IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST 1996 SESSION

STATE OF TENNESSEE, Appellee V. ROBERT CHAPMAN, Appellant.	))))))))))	No. 02C01-9510-CR-00304 SHELBY COUNTY HON. CHRIS CRAFT, JUDGE (Sentencing)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Robert Chapman, appeals as of right the sentences he received as a result of convictions in the Shelby County Criminal Court for attempted second degree murder and reckless endangerment. He was sentenced as a Range I standard offender to twelve (12) years on the attempted second degree murder conviction and two years in a workhouse for the reckless endangerment conviction. The sentences were ordered to be served consecutively.

Appellant challenges three aspects of his sentencing. He objects to the trial court's application of certain enhancement factors and the order of the maximum sentences within the ranges; ordering the sentences to run consecutively; and the propriety of ordering consecutive sentences when the State failed to give notice of its intent to seek consecutive sentences prior to trial. Finding no error in the length of appellant's sentences or the order for consecutive service of them, we affirm the trial court.

Appellant and three of his friends entered a popular shopping mall in Memphis looking for Roscoe Graham. There is some indication in the record that Graham had shot at appellant three weeks prior. Appellant and at least one other of the men were armed with guns. They entered a crowded arcade and spotted Graham. Appellant walked up to Graham, started a fight with him and then pulled his gun. Appellant fired several shots, three of which struck Graham in the leg, arm and stomach. An arcade worker who tried to break up the fight was in close proximity to the shots being fired, but was uninjured. Numerous patrons were in the arcade, but the record does not indicate if there were other injuries from the gunfire. The arcade suffered substantial damage from bullet holes due to the number of shots fired. Appellant was subsequently indicted for attempted first degree murder and reckless endangerment.

At trial, a jury convicted appellant of attempted second degree murder and reckless endangerment. He was sentenced as a Range I standard offender to twelve

(12) years in the Department of Correction and two (2) years in a workhouse on the respective convictions. Although the factual record is sparse, it does contain transcripts from the sentencing hearing which facilitates the necessary review.

When a defendant complains of his or her sentence, we must conduct a de novo review of the record. Tenn. Code Ann. §40-35-401(d) (1990). The sentence imposed by the trial court is accompanied by a presumption of correctness, id, and the appealing party carries the burden of showing that the sentence is improper. Tenn. Code Ann. §40-35-401 Sentencing Commission Comments. This presumption, however, is conditioned upon an 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).

When imposing a sentence, 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 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. Tenn. Code Ann. §40-35-210(d)-(e) (Supp. 1995).

Appellant first contends that the application of certain enhancement factors was incorrect and the findings of fact did not support the sentences ordered by the trial judge. Although the record does not support the application of every enhancement factor used by the trial court, the length of the sentences imposed was not erroneous.

On the attempted second degree murder conviction, the court found the following enhancement factors: (1) the defendant has a previous history of criminal convictions or behavior in addition to that necessary to establish the range; (2) defendant was a leader in the commission of the offense; (6) the personal injuries inflicted upon the victim were particularly great; and (9) defendant possessed or employed a firearm. See Tenn. Code Ann. §40-35-114 (1990). No mitigating factors

were found. Appellant disagrees with the application of enhancement factors (2) and (6). He states that it was never proven that he was a leader in the commission of the crime. However, the victim testified that appellant was the leader of the crime. At the sentencing hearing, appellant's counsel also stated that "he was a leader." From the record before us, it is evident that appellant entered the shopping mall with three of his friends, specifically looking for Graham and intending to "get this guy [Graham]." Once he found Graham, appellant started a fight with him. Then, as supported by the jury's conviction, he pulled out his gun and shot Graham three times. This enhancement factor was sufficiently sustained by the proof.

In contesting the application of factor (6), appellant argues that it is an element of the offense. He states that particularly great personal injuries inflicted upon the victim is inherent in the offense of attempted second degree murder. However, this Court has previously held otherwise. See State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995) (holding that particularly great injuries are not essential to the commission of attempted first degree murder); State v. David Lucian Gibson, No. 01C01-9503-CC-00099, slip op. at 12 (Tenn. Crim. App. at Nashville, January 26, 1996) (it is proper to apply enhancement factor (6) to attempted murder cases because murder may be attempted without actually causing any injury); State v. Gregory Maurice Brooks, No. 02C01-9411-CV-00261, slip op. at 9 (Tenn. Crim. App. at Jackson, July 19, 1995) (factor (6) was properly applied to enhance an attempted second degree murder conviction). We once again hold that particularly great injuries are not inherent in the offense of attempted second degree murder and may be applied as an enhancement factor.

We further find that the proof supports a finding that the personal injuries inflicted upon the victim were particularly great. The trial judge stated that this enhancer had application because at trial the victim displayed the extensive scars he suffered from the three gunshot wounds. He carries a scar on his stomach that is one and a half feet long. He also has scars from bullet holes on his arm and leg. In

addition, the presentence report contained a victim impact statement wherein Graham explained the extent of his injuries and the time he missed from work. Graham worked as a private investigator and missed six months of work as a result of the three gunshot wounds. The trial court did not err in applying this enhancement factor.

On the reckless endangerment conviction, the court applied enhancement factors (1) the defendant has a previous history of criminal convictions or behavior in addition to that necessary to establish the range; (2) defendant was a leader in the commission of the offense; (3) the offense involved more than one victim; (6) the damage to property was particularly great; (10) defendant had no hesitation about committing a crime when the risk to human life was high; and (16) crimes were committed under circumstances in which the potential for bodily injury to the victim was great. See Tenn. Code Ann. §40-35-114 (1990). No mitigating factors were found.

Again, appellant contests his characterization as a leader in the crime; this has previously been discussed and held applicable under the proof. He also argues that factors (3), (6), (10), and (16) are elements of the offense and cannot be used to enhance his sentence. We agree with appellant on factors (10) and (16), but find the remaining factors to be applicable.

Reckless endangerment occurs when a person "recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." Tenn. Code Ann. §39-13-103 (1991). As is evident from the definition of the crime, the presence of more than one victim and the amount of damage to property being particularly great are clearly not elements of the offense. However, we do find misapplication of enhancement factors (10) and (16) because they are essential elements of the offense. See Tenn. Code Ann. §40-35-114 (1991). Inherent in the offense of reckless endangerment is a lack of hesitation in committing a crime when the risk to human life is high. State v. Wayne L. Hughes, No. 01C01-9502-CC-00033, slip op. at 16 (Tenn. Crim. App. at Nashville, June 20, 1996) and State v.

Arnold V. Porter, No. 01C01-9410-CC-00353, slip op. at 10 (Tenn. Crim. App. at Nashville, January 5, 1996). Likewise, the great potential for bodily injury to a victim is also inherent in this offense. State v. Dewayne Smith, No. 03C01-9501-CR-00024, slip op. at 9 (Tenn. Crim. App. at Knoxville, September 19, 1995), perm. to app. denied (Tenn. 1996). Nevertheless, the remaining four enhancement factors are supported by the record and the absence of any mitigating factors are sufficient to justify the trial court's order of a two year sentence.

Considering the application of several enhancement factors on each conviction and the absence of any mitigating factors, we do not believe the trial court erred in the length of the sentences. See Tenn. Code Ann. §40-35-210 (1990).

The appellant next contends that the trial court's order of consecutive sentencing was in error. He states that the trial court's rationale was not consistent with the required factors in Tennessee Code Annotated section 40-35-115. Upon review of the record, we agree with appellant's argument. The trial court failed to include on the record any finding of the required elements of the statute to justify consecutive sentencing.

When the record does not reflect that the trial court followed the statutory considerations, the presumption of correctness fails and our review of the sentence is de novo. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). See also State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993) (in conducting a de novo review of the sentence, the Court of Criminal Appeals is authorized to consider any enhancement factors supported by the record).

Our review of the record leads us to conclude that the appellant is a dangerous offender and may be sentenced consecutively as such. In order to be found a dangerous offender, it must be demonstrated that the offender's behavior indicated little or no regard for human life and it reflected no hesitation about committing a crime in which the risk to human life was high. Tenn. Code Ann. §40-35-115(a)(4) (1990). Our supreme court has recently stated that additional findings are necessary to

sustain consecutive sentences based on this classification. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). The proof must further demonstrate that the terms imposed are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal acts by the offender. Id. We believe all four of those requisite findings are supported by the record.

Appellant's behavior indicated little or no regard for human life and also indicated no hesitation in committing a crime in which the risk to human life was high. This is supported by the evidence that appellant entered a crowded shopping mall with a loaded gun, sought out a particular victim, and carelessly fired repeated shots at that person, endangering the lives of all who were present. Moreover, appellant went to the mall with a specific intent, to "get this guy", and once he found the victim, he did not hesitate to carry out his intent. Furthermore, we conclude that the length of appellant's sentence is reasonably related to the seriousness of the offenses. Appellant repeatedly shot a man causing severe injuries and endangering the lives of numerous patrons in this arcade. An effective sentence of fourteen (14) years is, in our view, reasonably related to the seriousness of the offenses. Finally, the sentences are necessary to protect the public from further criminal acts by appellant. The record demonstrates that appellant's criminal record began when he was only nine (9) years old and contains numerous juvenile offenses. Each charge in juvenile court appears to have been adjusted "non-judicially" and the absence of confinement or stringent punishment has led this young man to continually break the law. If not confined for a significant period, it is apparent that appellant will only continue to commit crimes. His aggregate sentence is necessary to protect the public. The record amply supports a finding that appellant is a dangerous offender and his consecutive sentences, therefore, are upheld.[1]

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[1]In addition, appellant's consecutive sentences may be sustained under Tennessee Code Annotated section 40-35-115(a)(2). Appellant's criminal record is clearly extensive. As noted above, his first conviction was at nine (9) years of age and the presentence report reflects a total of ten (10) prior convictions. Due to appellant's

Appellant's final issue merits little discussion. He argues that the order of consecutive sentencing may not be upheld because the State did not provide him with a notice to seek this sentencing prior to trial. Appellant relies upon Tennessee Code Annotated section 40-35-202(a) and Tennessee Rule of Criminal Procedure 12.3(a) to sustain this alleged error. The plain language of both the statute and the rule apply only in the case of multiple, persistent or career offenders. As a Range I offender, these do not apply to appellant. The issue is without merit.

We find that the trial court's application of numerous enhancement factors justify the maximum sentence imposed on both convictions. We further hold that appellant is a dangerous offender and that his criminal history is extensive. Therefore, consecutive sentences are appropriate. Appellant's sentences are affirmed.

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William M. Barker, Judge

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Gary R. Wade, Judge

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Jerry L. Smith, Judge

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relatively young age (19) at the time of these offenses and his long criminal record, this factor is supported by the record. In this holding, we recognize that it is entirely proper to consider juvenile offenses in this application. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993).