IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9512-CC-00382
Appellee,	*	SULLIVAN COUNTY
VS.	*	Hon. R. Jerry Beck, Judge
JOHN MILLER, JR.,	*	(Felony Reckless Endangerment)
Appellant.	*	

For Appellant:

Terry L. Jordan
Assistant Public Defender
P.O. Box 839
Blountville, TN 37617

For Appellee:

Charles W. Burson
Attorney General & Reporter

Darian B. Taylor
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Phyllis H. Miller
Assistant District Attorney General
P.O. Box 526
Blountville, TN 37617

OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, John Miller, Jr., was convicted of reckless endangerment with a deadly weapon, a felony. Tenn. Code Ann. § 39-13-103(b). The trial court imposed a two-year sentence. In this appeal of right, the defendant challenges the sufficiency of the evidence and claims the sentence was excessive.

We affirm the judgment of the trial court.

On the morning of June 23, 1994, Karen Leigh Ableseth was driving her twenty-month-old daughter to her mother-in-law's residence when she attempted to pass a green, older model car on Volunteer Highway in Bristol. The traffic was heavy. In her words, the green car "came over into my lane, and I had to move over some, to keep him from hitting me." Ms. Ableseth continued her course, stopping at a red light. When the green car approached from behind and then veered into her lane, she had to pull into the emergency lane to avoid a collision. At that point, Ms. Ableseth saw that the defendant was the driver of the other car. As she stopped at other red lights on the way to her destination, the defendant continued to follow her and would "stop real close on [her] bumper." She claimed the defendant twice ran her off the road.

When Ms. Ableseth reached her mother-in-law's residence, she grabbed her daughter and ran inside. Meanwhile, the defendant parked his car on the street, got out of his vehicle, gestured towards Ms. Ableseth with his cane, and announced that he intended to teach her a lesson for speeding through school zones. According to Ms. Ableseth, the defendant insisted that she call the police and waited outside until Officer Joan Edwards arrived. The officer interviewed both drivers but made no arrest at that time. Two days later, the defendant was charged; he was subsequently indicted, brought to trial, and convicted by a jury.

The defendant first challenges the sufficiency of the evidence. Our scope of review is limited. On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e).

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(a). It is a Class A misdemeanor unless committed with a deadly weapon, which makes the offense a Class E felony. Tenn. Code Ann. § 39-13-103(b). A deadly weapon includes "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury." Tenn. Code Ann. § 39-11-106(a)(5)(B).

The jury in this case chose to accredit Ms. Ableseth's testimony that the defendant had purposefully veered his car into her lane of traffic twice on a congested highway; she had to pull off the road in order to avoid contact. In our view, this evidence supports the state's theory that the defendant operated the vehicle in a manner capable of causing death or serious bodily injury to the occupants of the Ableseth vehicle. Depending on the intended use of an automobile, it may qualify as a deadly weapon. See State v. Scott W. Long, No.

03C01-9301-CR-00032, slip op. at 6-7 (Tenn. Crim. App. at Knoxville, Aug. 19, 1993). Here, there was proof that the defendant utilized his car in a threatening and potentially dangerous manner. Ms. Ableseth claimed that but for her evasive action there would have been a collision. The jury accredited that account. The risks created by the defendant's driving are obvious. That the defendant continued to closely and aggressively follow Ms. Ableseth to her destination exacerbated the situation.

Next, the defendant claims as excessive the trial court's sentence of two years, the maximum available, and the denial of any form of alternative sentence. The state resisted the request for probation and presented evidence that the defendant, who had routinely harassed and threatened other drivers, was a bad risk for any other alternative sentence.

Lieutenant Bill Smith, testified at the sentencing hearing that the police department had numerous complaints from other drivers about the defendant's prior conduct. The officer claimed that the defendant had, in fact, threatened him just before the hearing. The proof also established that, previous to this offense, the defendant had cursed and harassed several postal customers and employees. On two occasions, the defendant had been removed from the post office by police. On another occasion, the defendant removed a sign from the lobby of the post office and threw it at an employee. The defendant had sent threatening mail to one postal employee and had been overheard making racial comments about African-American employees. Officer Rick Maul testified that the defendant had once engaged in an automobile chase after two young women. The women drove to the police department and contended that the defendant had been following them for quite some distance. Officer Maul warned the defendant not to follow other cars and the

defendant responded by making derogatory remarks about the women.

The defendant, sixty-eight years of age at the time of the offense, is divorced and had lived, apparently alone, in an apartment. A Navy veteran with a college degree and some post-graduate study, he has been retired for several years. Confined to a wheelchair for much of the time, the defendant walks with the aid of canes and has a variety of other physical problems. He received physical therapy treatment of some sort from a hospital on a regular basis. Beset with high blood pressure and non-malignant prostate problems, the defendant claimed various other medical ailments.

The presentencing report documents a history of mental illness. In 1991, the defendant was treated at Southwest Virginia Mental Health Institute and was diagnosed with "narcissistic personality disorder ... and passive-aggressive personality disorder." In 1991, he was treated by Lakeshore Mental Health Center where it was determined the defendant had "mild neurotic and schizoid tendencies [and] could become ... psychotic under stress." Hospital reports contained the following additional information:

> Throughout the hospitalization Mr. Miller was consistently contentious, argumentative, demanding, and he demonstrated a st[r]ong sense of entitlement.
>
> He alienated all peers. His judgment was so poor that he made dangerously inflammatory remarks to explosive patients.
>
> ***
>
> Patient seems very narcissistic, self a[g]grandizing and demanding. He views himself as a crusader and champion of the underdog.

Three months after the commission of this offense, the defendant was tentatively diagnosed with chronic schizophrenia and referred to a mental hospital. Insanity

was not, however, claimed as a defense.

The defendant attempted to justify his behavior as to this offense by claiming that he was attempting to make a citizen's arrest of Ms. Ableseth. Until 1991, he had no record of criminal behavior. Since then, he has had a variety of charges; his first conviction was for misdemeanor reckless endangerment. While out on probation for this offense, he was charged with and subsequently convicted of, a second count of misdemeanor reckless endangerment. The defendant also has a prior conviction for criminal trespass. Other charges, apparently related to these crimes, were dismissed.

When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-40l(d). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (l) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-l02, -l03, -210.

At the time of this offense, the presumptive sentence was the minimum in the range if there were no enhancement and mitigating factors. Tenn.

Code Ann. § 40-35-210 (amended in 1995 changing the presumptive sentence for a Class A felony to the midpoint in the range). 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 trial court should make specific findings on the record which indicate its application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209, -210.

At the sentencing hearing, the trial court found the following enhancement factors applicable:

> (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (2) the offense was committed for pleasure or excitement; and
>
> (3) the defendant has a history of unwillingness to comply with the conditions of a sentence involving release in the community.

Tenn. Code Ann. § 40-35-114(1), (7), (8). The trial court also found the following mitigating factors applicable:

> (1) The defendant, because of his age, lacked substantial judgment in committing the offense;
>
> (2) the defendant suffers from a mental or physical condition; and
>
> (3) the defendant has no prior felony convictions.

Tenn. Code Ann. § 40-35-113(6), (13). The trial judge found the defendant's mental illness did not meet the requirements of mitigating factor (8) that the "defendant was

suffering from a mental or physical condition that significantly reduced his culpability for the offense." Tenn. Code Ann. § 40-35-113(8). The trial court did, however, consider the defendant's mental illness under the "catch-all" provision found in factor (13) which allows the trial court to consider "any other factor consistent with the purposes of this chapter." Id.

The defendant contends the trial court erred by concluding that the offense was committed for pleasure or excitement. Tenn. Code Ann. § 40-35-113(7). He asserts there was no proof of the factor. We must agree. There was no proof either at trial or during the sentencing hearing as to what motivated the defendant to commit the offense. While the factor might have applied, there must be some underlying proof before the trial judge might rely upon its application. See State v. Adams, 864 S.W.2d 31 (Tenn. 1993).

In our view, however, the maximum two-year sentence is warranted because of the defendant's prior history of criminal behavior and his demonstrated unwillingness to comply with the conditions of a sentence involving release into the community; that is, he violated his probation on his first misdemeanor reckless endangerment sentence. We would also observe that the sentence could have been enhanced by the fact that the offense involved more than one victim, as the victim's twenty-month old child was in the car at the time of his reckless act. See Tenn. Code Ann. § 40-35-114(3).

The defendant also contends that he should have received some type of alternative sentence. Especially mitigated or standard offenders convicted of Class C, D, or E felonies are, of course, presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn.

Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(b). A Range I, Class E felony qualifies for a sentence of not less than one nor more than two years. Tenn. Code Ann. § 40-35-112(a)(5).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history, and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn.1978). The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn.1990). That the defendant meets the minimum requirements of the Community Corrections Act of 1985, however, does not mean that he is entitled to be sentenced under the act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App.1987). The following offenders are eligible for Community Corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 2 [repealed], parts 1-3 and 5-7 or title 39, chapter 13, parts 1-5;
>
> (3) Persons who are convicted of nonviolent felony offenses;
>
> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not

> involved;
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> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (6) Persons who do not demonstrate a pattern of committing violent offenses; and
>
> (7) Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a). Subparts (a)(3), (a)(5), and (a)(6) above would initially exclude the defendant; however, subpart (c) creates a "special needs" category of eligibility:

> Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of a chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

(Emphasis added). Thus, the defendant would arguably be eligible for the Community Corrections; and, under these circumstances, we would ordinarily encourage that alternative to a prison sentence.

In Ashby, however, our supreme court encouraged the grant of considerable discretionary authority to our trial courts in matters such as these. 823 S.W.2d at 171. See State v. Moss, 727 S.W.2d 229, 235 (Tenn.1986). "[E]ach case must be bottomed upon its own facts." Taylor, 744 S.W.2d at 922. "It is not the policy or purpose of this court to place trial judges in a judicial straight-jacket in this or any other area, and we are always reluctant to interfere with their traditional discretionary powers." Ashby, 823 S.W.2d at 171.

After considering the "special needs" provisions of Community Corrections Act, the trial court denied any form of alternative sentence on the basis

that the defendant had been on probation twice for reckless endangerment. The trial court observed that, due to earlier probation violations, previous measures less extreme than incarceration, including treatment at mental health facilities, had been tried and had failed; "[a]t some point, the line must be drawn even in regards to Mr. Miller who suffers from a disability." Given the defendant's criminal history of similar crimes, the trial court had a sound basis for denying probation. Moreover, we note that while the defendant has presented evidence of a diminished capacity, there was no indication in his medical records that his condition could be satisfactorily treated in the community. Earlier attempts at treatment and control of the defendant's unusual behavior had been unsuccessful. Thus the protection of the public becomes an important consideration.

Circumstances such as these are particularly perplexing for trial courts. The defendant, now 70 years of age, has a diminished mental capacity but does not qualify as legally insane. While well-educated and, by all appearances, a law-abiding and productive citizen in prior years, he has in recent years shown disdain for authority, lost his family support, and presented himself as a danger to the community. He has exemplified particular enmity for women, having stalked and intimidated several in his community. No medication or course of treatment has been effective to curb his misbehavior. While it is doubtful that our state prisons are any more likely to produce positive results than his prior care, no other viable alternative appears to offer any better answer.[1] Thus, the trial court also had a sound basis for denying Community Corrections.

Accordingly, the judgment of the trial court is affirmed.

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[1]The defendant did not make bail pending appeal. He was released by the Department of Correction in 1995, violated his parole, and was returned to custody.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Jerry L. Smith, Judge