

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1998

FILED

January 30, 1998

No. 02C01-9611-CR-00384

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee)

vs.)

JOSEPH TIPLER,)

Appellant)

SHELBY COUNTY

Hon. Bernie Weinman, Judge

(Aggravated Kidnapping - 2 counts;
Aggravated Assault - 2 counts;
Assault; Aggravated Burglary)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes

Judge

OPINION

The appellant, Joseph Tipler, was convicted by a Shelby County jury of two counts of aggravated kidnapping, two counts of aggravated assault, one count of assault, and one count of aggravated burglary. At the sentencing hearing, the trial court imposed an effective sentence of twenty years imprisonment in the Department of Correction.¹ In the sole issue presented for our review, the appellant contends that the kidnappings were merely incidental to the aggravated assaults of the victims, and, therefore, his convictions for these offenses violate his constitutional guarantee of due process.

After review of the record, we affirm the appellant's convictions.

Background

In 1995, Frances Smith resided with her thirteen year old son, Shannon, in Collierville. At some time during the month of September, Ms. Smith permitted the appellant, the brother of Ms. Smith's ex-husband, and his girlfriend, Penny McIntyre,² to stay at her residence.

¹Specifically, the trial court imposed the following sentences and ordered them to run concurrently with each other:

Assault -- eleven months, twenty-nine days
Aggravated Burglary -- six years
Aggravated Assault of Frances Smith -- six years
Aggravated Assault of Shannon Smith -- six years
Aggravated Kidnapping of Frances Smith -- twenty years
Aggravated Kidnapping of Shannon Smith -- twenty years.

On the date of the offenses the appellant was on probation from convictions imposed by the Fayette County Circuit Court. The Shelby County convictions were ordered to be served consecutive to the Fayette County convictions.

²Penny McIntyre was charged as a co-defendant in this case. Prior to the appellant's trial, McIntyre entered guilty pleas to the offenses of aggravated criminal trespass, assault, and attempted aggravated kidnapping.

On October 8, 1995, an argument erupted between the appellant and Ms. Smith because the appellant believed that Ms. Smith had accused him of stealing Shannon's stereo. When Ms. Smith denied making the accusation, the appellant "hit [her] in the mouth and busted [her] lip."³ Ms. Smith retaliated by evicting the appellant and his girlfriend from her home, reclaiming her keys to the residence, and placing the appellant's personal belongings "out on the back porch."

Two days later, at approximately 3:00 a.m., Ms. Smith was awakened by someone "beating on the back door." She woke her son and instructed him to go out the front door of the house. When Ms. Smith opened the front door, she was greeted by Penny McIntyre who physically detained Ms. Smith by grabbing her by the arm. Shannon, however, was able to escape and started running towards a neighbor's house. The appellant, who by this time had succeeded in breaking a board covering a broken glass pane on the back door and unlocking the door, ran through the house and inquired as to the whereabouts of Shannon. McIntyre informed the appellant that Shannon had gone next door. Armed with a "10 to 12" inch knife, the appellant "took off after [Shannon]." Before Shannon was able to reach the neighbor's front door, the appellant stopped him and told him to come back to the house. The appellant "grabbed [Shannon's] left arm and . . . pulled [him] back" to the house.

Once in the house, the appellant began "cussing [Ms. Smith] and calling [her] names," while Ms. Smith and Shannon sat "on the bed." The appellant "pulled the left side of [Ms. Smith's] hair back and slapped [her] upside the head." He then "threatened to kill [her] with the knife, but . . . gave the knife to Shannon," stating that "he better throw the knife away because if he didn't he would do something he would regret." Shannon threw the knife on the floor and McIntyre retrieved the weapon. The appellant informed Ms. Smith that "he come [sic] there to kill [her] just

³This altercation led to the appellant's conviction, in the present case, for assault.

like his brother-in-law had killed his sister.” Penny McIntyre inquired as to the location of a cassette tape, Ms. Smith responded and retrieved the cassette from “the counter.” Before leaving the house, the appellant asked Ms. Smith whether she needed a ride to work the next day. The entire episode lasted approximately forty-five minutes. Subsequent to the appellant’s departure, Ms. Smith remained in her bed for several hours before reporting the incident to law enforcement officials.

Analysis

The sole issue presented for our consideration is whether the appellant’s convictions for aggravated kidnapping violate due process and the mandate of State v. Anthony, 817 S.W.2d at 299, because these offenses were merely incidental to the primary purpose of committing the aggravated assaults.

Initially, we note that the State contends that the appellant has waived any challenge under Anthony, 817 S.W.2d at 299, by failing to raise the issue at the motion for new trial. See Tenn. R. App. P. 3(e). Although the State is correct in its assertion, with consideration of the fundamental error alleged, we proceed to review the issue on its merits. See Tenn. R. Crim. P. 52(b); Tenn. R. App. P. 2.

Addressing the due process concerns of whether movement incidental to an underlying crime is sufficient to support a separate kidnapping conviction, the appellate courts of this state have recognized that inherent in every rape, robbery, and, as in the present case, aggravated assault is a period of confinement or restraint. Thus, the courts are left to determine “whether the confinement, movement, or detention is essentially incidental to the accompanying felony and is not . . . sufficient to support a separate conviction for kidnapping . . . in and of itself. . .” Anthony, 817 S.W.2d at 306 (citation omitted). In a recent opinion reiterating

the principles of Anthony, our supreme court held that the focus of an Anthony inquiry is upon the “purpose of the removal or confinement and not the distance or duration.” State v. Dixon, No. 03S01-9704-CR-00043 (Tenn. at Knoxville, Dec. 15, 1997) (*for publication*). If the purpose of the removal or confinement is “not necessary for the commission of the [underlying felony],” the kidnapping is not incidental to the other offense.⁴ Id. If the “movement or confinement is beyond that necessary to consummate the [underlying offense],” the next inquiry is “whether the additional movement or confinement: (1) prevented the victim from summoning help; (2) lessened the defendant’s risk of detection; or (3) created a significant danger or increased the victim’s risk of harm.” Dixon, No. 03S01-9704-CR-00043 (citing Anthony, 817 S.W.2d at 306). Affirmative answers to these inquiries support affirmance of a contemporaneous kidnapping. See, e.g., Dixon, No. 03S01-9704-CR-00043.

Applying the due process principles announced in Anthony and under the guidelines of Dixon, we conclude that the separate convictions for aggravated assault⁵ and aggravated kidnapping in the case before us are proper.

A. Aggravated Kidnapping of Shannon Smith

Briefly reiterating the relevant facts, the proof establishes that when Shannon Smith fled from his residence, he was chased by the appellant with a knife and forcibly returned to the Smith residence. This movement was not incidental to the subsequent aggravated assault, *i.e.*, the movement back to the house was “not necessary for commission of the aggravated assault.” See, e.g., Dixon, No. 03S01-

⁴We note, however, that “[t]here can be no bright-line rule for determining whether the ‘removal’ or ‘confinement’ of a victim to another place is part and parcel of the accompanying felony. . . . The test remains a subjective one, based upon the facts of each case.” State v. Smith, No. 02C01-9602-CR-00061 (Tenn. Crim. App. at Jackson, May 15, 1997), concurring in results only, (Tenn. Jan. 5, 1997).

⁵In the case *sub judice*, the appellant was convicted of two counts of aggravated kidnapping with a deadly weapon. Tenn. Code Ann. § 39-13-304(a)(5) (1991). A person commits the offense of aggravated kidnapping “who knowingly removes or confines another unlawfully so as to interfere substantially with the other’s liberty” “while . . . in possession of a deadly weapon.” See Tenn. Code Ann. § 39-13-302(a) (1991); Tenn. Code Ann. § 39-13-304(a)(5).

9704-CR-00043. In fact, the act preceded the underlying crime. The act of forcibly moving Shannon back to the house effectively prevented him from summoning help, lessened the appellant's risk of detection, and increased the risk of harm to the juvenile. Id. We conclude that the evidence is sufficient to warrant separate prosecution for the kidnapping offense. Accordingly, the appellant's conviction for the aggravated kidnapping of Shannon Smith is affirmed.

B. Aggravated Kidnapping of Frances Smith

In regard to the aggravated kidnapping of Ms. Smith, the analysis is not as simple. We are constrained to note that, although there is some indication in the record that, at some point, Ms. Smith moved from the front door of her home to a bed, there is no indication as to whether this movement was forced or a volitional act on behalf of Ms. Smith. Again, inherent within the crime of aggravated assault is a period of confinement or restraint. However, we acknowledge the proof supporting the initial interference of Ms. Smith's liberty by Penny McIntyre. In an attempt to flee from her intruders, Ms. Smith ran toward the front door of her home. This attempt was thwarted when McIntyre grabbed the victim by the arm and told her to go back into the house. At this point, Ms. Smith testified that she did not feel free to leave. Soon thereafter, the appellant returned to the house with her son, during which time the subsequent assault and aggravated assault occurred.

We conclude that McIntyre's initial restraint of Ms. Smith was separate and not incidental to the subsequent aggravated assault. The aggravated assault with a deadly weapon could have been perpetrated upon Ms. Smith absent this initial detention. Moreover, this confinement prevented Ms. Smith from summoning help and lessened the appellant's risk of detection. See Dixon, No. 03S01-9704-CR-00043 (citation omitted). Again, we emphasize that "it is the purpose of the removal or confinement and not the distance or duration" that is the determinative factor. Id. Under these facts, the preceding restraint of Ms. Smith is sufficient, in and of itself,

to support a separate conviction for the offense of aggravated kidnapping. Accordingly, we conclude that the appellant's convictions for the aggravated kidnapping of Ms. Smith and the aggravated assault of Ms. Smith do not contravene the due process principles of Anthony.

Conclusion

The appellant's judgments of conviction for the offenses of assault, aggravated assault, aggravated burglary, and aggravated kidnapping are affirmed.

DAVID G. HAYES, Judge

CONCUR:

JOE B. JONES, Presiding Judge

JOE G. RILEY, Judge