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,	)	
	)	
APPELLEE,	)	
	)	No. 01-C-01-9601-CC-00003
	)	
	)	Dickson County
v.	)	
	)	Leonard W. Martin
	)	
	)	(Aggravated Burglary, Burglary and Theft)
TOMMY FRANKLIN SPAIN, JR.,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Tommy Franklin Spain, Jr., was convicted of seven (7) counts of aggravated burglary, a Class C felony, one count of burglary, a Class D felony, and one count of theft under $500, a Class A misdemeanor, after pleading guilty to the offenses. The trial court found the appellant was a persistent offender and imposed the following Range III sentences:

a.) Indictment No. CR1605:

1.) Count 1, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction;

2.) Count 3, burglary, a Class D felony, confinement for twelve (12) years in the Department of Correction;

3.) Count 5, theft under $500, a Class A misdemeanor, eleven months and twenty-nine days in the workhouse;

4.) Count 6, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction;

5.) Count 8, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction;

6.) Count 10, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction; and

7.) Count 12, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction.

b.) Indictment No. CR1606, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction.

c.) Indictment No. CR1826, aggravated burglary, a Class C felony, confinement for fifteen (15) years in the Department of Correction.

The trial court ordered the felony sentences to be served consecutively to each other and to outstanding Florida convictions. The effective sentence imposed by the trial court for the Tennessee convictions was confinement for 117 years in the Department of Correction.

The appellant presents one issue for review. He contends the sentences are excessive because the "trial court erred in imposing the maximum sentence in each of the nine counts involved herein, as well as imposing consecutive sentences in each of the nine counts."

The appellant resided in Florida for several years. He began drinking intoxicants at the age of eight, and he began ingesting marijuana at the age of nine. As time progressed, he became addicted to alcohol, marijuana and cocaine. He claims he was suffering from depression, and these substances helped him escape from his state of depression.

As the appellant's addiction progressed, he needed money to pay for the illicit drugs. He began to burglarize residences and steal property which he could sell to a pawn shop or another person. Before leaving Florida, he had been convicted of two counts of burglary of a dwelling, five counts of grand theft, driving a motor vehicle after his driver's license had been revoked, battery, and opposing an officer without violence. The Florida courts placed the appellant on probation for a period in excess of eighteen years. The appellant moved to Tennessee in January of 1993. The Tennessee authorities agreed to supervise the appellant's Florida probation.

The appellant's addiction continued to grow after he moved to Tennessee. He was ingesting a half-ounce of marijuana and one-eighth of an ounce of cocaine daily. In addition, he consumed two "eight balls" of cocaine each weekend.[1] Approximately a year after coming to Tennessee, he began burglarizing homes and stealing property which could be readily sold to pay for the illicit drugs he was consuming. He stated he had burglarized between 100 and 150 homes in Dickson, Cheatham and Hickman counties.

Dickson County law enforcement officers in conjunction with law enforcement officers from Cheatham and Hickman Counties received information the appellant was the person committing the burglaries, and stolen property was being stored in a trailer where he resided. The officers received consent to search the trailer. The information received by the officers was accurate as they found a truckload of stolen property in the trailer.

The appellant was twenty-three years of age when he was sentenced. He has a

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[1]The appellant apparently was ingesting LSD as well. He told his probation officer he liked to take LSD when he wanted "a real good high."

ninth grade education. His marriage ended in divorce. The presentence report indicates the appellant worked for three months in 1994. He began the present crime spree simultaneously with the termination of his employment.

When the appellant testified at the sentencing hearing, he stated he had never sought help for his drug addiction. According to the appellant, he would still be ingesting illicit drugs if he had not been arrested and confined to jail. He also stated he would ingest illicit drugs while confined in the Dickson County Jail if the cost of the drugs was cheaper.

The appellant was not candid with either the probation officer or the law enforcement officers who were investigating the burglaries. He admitted he withheld employment information from the probation officer. He told officers he obtained money for some of the stolen property by pawning the property at pawn shops in Nashville. However, the appellant did not tell officers he had traded stolen property to a drug dealer for illicit drugs. Nor did he tell the officers the identity of the drug dealer. While confined to jail, the appellant contacted one of the victims, the pastor of the church were he was baptized and his parents were members. He told the pastor that the unrecovered property taken from the church could be found at a pawn shop in Clarksville.

Delores Johnson, the appellant's mother, testified as a defense witness. She stated the appellant decided "he [was] going to do everything his way." The appellant had ongoing problems with school authorities. His life and habits grew progressively worse. She advised the trial court the appellant should not be released from confinement unless he was provided psychiatric assistance or help to obtain such assistance.

When the accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken 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, 832 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891

S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 163, 166 (Tenn. Crim. App. 1993). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is predicated upon the witnesses' demeanor and appearance.

In conducting a de novo review of a sentence, there are several important considerations. This Court must consider (a) any evidence received at the sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offenses, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

The party challenging the sentences imposed by the trial court has the burden of establishing the sentences were erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

The appellant presents a general argument to support his contention the sentences imposed by the trial court are excessive. He does not challenge the enhancement factors used by the trial court to enhance his sentences within the appropriate range. Nor does he challenge the trial court's rejection of practically every mitigating factor he asserted. He candidly admits he is not a proper candidate for alternative sentencing.

This Court is of the opinion the sentences imposed by the trial court were proper. In addition, the trial court properly ordered the sentences to be serve consecutively. While the effective sentence imposed by the trial court seems to be excessive at first blush, the circumstances of the offenses, the number of offenses, the number of enhancement factors, the lack of a mitigating factor, the obvious refusal of the appellant to conform his conduct, and the appellant’s testimony that he will not conform his conduct in the future support the maximum sentence in each case as well as consecutive sentencing.

There are several enhancement factors present. Most of these factors are entitled to great weight for the enhancement of sentences within the appropriate range.

The appellant has a history of prior criminal convictions and criminal behavior.

Tenn. Code Ann. § 40-35-114(1). All of the appellant's prior convictions were not used to determine the range of his sentences. Also, it must be remembered the appellant admitted to 100 to 150 burglaries. This means a theft occurred in most of the burglaries. He was only prosecuted for a minuscule number of these felonies. The appellant also testified he consumed marijuana daily and cocaine at least every other day. Each possession of these drugs constituted a separate crime.

The appellant was obviously a leader in the commission of these felonies. Tenn. Code Ann. § 40-35-114(2). The state does not have to establish the accused is "the" leader. All that is required is a showing that the appellant is "a" leader. In this case, the appellant testified he committed practically all of the burglaries in question with another person. Certainly this evidence proves he was "a" leader within the meaning of this enhancement factor.

The property taken from the victims was particularly great. Tenn. Code Ann. § 40-35-114(6). Two victims testified during the sentencing hearing. One victim testified the appellant took $11,000 in personal property from his residence.[2] He took just under $5,000 worth of personal property from another victim. The evidence establishes this factor. Moreover, the appellant was convicted of one theft offense, theft under $500. The appellant was not convicted of the other theft counts. Thus, this factor is appropriate.

The appellant has shown an unwillingness to comply with the terms of a sentence involving release into the community. Tenn. Code Ann. § 40-35-114(8). He candidly admits in his brief his probation in Florida was revoked before moving to Tennessee.

The appellant committed this offense while on probation for his Florida convictions. Tenn. Code Ann. § 40-35-114(13)(C). The appellant was placed on probation in Florida for a period in excess of eighteen years. His probation had not expired when he committed these offenses. Tennessee was supervising the appellant's probation pursuant to an agreement with Florida authorities.

An accused may be required to serve multiple sentences consecutively if (a) the accused meets the criteria for consecutive sentencing set forth in Tenn. Code Ann. § 40-35-115 or other applicable rules or statutes, (b) the effective sentence imposed reasonably

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[2]The other victim testified for the defense, requesting leniency.

relates to the severity of the crimes committed by the accused, State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995), and (c) an extended period of time of incarceration is necessary to protect the public from the accused's future criminal conduct. Id. In this case, the evidence supports consecutive sentencing.

The state established the appellant (a) was a professional criminal, (b) has a history of criminal activity, and (c) committed these offenses while on probation. Tenn. Code Ann. §§ 40-35-115(b)(1), (b)(2), and (b)(6). This Court has previously discussed the evidence which supports (b) and (c). As to the appellant's status as a professional criminal, the record establishes he worked for three months during the time he resided in Tennessee. The record further establishes he was fired from his employment simultaneously with the commencement of the crime spree set forth hereinabove. He had no other means of support. Thus, he supported himself and his drug habit by committing the burglaries, stealing personal property from the dwellings, and selling, pawning or trading the stolen property.

The offenses committed by the appellant, 100 to 150 burglaries committed in three counties, are gravely serious. When the burglaries were revealed, every person in this three county area had reason to fear their respective residences may be the next to be burglarized. No doubt these law abiding citizens feared being harmed by an armed burglar if they were home when the burglar struck. In essence, the criminal conduct of the appellant had the effect of terrorizing these three counties.

The length of the effective sentence in this case is vital to protect the citizens of this state from the appellant's criminal conduct. The appellant has shown his proclivity to commit crimes. As previously stated, the appellant stated if he were on the streets rather than in jail, he would continue to burglarize homes, steal personal property, and ingest illicit drugs. Moreover, the appellant stated the only reason he was not ingesting illicit drugs inside the jail was the exorbitant cost of the drugs. If he could have afforded the cost of the drugs, he would have continued to ingest these drugs inside the jail. Given these blatant statements, an exceedingly long effective sentence is essential to prevent the appellant from further terrorizing the citizens of this state.

The judgment of the trial court is affirmed.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

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J. STEVEN STAFFORD, SPECIAL JUDGE