IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

January 30, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 01C01-9602-CC-00056**
Appellee,	)	
	)	**MONTGOMERY COUNTY**
VS.	)	
	)	**Hon. John H. Gasaway, III, Judge**
JABBAUL PETTUS,	)	
	)	(Sentencing)
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The appellant, Jabbaul Pettus, appeals the sentence imposed by the Circuit Court of Montgomery County after he was found to be in violation of the terms and conditions of the community corrections program. While on the program he committed and pled guilty to the offense of attempted aggravated robbery. At the time of the new offense, Pettus was serving an eight (8) year sentence with the community corrections program for possession of cocaine with the intent to sell. As a result, the trial court revoked his sentence under the Community Corrections Act and re-sentenced him to ten (10) years for the drug charge and six (6) years for the attempted aggravated robbery, with the sentences to be served consecutively. Pettus claims that his sentence for possession of cocaine with the intent to sell is illegal because he was sentenced for a Class B felony whereas the indictment merely alleged a Class C felony. He further maintains that he should have received a separate re-sentencing hearing for the drug charge apart from the sentencing hearing on attempted aggravated robbery. Finally, appellant argues that the trial court erred in ordering consecutive sentencing. We find no error and affirm.

PROCEDURAL HISTORY

In October 1994, Pettus was indicted for one (1) count of possession of cocaine with the intent to sell. The indictment did not list the amount of cocaine for which Pettus was charged. In January 1995, Pettus entered a guilty plea for possession of cocaine with the intent to sell, a Class B felony. The trial judge sentenced him to eight (8) years to be served in the community corrections program pursuant to T.C.A. § 40-36-101, et. seq.

In October 1995, Pettus pled guilty to the charge of attempted aggravated robbery. The offense was committed while he was under the community corrections program. At the sentencing hearing, Pettus received a six (6) year sentence for attempted aggravated robbery as a Range I, Standard Offender. Furthermore, because he violated the community corrections program, the trial court revoked his

previous sentence and re-sentenced him to ten (10) years for the prior offense, with the sentences to run consecutively.

ILLEGAL SENTENCE

Pettus contends that his re-sentencing for the possession of cocaine with the intent to sell is illegal because he was sentenced to ten (10) years, which exceeds the sentence prescribed for a Class C felony. He argues that because the indictment did not specify that the amount of cocaine was 0.5 grams or more, then it is presumed to be less than 0.5 grams, a Class C felony. T.C.A. § 39-17-417(c)(1), (2); State v. Hilliard, 906 S.W.2d 466 (Tenn. Crim. App. 1995). The range of sentencing for a Class C felony for a standard offender is from three (3) to six (6) years. Therefore, Pettus argues that a ten (10) year Class B sentence is unauthorized by statute.

Generally, a sentence that is imposed in direct contravention to express statutory provisions is illegal and is subject to being set aside at any time. *See* State v. Burkhart, 566 S.W.2d 871 (Tenn. 1978). Recently, this Court has reiterated this principle in Woods v. State, 928 S.W.2d 52 (Tenn. Crim. App. 1996). In that case, the defendant pled guilty to three (3) counts of robbery and was sentenced as a Range I, Standard Offender to ten (10) year sentences. The specified sentence for a Class C felony within Range I is only three (3) to six (6) years. Therefore, this Court held that his sentence was illegal because it exceeded the statutory limits.

That is not the situation in this case. Even though the indictment did not specify the amount of cocaine, Pettus entered a knowing and voluntary plea of guilty as a Standard Offender to the Class B felony with a range of punishment of eight (8) to twelve (12) years. Therefore, the original eight-year community corrections sentence was within this statutory range of punishment. Furthermore, the ten-year sentence that Pettus received upon re-sentencing was also within the statutory range. Neither sentence was illegal.

A defendant can enter a plea of guilty pursuant to a plea agreement and be

sentenced to a higher range of classification than that which would ordinarily be imposed. State v. Mahler, 735 S.W.2d 226 (Tenn. 1987).

In State v. Wallen, 863 S.W.2d 34 (Tenn. 1993), the defendant was sentenced as an especially aggravated offender on the basis that he committed an offense while on parole from a conviction that was subsequently overturned. The defendant pled guilty to three (3) counts of armed robbery and later claimed that his sentence as an especially aggravated offender was illegal because it was based on void prior convictions. The Supreme Court rejected his argument saying, "the petitioner, with full knowledge of his rights, voluntarily took the benefits of the plea bargain. In accepting those benefits, . . . he waived any irregularity or defect in the proceedings . . . " 863 S.W.2d at 38.

Pettus' reliance on State v. Hilliard, 906 S.W.2d 466 (Tenn. Crim. App. 1995), is misplaced. In Hilliard the defendant did not plead guilty to the Class B felony but rather was tried and found guilty on an indictment that did not specify the amount of cocaine. Since the indictment did not specify the Class B felony amount, this Court concluded on direct appeal that defendant could only be sentenced for the Class C felony.

Unlike Hilliard, Pettus knowingly and voluntarily pled guilty to the Class B felony. He is now being re-sentenced based upon his prior plea of guilty and violation of the terms of the community corrections program. His prior guilty plea has the effect of waiving all non-jurisdictional and procedural defects and constitutional infirmities in any prior stage of the proceeding. State v. Griffin, 914 S.W.2d 564, 567 (Tenn. Crim. App. 1995). There are no jurisdictional defects. Therefore, we conclude that Pettus waived any claims with regard to the indictment by his prior plea of guilty. He has not received an illegal sentence. This issue is without merit.

SEPARATE RE-SENTENCING HEARING

Pettus next alleges that he should have received a separate re-sentencing hearing distinct from the sentencing hearing for attempted aggravated robbery. To

re-sentence for a violation of the Community Corrections Act, the trial court must conduct a sentencing hearing pursuant to the Criminal Sentencing Reform Act of 1989 and conform the new sentence to the provisions of the Act. State v. Timothy Lemont Wade, C.C.A. No. 01C01-9303-CR-00092 (Tenn. Crim. App. filed November 24, 1993 at Nashville); *see also* T.C.A. § 40-35-209(a) and 210(a)-(e). The trial court cannot arbitrarily establish the length of the new sentence and should approach the sentencing of the defendant in the same manner as if it were sentencing defendant initially, except that the trial court may consider the fact that community corrections was not successful. State v. McGill, C.C.A. No. 03C01-9409-CR-00345 (Tenn. Crim. App. filed September 19, 1995, at Knoxville). There is no authority to suggest that Pettus is entitled to a separate re-sentencing hearing. He admitted to his violation of community corrections. He suggested that the trial court "set a disposition at the same time a sentencing hearing is set" in the robbery case. On that date the trial court made extensive findings pursuant to the Criminal Sentencing Reform Act of 1989. These findings were relevant to the attempted robbery charge as well as the drug re-sentencing charge. Although the trial court could have been more definitive in its findings relating to each charge, Pettus suffered no prejudice simply because the sentencing and re-sentencing hearings were combined. This issue is without merit.

CONSECUTIVE SENTENCING

The defendant next argues the trial court erred by ordering his sentences to be served consecutively. At the sentencing hearing, the trial court found that the defendant committed the attempted aggravated robbery while on community corrections and ordered defendant's six- year sentence for attempted aggravated robbery and ten-year sentence for possession of cocaine with intent to sell to be served consecutively. T.C.A. §40-35-115(6). Defendant specifically argues that he was not on "probation" as specified by this statute but involved in a community correction program. He, therefore, contends that there is no proper basis to support consecutive sentencing.

Consecutive sentencing is governed by T. C. A. § 40-35-115. The trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912 (Tenn. Crim. App. 1995). Furthermore, the court is required to determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995).

When resentencing an offender who has violated the terms of community corrections, the trial court may consider the fact that community corrections was not successful. State v. McGill, 1995 WL 550793, C.C.A. No. 03C01-9409-CR-00345 (Tenn. Crim. App. filed September 19, 1995, in Knoxville). Moreover, T. C. A. §40-35-115 (b)(6) allows the trial court the same consecutive sentencing option for offenses committed while on community corrections as well as probation. State v. Hart, 1995 WL 380108, C.C.A. No. 02C01-9406-CC-00111, (Tenn. Crim. App. filed June 28, 1995, in Jackson); but see State v. Brown, 1995 LEXIS 682, C.C.A. No. 01C01-9412-CC-00419 (Tenn. Crim. App. filed August 11, 1995, in Nashville). Imposition of consecutive sentences may validly result from a violation of community corrections.

The record provides sufficient proof that the defendant's sentence is reasonably related to the severity of the offenses and is necessary to protect the public from further criminal acts. The effective sentence of fourteen (14) years for attempted aggravated robbery and possession of cocaine with intent to sell is also congruent with the general principles of sentencing. Accordingly, the consecutive sentences were properly imposed by the trial court.

The judgment of the trial court is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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WILLIAM M. BARKER, JUDGE