

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

March 4, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

C.C.A. NO. 03001-9602-CC-00056

Appellee,)

MONROE COUNTY

VS.)

HON. MAYO MASHBURN
JUDGE

MARTY MILLER,)

Appellant.)

(Escape)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF MONROE COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted by a Monroe County jury of felony escape.¹ He was sentenced to serve two years in the Department of Correction and ordered to pay court costs within six months after his release from incarceration. The Defendant appeals both his conviction and sentence and presents the following issues for review: (1) That the trial court erred by failing to rule that the probation warrant for which he was under arrest was issued beyond the statute of limitations and therefore void or voidable; (2) that the evidence was insufficient to prove the Defendant's guilt beyond a reasonable doubt; and (3) that the sentence imposed by the trial court was excessive. We affirm the judgment of the trial court.

We will begin with a discussion of the facts, including the background and procedural history relative to the issues presented in this case. Because the escape for which the Defendant was convicted occurred while he was being held for a charge of probation violation and because he raises in this appeal the issue of the validity of the probation violation warrant, we will also address the procedural history regarding a prior conviction.

(1) The Defendant was convicted of kidnapping on October 20, 1989. After a sentencing hearing conducted on November 20, 1989, he was sentenced to four (4) years with all but sixty (60) days suspended. The Defendant was placed

¹Tenn. Code Ann. § 39-16-605(b)(2).

on probation for the remainder of the term. The effective commencement date of the four-year term was October 20, 1989.

(2) A probation violation warrant was filed on November 5, 1990. A hearing was held on November 19, 1990. The Defendant was ordered to perform community service two times per week and pay the court costs.

(3) The next probation violation warrant was filed on October 7, 1991. The Defendant could not be found to be served and was placed on "absconder" status in July, 1992.

(4) The warrant was subsequently served on the Defendant on December 29, 1993.

(5) A hearing on the probation violation warrant was held on January 24, 1994. At that time, the trial court (a) revoked the Defendant's probation and (b) placed him on six (6) months intensive probation.

(6) A third probation violation warrant was filed on June 1, 1994. The Defendant was arrested on this warrant and was housed at the Monroe County jail. He was in the custody of the Monroe County Sheriff's Department when he was brought to the courthouse for the hearing on August 22, 1994 on the probation violation warrant that was issued on June 1, 1994.

It is at this point when the escape occurred. Sergeant Dan Dixon of the Monroe County Sheriff's Department was responsible for transporting and supervising several prisoners who were scheduled to appear in court on August 22, 1994. Several prisoners were shackled and some, including the Defendant, were not, because there was a shortage of shackles. The Defendant requested to use the restroom on several occasions and Sergeant Dixon allowed him to go by himself on the second trip. On possibly the third trip to the restroom, the

Defendant did not return. He was apprehended, indicted for felony escape on February 2, 1995, and was convicted on July 28, 1995. The jury imposed a fine of \$1,500. The Defendant was sentenced to two years confinement in the Department of Correction. It is from the conviction and sentence for felony escape that the Defendant appeals.

In his first issue, the Defendant argues that the trial court erred by failing to determine that the probation violation warrant for which he was being held was void or voidable. He claims that the statute of limitations for filing a warrant had expired when the June 1, 1994 warrant was issued. He asserts that if the warrant was invalid, he was being held illegally and could not be convicted of escape.

However, the validity of the probation warrant is generally irrelevant in determining whether the Defendant is guilty of escape. Assuming that the arrest warrants were invalid, this fact, standing alone, would not entitle the Defendant to relief. An accused has no constitutional immunity from an unlawful arrest. State v. Manning, 490 S.W.2d 512, 514 (Tenn. 1973); State ex rel. Carlson v. State, 219 Tenn. 80, 87-88, 407 S.W.2d 165, 168 (1966); State v. Miller, 608 S.W.2d 158, 160 (Tenn. Crim. App. 1980). The fact that an accused has been unlawfully arrested generally becomes relevant only when evidence tainted by the unlawful arrest is sought to be introduced by the State. Consequently, the mere fact that an accused's arrest was unconstitutional, invalid, or illegal, standing alone, will not afford the accused relief from his conviction for escaping from custody.

Escape, in and of itself, is a substantive offense codified in Tennessee Code Annotated section 39-16-605. See McCaslin v. McCord, 116 Tenn. 690, 94 S.W.79, 8 Ann. Cas. 245 (1906). Felony escape occurs when “any person arrested for, charged with, or convicted of an offense [escapes] from a penal institution, as defined in § 39-16-601” and it is a “Class E felony if the person was being held for a felony.” Tenn. Code Ann. § 39-16-605. Appropriate definitions are contained in Tennessee Code Annotated section 39-16-601 (Supp. 1990):

(2) “Custody” means under arrest by a law enforcement officer or under restraint by a public servant pursuant to an order of a court;

(3) “Escape” means unauthorized departure from custody or failure to return to custody following temporary leave for a specific purpose or limited period, but does not include a violation of conditions of probation or parole; and

(4) “Penal institution includes any institution used to house or detain a person: (A) Convicted of a crime; or (B) Who is in direct or indirect custody after a lawful arrest.

The State demonstrated that the Defendant was “in custody.” He was transported from the Monroe County Jail, clearly a “penal institution”, and was under restraint by Sergeant Dixon while at the courthouse. See State v. Culp, 891 S.W.2d 232, 236 (Tenn. Crim. App. 1994); State v. David Wayne Bodenhammer, C.C.A. No. 1183, Hamilton County (Tenn. Crim. App. 1979); Laird v. State, 565 S.W.2d 38, 41-42 (Tenn. Crim. App. 1978). Also, the Defendant failed to return following “temporary leave for a specific purpose,” therefore satisfying the requirement for an escape. And finally, the Defendant

had been convicted of the crime of kidnaping, a Class C Felony. Although he was being held for a probation violation, the terms of the probation are not relevant to the proof of escape. What is relevant is that he had been convicted of the underlying felony and was being held in connection with that conviction. See State v. J.R. Arp, C.C.A. No. 03C01-9112-CR-00401, Monroe County (Tenn. Crim. App., Knoxville, July 2, 1992), perm. to appeal denied (Tenn. 1992). Arp addressed this issue in the context of a parole violation, treating the violation as an extension of the proceedings for the original conviction. Id. at 3; see Allen v. State, 505 S.W.2d 715, 719 (Tenn. 1974). Similarly, it is unlawful for one to escape when being held for a violation of probation because such proceedings are also an extension of the original conviction.

In addition, the possible invalidity of the warrant because it was issued beyond the statute of limitation does not affect whether the Defendant was properly convicted for felony escape, as opposed to the alternative, misdemeanor escape. Compare Tenn. Code Ann. § 39-16-605(b)(1) with (b)(2). Hypothetically, if the statute of limitation had run for the probationary period imposed on the Defendant's conviction for kidnaping, a warrant subsequently issued would not be filed during the time he was serving for a felony. The Defendant asserts that the only available charge would be for misdemeanor escape because the Defendant was not currently incarcerated or on probation for a felony. However, the escape statute only requires that the Defendant be "held for a felony" to be guilty of felony escape. Tenn. Code Ann. § 39-16-605(b)(2). Even if the probation violation warrant for the underlying felony conviction was erroneous and it was determined that the arrest was illegal, this is of no consequence. See Chisom v. State, 539 S.W.2d 831, 833 (Tenn. Crim. App.

1976). Nor would it matter if the underlying charges were ultimately dismissed. The Defendant was being held for a felony and he escaped. This is all the statute requires. Thus, a conviction for felony escape was proper.

The validity of a warrant or an arrest should not be considered a defense to a charge for escape. Once a defendant is held in custody of any type by anyone vested with the lawful authority to do so, escape is not a lawful option.² The proper forum to assert defenses of any kind is before the trial court. Here, the Defendant could always have presented the defense that the issuance of the warrant exceeded the statute of limitation. Yet, he chose to escape while waiting at the courthouse for a hearing before the trial judge. If the validity of the probation violation warrant was indeed a valid defense, the trial court could have remedied the situation by dismissing the warrant.

Even if we were to address the Defendant's issue as presented on its merits, we would find that the probation violation warrant was validly issued. A trial court has the power to revoke a suspended sentence "at any time within the maximum time which was directed and ordered by the court for such suspension . . . and in such cases the original judgment so rendered by the trial judge shall be in full force and effect from the date of revocation." Tenn. Code Ann. § 40-35-

²We do note that a defendant may assert the defense of necessity, but this is applicable only in the most dire of circumstances. See Tenn. Code Ann. § 39-11-609. This Court clarified the statutory elements a defendant needs to establish for the defense of necessity in an escape case. State v. Culp, 900 S.W.2d 707, 711 (Tenn. Crim. App. 1994). They are as follows:

- (1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm;
- (2) The desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct;
- (3) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such compliance illusory; and
- (4) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

Id.

310. The trial judge has the discretionary power to revoke probation at any time during the period of probation. Tenn. Code Ann. § 40-35-310; State v. Duke, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995). Further, the Sentencing Commission Comments to section 40-35-310 provide that upon revocation, the original sentence “can be placed into effect.” This implies that the trial judge also has the discretion to “place into effect” a lesser sentence if he or she deems it appropriate.

When it becomes known that a defendant has violated the conditions of his or her probation, the trial court is vested with the power to issue a “warrant for the arrest of such defendant as in any other criminal case.” Tenn. Code Ann. § 40-35-311(a). Ordinarily, the time for filing a warrant against a defendant is limited to the “maximum time” ordered for probation. See Tenn. Code Ann. § 40-35-310. However, filing a probation violation warrant tolls the running of the time within which the trial court may revoke a defendant’s probation. Allen v. State, 505 S.W.2d 715, 717 (Tenn. 1974). The statute of limitation is tolled and no credit is earned from the date the warrant is issued. Id.

In the case sub judice, the statute of limitation was tolled beginning on October 7, 1991, the date the second probation warrant was issued.³ This warrant was not served upon the Defendant until December 29, 1993, for a tolling period of over two years. Thus, although the term for the Defendant’s probation would have run on October 20, 1993, the tolling of the limitation period rendered the validity of the trial court’s actions in full force and effect. Furthermore, the trial

³We need not consider the issuance and disposition of the first probation warrant that was filed on November 5, 1990. Its disposition is not relevant to the issue on appeal.

court revoked the Defendant's probation at the hearing on the probation violation warrant conducted on January 24, 1994. At that time, although vested with the authority to reinstate the Defendant's original sentence of four (4) years in the Department of Correction, the trial court exercised its discretion and imposed a period of intensive probation to last for six (6) months. See Tenn. Code Ann § 40-35-310. Absent any further violations and tolling of the statute, the maximum time within which a warrant could be filed was until July 23, 1994, or the end of the six-month period. However, a warrant was issued on June 1, 1994, which resulted in the Defendant's arrest and his subsequent escape from custody on August 22, 1994.

The Defendant argues that any warrants issued subsequent to the second warrant issued on October 7, 1991, should be held invalid because the trial court did not expressly order an extension of his probation. In other words, he argues that the trial court must expressly order an extension of probation when tolling of the statute of limitations occurs before any subsequent warrants can be issued. Otherwise, he argues that they should be held void or voidable. On the basis of this theory, the Defendant contends that the third warrant issued on June 1, 1994 was invalid and that he was being held illegally. He acknowledges that there is no case law on this point and we decline to adopt such a rule. Allen does not require notification to a defendant of any extension of probation time due to the tolling of the statute of limitation. Moreover, the Defendant was an absconder for over two years; any lack of notice was certainly his own making.

As a result, the order entered by the trial court on January 24, 1994, revoking the Defendant's probation was within the limitation period and was valid.

The trial judge ordered six months of intensive probation. The next warrant was issued on June 1, 1994, well within the limitation period. Likewise, the subsequent arrest of the Defendant was valid. The trial court did not err. Again, we emphasize that the validity of the warrant is irrelevant to the determination of whether the Defendant was guilty of felony escape. Therefore, this issue is without merit.

Next, the Defendant argues that the evidence was insufficient to support a verdict of guilt for felony escape. Namely, he contends that the State failed to prove that he was on probation when the violation warrant was issued.

The Defendant asserts that, because the State did not provide proof of his “probationary terms,” they failed to prove every element of the crime as required by In Re Winship, 397 U.S. 358, 364, 90 S.Ct. 1968, 1073, 25 L.Ed.2d 368 (1970) and Tennessee Code Annotated section 39-11-201. Yet, as we have noted in the previous discussion, proving the Defendant’s probationary terms is not necessary to prove felony escape beyond a reasonable doubt. What is relevant is that the State prove the elements of felony escape. It is clear from the record that this has been shown and it certainly supports the jury’s finding the Defendant guilty of escape. This issue has no merit.

As his final issue, the Defendant argues that the two-year sentence imposed by the trial court is excessive. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Defendant argues that the trial court misapplied enhancement and mitigating factors. The presentence report reflects that the Defendant was a thirty-five year old single male. He did not complete high school, and has had a number of jobs, primarily employed by family members as a construction worker. He had a long history of alcohol abuse and arrests related to intoxication. He had obtained mental health treatment at local mental health centers. He had a

lengthy criminal record, with convictions for possession of marijuana (2 convictions), public intoxication (3 convictions), kidnaping, reckless driving and resisting a stop. The State submitted three enhancement factors pursuant to Tennessee Code Annotated section 40-35-114: (1) That the Defendant had a previous history of criminal convictions; (2) that the Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release into the community; and (3) the felony was committed while on intensive probation. As a mitigating factor, the Defendant submitted that his conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1). In this appeal, he also argues that this Court should consider that he was unaware that his probation was still in effect and find this to be a mitigating factor under the catch-all subsection 40-35-113(13).

The trial court conducted a sentencing hearing. The Defendant did not testify. Counsel for the Defendant presented argument and the State relied on the presentence report. The trial court applied enhancement factor (1), the Defendant's previous history of criminal convictions and enhancement factor (13), that the Defendant was on probation. The trial court did not address or apply enhancement factor (8), that the Defendant had a history of unwillingness to comply with the terms of a sentence involving release into the community. The trial court applied mitigating factor (1), that the Defendant's conduct neither caused nor threatened bodily injury.

The State concedes that the trial court erred in applying enhancement factor (13), in that the Defendant was not on probation when the offense was committed because he was in the custody of the Sheriff's Department, rather

than on probation, when he escaped. Nevertheless, while the Defendant was being held in custody on a probation warrant, he remained on probation from the trial court's order for six months "intensive probation" entered on January 24, 1994. His probation remained in effect either until the probationary term expired or until the trial court revoked his probation. The escape occurred while he was on probation and we find no error in the trial court's application of this enhancement factor. The State also proposed that this Court should apply enhancement factor (8) regarding the Defendant's unwillingness to comply with his probation. We agree. Three probation violation warrants were issued during the Defendant's probationary period. Furthermore, he disappeared for over two years during the term of his probation. There is little evidence of cooperation on his part. It is appropriate to apply this enhancement factor.

However, we decline to apply the mitigating factor proposed by the Defendant; that he did not know his probation period had been tolled while he was incommunicado. A misunderstanding as to the validity of his restraint does not provide mitigation for an escape when the proper forum to argue the issue was in the hearing he was waiting to attend that day.

The presumptive sentence for a Class E felony is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). Should the trial court find mitigating and enhancement factors, it must start at the minimum sentence in the range and enhance the sentence based upon any applicable enhancement factors, then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is within the trial court's discretion provided that

the record supports its findings and it complies with the Sentencing Act. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991). The length of the term for a Class E felony, as a Range I, standard offender is one to two (1-2) years. The Defendant was sentenced to two years in the Department of Correction. He proposes that one year is a more appropriate sentence, considering the application of enhancement and mitigating factors. However, the Defendant has a long history of criminal offenses and he has failed to comply with the terms of his probation. Even if some evidence of mitigation exists, the applicable enhancement factors sufficiently outweigh the mitigating factor such that the maximum sentence is proper. See State v. Ruane, 912 S.W.2d 766, 785 (Tenn. Crim. App. 1995).

Finally, the trial court considered the Defendant's eligibility for alternative sentencing and found that confinement was necessary to avoid depreciating the seriousness of the offense. Also, the trial judge found that less restrictive measures had proved ineffective and that it was necessary to protect society by incarcerating the Defendant. Moreover, the Defendant does not argue that alternative sentencing is warranted. Therefore, we feel that the record fully supports the sentence imposed by the trial court. This issue is without merit.

Accordingly, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

THOMAS T. WOODALL, JUDGE