-9305-CR-00141 (Tenn. Crim. App. at Knoxville, Dec. 17, 1993). Thus, Tenn. Code Ann. § 40-35-114(10) and -114(16) are inapplicable to the present offenses. See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994); Hill, 885 S.W.2d at 363; State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993).

The State concedes that the trial court improperly applied enhancement factors (6), (9), (10), and (16) to the offenses of aggravated robbery and

aggravated assault. We agree with the State that the trial court misapplied factors (9), (10), and (16) to all counts of the indictment. Moreover, we agree that the trial court misapplied factor (6) to two counts of aggravated robbery and two counts of aggravated assault. However, we conclude that the trial court correctly applied factor (6) to the remaining two counts of aggravated robbery.

ii. Applicable Enhancement Factors

Upon *de novo* review, we conclude that the trial court correctly applied Tenn. Code Ann. § 40-35-114(1), the appellant has a history of criminal convictions and criminal behavior. Although the appellant's criminal history is limited to alcohol related offenses, this is sufficient to support application of this enhancement factor.

We also conclude that the trial court correctly applied enhancement factor (5), that the victims were treated with exceptional cruelty. Tenn. Code Ann. § 40-35-114(5). Exceptional cruelty is not an essential element of aggravated robbery or aggravated assault *per se*. Chadwick, No. 01C01-9501-CC-00014 (citing State v. Bennett, No. 03C01-9403-CR-00104 (Tenn. Crim. App. at Knoxville, Dec. 8, 1994)). "Exceptional cruelty" is interpreted as "cruelty above that needed to effectuate the crime." Bennett, No. 03C01-9403-CR-00104. In the present case, the victims were struck with a club after they had complied with the orders to lie down on the floor, causing the two assault victims to fear imminent bodily injury. Striking these victims and causing others to watch the beating and fear a similar fate after complying with the appellant's orders was unnecessary to effectuate the crimes. Although both aggravated assault and aggravated robbery inherently entail some cruelty, the cruelty in this case goes beyond the requisite amount. Id. This factor was properly applied.

Finally, although not considered by the trial court, we conclude that factor (8), unwillingness to comply with the conditions of a sentence involving release into the community, is also applicable to the present offenses. Tenn. Code Ann. § 40-35-114(8). Enhancement by this factor is clearly supported by the record. At the time of the instant offenses, the appellant was on probation for a DUI conviction. Additionally, on multiple occasions, the appellant violated the terms of probation for convictions of public intoxication by subsequent arrests and convictions for other alcohol related offenses.

iii. Applicable Mitigating Factors

The appellant argues the application of the following mitigating factors:

> (3) Substantial grounds exist tending to excuse or justify the defendant's criminal conduct;
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> (4) The defendant played a minor role in the commission of the offense;
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> (6) The defendant, because of his youth, lacked substantial judgment in committing the offense;
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> (8) The defendant was suffering from a mental condition that significantly reduced his culpability for the offense;
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> (11) The defendant, although guilty of the crime, committed the offense under such unusual circumstances that it was unlikely that a sustained intent to violate the law motivated his conduct;
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> (12) The defendant acted under duress or under the domination of another person, even though the duress or the domination of another person was not sufficient to constitute a defense to the crime;
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> (13) The defendant was originally found incompetent to stand trial;
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> (13) The defendant's IQ was 68;
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> (13) The defendant suffered from a congenital hearing defect and was unable to hear and understand statements as would a normal person;
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> (13) Defendant has been documented as having a vocabulary level and functioning at an academic level of eight years, ten months; and
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> (13) The defendant was mentally retarded as defined in Tenn.

> Code Ann. § 39-13-203(a)(1), whereby the defendant is significantly sub-average in general intellectually functioning as evidenced by a functional intelligence quotient of 70 or below.

Tenn. Code Ann. § 40-35-113(1990). Although the trial court imposed the maximum sentence for all six convictions, it indicated that factors (8), (11), (12) and (13) were given "some consideration."

We conclude that the trial court was incorrect in its application of non-enumerated mitigating factor (13). In applying factor (13), the trial court essentially relied upon those same facts which were utilized to establish mitigating factor (8). We agree with the trial court's application of mitigating factors (8), (11), and (12). Moreover, upon *de novo* review, we conclude that mitigating factor (6), the appellant lacked substantial judgment due to his youth, is also applicable. The proof established that, on the date of the offenses, the appellant was twenty years old and lived with his mother. In State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993), our supreme court held that,

> [i]n determining whether this factor is to be applied, courts should consider the concept of youth in context, i.e., the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct.

We find this mitigating factor appropriate applying this criteria. In summary, we find mitigating factors (6), (8), (11), and (12) applicable.

iv. Determination of Appropriate Length of Sentences

In determining the appropriate length of a sentence for a felony conviction, Tenn. Code Ann. § 40-35-210(e)(1994 Supp.) instructs the sentencing court that, 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. There is no scientifically determined or

controlling value applied to the enhancement and mitigating factors. Rather, the weight afforded a specific factor is left to the sentencing court's discretion as long as the court complies with the purposes and principles of the Sentencing Act and its findings are adequately supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995) (citing Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986)).

In the present case, the appellant pled nolo contendere to four class B felonies and two class C felonies. See Tenn. Code Ann. § 39-13-102(d); -402(b). Additionally, the court found the appellant to be a range I offender. The sentence range for a range I offender of a class B felony is "not less than eight nor more than twelve years." Tenn. Code Ann. § 40-35-112(a)(2)(1990). The court sentenced the appellant to twelve years on each count. The sentence range for a range I offender of a class C felony is "not less than three nor more than six years." Tenn. Code Ann. § 40-35-112(a)(3). The court sentenced the appellant to six years on each count. Based upon the presence of the applicable enhancement and mitigating factors, we conclude that the sentences are excessive. The sentences for counts 1 and 2, aggravated robbery of Betty Samples and Helen Moore, are modified to reflect a term of ten years for each count. See supra note 12. The sentences for counts 3 and 4, aggravated robbery of Herbert Sawyer and Henry Clay Fox, are modified to reflect a term of nine years for each count. Likewise, the sentence of six years for each aggravated assault is modified to reflect a term of four years for each count.

B. Consecutive Sentences

If a defendant is convicted of more than one criminal offense, the court

may order the sentences to run consecutively. Tenn. Code Ann. § 40-35-115. In the present case, the trial court imposed three consecutive sentences, although, the record does not indicate on what grounds. Both parties, on appeal, contend that consecutive sentencing was imposed based upon the appellant's classification as a dangerous offender. Thus, the only determination is whether the appellant qualifies as a "dangerous offender." Tenn. Code Ann. § 40-35-115(b)(4) (1990).

In Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976), our supreme court held that "[a] defendant may be classified as a dangerous offender if the crimes for which he is convicted indicate that he has little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." (Emphasis added). See also Tenn. Code Ann. § 40-35-115(b)(4); State v. Wilkerson, 905 S.W.2d 933, 937 (Tenn. 1995). In the present case, the appellant's actions in viciously striking his victims were malicious and callous. His conduct was entirely unwarranted as the victims had complied with his orders by lying on the floor and were not resisting the robbery when assaulted. The proof before us establishes that the appellant had no hesitation about committing a crime when the risk to human life was high. Thus, we conclude that the offenses committed by the appellant are sufficient to qualify him as a "dangerous offender."

However, this classification alone will not justify consecutive sentencing. Wilkerson, 905 S.W.2d at 938. "The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender." Id. In the present case, we find that the aggregate sentences, as modified, are reasonably related to the severity of the offenses. We are unable to conclude that the trial court abused its discretion in ordering consecutive

sentences in counts 1, 2, and 6.

III. Conclusion

In conclusion, the sentences imposed by the trial court under counts 1 and 2 are modified to reflect a sentence of ten years for each aggravated robbery conviction and the aggravated robbery convictions under counts 3 and 4 are reduced to a term of nine years. The trial court's determination as to consecutive sentencing is affirmed. Accordingly, the total effective sentence, as modified, is reduced from a term of thirty years incarceration to twenty-four years incarceration. This cause is remanded to the trial court for entry of judgments of conviction consistent with this opinion. _

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge