IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER, 1997 SESSION

STATE OF TENNESSEE,	)	No. 02C01-9612-CR-00457
	)	
Appellee,	)	
	)	Shelby County
vs.	)	
	)	Honorable Chris Craft, Judge
DERRICK T. ALSTON	)	
	)	(Attempted First Degree Murder,
Appellant.	)	Especially Aggravated Burglary)

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OPINION FILED: _____

AFFIRMED

CURWOOD WITT
JUDGE

OPINION

The defendant, Derrick T. Alston, pleaded guilty in Shelby County Criminal Court to attempted first degree murder and especially aggravated robbery, both Class A felonies, and to four counts of aggravated assault, a Class C felony. As a Range I, standard offender, the eighteen-year old defendant received an effective sentence of forty-two years.[1] In conjunction with his guilty plea, the defendant properly preserved a certified question of law in which he challenges the validity of his convictions for attempted first-degree murder and especially aggravated robbery of the same victim on double jeopardy grounds. The defendant also contends that the evidence does not support the trial court's finding that he is a dangerous offender for the purposes of consecutive sentencing.

After a careful review of the record and the law, we affirm the judgment of the trial court.

The defendant and the state stipulated to the facts presented at the guilty plea submission hearing, and several witnesses, including the defendant, testified at the sentencing hearing. It is from these sources that we draw the following account.

February 15, 1995 was the defendant's seventeenth birthday. His mother dropped him off at his high school. After school they planned to go to the driver's license examining station so that the defendant could obtain a license. The defendant, however, did not remain at school. He went with his friend, Scheldrick Ward, to celebrate his birthday. According to the defendant, they passed the morning drinking and smoking pot and then decided that they needed more money.

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[1]The trial court sentenced him to serve consecutively twenty-three years for attempted first-degree murder and nineteen years for especially aggravated robbery. He received four-year sentences on each of the aggravated assault convictions to be served concurrently with the two consecutive sentences.

They found four friends hanging out on a street corner who were willing to join them. The defendant stopped to retrieve a shotgun he had hidden in an empty house.[2] Amongst them, these young men had two sawed-off shotguns and two handguns.

They walked to the Davey Crockett Golf Course where three of them entered through the front door of the clubhouse while the other three, including the defendant, entered the back door. Several men were in the large room sitting at tables. The defendant said, "Give it up, give us the money" or words to that effect while his cohorts pointed their weapons at the sitting men. After George Warren, the victim, tossed a handful of money at Scheldrick Ward, a struggle ensued. The pair fell to the floor with Warren on top. The defendant crossed the room and fired both barrels of the shotgun into the victim's backside. Ward scrambled to his feet, and the six young men fled. They took refuge in the home of another friend where the police arrested them three or four hours later. During a search of the house, the police found two shotguns, a .22 caliber revolver and a .380 semi-automatic pistol under insulation in the attic. The defendant later gave a statement to the police in the presence of his parents. In his statement, he admitted that he shot the victim during the robbery of the golf course clubhouse.

On March 25, 1996, the defendant pleaded guilty to criminal attempt to commit murder in the first degree, especially aggravated robbery, and four counts of aggravated assault.[3] At the sentencing hearing, Dr. Francis Elizabeth Pritchard testified to the very serious injuries the victim had sustained. The shots fired into his hip and buttocks left large gaping wounds. His colon, rectum and anus were destroyed and the left hip joint was shattered. His bladder and prostate were damaged. He cannot walk or sit normally, can stand for only a few moments, and must wear a colostomy bag for the remainder of his life. He spent three months in

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[2]The defendant testified that he had found the weapon in the woods as he was walking home from school one day. He hid it in the empty house so that his parents would not find it.

[3]The record reflects that the defendant was transferred from juvenile court to criminal court for prosecution and sentencing as an adult on March 8, 1995.

the hospital and then two additional months in rehabilitation. Warren's wife, Konnye Novlin Warren, described the devastating effect his injuries had on their family. Walter Earl Jenkins, a seventy-three year old man who had undergone open heart surgery a few months prior to the robbery, testified as to his fear when one of the robbers pointed a gun at him and the man with whom he was sitting.

The state entered into evidence the defendant's juvenile record consisting of four offenses[4] that were non-judicially adjudicated and a short psychological evaluation. The evaluation reports that the defendant's verbal IQ is 79 and that he has some visual motor processing deficits. With respect to his personality assessment, the psychologist stated that the defendant was an individual with marked disregard for social standards and values and a high potential for antisocial behavior. He appeared to be narcissistic, self-centered and self-indulgent in orientation, impulsive and unable to delay gratification of his immediate impulses. He is described as one who has serious difficulty learning from his experiences or assuming responsibility for his behavior. His tolerance for frustration is very low, he is likely to be moody, irritable and resentful much of the time, and he harbors rather strong feelings of anger and hostility which may manifest themselves in emotional outbursts. The data did not indicate any psychoses. Although the state provided a pre-sentence report, it was not made an exhibit at the hearing and is contained only in the technical record.

The defendant testified on his own behalf. He said that he had aimed at Warren's leg and had meant only to help his friend. He admitted that what he had done was wrong. Dorothy Ann Alston, the defendant's mother, also testified for the defense. Defense counsel presented into evidence a number of letters written by friends and family members in support of the defendant. Based on this

[4]The offenses included two altercations with other students, a trespass offense for crossing the junior high school campus, and attempted theft.

evidence, the trial court found that the defendant was a dangerous offender and sentenced him to serve an effective sentence of 42 years as a Range 1 offender.[5]

Certified Question of Law

The defendant, with the permission of the trial court and the district attorney, expressly reserved the following question of law:

> Can the Defendant be convicted both of Criminal Attempt: Murder First Degree of George Warren and also Especially Aggravated Robbery of George Warren, on the facts of this case, or should the Especially Aggravated Robbery indictment be dismissed as in violation of the double jeopardy provisions of the United States and Tennessee Constitutions?[6]

In this appeal, the defendant contends that, because the stipulated facts demonstrate that neither the attempt to commit first-degree murder nor the especially aggravated robbery required proof that the other did not, the convictions violate double jeopardy. We respectfully disagree.

The double jeopardy clause of the United States Constitution provides that no person shall "be twice put in jeopardy of life or limb." U.S. Const. amend. V. Article I, section 10 of the Tennessee Constitution states that "no person shall, for the same offense, be twice put in jeopardy of life or limb." The wording in the two constitutions is almost identical, and Tennessee courts have interpreted our constitutional provision consistently with the federal courts' interpretation of the Fifth Amendment. See, e.g., State v. Blackburn, 694 S.W.2d 934 (Tenn. 1985); State v, Frank B. Jackson, Jr. and Robert Joe Randolph, No. 03C01-9206-CR-00222 (Tenn. Crim. App., Knoxville, July 29, 1993), perm. app. denied (Tenn. 1993). Double jeopardy essentially protects (1) against a second prosecution after an acquittal; (2) against a second prosecution after conviction; and (3) against multiple

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[5]We discuss the trial court's sentencing findings in detail when we address the consecutive sentencing issue.

[6]We applaud the trial court's thoughtful and complete Consent Order that explicitly reserves the certified question of law and which fulfills the requirements of Rule 37(b)(2)(I) of the Tennessee Rules of Criminal Procedure and State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988).

punishments for the same offense. State v. Denton, 938 S.W.2d 373, 378 (Tenn. 1996) (citations to other cases omitted). The issue in this case falls into the third category.

Legislative intent is the key to determining whether multiple punishments violate double jeopardy. Denton, 938 S.W.2d at 379. In Tennessee, the analysis depends upon a "close and careful analysis of the offenses involved, the statutory definitions of the crimes, the legislative intent, and the particular facts and circumstances." Id. (quoting from State v. Black, 524 S.W.2d 913, 919 (Tenn. 1975)). Our supreme court has summarized the steps in the analysis as follows:

> 1. An analysis of the elements of the crimes in question pursuant to Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932);
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> 2. An analysis guided by the principles of Duchac v. State, 505 S.W.2d 237 (Tenn. 1973);
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> 3. A consideration of whether there were multiple victims or discrete acts;
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> 4. A comparison of the purposes of the respective statutes.

Denton, 938 S.W.2d at 381. None of these steps, however, is determinative. The results of each must be weighed and considered in relation to each other. Id.

To determine whether the defendant's convictions for attempted first-degree murder and especially aggravated robbery are the "same" for double jeopardy purposes, we begin with an examination of the elements of the two crimes pursuant to Blockburger. Blockburger requires that courts examine the offenses to ascertain whether each provision requires proof of an additional fact which the other does not. Blockburger, 284 U.S. at 304, 52 S.Ct. at 182.

A person commits a criminal attempt when, acting with the culpability required for the offense attempted, the person (1) intentionally engages in action or causes a result that would constitute an offense, (2) acts with the intent to cause a

result that is an element of the offense, or (3) acts with an intent to complete a course of action or cause a result that would constitute the offense. Tenn. Code Ann. § 39-12-101(a) (1997); State v, Frank B. Jackson, Jr. and Robert Joe Randolph, slip op. at 5. At the time of this offense, first-degree murder entailed the "intentional, premeditated and deliberate killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (Supp. 1994) (repealed and replaced July 1, 1995). Especially aggravated robbery is the taking of property from a person accomplished with a deadly weapon that causes a victim serious bodily injury. Tenn. Code Ann. § 39-13-403 (1997). Obviously, neither the taking of property, the use of a deadly weapon, nor serious bodily injury are elements of attempted first degree murder. Conversely, especially aggravated robbery does not require the premeditated and deliberate intent to kill another. Moreover, the criminal intent needed for the commission of a murder does not preclude the defendant from having the separate intent to rob the victim with a deadly weapon in such a manner as to cause serious bodily injury. State v, Frank B. Jackson, Jr. and Robert Joe Randolph, slip op. at 6. Therefore, under Blockburger, the two offenses are not the same.

Our inquiry does not stop with Blockburger, however. We turn to the principles announced in Duchac to determine whether the state would have relied upon the same evidence to prove both crimes if the case had gone to trial. In that case, the Tennessee Supreme Court held that two convictions growing out of a single transaction may stand if the same evidence is not required to prove each offense. Duchac, 505 S.W.2d at 239. In the present case, the facts that support attempted first-degree murder consist of the following: (1) the defendant's statement that he saw his friend struggling on the floor with the victim; (2) the defendant's decision to aid his friend by shooting the victim; and (3) his pointing the shotgun at the victim and pulling both triggers. Nothing more is required. Even if the shotgun had misfired or if the blast had gone harmlessly into the floor, the attempt to commit first-degree murder was complete. On the other hand, to prove that the defendant had committed especially aggravated robbery, the state would have shown (1) that

the defendant had gone to the clubhouse to rob the patrons; (2) that he had demanded that they "give up" their money and that the victim complied; (3) that he used a firearm in the course of the robbery; and (4) that the victim suffered serious bodily injury. In addition, the intent to rob and the intent to murder are separate and distinct and require the state to put on different proof. See State v, Frank B. Jackson, Jr. and Robert Joe Randolph, slip op. at 6(criminal intents are not mutually exclusive and may exist together); cf. State v. Richardson, 875 S.W.2d 671 (Tenn. Crim. App. 1993)(single intent to use weapon precludes two convictions for one course of conduct). Clearly the state could not rely upon the same evidence to prove the elements of each crime at trial.

The third step in the Denton analysis requires us to determine whether there are either multiple victims or discrete actions that support the imposition of two convictions. In Denton, the supreme court found that convictions for aggravated assault by use of a deadly weapon and attempted voluntary manslaughter could not stand because the evidence consisted of a single attack by Denton on the victim and no discrete acts were required to prove the elements of each crime. 938 S.W.2d at 382. In this case, however, the acts involved in committing the robbery are separate and distinct from those which resulted in the commission of attempted first-degree murder. Moreover, none of the facts relevant to establishing serious bodily injury were relevant to the attempted murder. Although George Warren was the victim of both crimes, the proof includes several discrete acts, some of which pertain only to the robbery while others are pertinent only to the attempted murder.

Last, we must consider whether the purposes of the statutes proscribing especially aggravated robbery and first-degree murder are the same. See Tenn. Code Ann. § 39-13-202 (Supp. 1994) (repealed and replaced July 1, 1995) and § 39-13-403 (1997). Although both are offenses against the person, different evils are clearly addressed. At the time of this offense, section 39-13-

202(a) prohibited the killing of another after the exercise of reflection and judgment. See Tenn. Code Ann. § 39-13-201(b)(2) (1991) (deleted by 1995 amend.) Section 39-13-403, on the other hand, is designed to protect victims of armed robbery from serious bodily injury. Therefore, we conclude that the legislature intended that multiple punishments may be imposed for these offenses when the evidence of discrete acts is sufficient to prove the elements of each crime.[7]

We have examined the facts and circumstances of this case according to the four-step analysis required in Denton and conclude that the considerations weigh heavily against the defendant's argument. The defendant's convictions for attempted first-degree murder and especially aggravated robbery do not offend the constitutional protections against double jeopardy, and both convictions are valid.[8]

Consecutive Sentencing

The defendant also contends that the trial court erred by ordering him to serve his sentence for especially aggravated robbery consecutively to the sentence for attempted first-degree murder. Specifically, he argues that the evidence in the record does not support the trial court's determination that

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[7]This court has previously found that convictions for especially aggravated robbery and first-degree murder or attempted murder do not violate constitutional protections against double jeopardy. See State v. Zirkle, 910 S.W.2d 874 (Tenn. Crim. App. 1995); State v. Oller, 851 S.W.2d 841 (Tenn. Crim. App. 1992); State v. Ronald B. Waller, No. 03C01-9212-CR-00429 (Tenn. Crim. App., Knoxville, Oct. 6, 1993); State v. Frank B. Jackson, Jr. and Robert Joe Randolph, No. 03C01-9206-CR-00222 (Tenn. Crim. App., Knoxville, July 29, 1993), perm. app. denied (Tenn. 1993); see State v. Henry Eugene Hodges, 944 S.W.2d 346 (Tenn. 1997) (no double jeopardy issue raised); State v. Jennifer Strevel, No. 03C01-9606-CR-00249 (Tenn. Crim. App., Knoxville, Apr. 3, 1997) (no double jeopardy issue raised).

[8]The defendant does not challenge his convictions on due process grounds pursuant to State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). We note, however, that at least one panel of this court has decided that the teachings of Anthony have no application to convictions for attempted murder and especially aggravated robbery as neither crime is necessarily incidental to the other. State v. Frank B. Jackson, Jr. and Robert Joe Randolph, No. 03C01-9206-CR-00222, slip op. at 7 (Tenn. Crim. App., Knoxville, July 29, 1992), perm. app. denied (Tenn. 1993).

consecutive sentences are necessary to protect the public from the defendant's further criminal acts or that the punishment is reasonably related to the severity of the offenses.

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) (1997). 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). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the appellant's statements, the nature and character of the offense, and the appellant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b); State v. Ashby, 823 S.W.2d at 169. 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).

The defendant's sentence is governed by the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-101 to -504 (1997). Under that act, consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the statutory criteria exist. See Tenn. Code Ann. § 40-35-115(b).[9] The trial judge in this case ordered consecutive sentences

[9]Those criteria are: (1)The defendant is a professional criminal who has knowingly devoted 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; (4) the defendant is a dangerous offender whose behavior indicates

based upon his finding that the defendant is a dangerous offender with little or no regard for human life and who demonstrated no hesitation about committing a crime in which the risk to human life was high. Tenn. Code Ann. § 40-35-115(b)(4). However, the fact that an offender has committed two or more dangerous crimes is not necessarily sufficient to sustain consecutive sentences. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). The proof must also establish that the terms imposed are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal acts by the defendant. Id.

The trial judge, in this case, placed in the record a written order in which he carefully considered the factors relevant to consecutive sentencing and in which he described in detail the evidence which supported his conclusions. In the order, he found that the circumstances surrounding the offense were aggravated in that (1) during a well-orchestrated attack on at least ten persons, the defendant fired a sawed-off shotgun into the body of an unarmed man who was lying on the floor; (2) the defendant then left the golf course with his friends and proceeded to drink alcohol and use drugs without any concern for the victim; (3) when found by the police, the defendant and his companions refused to surrender for several hours; (4) the victim's injuries have left him bedridden and have virtually destroyed the lives of his family. The trial court also found that the defendant's excessive truancy, his caching a weapon in an empty house, his abuse of alcohol and illegal drugs, and his "gang mentality" indicated an unwillingness to lead a productive lifestyle and to avoid further criminal activity consistent. Finally, the court found that the aggregate sentence of 42 years reasonably relates to the seriousness of the two Class A felonies for which the defendant stands convicted. As a Range I offender,

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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; (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) (1997).

the court concluded, the defendant will have ample opportunity to take part in the educational, vocational, and rehabilitative programs available in prison and that, when his prison time is behind him, he will be young enough to have many productive years ahead.

The defendant has not carried his burden of demonstrating that his sentence is improper. His conclusory statement that "there is absolutely no evidence in the record to support a finding that the public needs protection from the Appellant" is insufficient to disturb the well-articulated findings of the trial court. He argues only that the trial court should not have considered his juvenile record in the imposition of consecutive sentencing because none of the offenses were judicially adjudicated. A trial court must, however, consider all relevant facts and circumstances when making its sentencing determinations. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Therefore, it was not improper for the trial court to note those offenses. However, nothing in the record indicates that the court placed any weight on the four juvenile offenses in determining that consecutive sentences were appropriate. Moreover, the defendant's psychological evaluation strongly supports a conclusion that the defendant would likely re-offend if he were released into society too quickly.

The record in this case supports the trial court's finding that the defendant is a dangerous offender as defined by statute and that the sentence imposed is required to protect the public from the defendant's future activity. The defendant committed two Class A felonies and four Class C felonies within a few minutes. The defendant's actions inflicted on the victim terrible wounds from which he will continue to suffer for the rest of his life. An aggregate sentence of 42 years reasonably relates to the severity of the offenses.

We affirm the judgment of the trial court in its entirety.

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CURWOOD WITT, Judge

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JOE B. JONES, Presiding Judge

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JERRY L. SMITH, Judge