IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9510-CC-00311**
	)	
Appellee,	)	
	)	
	)	**HENRY COUNTY**
VS.	)	
	)	**HON. C. CREED MCGINLEY**
STEVEN TERRENCE RUSSELL,	)	**JUDGE**
	)	
Appellant.	)	**(Sentencing and Evidence)**

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Steven Terrence Russell pled guilty in the Henry County Circuit Court to possession of cocaine in excess of 0.5 grams with intent to sell or deliver and to possession of marijuana. As a Range I standard offender, he received an effective sentence of ten years in the Tennessee Department of Correction. In this appeal, Appellant presents the following issues: (1) whether the trial court erred in denying his motion to suppress evidence seized during his arrest; and (2) whether his sentence is excessive.

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

I. FACTUAL BACKGROUND

The record reflects that, on October 13, 1994, Ms. Pamela Hughes, the principal of Lakeside Christian Academy, notified the Henry County Sheriff's Department that several students had witnessed a drug transaction between Appellant, a seventeen-year-old student, and Matthew Longue, a fourteen-year-old student. Ms. Hughes also informed the authorities that Longue's parents had found drugs in their home the preceding day. Officer Donald Blackwell and another officer, both of the Drug Task Force, responded to the call.

The arrival of the officers at the school was visible from the classroom in which Appellant was located. When Ms. Hughes met the officers outside Appellant's classroom, lunch was due to begin within five to ten minutes. After discussing the fact that Appellant would have access to the parking lot during lunch, Ms. Hughes removed him from the classroom.

Appellant became hostile when questioned regarding the drug transaction and expressed a desire to confront those individuals who had accused him of drug trafficking. In response, Officer Blackwell instructed Appellant to place his hands on the wall. Officer Blackwell then conducted a search of Appellant's person both for weapons and for drugs. During the search, Officer Blackwell found cocaine and marijuana. Appellant was subsequently placed under arrest.

On December 29, 1994, the Henry County Juvenile Court determined that Appellant should be tried as an adult and transferred his case to the Henry County Circuit Court. On March 7, 1995, a Henry County Grand Jury indicted Appellant for possession of cocaine in excess of 0.5 grams with intent to sell or deliver in violation of Tennessee Code Annotated Section 39-17-417(a)(4)(c)(1) and for possession of marijuana in violation of Tennessee Code Annotated Section 39-17-418(a). On March 25, 1994, Appellant filed a pretrial motion to suppress the cocaine and marijuana seized during his arrest, alleging that the search was unconstitutional. Following an evidentiary hearing, the trial court denied the motion. On May 22, 1995, Appellant pled guilty, reserving the suppression issue as a certified question of law pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure.[1] At the conclusion of the sentencing hearing, the trial court imposed concurrent sentences of ten years for the cocaine offense and eleven months and twenty-nine days for the marijuana offense.

II. MOTION TO SUPPRESS

Appellant first alleges that the trial court erred in denying his motion to suppress the cocaine and marijuana seized during his arrest. Appellant argues that the warrantless search of his person was unconstitutional.

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[1] Appellant has satisfied all prerequisites for consideration of his certified question of law. See State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988); see also State v. Pendergrass, No. 01S01-9507-CR-00110, 1996 S.W.2d 520351, at *4-*5 (Tenn. Sept. 16, 1996).

The Constitution of the State of Tennessee guarantees that “the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . .” Tenn. Const. art. I, § 7. The Fourth Amendment to the United States Constitution provides the same guarantee. Any search and seizure conducted without a warrant is presumed illegal. State v. Crabtree, 655 S.W.2d 173, 179 (Tenn. Crim. App. 1983). The State then has the burden of showing that the search and seizure was conducted within a recognized exception to the warrant requirement. State v. McClanahan, 806 S.W.2d 219, 220 (Tenn. Crim. App. 1991). One such recognized exception is a search supported by probable cause and conducted under exigent circumstances. See State v. Blakely, 677 S.W.2d 12, 16 (Tenn. Crim. App. 1983). Probable cause has been defined as "a reasonable ground for suspicion, supported by circumstances indicative of an illegal act." State v. Johnson, 854 S.W.2d 897, 899 (Tenn. Crim. App. 1993). In discussing a warrantless search based upon a claim of probable cause, our Supreme Court has made the following statement:

> It is only unreasonable searches and seizures that are prohibited by the state or federal constitutions. Despite the heavy judicial gloss on the provisions of both instruments, reasonableness of the conduct of investigating officials in light of all the surrounding circumstances has to be the touchstone of whether or not evidence concerning a particular seizure should be suppressed in furtherance of the exclusionary rule.

State v. Jennette, 706 S.W.2d 614, 618 (Tenn. 1986).

Here, Officer Blackwell testified that he conducted a search of Appellant’s person based upon the information he had received from Ms. Hughes and the fact that Appellant would soon have an opportunity to destroy evidence. This Court has held that a warrantless search is proper if the investigating officer has probable cause to believe that evidence of a crime exists and that an immediate search is necessary to prevent the destruction of that evidence. See State v. Wilkins, No.

02C01-9410-CC-00229, 1995 WL 144247, at *3 (Tenn. Crim. App. Mar. 29, 1995). Officer Blackwell's probable cause to believe that Appellant had drugs on his person was based upon the eyewitness accounts of other students, corroborated by the fact that Matthew Longue's parents found drugs in their home the preceding day.[2] Furthermore, since Appellant observed the arrival of the officers from his classroom, it was reasonable to conclude that the destruction of any drugs on his person was imminent.

Given the circumstances surrounding this particular situation, we do not believe it material that the officers acted upon the information provided by Ms. Hughes without first interviewing the students who actually witnessed the drug transaction. Our Supreme Court has drawn a distinction between "citizen informants" and "criminal informants." See State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993); State v. Melson, 638 S.W.2d 342, 354-55 (Tenn. 1982). Information provided by a known citizen witness is presumed reliable. Cauley, 863 S.W.2d at 417. We believe that this distinction extends to the case at bar. The officers had no reason to question the credibility of the students or the reliability of the information. Moreover, in light of the exigent circumstances discussed previously, the officers had no opportunity to interview each witness and conduct a thorough investigation. Because Officer Blackwell's search was supported by probable cause and was conducted under exigent circumstances, we conclude that the trial court properly denied Appellant's motion to suppress.

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[2] In New Jersey v. T.L.O., 469 U.S. 325 (1985), the United States Supreme Court determined that a search conducted by school officials on school property need only meet the requirement of reasonableness, as opposed to the more stringent requirement of probable cause necessary for most other searches. See id. at 341-43. However, the Court limited its findings to searches conducted by school officials and explicitly declined to address the question of whether searches conducted by law enforcement agents are also subject to the reasonableness standard. See id. at 341 n.7. We are unaware of any case to date that has extended the reduced standard of reasonableness to law enforcement agents conducting searches on school property. Therefore, we elect to review the validity of the search in this case under the traditional probable cause standard.

III. SENTENCING

Appellant also alleges that his sentence is excessive. Specifically, Appellant argues that the trial court erred in determining the length of his sentence.

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, this presumption of correctness is "conditioned upon the affirmative showing that the trial court in the record 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 conducting a review, 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 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).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant's sentence will be de novo with a presumption of correctness.

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. 1995). 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).

Appellant was convicted of possession of cocaine in excess of 0.5 grams with intent to sell or deliver, a Class B felony. See Tenn. Code Ann. § 55-10-616. As a Range I standard offender convicted of a Class B felony, Appellant's statutory sentencing range was eight to twelve years. See id. § 39-17-417(c)(1). The trial court found the following enhancement factors applicable to the sentence:

> (1) the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; and
> (2) the defendant committed the offense while on school property.

Id. § 40-35-114(1), (17). The trial court found no mitigating factors. At the conclusion of the sentencing hearing, the trial court imposed an effective sentence of ten years. Appellant takes issue with the trial court's application of enhancement factor (1) and its failure to apply mitigating factor (6).

1. PREVIOUS CRIMINAL HISTORY

Appellant maintains that the trial court improperly applied enhancement factor (1), concerning his previous criminal history. Appellant implies that the trial court's reliance upon prior juvenile convictions is improper. However, our Supreme Court has concluded that a sentencing court may consider juvenile convictions when determining the applicability of enhancement factor (1). See State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993). Appellant's juvenile record reflects convictions for reckless endangerment, resisting arrest, criminal responsibility for burglary, and vandalism. Thus, the trial court's application of enhancement factor (1) was proper.

2. LACK OF SUBSTANTIAL JUDGMENT

Appellant also maintains that the trial court should have applied mitigating factor (6), which states that "[t]he defendant, because of his youth or old age, lacked substantial judgment in committing the offense." Tenn. Code Ann. § 40-35-113(6). When determining the applicability of this mitigating factor, the sentencing court should consider "the defendant's age, education, maturity, experience, mental capacity or development, and any other pertinent circumstance tending to demonstrate the defendant's ability or inability to appreciate the nature of his conduct." State v. Adams, 864 S.W.2d 31, 33 (Tenn. 1993). At the time of the offense, Appellant was almost eighteen years old, was in good mental and physical health, and was attending Lakeside Christian Academy as an eleventh grader. As detailed previously, this incident was not Appellant's first experience involving a criminal offense. The record is devoid of any evidence supporting the contention that Appellant lacked substantial judgment to appreciate the nature of his conduct. Thus, mitigating factor (6) is inapplicable.

In light of the applicability of two enhancement factors and no mitigating factors, we conclude that the trial court's imposition of a mid-range, ten year sentence is justified and reasonable.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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DAVID H. WELLES, JUDGE