IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL, 1997 SESSION

FILED

July 31, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01CO1-9602-CC-00073
	)	
vs.	)	Putnam County;
	)	Cumberland County
	)	
MICHAEL WILSON,	)	Honorable, Leon C. Burns,
SEAN KEVIN WILSON, and	)	Judge
KENNETH QUILTER, JR.	)	
	)	(Aggravated Burglary)
Appellant.	)	
	)	

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OPINION FILED: _____

AFFIRMED AS MODIFIED
AND REMANDED

CURWOOD WITT
JUDGE

OPINION

The defendants, Michael Wilson, Sean Kevin Wilson, and Kenneth Quilter, Jr., pleaded guilty to two counts of aggravated burglary in Putnam County Criminal Court in Indictments No. 94-714 and No. 94-715 and to two counts of aggravated burglary in Cumberland County in Indictment No. 3831.[1] Michael Wilson and Sean Kevin Wilson were convicted by a Putnam County jury of aggravated burglary, theft, and conspiracy to commit aggravated burglary and theft in #716. Kenneth Quilter, Jr., plead guilty to a single count of aggravated burglary in #716. The trial court imposed sentences for all the convictions after a single sentencing hearing. Michael Wilson received an aggregate sentence of sixteen years in the Department of Correction as a Range II offender. Sean Kevin Wilson, a Range I offender, received an aggregate sentence of ten years in the Department of Correction. Kenneth Quilter, also sentenced as a Range I offender, received an aggregate sentence of 8 years. Quilter was ordered to serve his sentence in split confinement.[2] According to the judgment forms, the jury assessed $9,000 in fines against the Wilsons, and the three defendants are jointly and severally liable for $8,273.40 in restitution.[3]

In this appeal, Michael Wilson contends that the items seized in a warrantless search of his trailer should have been suppressed. Sean Wilson and Kenneth Quilter challenge the length and the consecutive service of their respective

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[1] Hereafter, we refer to the Putnam County cases as #714, #715, and #716, and the Cumberland County case as #3831.

[2] The judgment forms and the findings of the trial court that appear in the transcript are not entirely clear on the subject of Quilter's split confinement. We address this issue in more detail later in this opinion.

[3] The judgment forms do not reflect the trial court's sentencing order contained in the record with respect to restitution and fines.

sentences. In addition, Quilter alleges that the trial court erred in refusing to credit against his sentence the 307 days he spent in jail prior to sentencing.

Our review discloses that Michael Wilson has failed to preserve the suppression issue for appeal, and, therefore, we affirm his convictions. However, the record discloses a number of sentencing errors that we must address. We affirm the defendants' sentences as modified in this opinion.

A short summary of the facts will provide the necessary context for the issues in this appeal. Beginning August 29, 1994, Michael Wilson, his brother Sean, Kenneth Quilter, and two co-defendants who are not involved in this appeal committed a series of five burglaries in Putnam and Cumberland Counties. The crime spree ended when the Wilsons, Quilter, and their co-defendants were arrested on September 21, 1994. The Putnam County grand jury issued separate indictments, #714, #715, and #716, for each burglary committed in that county. The counts included aggravated burglary, theft of property valued at one thousand dollars or more, and conspiracy to commit aggravated burglary and theft. The single indictment from Cumberland County (#3831) contained two counts of aggravated burglary and two counts of theft of property valued at one thousand dollars or more.

Trial was set in Putnam County in #716 on May 25, 1995. Two days prior to trial, Quilter pleaded guilty to five counts of aggravated burglary. The prosecution dismissed the remaining charges. After a one-day trial, the jury found both Wilsons guilty of aggravated burglary, theft, and conspiracy and assessed fines

totaling $9,000.[4] The Wilsons then agreed to plead guilty to four counts of aggravated burglary, and the state dismissed the remaining theft and conspiracy charges.[5] The trial court conducted a single sentencing hearing. The probation officers who prepared the pre-sentence reports and two of the victims testified for the state. The defendants put on no proof.

The transcript of the sentencing hearing reflects that the trial judge found that Michael Wilson had the requisite number of prior convictions to qualify for Range II sentencing.[6] The trial judge found that five enhancement and no mitigating factors were applicable to Wilson's sentence and concluded that his extensive criminal record justified consecutive sentencing.[7] In #714 and #715 and Count 3 of #3831, the trial court imposed concurrent sentences of eight years for aggravated burglary. In #716, the case tried to a jury, the trial court ordered an eight-year sentence for aggravated burglary, six years for theft, and three years for conspiracy. These sentences are to be served concurrent to each other and to those imposed in #714, #715, and to Count 3 of #3831. For the aggravated burglary conviction in Count 1 of #3831, the trial court imposed an eight-year

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[4] The trial record is not included in the record on appeal. We have gleaned these facts from the judgment forms, an Order of Conviction in Michael Wilson's record, and from the comments of the attorneys and the trial court.

[5] The Wilson's guilty pleas were entered on July 10 in Cumberland County and July 25, 1995 in Putnam County.

[6] Michael Wilson's prior convictions include four convictions for burglary and theft and five convictions for receiving stolen property in New Jersey. He was convicted in Pennsylvania for robbery and conspiracy. A New Jersey warrant for violation of parole was outstanding. The defendant did not dispute the existence of these convictions.

[7] We need not discuss the enhancement factors or the trial judge's findings in detail as Michael Wilson does not challenge either the length or the consecutive service of his sentence.

sentence to be served consecutively to the aggravated burglary conviction in #716 resulting in an aggregate sentence of sixteen years.[8]

The trial judge followed a similar pattern in sentencing the other defendants. In sentencing Sean Wilson, the trial court applied three enhancement factors finding that (1) he was a leader in the commission of an offense involving two or more criminal actors,[9] (2) the offense involved more than one victim,[10] and (3) he possessed a firearm during the commission of the offense.[11] The court found no mitigating factors of any consequence. The court imposed Range I sentences of five years for the five aggravated burglary convictions, three years for theft, and one year for conspiracy. Because of the number of burglaries involved, the trial court ordered that the five-year sentences for count 1 of #716 and count 1 of #3831 be served consecutively for a sentence of ten years in the Department of Correction.[12]

Quilter, a Range I offender, received five four-year sentences for his five aggravated burglary convictions. With respect to enhancement and mitigating

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[8] The record does not contain a judgment form for the conviction in count 3 of # 3831. The other forms, in addition to the sentences pronounced by the trial court at the hearing, reflect the fines imposed by the jury in #716 and restitution in 714, 715, and count 1 of 3831. The trial judge made no mention of any fines at the hearing and made no findings concerning the appropriateness or amount of restitution.

[9] Tenn. Code Ann. § 40-35-114(2) (Supp. 1996).

[10] Tenn. Code Ann. § 40-35-114(3) (Supp. 1996).

[11] Tenn. Code Ann. § 40-35-114(9) (Supp. 1996).

[12] The record does not contain judgment forms for either count of #3831. The other forms, in addition to the sentences pronounced by the trial court at the hearing, reflect the fines imposed by the jury in #716 and restitution in #714, #715, and count 1 of #3831. The trial judge made no mention of any fines at the hearing and made no findings concerning the appropriateness or amount of restitution.

factors the trial judge made no specific findings although he mentions Quilter's juvenile problems and his misdemeanor conviction for casual exchange and underage possession. He found that Quilter was not a leader in the offenses and, without further discussion, noted that there were some mitigating factors worthy of consideration. Because of "his extensive involvement in these cases, number of cases that are involved here," the court ordered that Quilter serve the sentences in #716 and Count 3 of #3831 consecutively for an eight-year aggregate sentence.

The court also concluded that, because of Quilter's "youthful age and immaturity," his confinement should be served in split confinement. The trial judge ordered that he serve one year in the county jail beginning on the day of sentencing and the balance on Community Corrections or probation for a total of 12 years. When defense counsel asked if Quilter would be given credit for the ten months[13] he had already served, the trial court responded that "I think he should have beginning one year from today is my ruling if that's justifiable."[14]

Michael Wilson contends in this appeal that the trial court erred in denying his motion to suppress the evidence seized from his trailer during a warrantless search and that the admission of the illegally obtained evidence at trial was not harmless error. The other two defendants raise sentencing issues. We address the suppression issue first.

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[13] Quilter was arrested on September 21, 1994. He did not make bail and on July 25, 1995, the date of the sentencing hearing, he had served three hundred seven (307) days.

[14] Quilter's judgment forms, unlike the transcript of the sentencing hearing, reflect that in addition to split confinement, he must make restitution to the victims. The forms also reflect that he was given credit for the 24 days between July 25 and August 18 against his sentence.

I. Admission of Illegally Seized Evidence

After the arrest of the five burglars, the police conducted a warrantless search of a trailer rented by Michael and Sean Wilson. During this search they discovered and seized property that had been stolen during the various burglaries in Putnam and Cumberland Counties. At least some of this property was admitted into evidence at trial in #716. We are, however, unable to review either the constitutionality of the search or the degree to which the alleged "fruit of the poisonous tree" may have affected the jury verdict.

The record before us contains neither the trial court's order denying the motion for new trial nor a transcript of the trial itself.[15] The failure to raise an issue in a motion for new trial waives that issue on appeal if a resolution favorable to the appellant would result in a new trial. State v. Sowder, 827 S.W.2d 924, 926 (Tenn. Crim. App. 1991); Tenn. R. App. P. 3. With respect to #716, the inadequacy of the record precludes our consideration of the legality of the search. Moreover, even if this court found that the warrantless search was unconstitutional, we would be unable to determine whether the error had adversely affected the trial's outcome because the defendant failed to include a transcript of the trial in the record. It is the appellant's obligation to prepare a record that will allow for meaningful review upon appeal. Tenn. R. App. P. 24(b). We cannot consider an issue unless the record

[15] The record does contain a transcript of the hearing on the motion to suppress as well as a copy of the motion.

contains a fair, accurate and complete account of what transpired below relevant to that issue. State v. Ballard, 855 S.W.2d 557, 560-561 (Tenn. 1993).

In addition to the convictions in the trial of #716, Michael Wilson pleaded guilty to four counts of aggravated burglary in indictments #714, #715, and #3831. A defendant who pleads guilty may preserve an issue for appeal if certain conditions are satisfied. State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988); Tenn. R. Crim. P. 37(b)(2). In Preston the supreme court said:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment . . . must contain a statement of the dispositive certified question of law reserved by the defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. . . . Also, the order must state that the certified question was expressly reserved as part of the plea agreement, that the State and the trial judge consented to the reservation, and that the state and the trial judge are of the opinion that the question is dispositive of the case.

759 S.W.2d at 650. The burden is on the defendant to satisfy the mandatory requirements of Rule 37 as interpreted in Preston. State v. Pendergrass, 937 S.W.2d 834, 837 (Tenn.1996).

In this instance, the judgment orders do not mention any certified question of law. The only indication in the record of the defendant's intent to reserve such a question is a pleading captioned "Motion to Preserve Issue of Search and Seizure." By itself, such a motion is insufficient to reserve a certified question of law. A guilty plea constitutes a waiver of all nonjurisdictional and procedural defects or constitutional infirmities. State v. Bilbrey, 816 S.W.2d 71, 75 (Tenn. Crim. App. 1991). Since the defendant has ignored the requirements of Rule 37(b) and failed to preserve the issue in a motion for new trial, the issue regarding the constitutionality of the search of Wilson's trailer is waived.

II. Sentencing Issues

Sean Wilson and Kenneth Quilter argue that their sentences are excessive and that the trial judge erred in his order that two of the sentences run consecutively. Michael Wilson has raised no sentencing issues on appeal; however, our de novo review of the record has uncovered other sentencing errors which will affect his sentence as well as those of the other two defendants.

When an accused challenges 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 trial court are correct. Tenn. Code Ann. § 40-35-401(d)(1990). 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). The defendant has the burden of demonstrating that the sentence is improper. Id. In the event the record fails to demonstrate the appropriate consideration by the trial court, appellate review of the sentence is purely de novo. Id. If our review reflects that the trial court properly considered all relevant factors and the record adequately supports its findings of fact, 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 making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the sentencing range, the specific sentence, and the propriety of imposing consecutive sentences or one involving an alternative to total confinement. The trial court must consider (1) any evidence presented at trial and the sentencing hearing, (2) the presentence report, (3) the

sentencing principles. (4) the arguments of counsel, (5) any statements the defendant has made to the court, (6) the nature and characteristics of the offense, (7) any mitigating and enhancement factors, and (8) the defendant's amenability to rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), and 40-35-210(a), (b)(Supp. 1996); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The trial court must begin with a presumptive minimum sentence. Tenn. Code Ann. § 40-35-210(c). The sentence may then be increased by any applicable enhancement factors and reduced in the light of any applicable mitigating factors. Tenn. Code Ann. § 40-35-210(d),(e).

Due to the many inconsistencies between the judgment forms contained in the record and the pronouncement of the trial court at the sentencing hearing as well as the incompleteness of the trial court's findings, we review these sentences de novo without the presumption of correctness. Although the trial court made some factual findings with respect to the enhancement factors applicable to the Wilsons' sentences, the court did not distinguish between the applicability of the factors to the various offenses, made only a vague reference to enhancement and mitigating factors and alternative sentencing in Quilter's case, and made none of the required findings concerning the appropriateness of consecutive sentencing for both the Wilsons and Quilter. The judgment forms reflect that the trial court imposed fines on the Wilsons in #716 amounting to $9,000 and restitution equaling $8,273.40 jointly and severally against each defendant even though the transcript of the sentencing hearing contains no reference to any fines and no findings concerning the appropriateness of restitution in these cases.[16] Moreover, at the

[16] The judgment forms reflect the following amounts of restitution:
#714 : $1,718.48 to Legge Insurance; $100 to Howard and Vivian Mayberry
#715: No restitution
#716: $1,867.92 to Donald and Marcia Spurlock

hearing the trial court refused to give Quilter credit for the 307 days he served in jail prior to sentencing. The judgment forms, on the other hand, indicate that Quilter received credit for 24 days of pre-sentence jail credit. Under these circumstances, the presumption of correctness must fall.

Before we turn to those issues which affect the individual sentences of Sean Wilson and Kenneth Quilter, we address those errors that concern more than one defendant, namely the orders of restitution and the payment of fines.[17]

A. Restitution

The judgment forms in the record indicate that the trial court made each defendant jointly and severally liable for restitution in four of the five burglaries totaling $8,273.40. The defendants were ordered to pay a total of $6,205 to three insurance companies and the balance directly to the victims.[18] The transcript, however, does not include such an order, and if the court had ordered restitution, the order would have been contrary to law.

#3831: (Count 1) $2,038 to Farm Bureau Insurance: $100 to Anthony Farris
(Count 3) $2,449 to Farm Bureau Insurance

[17] We are aware that none of the defendants challenged either the payment of restitution or fines in this appeal. However, we consider these issues as part of our de novo review of the sentences of Sean Wilson and Kenneth Quilter. Tenn. R. App. P. 2.

[18] We express no opinion on the appropriateness of awarding restitution to insurance companies. We note that in State v. Michael Ralph Alford, No. 02C01-9509-CC-00281 (Tenn. Crim. App., Jackson, Sept. 30, 1996) a panel of this court held that an insurance company can be a victim for the purposes of restitution in Tennessee Code Annotated Section 40-35-304. The Tennessee Supreme Court granted the appellant's application for permission to appeal on April 14, 1997 on that issue and has not yet rendered its decision.

Both Wilsons were sentenced to serve their sentences in the Department of Correction, and the trial court was without authority to impose restitution as part of a sentence of confinement. State v. Davis, 940 S.W.2d 558, 561-62 (Tenn.1997). At the time of the sentencing hearing, Tennessee statutes expressly authorized a sentence of restitution only as part of a term of supervised probation. Tenn. Code Ann. § 40-35-104(c)(2) (1990).[19] We cannot affirm a sentence that is not expressly authorized by the legislature. State v. Davis, 940 S.W.2d at 562. Therefore, we remand this case to the trial court for the preparation of new judgment forms for Michael Wilson and Sean Wilson in cases #714, #716, and #3831 that omit the orders of restitution.[20]

On the other hand, the trial court imposed a sentence of split confinement on Kenneth Quilter. Split confinement includes a period of probation, Tenn. Code Ann. §40-35-306(a) (1990), and a trial court may order restitution as a condition of probation. Tenn. Code Ann. § 40-35-104(c)(2). The record on appeal contains the presentence reports, testimony from the victims, and testimony from the officers who prepared the presentence reports in which damages in various amounts are alleged. The defense objected to the amounts reported by the victims and the probation officers both at the hearing and in the pre-sentence report because of the lack of documentation. The trial court made no findings concerning

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[19] In 1995 when the defendants were sentenced, Tennessee Code Annotated Section 40-35-104(c)(2) listed as a sentencing alternative "[a] sentence of confinement which is suspended upon a term of probation supervision which may include community service or restitution, or both." The legislature amended the statute, and as of July 1, 1996, the statute allows for "[p]ayment of restitution to the victim or victims either alone or in addition to any other sentence authorized by this subsection." Tenn. Code Ann. § 40-35-104 (1996 Supp.)

[20] Michael Wilson has not challenged his sentence. However, since the recent decision of our supreme court in State v. Davis, 940 S.W.2d 558, 562 (Tenn.1997) makes an order of restitution clearly illegal, we correct the error in his sentences in the interests of justice. Tenn. R. App. P. 2.

the amount of restitution nor did the court consider Quilter's financial resources or his future ability to pay. See Tenn. Code Ann. § 40-35-304(d) (1990). In fact, the judge did not mention restitution when he sentenced Quilter. The judgment forms, on the other hand, order Quilter to pay restitution as follows:

#714 Legge Insurance:	$1, 718.00
Howard & Vivian Mayberry:	100.00
#715 None	
#716 Donald and Marcia Spurlock	$1,867.92
#3831(1) Farm Bureau	$2,038.00
Anthony Farris	100.00
(3) Farm Bureau	$2,449.00

After on our de novo review of the record, we conclude that these orders of restitution cannot stand, based upon either of two reasons.

First, the amount of restitution a defendant is ordered to pay must be based upon the victim's pecuniary loss and the financial condition and obligations of the defendant. Tenn. Code Ann. § 40-35-303(d)(10) (Supp. 1996); State v. Smith, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). The trial court must determine the actual loss based on realistic values,[21] and the amount of restitution need not equal or mirror the exact pecuniary loss of the victim. State v. Smith, 898 S.W.2d at 747. The trial court must consider the defendant's ability to pay given his current means and his likely ability to pay in the future. The amount of restitution must be reasonable and one that the defendant can reasonably be expected to pay during

[21] In this case, the presentence reports contain only the victims' statements as to the amount of loss. At the sentencing hearing, the probation officers conceded that the amounts were those reported by the victims to their insurance companies. The two victims who testified gave only very general statements as to the amount of pecuniary loss they had suffered and those amounts were not entirely consistent with those in the presentence reports or in the testimony of the probation officers. The record contains no explanation as to how the victims arrived at the reported amounts. In State v. Smith, this court found that the amount the victim had placed on a proof of loss provided by an insurance company was not sufficient to establish the loss actually incurred. 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994).

his probationary period. Tenn. Code Ann. § 40-35-304(d)(Supp. 1996); State v. Smith, 898 S.W.2d at 747. The record does not show that any of these requirements were met at the sentencing hearing.

Second, the order for restitution to be paid by Quilter is not evident in the record of the sentencing hearing. In those cases where the trial court has ordered restitution but failed to make the appropriate findings, an order of remand would allow the trial judge to make the requisite findings on the record so that the propriety of restitution could be reviewed upon appeal. See e.g., State v. Smith, 898 S.W.2d at 747; State v. Thomas Wayne Johnson, No. 03C01-9606-CC-00214, slip op. at 9 (Tenn. Crim. App., Knoxville, May 19, 1997). However, in this instance, a remand is not appropriate. Tennessee law requires that restitution, as a condition of probation, shall be specified at the time of the sentencing hearing. Tenn. Code Ann. § 40-35-304(c) (Supp. 1996). In this case, the transcript of the sentencing hearing mentions no order of restitution in any amount for any of the defendants. The trial court did not specify that restitution was a condition of the probationary portion of Quilter's sentence. The judgment forms are, therefore, in conflict with the transcript of the proceedings. This court has held, under similar circumstances, that the transcript controls. State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991). See also State v. Zyla, 628 S.W.2d 39, 42 (Tenn. Crim. App. 1981); Farmer v. State, 574 S.W.2d 49, 50 (Tenn. Crim. App. 1978). Therefore, the judgment forms are in error and must be corrected upon remand to conform to the findings and order of the trial court as they are contained in the transcript.

B. Fines

The judgment forms are also inconsistent with the trial court's orders as recorded in the transcript with respect to fines. In #716, a jury convicted the Wilsons of aggravated burglary, theft over $1,000, and conspiracy to commit aggravated burglary and theft. The record contains an order of conviction styled "State of Tennessee v. Michael Wilson," signed by the trial judge and dated May 25, 1995, which indicates that the jury assessed fines of $5,000, $2,500, and $1,500 respectively. The transcript of the sentencing hearing contains no mention of these fines. The trial judge made no findings concerning the amount of the fines nor did he order the defendants to pay any fines when he imposed sentence upon them at the conclusion of the sentencing hearing. Michael and Sean Wilson's judgment forms, however, include the payment of the fines as assessed by the jury

The Tennessee constitution provides that a trial judge may not impose a fine in excess of $50.00. Tenn. Const. art. 6 § 14. In those cases where the range of punishment includes a fine in excess of $50.00, current law requires that the jury report any fine it wishes to assess with its guilty verdict. Tenn. Code Ann. § 40-35-301(b)(1990). However, the statute also provides that the trial judge "[w]hen imposing sentence, after the sentencing hearing, shall impose a fine, if any, not to exceed the fine fixed by the jury." Id. (emphasis added). Therefore, the trial court is obligated to evaluate the fine fixed by the jury and impose the exact amount of the fine, if any, as part of the sentence. State v, Robert Harrison Blevins, No. 03C01-9606-CC-00242, slip op. at 13 (Tenn. Crim. App., Knoxville, May 23, 1997); see Tenn. Code Ann. § 40-35-301(b). The fine may not exceed the amount fixed by the jury, and the trial judge may reduce, suspend, or release fines even after the judgment is final. See Tenn. Code Ann. §§ 40-24-101, 102, and 104 (1990 & Supp. 1996).

Under current Tennessee law, the fine assessed by the jury is not a final judgment, and the trial court may not simply impose the fine as fixed by the jury. State v. Robert Harrison Blevins, slip op. at 13. The fine and incarceration are inextricably linked, and a trial court must consider the fine as part of the entire sentencing package. State v. Bryant, 805 S.W.2d 762, 766 (Tenn.1991). In State v. Bryant, our supreme court discussed the role of the trial court in setting fines:

> It is clear that when the fine is imposed after the sentencing hearing, the trial judge, unlike the jury, knows the facts developed in the sentencing hearing. The trial judge learns about prior offenses, potential for rehabilitation, mitigating and aggravating circumstances, and other matters relevant to an appropriate sentence. At that stage an informed judgment can be made as to the sentence, including the amount of fine, confinement, or any other sentencing alternatives offered by the Reform Act.

805 S.W.2d at 765.

De novo review of a sentence imposed pursuant to Tennessee Code Annotated Section 40-35-401(a) cannot be accomplished without reviewing "the amount of the fine, the defendant's ability to pay that fine, and other factors of judgment involved in setting the total sentence." State v. Bryant, 805 S.W.2d at 766. Although the defendant's ability to pay a fine is not necessarily a controlling factor, an oppressive fine can disrupt future rehabilitation and prevent a defendant from becoming a productive member of society. State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). A significant fine is not automatically precluded, however, simply because it works a substantial hardship on the defendant. Id.

The jury assessed $9,000 in fines against both Michael Wilson and Sean Wilson. We, however, must consider each defendant's sentence separately. Michael Wilson was twenty-six years old at sentencing. He admitted to a long history of drug abuse including marijuana, LSD, cocaine, heroin and angel dust. His

criminal record contains several convictions for burglary, robbery, and theft. His employment history is virtually non-existent. His proven disregard for the laws of society and his lack of honest effort to provide for himself and those who depend upon him do not bode well for rehabilitation. The fines of $5,000 for aggravated burglary, $2,500 for theft, and $1,500 for conspiracy are warranted for punishment and deterrence. In the future, the trial court may grant such relief it deems appropriate given his conduct and circumstances at that time. The amount of fines recorded on Michael Wilson's judgment forms in counts 1, 2, and 3 of #716 are affirmed.

On the other hand, Sean Wilson, who was twenty-four years old, has no prior criminal record and, other than the use of marijuana, no extensive record of criminal behavior. His education includes two years of junior college, and the record indicates that if the opportunity were available he would seek further educational opportunities. In Sean Wilson's case, we find that fines of ($3,000) for aggravated burglary, ($1,500) for theft, and ($500) for conspiracy are consistent with the purposes of our sentencing law. See Tenn. Code Ann. § 40-35-102 (Supp. 1996). Upon remand, the trial court shall prepare judgment forms consistent with these findings.

C. The Length of Sean Wilson's Sentences

Sean Wilson, a Range I standard offender, received a five-year sentence for each of five aggravated burglary convictions, three years for theft of property worth $1,000 or more, and 3 years for conspiracy to commit burglary and theft. The trial court ordered that all the sentences run concurrently except for the aggravated burglary convictions in count one of #716 and count three of #3831

which run consecutively for an effective sentence of ten years in the Department of Correction.[22] In this appeal, Sean Wilson contends that the trial judge erroneously applied enhancement factors to enhance his punishment beyond the minimum in the range, that he failed to find two mitigating factors, and that the trial court erred in imposing consecutive sentences.

The trial court found that the evidence supported the existence of the three following enhancement factors and apparently applied them uniformly to each of the eight sentences:

> (2) The defendant was a leader in the commission of an offense involving two (2) or more criminal actors. Tenn. Code Ann. § 40-35-114(2) (Supp. 1996) .
>
> (3) The offense involved more than one victim. Tenn. Code Ann. § 40-35-114(3).
>
> (9) The defendant possessed or employed a firearm during the commission of the offense. Tenn. Code Ann. § 40-35-114(9).

The record supports a finding that Sean Wilson was a leader in the commission of the offense. Co-defendant Erica Peters testified without contradiction that the two Wilsons were the leaders in the burglary ring. Thus factor (2) applies with equal weight to each conviction.

The other two factors are more problematic. With respect to factor (3), the trial judge found that more than one person who lived in each residence had been harmed by the defendant's activities. It isn't clear from the record whether the

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[22] We note that the record on appeal does not contain Sean Wilson's judgment forms in # 3831. We have gleaned this information from the trial judge's findings contained in the transcript of the sentencing hearing.

trial judge used this factor to enhance only the burglaries or applied it to the theft and conspiracy convictions as well. He noted only that he accorded this factor limited weight. Testimony at the hearing demonstrates that in two of the burgled households the defendants took property belonging to more than one person.[23] The same two witnesses testified that the burglaries had made other members of their families nervous and afraid. As the state concedes, the factor should not be applied to those convictions for which no proof was offered, that is, in #714, #715, and Count 1 of #3831. Its use in #716 and Count 3 of #3831 must be examined.

Aggravated burglary occurs when a person enters a habitation without the effective consent of the owner with the intent to commit a felony or theft. Tenn. Code Ann. §§ 39-14-402, 403 (1990). If the intruder has the requisite intent, the offense is complete the moment any part of the body or any object in physical contact with the body intrudes into the habitation. Tenn. Code Ann. § 39-14-402 (b). We have examined Tennessee case law and have found no instance in which this factor has been used to enhance a conviction for aggravated burglary unless more than one victim were present at the time the crime was committed. See e.g., State v. Derek Denton, No. 02C01-9409-CR-00186 (Tenn. Crim. App., Jackson, Aug. 2, 1996)(two victims present and injured during a burglary, assault, and murder); James H. Register v. State, No. 01CO1-9210-CC-00329 (Tenn. Crim. App., Nashville, August 12, 1993)(two-year old and mother present during burglary and robbery). In the case before us, none of the victims were present.[24]

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[23] Both Donald Spurlock (#716) and Greg Goodwin (Count 3 of #3831) testified at the hearing.

[24] In fact, the record indicates that the defendants carefully selected only empty houses and entered during daylight hours.

A victim, as used in this enhancement factor is defined as "a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime." State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994). Neither Raines nor the Criminal Sentencing Reform Act defines the words "injured" or "injury." In State v. Smith, 891 S.W.2d 922, 930 (Tenn. Crim. App. 1994), this court considered the difference between "personal injury" as used in enhancement factor six and "bodily injury" in factors eleven, twelve, and sixteen and concluded that the term "personal injury" is broad enough to embrace emotional injuries and psychological scarring that a victim of rape may suffer.[25]

Therefore, we do not consider the term "injury" to include only a physical bodily injury. It may be, arguendo, that upon proper proof a single burglary could victimize multiple residents who were absent at the time of the burglary, but the proof in this case is insufficient to support a conclusion that factor (3) applies to the offense of burglary in cases #716 and #3831, Count 3.[26]

Although enhancement factor three may not be used to enhance Sean Wilson's sentences for aggravated burglary, the record supports the use of this factor to enhance his conviction for theft in count 2 of #716. Donald Spurlock's testimony that the defendant took jewelry belonging to his wife and a pistol that was

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[25] This court has held that an unwanted pregnancy that is the result of a rape warrants the use of enhancement factor six. State v. Smith, 910 S.W.2d 457, 461(Tenn. Crim. App. 1995); State v. Jones, 889 S.W.2d 225, 231 (Tenn. Crim. App. 1994), and that depression and other psychological difficulties requiring treatment may be personal injuries in rape cases. State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995), perm. app. denied (Tenn. 1996).

[26] The legislature has provided for enhanced sentences for the burglary of a habitation. Tennessee Code Annotated Section 39-14-402 defines "burglary" of a building other than a habitation as either a Class D or E felony. Burglary of a habitation, however, is aggravated burglary and is a Class C felony. Tenn. Code Ann. § 39-14-404 (1990).

his property is uncontradicted. The trial court appropriately used this factor when sentencing Sean Wilson for theft of property.

The trial court also found that the defendant possessed or employed a firearm during the commission of the offense and enhanced his sentences accordingly. Tenn. Code Ann. § 40-35-114(9)(Supp. 1996). The record does not support the use of this factor. Testimony in the record indicates that the defendants stole weapons from two of the households. Co-defendant Ericka Peters testified that Michael Wilson left a weapon taken from the Spurlock home in the car with her during the second Cumberland County burglary. She testified that Sean Wilson had a gun in a holster strapped to his waist as he carried a large TV set from the Goodwin home. On cross examination, she conceded that, to her knowledge, no weapons were ever carried into the houses. As we discussed above, a burglary is complete the moment any part of the body or any object in physical contact with the body intrudes into the habitation. Tenn. Code Ann. § 39-14-402 (b)(1990). A weapon found after the building or habitation is entered was neither possessed nor employed during the commission of the burglary. With respect to the Spurlock weapon, Peters testified that Michael, not Sean, left the Ruger in the car during the burglary of the Goodwin home. In short, the record contains nothing that shows that Sean Wilson either used or possessed a firearm during the commission of any of the burglaries.[27]

Based on our de novo review we find that the record supports the application of one enhancement factor, that the defendant was a leader in the

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[27] One could plausibly argue that when Sean Wilson carried stolen goods from the Goodwin home with a pistol strapped around his waist that he possessed a firearm during the commission of the theft. However, the theft charge was dismissed in the Goodwin case.

commission of an offense involving two or more criminal actors, to each of Sean Wilson's convictions. Factor (3), that the offense involved more than one victim, may be used to enhance Sean Wilson's conviction for theft in #716. The trial court found no mitigating factors, and our independent review has disclosed none.

The trial court sentenced Sean Wilson to five years of incarceration for each of the five aggravated burglary convictions and to three years each for theft and conspiracy. Aggravated burglary is a Class C felony. The sentencing range for a Range I offender is three to six years. Conspiracy to commit aggravated burglary and theft is a Class D felony with a sentencing range of two to four years for Range I offenders. Given the existence of a single enhancement factor, but one that is entitled to significant weight, and no mitigating factors, we find that sentences of five years for each conviction for aggravated burglary and of three years for conspiracy are appropriate under the principles and considerations of sentencing and consistent with the interests of justice. Two enhancement factors, numbers (2) and (3), apply to the defendant's conviction for theft of property valued more than $1,000 but less than $10,000, a Class D felony. In this instance, the three-year sentence set by the trial court is also appropriate.[28]

D. The Length of Kenneth Quilter's Sentences

The trial judge followed a similar pattern in sentencing Kenneth Quilter. Quilter received four-year sentences for each of his five convictions for aggravated burglary. Unlike Michael and Sean Wilson, Quilter has no convictions for theft or conspiracy because the state dismissed the other charges against him

[28] We consider the issue of consecutive sentencing separately in section IIE of this opinion.

upon entry of his guilty pleas to aggravated burglary. The trial court ordered that all the sentences run concurrently except for the aggravated burglary convictions in #716 and count three of #3831 which run consecutively for an effective sentence of eight years. The trial judge concluded that Quilter should serve his sentence in split confinement and sentenced him to serve a year in confinement and twelve years in community corrections. The trial judge refused to include the 307 days Quilter had already spent in jail as part of the year of confinement. In this appeal, Quilter contends that he should have received the minimum sentence in each conviction, that the trial court erred in failing to give him credit for the time he served pretrial, and that his sentences should be served concurrently.

The trial court did not clearly articulate for the record its reasons for enhancing Quilter's sentence beyond the minimum in the range. The trial judge noted that he had some problems as a juvenile and that his only adult conviction was a misdemeanor for exchange and underage possession. Quilter, who was 19 years old when he was arrested, ran away from home as a juvenile, was assigned to a special school for those with learning disabilities and behavior problems, and was charged twice with criminal trespass as a juvenile. The trial court found that Quilter was not a leader in the offense but did not identify any other enhancement factors.[29] The trial judge found that there were mitigating factors that were entitled to some weight but did not point to any specific factor. The court, however, alluded to Quilter's "youthful age and immaturity" when determining that split confinement was appropriate.

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[29] We have considered the applicability of enhancement factors(3) and (9) in our discussion of Sean Wilson's sentence. As they were inappropriate to enhancing Wilson's convictions for aggravated burglary, they are equally inappropriate here.

We have carefully reviewed the record in this case. Uncontradicted testimony in the record shows that Quilter merely followed the lead of the older, more experienced defendants. Factor (2) is inapplicable in his case. However, we find that based on Quilter's record as a juvenile and his admitted use of marijuana and speed, some weight must be given to his previous history of criminal behavior. Tenn. Code Ann. § 40-35-114(1)(Supp. 1996). We also find that the defendant, because of his youth, lacked substantial judgment in committing these offenses. Tenn. Code Ann. § 40-35-113(6)(Supp. 1996). Therefore, one enhancement factor and one mitigating factor apply to each of Quilter's sentences.

To arrive at the appropriate sentence, we must begin with a presumptive minimum sentence. Tenn. Code Ann. § 40-35-210(c)(Supp. 1996). The sentence may then be increased by any applicable enhancement factors and reduced in the light of any applicable mitigating factors. Tenn. Code Ann. § 40-35-210 (d), (e).

Quilter's juvenile record includes two criminal trespass violations and he admits the use of illegal substances. His prior criminal behavior outweighs the mitigating factor in this case, and sentences one year above the minimum are appropriate. We affirm Quilter's sentences for four years in each aggravated burglary conviction.

E. Consecutive Sentencing

Both Sean Wilson and Kenneth Quilter argue that the trial court erred in ordering that two of their convictions run consecutively for effective sentences of ten and eight years respectively.

Consecutive sentencing may be imposed in the discretion of the trial court upon a determination that one or more of the following criteria exist:

> (1) The defendant is a professional criminal who has knowingly devote himself to criminal acts as a major source of livelihood;
>
> (2) The defendant is an offender whose record of criminal activity is extensive;
>
> (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
>
> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (6) The defendant is sentenced for an offense committed while on probation; or
>
> (7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1990). In considering consecutive sentences, the trial court must insure that the aggregate sentence imposed is the least severe measure necessary to protect the public from a defendant's future criminal conduct and should bear some relationship to a defendant's potential for rehabilitation. State v. Desirey, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995).

The trial court made no findings relevant to consecutive sentencing except a single statement that consecutive sentences were warranted because of the extensive involvement of both Sean Wilson and Kenneth Quilter in the five burglaries. We have examined the record in light of the statutory criteria and conclude that consecutive sentencing is not justified in either case. Neither defendant has an extensive criminal record. Tenn. Code Ann. § 40-35-115(2). In fact, Sean Wilson has none at all. Both were young when the crimes were committed and neither can have much in the way of an employment history. Sean Wilson attended junior college in Florida and a nineteen-year old Kenneth Quilter was unlikely to have had many opportunities to establish a solid employment record. We cannot conclude that either defendant is a professional criminal who has derived a major source of his livelihood from criminal activities. Tenn. Code Ann. § 40-35-115(1). Neither was on probation or sentenced for criminal contempt. Tenn. Code Ann. § 40-35-115(6), (7). Nothing in the record demonstrates that either is a dangerous mentally abnormal person or a dangerous offender who had no hesitation about committing crimes in which the risk to human life was high. Tenn. Code Ann. § 40-35-115 (3), (4). In fact, testimony in the record indicates that the defendants attempted to minimize the dangers associated with burglary and took care not to enter homes that were occupied. The multiplicity of the offenses under indictment may well be relevant in making some other sentencing determination, such as the length of the sentence or the suitability of alternative sentencing options, see State v. Zeolia, No. 03C01-9503-CR-00080 (Tenn. Crim. App., Knoxville, March 21, 1996), but the legislature has not seen fit to include this factor among the bases for ordering consecutive sentencing.

We conclude that consecutive sentencing is not required to protect society from these defendants and that concurrent sentencing satisfies the interests of justice. State v. Desirey, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995).

F. Alternative Sentencing (Quilter)

Neither the state nor the defendant has challenged the trial court's order that Quilter's sentence be served in split confinement. See Tenn. Code Ann. § 40-35-306 (1990); however, we discern certain issues that must be resolved with respect to the split confinement aspect of Quilter's alternative sentencing.

The difficulty is that the neither the transcript of the sentencing hearing nor the judgment forms themselves are clear as to the terms of the split confinement. Moreover, the trial judge refused to give the defendant credit for the 307 days he had already spent in jail. The transcript reveals that the trial judge ordered that Quilter serve "one year in the county jail beginning today and then the balance would be on community corrections." The following conversation then ensued:

Gen. Patterson:	Your Honor, is that an eight year term?
The Court:	For a total of 12 years on Community Corrections or probation.
Mr. Fickling:	Your Honor, is Mr. Quilter given credit for time served?

The Court:	How much time does he have served?
Mr. Fickling:	He's served ten months, Your Honor?
The Court:	Well, I think he should have beginning one year from today is my ruling if that's justifiable.

The judgment forms show that Quilter was sentenced to serve "4 years with 1 additional year to serve beginning 7-25-95" in the TDOC. The block before "Probation" has been checked and the abbreviation "Comm. Corr." inserted after the word "Probation." The forms, which are dated August 22, 1995, state that the probationary/community corrections period is to last 12 years beginning July 25, 1996. Under pre-trial jail credit, the forms give the defendant credit for the twenty-four days between July 25, 1995 and August 21, 1995. The forms are inaccurate and confusing.

The first problem that is apparent in Quilter's sentence is the lack of credit for pre-trial jail time. Tennessee law requires that a convicted defendant receive credit on his sentence for time spent in jail, workhouse or penitentiary prior to any conviction arising out of the original offense for which the defendant was tried. Tenn. Code Ann. § 40-35-201(b)(Supp. 1996); Stubbs v. State, 216 Tenn. 567, 393 S.W.2d 150, 154 (Tenn. 1965); State v. Edward Frank Henry, No. 01CO1-9604-CC-00176, slip op. at 2 (Tenn. Crim. App., Nashville, Feb. 20, 1997); State v. Recardo McClellan, No. 02CO1-9208-CC-00190, slip op. at 3 (Tenn. Crim. App., Jackson, Feb. 24, 1993). The purpose of the requirement to provide jail time credit is to eliminate the unjust disparity that would be created "between the person of

means who could make bond and the person who could not and was forced to languish in jail." State v. Abernathy, 649 S.W.2d 285, 286 (Tenn. Crim. App. 1983). The trial court erred in sentencing Quilter to serve a year of incarceration without allowing credit for the ten months that he had already spent in confinement.

The question of jail-time credit is interwoven with the trial court's attempt to structure the split confinement, the second alternative sentencing problem apparent in the case. This interweaving happens because Tennessee Code Annotated section 40-35-306(a), the statute that authorizes split confinement, contains a limitation on the amount of confinement that can be ordered. It provides:

> A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one (1) year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense.

Tenn. Code Ann. § 40-35-306(a) (1990). See also Tenn. Code Ann. § 40-35-303(c) (Supp. 1996). The trial court expressed his intention to confine Quilter for a year from July 25, 1995, while at the same time disallowing credit for 307 days already served. Since the trial court was compelled to award 307 days credit, the trial court effectively established a confinement period of approximately twenty-two months as a part of a split confinement plan. Under section 40-35-306(a) the portion of "the sentence" to be served in split confinement may not exceed one year. Perhaps the trial court intended, by establishing two four-year sentences to run consecutively, to utilize two "sentences", thereby tacking two section 306(a) confinement periods together for an aggregate maximum confinement of two years. We can discern no other rationale for ordering the service of an additional year while using the split confinement option. However, we do not have to determine whether the phrase "the sentence" in section 306(a) is capable of such a construction because we have

already determined that consecutive sentencing is not supported in the record. The result is that Quilter has one effective sentence of four years, and if split confinement is to be used, not only is one year the maximum amount of confinement allowable, but the pre-sentence jail time must be allowed as a credit.

Based upon the record in this case, we hold the alternative sentencing option of split confinement is appropriate and that the maximum confinement period of one year should be ordered, subject to the credit for 307 days previously served.

The third difficulty with Quilter's alternative sentence arises out of the somewhat murky relationship between probation and the community corrections program. At the hearing, the trial judge sentenced Quilter to serve "a total of 12 years on community corrections or probation." Probation and community corrections are two separate and distinct sentencing possibilities. State v. Michael Richmond, No. 02C01-9410-CR-00217, slip op. at 4 (Tenn. Crim. App., Jackson, Sept. 13, 1995). However, Tennessee Code Annotated section 40-36-106(f) provides that "nothing herein shall prevent a court from permitting an eligible defendant to participate in a community-based alternative to incarceration as a condition of probation in conjunction with a suspended sentence, split confinement or periodic confinement as provided in Chapter 35 of this title." Tenn. Code Ann. § 40-36-106(f) (1996 Supp.); State v. David Edward Tiffin, Jr., No. 01CO1-9308-CR-00254, slip op. at 6 (Tenn. Crim. App., Nashville, May 5, 1994). See also Tenn. Code Ann. § 40-36-302(b)(1990). We read the ambiguous language on the judgment forms to mean that the defendant was to be released on probation with placement for twelve years in the community corrections program as a condition of that probation.

Our law provides that in a sentence involving split confinement, the defendant may be required to serve a probationary period up to and including the statutory maximum time for the class of the conviction offense. Tenn. Code Ann. §40-35-306(a)(1990). Aggravated burglary is a Class C felony with a statutory maximum of fifteen years. Tenn. Code Ann. § 40-35-111(c) (1990). However, the community corrections statute states that in sentencing an eligible defendant to a community-based alternative, "the court shall possess the power to set the duration of the sentence within the appropriate sentence range. . . ." Tenn. Code Ann. § 40-36-106(e)(2) (Supp. 1996) (emphasis added). As a Range I offender, Quilter's appropriate sentencing range for a Class C felony is three to six years. Therefore, although twelve years would be a legal sentence for the probationary period, the community corrections portion cannot exceed six years.

Based on our de novo review of the evidence at sentencing, the presentence report, the sentencing principles, the nature and characteristics of the offense, the mitigating and enhancement factors, and the defendant's amenability to rehabilitation, we conclude that a probationary period of four years, commencing on date confinement should have ended, shall be served within the Community Corrections program. Quilter is not an offender with a long history of criminal conduct from whom the public must be protected. He is a young man who needs adequate supervision to ensure that he refrains from the illegal use of drugs and that he acquires education and job skills training that will enable him to live a productive life. The trial judge shall prepare new judgment forms indicating that the four- year probationary period commencing on the date Quilter should have been released from confinement according to the provisions of this opinion.

G. Conclusion

We summarize our conclusions as follows:

Michael Wilson: His convictions and sentence are affirmed as imposed by the trial court except for the order to pay restitution which is reversed.

Sean Wilson: His three-year sentence for theft is affirmed. His five-year sentences for aggravated burglary are affirmed and the three-year sentence for conspiracy is affirmed. All sentences will be served concurrently. The trial court's order that he pay restitution is reversed. The order for the payment of fines is modified.

Kenneth Quilter: Each of his five burglary sentences of four years is affirmed. All sentences will be served concurrently. The trial judge's order that his sentence be served on split confinement is affirmed. The confinement portion of the sentence is fixed at one year, subject to 307 days credit. The defendant is ordered to serve four years of probation with a community-based alternative program being a condition of probation. His probationary period began on the date his confinement should have ended. The trial court's order that he pay restitution is reversed.

The trial court will prepare new judgment forms that are consistent with the findings in this opinion.

_____
CURWOOD WITT, Judge

CONCUR:

_____
GARY R. WADE, Judge

_____
DAVID H. WELLES, Judge