IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1997 SESSION

FILED

June 5, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. No. 03C01-9605-CC-00178**
	)	**McMINN COUNTY**
Appellee,	)	
	)	**Hon. Mayo Mashburn, Judge**
VS.	)	
	)	**(SECOND DEGREE MURDER)**
JOSHUA McDANIEL,	)	**No. 95-586 BELOW**
	)	
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

CORNELIA A. CLARK,
Special Judge

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OPINION

Defendant appeals as of right from his conviction for second degree murder. He raises three issues on review: (1) whether his case was properly transferred from juvenile court to criminal court for trial; (2) whether the proof is sufficient to support the jury's rejection of his insanity plea; and (3) whether the trial judge erred in imposing sentence. We affirm the judgment of the trial court.

Defendant Joshua McDaniel was born July 14, 1979. On July 15, 1993, his mother, Cynthia McDaniel, was murdered, wrapped in a mattress, and dumped about fifty yards from her home. She had been shot five times. Portions of the house were in disarray, and there were blood spatters on the walls of the victim's bedroom. Upon arrival, the investigating officers took all persons regularly living in the household, including the victim's two minor sons, to the McMinn County Sheriff's Department. Early in the investigation the officers learned that a weapon was missing from the house. All residents, including the defendant, were questioned. Defendant ultimately gave three statements to investigating officers.

The first statement was taken beginning approximately 7:40 a.m. Present in addition to the defendant were Detective Sgt. Gary Cullins and Youth Services Officer Larry Rhodes. In this statement defendant stated he had spent the previous night at a friend's house. He did not implicate himself in the crime in any way.

In the second statement, given to Detective Sergeant Cullins and then to Detective Lieutenant Jerry Tate, defendant stated that a strange man forced him to take a gun of his uncle's and shoot his mother under the threat that he would be killed.

By the time the third statement was taken, defendant's former stepfather, Brian Thompson, also was present. In the third statement defendant confessed to

sole responsibility for the murder and implicated no one else. His statement was typed and then signed by the defendant and his former stepfather.

On July 21, 1993, defendant was admitted to the hospital for formal psychological evaluation. His evaluation and subsequent treatment took several months, resulting in a delay in the legal proceedings.

On July 12, 1994, the state filed a motion to transfer defendant to criminal court for trial as an adult. The transfer hearing was conducted September 12, October 4, and November 8, 1994. The transfer order was entered December 2, 1994. On January 10, 1995, defendant filed a motion for acceptance hearing. By order entered June 16, 1995, the circuit court denied the motion, on the grounds that T.C.A. §37-1-159(d) had been amended effective April 15, 1994, to abolish the right to an acceptance hearing.

The defendant was then indicted and tried as an adult for the offense of first degree murder. On November 3, 1995, he was convicted by a jury of second degree murder. On December 8, 1995, he was sentenced to fifteen (15) years as a Range I standard offender.

I.

Defendant first contends that he was improperly transferred to and tried in the criminal court. T.C.A. §37-1-134(a)(4) provides that a child may be transferred to criminal court for trial as an adult if there are reasonable grounds to believe that (1) the child committed the delinquent act as alleged; (2) the child is not presently committable to an institution; and (3) the interests of the community require legal restraint.

A.

Defendant's primary assertion is that at the time of the transfer hearing he was committable to an institution, and that therefore the requirements of T.C.A. §134(a)(4)(B) were not met.

Dr. Thomas Pendergrass, a clinical psychologist, and Dr. Allen Solomon, a psychiatrist, testified for defendant at the transfer hearing. Each stated that he had diagnosed defendant with and/or treated him during initial hospitalization in July 1993 for polysubstance use/abuse with solvents, post traumatic stress disorder, major depression, borderline intellectual functioning, and micropsychotic occurrence.

Dr. Pendergrass also discussed defendant's second hospitalization at Cumberland Hall Mental Hospital on October 14, 1993, because of suicidal tendencies. During this hospitalization the doctors learned from defendant of prior physical abuse by his stepfather and prior sexual abuse by his mother. Defendant was stabilized and discharged. Both practitioners testified that defendant had three mental illnesses, that he was not mentally retarded, and that future hospitalization for treatment might be necessary if defendant felt himself dangerous to others. However, both Dr. Pendergrass and Dr. Solomon testified that at the time of the hearing in September 1994 the defendant was not legally committable to an institution. Dr. Pendergrass further testified that defendant was not judicially committable at the time of first treatment in July 1993, one week after the murder.

As a secondary matter defendant contends there is insufficient proof under §134(a)(4)(C) that the interest of the community requires the proposed legal restraint or discipline. The testimony of the treating professionals and of other witnesses varied. The possibility of defendant's physical danger to himself or to others if his substance abuse continued and/or his mental illnesses went untreated

certainly existed at that time. He was charged with the most serious criminal offense one can commit in this state.

The evidence does not preponderate against the juvenile court's findings on either issue. This issue is without merit.

B.

Defendant next contends that the transfer to criminal court was inappropriate because the statements he made to police should have been suppressed and because, without them, there would have been no evidence tying defendant to the crime, thereby failing to satisfy the probable cause requirement of T.C.A. §37-1-134(a)(4)(A). He complains that the statements were taken in violation of Rules 5 and 7, Tenn. R. Juv. P.,[1] because a legal guardian was not present for much of the questioning.

This argument is without merit for two reasons. First, the proof regarding this element was stipulated. Defense counsel opened his remarks on September 12, 1994, by saying:

> MR. ROGERS: Your Honor, in terms of judicial economy, certainly I try to help the Court along when I can. I think one of the things that the General has to prove in this hearing for transfer is whether there is probable cause, so to speak, that my client may have committed acts giving rise to the charges. We don't intend to make an issue out of that and we are prepared to enter into a stipulation in terms of Your Honor finding that probable cause will exist that Mr. McDaniel, in fact, committed an act which resulted in the death of his mother.

Second, defendant has failed to provide any record of his argument of this

[1]T.C.A. §37-1-115(a)(1) also is applicable.

issue or of the juvenile judge's findings and conclusions in this regard. A general, continuing objection was made during the testimony of Deputy Jerry Tate:

> Q. And did Joshua McDaniel give any preliminary statement regarding what happened?
>
> A. Yes, he did.
>
> MR. ROGERS: And for the record, this is a very important time that objection comes into play. I think the officer has already indicated, that present at the scene was this Ms. Skinner and her husband who lived in the same home with him. He already had knowledge that this juvenile was the son of the deceased, and obviously to him then an aunt. A sister would've been a perfect person to have available during questioning interrogation. They were available, readily available, and we object to anything that was said by Mr. McDaniel.
>
> THE COURT: Well, you haven't -- there has been no other foundation laid as to what steps they may have taken, so I -- you know, you can -- again, I'm going to overrule your motion at this point. I'm going to let the state have an opportunity to lay whatever foundation they want to lay. And we also need to -- the court officer stepped out. I need to get my rules out here in just a minute, too. I don't have them here with me. I'll get them when we break in just a minute. I'm not going to rule on the motion for sometime.
>
> MR. ROGERS: And I don't mean to just speak -- but I just want to point out, Your Honor, it's precisely where --
>
> THE COURT: Precisely what you're contesting to. I understand.

The objection was renewed each time one of the three statements was admitted. However, the later arguments of counsel and the findings of the court have not been included in the record. On appeal, the defendant has the burden of showing that the evidence preponderates against the trial judge's findings on the issue. Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975). Without a record of the court's findings, we are unable to conduct this review.

It is the appellant's obligation to prepare an adequate record in order to allow meaningful review on appeal; an appellate court cannot consider an issue which is not preserved in the record for review. State v. Banes, 874 S.W.2d 73 (Tenn. App. 1993). Therefore, the issue is waived on appeal. T.R.A.P. 24; State v. Ballard, 855

S.W.2d 557, 560-61 (Tenn. 1993).

Even if addressed on the merits, defendant's claim must fail. Defendant complained that the statements he made to police should have been suppressed at trial because they were taken in violation of Rules 5 and 7(d) of the Tennessee Rules of Juvenile Procedure. Those rules provide that a parent, guardian, or legal custodian[2] should be present during questioning of a juvenile, if feasible, and that "no child . . . shall be interrogated . . . unless [he] intelligently waives in writing the right to remain silent." Rule 7(d), Tenn. R. Juv. P. The voluntariness of a statement is not, however, dependent upon the presence of a parent. Braziel v. State, 529 S.W.2d at 506. Instead, the relevant issue is whether "a juvenile's confession or admission [had been] voluntarily given to police . . . after being fully warned and advised [of] his constitutional rights. Id. The record shows that the defendant knowingly and voluntarily signed a waiver of his rights. It contained specific provisions relating to a juvenile's right to have an adult present. His first statement was not inculpatory in any way. His second statement placed primary responsibility on an adult stranger. Once the officers learned of the presence of family members they permitted defendant to choose the adult whom he wished to have present. The last and most inculpatory statement was witnessed by that adult. This issue has no merit.

Although not specifically noted in his statement of issues, defendant argues in his brief that his motion to suppress filed in criminal court should have been granted on the same grounds. It is established law in this state that once a juvenile has been transferred from juvenile court to criminal court to be tried as an adult, he is afforded only those protections that are available to similarly situated adults. Colyer v. State, 577 S.W.2d 460, 462-63 (Tenn. 1979). The extra protections

[2]Defendant's mother, who was the murder victim, was apparently his legal guardian at the time of the offense. He had never known his father. Thus, although aunts, uncles, and a former stepfather were present, none of those persons met the legal definition contained in the Rules of Juvenile Procedure.

outlined in the juvenile code no longer apply. Id. at 463; State v. Turnmire, 762 S.W.2d 893, 896 (Tenn. Crim. App. 1988). Therefore, the protections of the juvenile code were not applicable at the suppression hearing in the defendant's adult trial. Id. at 897.

The testimony is undisputed that defendant was advised of his Miranda rights, that he signed a special juvenile waiver of rights form, and that he appeared to understand his rights. The trial judge found that the statements were freely, knowingly, and voluntarily made. The evidence does not preponderate against the trial court's findings. Accordingly, the trial court did not err in denying the appellant's motion to suppress the statements.

C.

Defendant finally contends that his substantive due process rights were violated because he was not granted the right to an acceptance hearing under a statute which applied at the time of the alleged offense but had been repealed by the time his request was made.

In order for a juvenile to be transferred to criminal court to be tried as an adult, the juvenile court must conduct a transfer hearing in accordance with Tenn. Code Ann. §37-1-134. A transfer pursuant to this section terminates the jurisdiction of the juvenile court with respect to the delinquent acts originally alleged. Tenn. Code Ann. §37-1-134(c). Prior to April 15, 1994, T.C.A. §37-1-159(d) provided that, upon proper motion, the trial court must hold a hearing to determine whether it would accept jurisdiction over the child. This hearing was to be conducted de novo and functioned essentially as a review of the transfer hearing. Colyer v. State, 577 S.W.2d at 463 n.2. Following the hearing, the criminal court could remand the child back to the juvenile court or enter an order certifying that it had taken jurisdiction over the child. Tenn. Code Ann. §37-1-159(e). Since April 15, 1994, the effective date of an amendment to the statute, the acceptance hearing is authorized only if

a non-lawyer judge presides at the original transfer hearing.

The right to a probable cause hearing by a judge licensed to practice law before a juvenile is deprived of his liberty is guaranteed under Article I, Section 8 of the Tennessee Constitution. State ex rel. Anglin v. Mitchell, 575 S.W.2d 284, 289 (Tenn. 1979). However, no constitutional right exists to more than one such valid hearing, particularly where one was designed primarily as a review of the other. See Colyer v. State, 577 S.W.2d at 463 n.2. If the juvenile judge who presides at the transfer hearing is a lawyer, the statute does not provide for an acceptance hearing in criminal court and one apparently cannot be held. State v. Griffin, 914 S.W.2d 564, 566 (Tenn. Crim. App. 1996).

This issue is without merit.

II.

In his second major issue defendant contends that the trial court erred in failing to grant a judgment of acquittal because the state failed to refute the insanity defense he established.

When an accused challenges the sufficiency of the evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or reevaluate the evidence and are required to afford the state the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this court. Id.

Insanity at the time of an offense is an absolute defense if, as a result of mental disease or defect, the defendant lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform that conduct to the requirements of the law. State v. Sparks, 891 S.W.2d 607, 615 (Tenn. 1995); Graham v. State, 547 S.W.2d 531, 543-44 (Tenn. 1977). See T.C.A. §39-11-501(a). Since the defendant is presumed sane, he has the initial burden of proof. However, if the proof raises a reasonable doubt as to the defendant's sanity, the burden shifts to the state to establish sanity beyond a reasonable doubt. Sparks, 891 S.W.2d at 615. Sanity then becomes an element of the offense. Id. at 616.

The state can meet its burden of proof through the presentation of expert opinions, lay opinions, and acts or statements of the defendant at or near the time of the crime, which are consistent with sanity or inconsistent with sanity. Id., quoting Edwards v. State, 540 S.W.2d 641, 646 (Tenn. 1976), cert. denied, 429 U.S. 1061, 97 S.Ct. 784, 50 L.Ed.2d 777 (1977).

All the expert evidence on the issue of insanity was presented by defendant's treating professionals, Dr. Thomas Pendergrass and Dr. Allen Solomon. Each testified at trial very similarly to the way he testified at the transfer hearing, and their opinions conflicted. Both found the presence of mental disease. Dr. Solomon identified severable psychiatric illnesses. Dr. Pendergrass focused on defendant's substance abuse by "huffing" paint. He could not say whether defendant suffered from a mental disease at the time of the murder.

Dr. Solomon initially testified that defendant probably could not appreciate right from wrong at the time of the murder, and could not conform his actions. However, in other parts of his testimony he stated that defendant knew that killing

his mother was wrong, and that he knew right from wrong. After hearing defendant's detailed account of the murder Dr. Solomon acknowledged that defendant may have known what he was doing.

Dr. Pendergrass testified that the defendant's ability in his third statement to provide significant details about the murder suggested that he was not in an intoxicant-induced blackout at the time of the offense. Defendant could tell right from wrong when Dr. Pendergrass first saw him one week after the murder. He testified that defendant's cold and calm demeanor and his ability to organize and carry out the fairly complex steps taken to commit the murder and hide the body also militated against a finding of impairment at the time of the offense.

Numerous lay witnesses also provided conflicting testimony about defendant's mental state at the time of the murder. His brother said the only huffing on the day of the murder occurred many hours earlier. Most persons who saw defendant immediately after the murder testified that he appeared normal and not under the influence of any intoxicant.

The defendant was able to fabricate a story to provide an opportunity to remain alone in the trailer with his mother. He then assembled a rifle, fired it five times into his mother's head, disassembled it, put it in its case, and tossed it into a ditch. He ransacked the trailer to create the impression of a burglary. He wrapped his mother's body in a mattress cover and moved it to the woods. He also cleaned up, changed his clothes, and disposed of his bloody garments. All these actions suggest defendant's understanding of the wrongfulness of his actions.

The evidence is sufficient to support the jury's rejection of defendant's insanity defense. This issue is without merit.

III.

Defendant finally contends that the court erred in sentencing him to fifteen (15) years because he should have been sentenced as an especially mitigated offender. When a defendant complains of his sentence, we conduct a de novo review with a presumption of correctness of the findings of the trial court. Tenn. Code Ann. §40-35-401(d). This presumption is conditioned upon an 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). However, the burden of showing that the sentence was improper is upon the appealing party. Tenn. Code Ann. §40-35-401(d) Sentencing Commission Comments.

In determining an appropriate sentence, the court must consider the following: (1) any evidence from the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the nature and characteristics of the offense; (5) information concerning the enhancing and mitigating factors as found in Tenn. Code Ann. §§40-35-113 and 114; and (6) the defendant's statement in his own behalf concerning sentencing. Tenn. Code Ann. §40-35-210(b).

The sentence range for a Class A felony is fifteen (15) to twenty-five (25) years. The presumptive sentence for the defendant is the minimum sentence in the range before enhancement or mitigating factors are considered.[3] The trial court in this case sentenced the defendant to fifteen (15) years, which is the presumptive minimum in the range.

The trial court found that two enhancement factors applied under the

[3]T.C.A. §40-35-210. The crime occurred July 15, 1993. The defendant was sentenced December 8, 1995. Effective July 1, 1995, for crimes committed after that date, the presumptive sentence for a Class A felony is the mid-point of the range if there are no enhancement or mitigating factors.

provisions of T.C.A. §40-35-114: (9) that the defendant possessed a firearm during the commission of the offense, and (15) that the defendant abused a position of private trust in that he killed a family member. Both factors are applicable here. The presence of even a single enhancement factor disqualifies the defendant from sentencing as an especially mitigated offender. Tenn. Code Ann. §40-35-109(a)(2); State v. Braden, 867 S.W.2d 750, 762-63 (Tenn. Crim. App. 1993). For this reason alone defendant's argument must fail.

The trial court applied three mitigating factors under T.C.A. §40-35-113: (3) substantial grounds exist tending to excuse or justify the criminal conduct, though failing to establish a defense; (6) because of his youth, the defendant lacked substantial judgment in committing the offense; and (11) the crime was committed under such unusual circumstances it is unlikely that a sustained intent to violate the law motivated his conduct. Having found two enhancing and three mitigating factors, the trial court acted within its discretion in sentencing defendant to the minimum sentence in the range. This issue is without merit.

For the reasons set forth above, the judgment of the trial court is affirmed in all respects.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
JOHN H. PEAY
JUDGE

_____
PAUL G. SUMMERS
JUDGE

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	)	**Hon. Mayo Mashburn, Judge**
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	)	**(SECOND DEGREE MURDER)**
JOSHUA McDANIEL,	**)**	**No. 95-586 BELOW**
	)	
Appellant.	**)**	

JUDGMENT

Came the appellant, Joshua McDaniel, by counsel and also came the attorney general on behalf of the state, and this case was heard on the record on appeal from the Criminal Court of McMinn County; and upon consideration thereof, this court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of McMinn County for execution of the judgment of that court and for collection of costs accrued below.

Costs of this appeal will be paid by the appellant.

PER CURIAM

John H. Peay, Judge
Paul G. Summers, Judge
Cornelia A. Clark, Special Judge

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