

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

February 13, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

RANDIE W. STECKLEY,)

Appellant.)

C.C.A. NO. 03001-9606-CC-00213

SEVIER COUNTY

HON. REX HENRY OGLE
JUDGE

(RAPE)

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

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Appellant, Randie W. Steckley, appeals pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Appellant was indicted for one count of aggravated rape, one count of aggravated sexual battery and one count of aggravated burglary. The Appellant negotiated a guilty plea, and pled guilty to rape and aggravated burglary. As part of his guilty plea, the trial court was to decide the length of sentence between eight (8) and twelve (12) years, and the manner of service of sentence. He was sentenced by the Sevier County Criminal Court to eleven years on the rape and five years on the aggravated burglary to be run concurrently as a Range I Standard Offender. The Appellant appeals his eleven year sentence on the rape. We affirm the judgment of the trial court.

The Appellant and the victim were at a party with several other individuals. The victim had recently broken her hip, and this was one of her first times out of her house in her leg cast. The party they attended was in the same building as her apartment. The victim became intoxicated at the party and went home to go to bed. She took a pain pill before going to sleep. She left the door unlocked because her daughter was expected home soon. She woke up to find the Appellant having sexual intercourse with her while a friend of his was also in the room. She yelled at the Appellant to stop, but he did not stop until he had ejaculated. The Appellant and his friend then ran out of the apartment. They were arrested, the Appellant was charged and subsequently entered guilty pleas as stated above.

The Appellant's sole issue is that his eleven year sentence for rape was not proper considering the enhancing and mitigating factors applied in his case. 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. § 40-35-401(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, 823 S.W.2d 166, 169 (Tenn. 1991).

Our review requires an analysis of: (1) 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. §§ 40-35-102, -103, -210.

The Appellant argues that the enhancing and mitigating factors do not support his eleven year sentence for rape, and that the trial court did not weigh the enhancing and mitigating factors properly. The trial court found three enhancement factors: (1) The Appellant had a previous history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range; (2) the victim was particularly vulnerable to such an offense because of her hip injury; and (3) the crime was committed under circumstances under which the potential for bodily harm was exceptionally great. Tenn. Code

Ann. § 40-35-114(1), (4), & (16). The trial court stated that he did not place much weight with the last factor. The mitigating factors applied were: (1) The Appellant's young age, (he was nineteen at the time of the offense); and (2) his history of behavioral problems. Tenn. Code Ann. § 40-5-113(6) & (13). The trial judge stated that he considered these mitigating factors as working together.

The Appellant first argues that the trial court should not have used his juvenile record to support the enhancement factor that the Appellant has a previous history of criminal convictions or criminal behavior. Our supreme court has held that a juvenile record is sufficient to apply enhancement factor (1), previous history of criminal convictions or behavior. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993). Therefore, this factor was properly applied by the trial court.

The Appellant also argues that the record does not support enhancement factor (16), that the potential for bodily injury to the victim was particularly great. We do not agree. The trial court found that because the victim had recently broken her hip, and she was in a leg cast at the time of the offense, there was a danger of injury. There was evidence in the record that the victim was having trouble with her hip after the rape. She did not think that it had healed correctly and had trouble returning to work because of this injury. We believe that this enhancement factor is very important and should be weighted heavily. Therefore, this enhancement factor applies in the case sub judice.

The Appellant does not challenge enhancement factor (4), that the victim was particularly vulnerable because of a physical disability. However, based upon the record before us, this enhancement factor does not apply because it is

inherent in the offense. The Appellant was indicted for aggravated rape with the language in the indictment alleging that he was aided and abetted by another person and that the victim was physically helpless. The allegation that Appellant was aided or abetted by another person is what made the rape aggravated. See Tenn. Code Ann. § 39-13-502(a)(3)(B). The Appellant later pled guilty to rape. This is a lesser included offense of aggravated rape, and the indictment was not amended. We must assume that the rape for the guilty plea was based on the statutory element that the victim was physically helpless. Tenn. Code Ann. § 39-13-503(a)(3). If an enhancement factor is an essential element of an offense, then it cannot be used to enhance a sentence. Tenn. Code Ann. § 40-35-114, Sentencing Commission Comments.

The Appellant argues that an additional mitigating factor should have been imposed. First, he argues that the trial court should have found that the crime was committed under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the Appellant's conduct. Tenn. Code Ann. § 40-35-113(11). To support this argument, the Appellant states that he was highly intoxicated when the offense occurred and that his mother testified at the sentencing hearing that she could believe that he would be involved in a theft, but not that he would be involved in a rape.

We agree with the trial judge that this is not sufficient reason to apply this mitigating factor. He has a record of criminal behavior as both a juvenile and an adult. Among the Appellant's juvenile charges are occurrences of burglary and breaking and entering. The offense in the case sub judice also involved burglary. It is obvious that the Appellant has a history of entering people's homes illegally,

and this is not an isolated occasion of violating the law due to special circumstances.

The Appellant also argues that the trial court did not take into account his ability to be rehabilitated. The Appellant was committed to the Department of Youth Development on more than one occasion. The Appellant continued to break the law. We conclude that the Appellant has not shown potential for rehabilitation.

Rape is a Class B felony. The sentencing range for a Range I offender for a Class B felony is eight (8) to twelve (12) years. The trial court applied three enhancement factors, one of which we have found was erroneously applied, and two mitigating factors, that were correctly considered together. We find the ultimate result is correct. More emphasis should be put upon the potential for injury to the victim, and the physical disability of the victim at the time of the crime should not be used as an enhancement factor. Starting at eight (8) years and using the enhancing factors, then applying the mitigating factors, we find that the trial court's sentence of eleven (11) years is appropriate. Therefore, this issue is without merit.

We affirm the judgment of the trial court.

THOMAS T. WOODALL, Judge

CONCUR:

DAVID H. WELLES, Judge

DAVID G. HAYES, Judge