IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1997

FILED

December 12, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9610-CC-00429**
	)	
Appellee,	)	
	)	**MAURY COUNTY**
	)	
V.	)	
	)	**HON. JAMES L. WEATHERFORD, JUDGE**
AARON ECKARD,	)	
	)	
Appellant.	)	**(ARSON)**

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Aaron Eckard, appeals as of right. Pursuant to a negotiated plea agreement, the Defendant pled guilty to arson in the Circuit Court of Maury County and was sentenced to six years in the Tennessee Department of Correction. In his sole issue on appeal, the Defendant argues that the trial court erred in denying alternative sentencing and ordering him to serve the six years in confinement. We affirm the judgment of the trial court.

Testimony at the sentencing hearing revealed that on February 6, 1994, at approximately 2:00 a.m., Jana Duncan was awakened in her home by the barking of the family dog. After opening her bedroom door, she discovered that the house was on fire. Ms. Duncan, her daughter Cayce, and three other guests managed to escape by jumping out of the windows. Ms. Duncan jumped just before the roof fell in on the house. One family pet died in the fire.

Cayce Duncan had been in a dating relationship with the 18-year-old Defendant prior to the night of the fire, but they had recently broken-up. Cayce stated that the relationship did not end on good terms. On the night of the offense, the Defendant entered the Duncan's attached garage and set fire to a note he found in Cayce's car. The Defendant left the premises without seeing the house engulfed in flames. The fire that the Defendant started rapidly spread and eventually burned down the Duncan's home, destroying everything that they owned.

As a result of the fire, Jana Duncan had to walk with the use of crutches and a cane for several weeks. Both Jana and Cayce required treatment for

"post-trauma syndrome." Ms. Duncan was still being treated at the time of the hearing and indicated that she continues to take antidepressants. Cayce still suffers from nightmares and insomnia. After the fire, they took turns sleeping because of the fear that the Defendant "might have found out where we were, and be outside, again."

One month after the incident, the Defendant was questioned by police and admitted responsibility for the fire. Prior to being indicted, he went to Pennsylvania to visit friends and family, where he was arrested for burglary and spent two (2) years in the Pennsylvania Department of Correction. After completing the sentence in Pennsylvania, the Defendant was extradited to Tennessee on the charge of aggravated arson. He pled guilty one month later to the lesser offense of arson.

When an accused challenges the length, range, or the manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness, however, only applies if it 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 showing that his sentence is improper. Id.

In conducting a de novo review of a sentence, including the manner in which the sentence is to be served, this Court must consider the evidence adduced at trial and the sentencing hearing, the presentence report, the

principles of sentencing, the arguments of counsel relative to sentencing alternatives, the nature of the offense, any mitigating or statutory enhancement factors, and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-210; State v. Parker, 932 S.W.2d 945, 955-56 (Tenn. Crim App. 1996).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and made findings of fact adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). Defendant argues that the sentence should not be afforded the presumption of correctness because the trial court disregarded the factors set forth in Tennessee Code Annotated section 40-35-103(1)(A)-(C). While the trial judge did not specifically mention that statute in its ruling, it is clear from the record that the trial court considered facts pertaining to that statute, and therefore, review by this court is de novo with a presumption of correctness.

Tennessee Code Annotated section 40-35-102 outlines when alternative sentencing is appropriate. A defendant "who is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority

regarding sentencing involving incarceration." Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2) and (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

The Defendant in the instant case is statutorily entitled to the presumption as he was sentenced to six (6) years in the Department of Correction for a Class C felony. However, this presumption of alternative sentencing is sufficiently overcome here, as discussed below, by "evidence to the contrary." Tenn. Code Ann. 40-35-102(6). Therefore, we conclude that the Defendant should not be afforded a presumption favoring the imposition of an alternative sentence.

When imposing a sentence of total confinement, our Criminal Sentencing Reform Act mandates the trial court to base its decision on the considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations

which militate against alternative sentencing include: the need to protect society by restraining a defendant having a long history of criminal conduct, whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense, the need to avoid depreciating the seriousness of the offense, and the need to order confinement in cases in which less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1)(A) - (C).

In the case sub judice, the trial court found that the Defendant did not meet the appropriate criteria to be eligible for alternative sentencing. The Defendant has a felony adult criminal history in the State of Pennsylvania for crimes he committed while the present offense was under investigation. He served two (2) years in Pennsylvania for the offenses of attempted burglary, criminal conspiracy to commit burglary, criminal mischief, and fleeing or attempting to elude police. The Defendant also has a juvenile criminal record consisting of threatening bodily harm and vandalism. The Defendant was expelled from high school for disruptive behavior and sent to alternative school where he was also later dismissed for disciplinary problems. The Defendant has indicated that he was a heavy drug user, with daily use of cocaine and marijuana. Although he stated that he does not currently use drugs, he admits that he continues to drink alcohol, despite the fact that he is underage. Because of these facts, we find that the Defendant has a lengthy criminal history, especially for a person of such a young age, and a total disregard for the laws and morals of society.

The trial judge also concluded that "[n]ot complying with rules and regulations is not new to [Defendant]." The Defendant had been placed on

probation by the Juvenile Court of Maury County prior to the present offense. It is not clear when this probationary term began or ended, but it is obvious that it did not deter the Defendant from committing the present offense or the offenses in Pennsylvania. This Court has held that where a defendant's history indicates a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate, the trial judge does not abuse his discretion in denying probation. State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App. 1994).

Statutory mitigating and enhancement factors are also applicable as they are relevant to the Tennessee Code Annotated section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The trial court in the instant case found the following four enhancement factors to be applicable: (1) the offense involved more than one (1) victim; (2) the personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great; (3) the defendant had no hesitation about committing a crime when the risk to human life was high; and (4) the potential for bodily injury to a victim was great. See Tenn. Code Ann. § 40-35-114(3), (6), (10) and (16).

"Victim," as used in enhancement factor (3), is limited in scope to 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). Obviously, the victim of this crime, as evidenced by the indictment, is Jana Duncan, as it was her house that the Defendant burned to the ground. However, it is logical to infer that her daughter, Cayce, is also a victim, as all of her personal property was destroyed by the fire as well. The presentence report

also indicates that the vehicles of Ms. Duncan's boyfriend and Cayce's friend were damaged as well. Clearly, there was more than one (1) victim in this case, thus, making factor (3) applicable.

The amount of property damage, as well as the personal injuries suffered by the victims in this case was particularly great. Tenn. Code Ann. § 40-35-114 (6). The Defendant's conduct in this case resulted in property damages to Ms. Duncan amounting to a quarter of a million dollars. Furthermore, evidence that Jana and Cayce required counseling as a result of Defendant's actions supports the application of this enhancement factor. See State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994). Testimony revealed that Cayce received professional treatment for "post-trauma syndrome" for one (1) year after the fire, and that Jana was still being treated with antidepressants at the time of the hearing. As Cayce Duncan stated, "[i]t's now a struggle, financially and mentally, to get through it . . . . Because it was the worse time we have ever had, and it's something we still suffer from every day. I mean, we have flashbacks. Nightmares." We find this enhancement factor to apply.

Enhancement factors (10) and (16), pertaining to risk to life and potential for bodily injury, may be applied in situations where persons other than the victim are in the area and are subject to injury. State v. Sims, 909 S.W.2d 46, 50 (Tenn. Crim. App. 1995). In the case sub judice, the Defendant set the fire while Jana Duncan and four other people were asleep in her home. Clearly, he had no hesitation about placing the lives of four (4) innocent people, other than the victim, in great danger. The trial judge stated that he "probably would not have accepted the plea to arson," if he had been aware of the facts surrounding this

offense. He further stated that this case "could be five murder cases," instead of the negotiated plea of one count of arson. Furthermore, this Court has specifically found factor (10) applicable in arson cases because of the danger to firefighters, law enforcement, and other people at the scene. See State v. Blair, C.C.A. No. 01C01-9406-CR-00191, Wilson County (Tenn. Crim. App., Nashville, opinion filed June 3, 1994) (no Rule 11 application filed).

Some of the above-mentioned enhancement factors would not be applicable to aggravated arson, of which the Defendant was originally charged, because they are elements of that offense. However, we find that the four (4) enhancement factors are not elements of the offense of arson, and therefore, were correctly applied by the trial court in this case.

The Defendant argues that his time spent in prison in Pennsylvania served as a "wake-up call" to him, and therefore incarceration is now, two years after the offense, unwarranted. However, it must be noted again that the Defendant burned a house down, admitted responsibility for the act, then went to Pennsylvania where he committed and was convicted of burglary and other offenses. While serving time in Pennsylvania, he did obtain his GED and received some treatment for his drug addictions. The Defendant is now employed, but has only been so for a short period of time. The trial court obviously did not place great weight on these factors and found that the circumstances of the offense and the circumstances of this Defendant called for confinement in the Department of Correction.

Based upon the evidence presented at the sentencing hearing, the presentence report, the principles of sentencing set forth in Tenn. Code Ann. § 40-35-102, -103, -104, -114, the arguments made by counsel, the nature of the offense, and the Defendant's potential for rehabilitation, we find that the trial court did not err in denying the Defendant alternative sentencing.

Accordingly, the judgment of the trial court is affirmed.

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THOMAS T. WOODALL, Judge

CONCUR:

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GARY R. WADE, Judge

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J. CURWOOD WITT, JR., Judge