IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

FILED

February 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9512-CC-00392
	)	
	)	Roane County
v.	)	
	)	E. Eugene Eblen, Judge
	)	
	)	(Sentencing)
JOHNNY LOCKHART,	)	
	)	
APPELLANT.	)	

FOR THE APPELLANT:

Thomas N. DePersio
Attorney at Law
136 South Illinois Avenue, Suite 104
Oak Ridge, TN 37830
(Appeal Only)

Walter B. Johnson, II
Assistant District Public Defender
502 Roane Street
Harriman, TN 37748
(Trial Only)

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Timothy F. Behan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Charles E. Hawk
District Attorney General
P.O. Box 703
Kingston, TN 37763-0703

D. Roger Delp
Assistant District Attorney General
P.O. Box 703
Kingston, TN 37763-0703

OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Johnny Lockhart, entered pleas of guilty to two counts of attempting to commit murder in the second degree,[1] a Class B felony, following his pleas of guilty to the offenses. The parties agreed the appellant was to be sentenced as a Range I offender, but there was no agreement regarding the length of the sentences to be imposed by the trial court. A sentencing hearing was conducted to determine the length and manner of serving the sentences. The trial court imposed a Range I sentence consisting of confinement for ten (10) years in the Department of Correction in each count. The sentences are to be served consecutively. The effective sentence imposed by the trial court was confinement for twenty (20) years. The appellant contends the sentences imposed are excessive. After a thorough review of the record, the briefs submitted by the parties, and the authorities governing the issue presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

The appellant lived across the highway from Mr. and Mrs. Albert F. Brummitt. On the evening of December 15, 1993, the appellant went to the Brummitts' residence to use the telephone. Mr. Brummitt answered the door. Although Mrs. Brummitt told him not to admit anyone, Mr. Brummitt let the appellant into the residence. Mrs. Brummitt led the appellant into the kitchen to use the telephone. He made a collect call to his mother. When he completed the call, he asked Mrs. Brummitt for a glass of water. She gave the appellant a glass of water, and he placed the glass where she requested.

Mrs. Brummitt followed the appellant into the living room. She thought he was going to the front door. However, the appellant walked to a display of knives on a wall of the living room, removed a knife, turned, and cut Mrs. Brummitt across the neck. A doctor testified the wound was superficial. The appellant walked to Mr. Brummitt, inflicted a twelve-inch cut to his left arm, and stabbed him numerous times. When Mrs. Brummitt returned with a rifle, the appellant exited the residence.

Mr. and Mrs. Brummitt required treatment at a local hospital. Mrs. Brummitt testified she has trouble sleeping at night. What occurred the night of December 15th is etched in

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[1]The indictment charged the appellant with two counts of attempting to commit murder in the first degree.

her mind, and she thinks of the occurrence all day and all night. Mr. Brummitt is suffering from post traumatic stress disorder. Mrs. Brummitt said Mr. Brummitt is now like a child. She now has to take care of both of them.

The Brummitts did not know the appellant before the night in question. They had seen him in the yard where he resided.

The appellant challenges the length of the sentences imposed by the trial court and the way the sentences are to be served. He argues the trial court failed to consider certain mitigating factors in imposing the sentence and erroneously applied certain enhancing factors. He also argues the evidence does not support consecutive sentencing.

When an accused challenges the length and manner of serving sentences, it is the duty of this Court to review sentences de novo with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). However, there are exceptions to this requirement. First, the requirement this Court presume the determinations made by the trial court are correct 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused. State v. Bonestel, 871 S.W.2d 163 (Tenn. Crim. App. 1993). Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts or a document, such as the presentence report. Id.

In conducting a de novo review, this Court must consider (a) the stipulated facts related to the court at a submission hearing and the evidence received at the sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any applicable mitigating and enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 820 (Tenn. Crim. App. 1987).

When the accused raises sentencing issues in this Court, the accused has the burden of establishing the sentences imposed by the trial court are erroneous. Sentencing

Commission Comments to Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169. In this case, the appellant has the burden of establishing the trial court erroneously (a) considered enhancement factors, (b) failed to consider mitigating factors, and (c) ordered the sentences to be served consecutively.

The trial court found multiple enhancement factors should be used to enhance the length of the appellant's sentences within the applicable range. The court found the following enhancement factors were applicable: (a) the appellant has a prior history of criminal behavior and convictions, Tenn. Code Ann. § 40-35-114(1), (b) the victims were particularly vulnerable, Tenn. Code Ann. § 40-35-114(4), and (c) the appellant treated Mr. Brummitt with exceptional cruelty, Tenn. Code Ann. § 40-35-114(5).

The appellant concedes he has a prior history of convictions and criminal behavior, but he argues the weight to be given this factor should be slight. He also concedes the victims were particularly vulnerable within the meaning of enhancement factor (4). The appellant argues the trial court erroneously applied enhancement factor (5). However, this Court cannot decipher the argument made in support of this contention. He states in his brief: "Defendant would submit that the facts which support the charge of Attempt to Commit Second Degree Murder are, in fact, the same facts which would show exceptional cruelty to the victim." Apparently, the appellant is attempting to state this is an element of the offense, and, therefore, the trial court should not have applied this enhancement factor. Contrary to the appellant's argument, the trial court did not enhance the sentences predicated upon (a) there being more than one victim, Tenn. Code Ann. § 40-35-114(3), or (b) the injuries sustained by the victims being particularly great. Tenn. Code Ann. § 40-35-114(6).

The trial court properly applied enhancement factor (5) because the appellant did treat Mr. Brummitt with exceptional cruelty. State v. Mallory Michael Roberts, Davidson County No. 01-C-01-9309-CR-00295 (Tenn. Crim. App., Nashville, August 4, 1994); State v. Terry Joseph Million, Jackson County No. 01-C-01-9303-CC-00100 (Tenn. Crim. App., Nashville, November 24, 1993). Mr. Brummitt, who was eighty-three years of age, was stabbed repeatedly by the appellant. The photographs introduced at the sentencing show the nature and location of the stab wounds. While every act of attempted murder involves

an act of cruelty, the appellant demonstrated a degree of cruelty beyond that required for this crime. State v. Jesperson, Monroe County No. 03-C-01-9206-CR-00212 (Tenn. Crim. App., Knoxville, August 11, 1993); State v. Witherspoon, 769 S.W.2d 880 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989).

The appellant contends the trial court should have considered the appellant's military record as a mitigating factor. Tenn. Code Ann. § 40-35-113(13). The appellant was a member of the United States Marine Corps, served two tours in Vietnam, and was decorated for bravery in the face of the enemy. This Court will consider this factor in determining the length of the sentences imposed by the trial court.

The appellant takes issue with the decision of the trial court to require him to serve the two sentences consecutively. He simply states the record does not support the requirements of State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995). This Court disagrees.

The appellant has previous convictions for burglary, damage to property, and robbery. He has a robbery case that has been pending in Franklin County, Ohio, since 1984. The appellant left the state, and, thereafter, failed to appear. He currently takes medicine to control seizures, anxiety, insomnia, depression, and his manic depressive psychiatric disorder. He was declared disabled by the Veterans Administration in 1982.

The presentence report establishes the appellant has a history of alcohol abuse. He first consumed alcohol at the age of 10. While he was received into a program to curb this abuse, the appellant continued to consume alcohol the entire time he was in the program. Of course, he did not successfully complete the program. He candidly admitted to the presentence officer he consumed marijuana. In the 1970's the appellant used hallucinogenic acids, probably LSD.

According to the appellant, he was under the influence of alcohol and Lorazepam when he committed the crimes in question. He remembers going to the Brummitts' to use the telephone, making the telephone call to his mother, and asking for a glass of water. He has no memory of obtaining the knife, attacking Mrs. Brummitt, and attacking Mr. Brummitt.

The offenses committed by the appellant are clearly dangerous offenses. He is also a "dangerous offender." A "dangerous offender" is defined as a person "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." Tenn. Code Ann. § 40-35-115(b)(4).

In this case, the sentences imposed by the trial court "are reasonably related to the severity of the offenses committed" by the appellant. Wilkerson, 905 S.W.2d at 938. Furthermore, consecutive sentencing is warranted in this case "to protect the public from further criminal acts" by the appellant. Id.

What is to prevent the appellant from committing other violent crimes in the future? The appellant has failed to curb his alcohol problem during the thirty-five years he has been consuming alcoholic beverages. He knew, or should have known, drinking alcoholic beverages while taking certain medication would cause serious behavioral problems. Unless steps are taken to confine the appellant for several years, he may very well attack other individuals with a dangerous weapon, rob a victim, or burglarize a residence. In this case, the appellant may have murdered Mr. Brummitt if Mrs. Brummitt had not appeared with a rifle. It was then, and only then, the appellant exited the residence running. If the appellant was in a mental stupor due to the consumption of drugs and alcohol as he stated, why did he exit the residence at the sight of a rifle? Was he really in such a stupor?

What was the appellant's purpose for attacking the Brummitts? The appellant and the Brummitts did not know each other. The Brummitts had seen the appellant in the yard where he lived, but they had never spoken. Was he going to rob the victims? Or was he just going to maim and kill someone?

The appellant is beyond the rehabilitative stage in his life. As previously stated, an effort to reform his life was a complete abomination. However, it is extremely sad the appellant's life has to come to such an abrupt halt. He served his country honorably. He rescued a fellow soldier while under fire. Like other Vietnam veterans, he no doubt is suffering from the trials and tribulations he encountered in Vietnam and upon his return to his country. Nevertheless, this Court cannot permit such a decorated veteran to continue to run rampant consuming alcohol and medication when it was this combination, according to the appellant, that resulted in the attacks on this elderly couple. The question this Court must ask: Will there be another victim, and, if so, who? There is a strong likelihood the appellant will commit another serious crime if he is not deterred by a lengthy sentence.

In summary, this Court is of the opinion the length of the sentences imposed by the trial court is reasonable. This Court notes the voluntary consumption of alcohol is not a mitigating circumstance. The record is devoid of evidence of how the appellant's abuse of alcohol affects his mental capabilities. The addition of a mitigating circumstance, military service, does not equate to a reduction in the appellant's sentence. See State v. Keel, 882 S.W.2d 410 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). In addition, the trial court properly ordered the two sentences to be served consecutively.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOHN K. BYERS, SENIOR JUDGE