IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9508-CR-00244**
	)	
Appellee,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JOSEPH B. DAILEY**
JEFFERY A. MIKA,	)	**JUDGE**
	)	
Appellant.	)	(Vehicular Homicide, Etc.)

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

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

A Shelby County Criminal Court jury found Appellant Jeffery Mika guilty of theft of property and two counts of vehicular homicide. Although a juvenile, Appellant had been transferred to Criminal Court for trial as an adult. Tenn. Code Ann. § 37-1-134 (1996). As a Range I standard offender, Appellant received consecutive sentences of six (6) years for theft and five (5) years for each count of vehicular homicide. On appeal, Appellant raises two issues: (1) whether his sentence is excessive, and (2) whether the trial court improperly ordered Appellant to serve the sentences consecutively.

After a review of the record, we affirm the judgment of the trial court.

I. Factual Background

On August 20, 1993, Appellant stole a Jeep Cherokee from a parking lot located in downtown Memphis. Later that day, Appellant was seen traveling in an eastwardly direction at a high rate of speed on North Parkway, a major Memphis thoroughfare. Another jeep was traveling with Appellant. Eventually, the other jeep pulled off North Parkway. Appellant continued on North Parkway until the street narrows from three lanes to two lanes and makes an S curve into a tunnel. At this point, Appellant lost control of the vehicle, hit a utility pole, scraped a concrete retaining wall, hit another utility pole, crossed two lanes of traffic, hit the curb, jumped the median, became airborne, flipped the vehicle, and landed on a westbound car occupied by Aaron Weiss and his wife Belle Weiss, an elderly Memphis couple. Mr. and Mrs. Weiss were killed. Appellant and his passenger were hospitalized with injuries.

II. Length of Sentence

Appellant first maintains that the length of his sentence is excessive because of the improper application of several enhancement factors and the failure of the judge to give sufficient weight to a mitigating factor. When an appeal challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, the presumption of correctness 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 the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this Court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In reviewing a sentence, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the defendant's potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

In the absence of enhancement and mitigating factors, the presumptive length of sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range while the presumptive length of sentence for a Class A felony is the midpoint in the statutory range. Tenn. Code Ann. § 40-35-210(c) (Supp. 1996). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Id. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as

appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Id. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

As a Range I standard offender convicted of theft of property over $10,000 and vehicular homicide, both class C felonies, Appellant's statutory sentencing range is three to six years. See Tenn Code Ann. § 40-35-112(a)(3) (1990). The trial court found the following enhancement factors applicable to the vehicular homicide convictions:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
> (3) The offense involved more than one (1) victim;
> (8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;
> (12) During the commission of the felony . . . the actions of the defendant resulted in the death of or serious bodily injury to a victim or a person other than the intended victim; and
> (13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:
> (C) Probation.

Tenn. Code Ann. § 40-35-114(1), (3), (8), (12), (13)(C) (Supp. 1996). With regard to the conviction for theft, the court found the following enhancement factors applicable in addition to the above-mentioned enhancement factors:

> (2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors;
> (6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;
> (10) The defendant has no hesitation about committing a crime when the risk to human life was high;
> (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

Id. § 40-35-114(2), (6), (10), (16). The court found mitigating factor number (6), ". . . defendant, because of his youth or old age, lacked substantial judgment in committing the

offense," applicable to the vehicular homicide convictions. Id. at § 40-35-113(6). The court found no mitigating factors applicable to the conviction for theft. Based on the foregoing enhancement and mitigating factors and relevant sentencing principles, the trial court imposed a six year sentence for the conviction for theft and a five year sentence for each count of vehicular homicide. Finding that Appellant had an extensive record of criminal activity and was a dangerous offender, the court ordered the sentences to run consecutively. Because the trial court considered the principles, purposes, and goals of the 1989 Sentencing Reform Act, we begin our review with the presumption that the sixteen-year sentence is correct.

A. Previous Criminal History

Appellant first argues that the trial judge improperly applied enhancement factor (1). Appellant maintains that although he has a lengthy juvenile record, he does not have an adult criminal record which would support the application of enhancement factor (1). According to Appellant, the juvenile court system was established to punish juveniles while protecting young offenders from the "taint of criminality." Thus, an illegal act is a "crime" where an adult is involved and a "delinquent act" where a juvenile is involved. Appellant's claim has no merit. This Court has upheld the application of enhancement factor (1) to enhance a sentence received by a juvenile tried as an adult. State v. Griffin, 914 S.W.2d 564, 568 (Tenn. Crim. App. 1995); State v. Evans, No. 02C01-9306-CR-00109, 1994 WL 591702, at * 4 (Tenn. Crim. App. Oct. 12, 1994). As in this case, the defendant in Griffin had been tried as an adult. In upholding the trial court's sentencing determinations, this Court approved the trial court's consideration of the defendant's lengthy juvenile record in applying enhancement factor (1). Appellant's thirteen prior arrests, six of which involved the theft of a vehicle, certainly supports the application of this factor. Thus, we conclude that the trial court's application of enhancement factor (1) to both the vehicular homicide and the theft conviction was proper.[1]

[1] Although inapplicable to this case because the offenses occurred in 1993, Tennessee Code Annotated Section 40-35-114(20) became law July 1, 1995. That subsection provides that a record of adjudication as a delinquent by reason of acts that would constitute a felony if committed by an adult is in and of itself an enhancement factor.

B. Multiple Victims

Next Appellant argues that the trial judge improperly applied enhancement factor (3). Appellant complains that this enhancement factor was improperly applied because the basis for its application was also used to support the application for enhancement factor (6). Appellant mistakenly believes that the trial judge applied this factor because of the property damage to the stolen vehicle, which was the basis for applying enhancement factor (6). However, enhancement factor (3) was properly applied to the vehicular homicide convictions because Appellant's passenger was injured as well as the Weisses. Appellant's passenger was cut from the stolen vehicle and then hospitalized. Thus, there was more than one victim to the offense of vehicular homicide, and the trial judge's application of this factor was proper. However, the State concedes, and we agree that the application of this enhancement factor to the theft conviction was erroneous.

C. Unwillingness To Comply With Terms Of A Sentence Involving Release/ Felony Committed While On Probation

Appellant also challenges the application of enhancement factors (8) and (13) to his vehicular homicide and theft convictions. Appellant's juvenile record reflects that he violated probation several times as a juvenile. The record also reflects that he committed the felonies of vehicular homicide and theft while on probation. Nevertheless, Appellant argues that factors (8) and (13) should not apply because he was a juvenile when he violated his probation. As mentioned previously, a defendant's juvenile record may be used to enhance a sentence. Griffin, 914 S.W.2d at 568. In Griffin, this Court found that the application of enhancement factor (8) was appropriate where the defendant had violated probation as a juvenile. 914 S.W.2d at 568. In Evans, this Court found that application of enhancement factor (13) was appropriate where the defendant had committed the felony offense while on probation as a juvenile. 1994 WL 591702, at *5. Appellant further challenges the use of his juvenile record as support for application of an enhancement factor and as a basis for ordering consecutive sentences.

However, there is no prohibition against using the same facts as a basis to enhance a sentence and to order consecutive sentences. State v. Meeks, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993). Finally, Appellant argues that application of these enhancement factors was erroneous because the State failed to give notice that it would seek their application. It is well-established that a trial judge may consider enhancement factors even though the State failed to file its notice. State v. Birge, 792 S.W.2d 723, 726 (Tenn. Crim. App. 1990). Therefore, we find that the application of enhancement factors (8) and (13) to Appellant's vehicular homicide and theft convictions was appropriate.

D. Actions Resulted In Death Or Serious Bodily Injury

Appellant next argues that the trial judge erroneously applied enhancement factor (12) to his vehicular homicide and theft convictions. The trial judge applied this factor because he believed that Appellant's passenger suffered serious bodily injury. Appellant claims that there was no evidence presented at trial that supports this finding. Testimony at trial revealed that Appellant was traveling at sixty-five miles per hour after having hit two utility poles and a concrete retaining wall. The passenger side of the vehicle received the impact of hitting the concrete wall, and the vehicle landed on the passenger side. The passenger had to be cut from the vehicle by emergency personnel and was then hospitalized as a result of his injuries. The evidence supports the application of this enhancement factor to the vehicular homicide conviction. However, the State concedes, and we agree that the trial judge was in error in applying it to the theft conviction.

E. Leader In The Commission Of An Offense

In addition to the above-mentioned enhancement factors applied to the conviction for theft, the trial judge applied four other enhancement factors solely to the theft conviction. One enhancement factor applied to the theft conviction only was enhancement factor (2). The State

concedes, and we agree that the record does not support the application of this enhancement factor.

F. Particularly Great Personal Injuries Or Property Damage

The trial judge also applied enhancement factor (6) to the theft conviction because the Jeep Cherokee Appellant was driving was destroyed. The State concedes, and we agree that the trial judge erred in applying this enhancement factor. Since the sentence for theft is graded according to the amount of property taken, it would be improper for us to further enhance Appellant's sentence by applying factor (6). See Tenn. Code Ann. § 40-35-114(6); see also State v. Tate, No. 03C01-9204-CR-127; 1993 WL 55631, at *3 (Tenn. Crim. App. 1993).

G. High Risk To Human Life

Appellant argues that the application of enhancement factor (10) was erroneous because the theft was initially completed without any harm or danger of harm to anyone. Nevertheless, testimony at trial revealed that a policeman spotted Appellant and the jeep which he raced immediately preceding Appellant's fatal crash. The policeman testified that after he began to follow them, the two jeeps increased their speed to a point where he could no longer follow them. Therefore, there is evidence to support the claim that Appellant was driving recklessly in an attempt to elude the police. This Court has upheld the application of this factor where a defendant who had stolen a car was apprehended after a high speed chase. See Tate, 1993 WL 55631, at *3. This Court found that the defendant's reckless driving during the chase "certainly indicated that the defendant has no hesitation about the high risk to human life resulting from his conduct." This Court has also applied this factor to an aggravated assault and aggravated robbery conviction where the defendant drove recklessly, endangering other motorists on the interstate in an attempt to escape from the police. See State v. Helfer, No. 01C019407CR-00242; 1995 WL 567064, at *7 (Tenn. Crim. App. 1995). Thus, the application of enhancement factor (10) was appropriate.

H. Great Potential For Bodily Injury To A Victim

Finally, Appellant maintains that the trial judge should not have applied enhancement factor (16) to his conviction for theft. He contends that it was improper to apply factor (16) because the actual taking was not accomplished in a dangerous manner. Again, there is evidence to suggest that Appellant was fleeing from police immediately preceding his crash. His reckless driving not only presented a high risk to human life but also created a great potential for bodily injury to a victim. Therefore, we conclude that the trial court's application of enhancement factor (16) was proper.

I. Youth

As to mitigating factors, Appellant argues that the trial judge erred in giving mitigating factor (6) little weight in determining the sentence for the vehicular homicide and no weight in determining the sentence for theft. Appellant claims that the length of his sentence should be reduced because of the "natural irresponsibility of a normal teenager," and his immaturity. While this Court is not unfamiliar with the allowance of youth, we do not believe a "normal teenager" would have stolen six vehicles by the time he was sixteen. Appellant cannot persuasively argue that after having stolen six vehicles and going in and out of every correctional facility the county had to offer by the time he was sixteen, he lacked substantial judgment about stealing a vehicle. Moreover, our Supreme Court has held that age is not a proper mitigator without evidence that age, education, maturity, experience, mental capacity or development, or any other pertinent circumstances indicate less ability to appreciate the nature of one's conduct. State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993). Finally, the weight given enhancing and mitigating factors is left to the discretion of the trial judge assuming he complies with the purposes and principles of the 1989 Sentencing Act and his findings are supported by the record. Hayes, 899 S.W.2d at 185. Therefore, we find that the trial judge was correct in giving little weight to mitigating factor (6) when sentencing Appellant for vehicular homicide and giving it no weight when sentencing Appellant for theft.

In sum, we find that although the trial judge incorrectly applied enhancement factors (2), (3), (6), and (12) to Appellant's conviction for theft, in light of the strength and number of the remaining enhancement factors and lack of mitigating factors, the length of Appellant's sentence for theft is not excessive. We also find that the trial judge correctly applied enhancement factors (1), (3), (8), (12), and (13) to Appellant's sentences for vehicular homicide, and correctly attributed little weight to mitigating factor (6). Therefore, we also conclude that Appellant's sentences for vehicular homicide are not excessive.

II. Consecutive Sentencing

Appellant next maintains that the trial court erred in ordering him to serve his sentences consecutively. The trial court has the discretion to impose sentences concurrently or consecutively. Tenn. Code Ann. § 40-20-111(a) (1990). The imposition of consecutive sentences is appropriate if the defendant has been convicted of more than one offense and the trial court finds, by a preponderance of the evidence, one or more of the following criteria:

> (1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;
> (2) The defendant is an offender whose record of criminal activity is extensive;
> (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 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;
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . . ;
> (6) The defendant is sentenced for an offense committed while on probation; or
> (7) The defendant is sentenced for criminal contempt.

Id. § 40-35-115(b) (1990).

In imposing consecutive sentences, the trial court noted Appellant's record of extensive criminal activity. Id. § 40-35-115(b)(2). Appellant objects because the trial court used his juvenile record as a basis for finding a record of extensive criminal activity. According to the proof submitted at the sentencing hearing, Appellant has been arrested thirteen times as a

juvenile. Appellant has been arrested once for aggravated burglary, once for disorderly conduct, twice for vandalism, twice for truancy, three times for theft of property, and five times for theft of a vehicle. This Court has held that a juvenile record could provide the basis for finding a record of extensive criminal activity justifying the order of consecutive sentences. Evans, 1994 WL 591702, at *5. Therefore, we conclude that based on this finding, the trial court properly imposed consecutive sentences.

The trial court also found that Appellant was a dangerous offender as a ground for imposing consecutive sentences. Tenn. Code Ann. § 40-35-115(b)(4). However, this finding, standing alone does not justify consecutive sentences. A trial court may not impose consecutive sentences based upon the defendant's dangerous offender status unless the record establishes that:

> (a) the defendant's behavior indicated little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
> (b) the circumstances surrounding the commission of the offense were aggravated;
> (c) consecutive sentences are necessary to protect society from further criminal conduct by the defendant;
> (d) consecutive sentences reasonably relate to the severity of the offenses committed; and
> (e) the sentence is in accord with the principles set forth in the Sentencing Reform Act.

State v. Wilkerson, 905 S.W.2d 933, 938-39 (Tenn. 1995); see also State v. Ross, No. 03C01-9404-CR-00153, 1996 WL 167723, at *9 (Tenn. Crim. App. Apr. 10, 1996).

The trial judge found that Appellant's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. As stated previously, the record certainly supports this finding. Appellant was traveling at an excessive rate of speed on a major thoroughfare in a residential area. Evidence showed that he was traveling at such a high speed that it was estimated he was going sixty-five miles per hour after hitting several objects. Evidence showed that he never attempted to apply his breaks. While incarcerated awaiting trial Appellant was disciplined by jail authorities for possession of a

"shank" or homemade knife. In addition, the record contains a letter written by Appellant while awaiting trial expressing his pride at being a member of a notoriously violent gang known as the Crips.

The trial judge also found and the record supports that the circumstances were aggravated. Because of Appellant's actions in stealing a vehicle and driving it at a high rate of speed in an apparent attempt to elude police, an innocent elderly Memphis couple were needlessly killed. There was evidence to suggest that the victims saw the Jeep coming toward them, and before their death they were burned by the fire that erupted in their car after the Jeep Cherokee driven by Appellant landed on them.

The trial judge further found that confinement was necessary to protect society. The record reflects that Appellant was simply warned and placed under the supervision of his mother for his first three offenses as a juvenile: aggravated burglary, vandalism, and theft of property. After two arrests for truancy, one arrest for disorderly conduct, and two arrests for theft of property, Appellant was placed in the Hanover House program, a house arrest program. He was then arrested for theft of a vehicle and detained at Tall Trees. He escaped from Tall Trees and was arrested again for theft of a vehicle. He was next sent to Shelby Training Center, a secure residential program. He was released from Shelby Training Center back into the Hanover Program when he was arrested for theft of a vehicle. He was returned to the Shelby Training Center. He was again released from Shelby over to the Hanover Program which he completed and custody was returned to his mother. Later, he was arrested for burglary of a vehicle and vandalism. He was released from these charges because the victim did not want to prosecute. After an arrest for theft of a vehicle, Appellant was committed to the Tennessee Department of Youth Development which is for juveniles the equivalent of the Tennessee Department of Correction for adults. Soon after he was released from the Department of Correction he was arrested for the vehicular homicides and theft of property which led to this case. While

incarcerated awaiting trial Appellant was found in possession of a contraband weapon and wrote of his affection for a known criminal street gang. Obviously, Appellant's history suggests that he would likely continue his criminal activity unless confinement prevented him from doing so.

The trial judge also found the consecutive sentences reasonably related to the severity of the offenses. If the two five year and one six year sentences were run concurrently, Appellant would only serve six years for stealing a car, destroying two vehicles, and killing two innocent people. As the trial judge stated, if the sentences were not run consecutively, it "would be a travesty of the law." Finally, the consecutive sentence was in accord with the principles of the Sentencing Reform Act. Among other things, consecutive sentences are necessary to protect society.

Because the trial court carefully considered the necessary factors and properly concluded that Appellant had an extensive record of criminal activity and was a dangerous offender, the court properly ordered Appellant to serve his sentences consecutively.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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DAVID H. WELLES, JUDGE