

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1998 SESSION

STATE OF TENNESSEE, )  
 ) C.C.A. No. 02C01-9708-CC-00321  
 Appellee, )  
 ) Shelby County  
 V. )  
 ) Honorable Arthur T. Bennett, Judge  
 KEDRICK D. TALIAFERRO, and )  
 FABIAN J. TALIAFERRO, ) (Sentencing - Probation Denial)  
 )  
 Appellants. )

FOR THE APPELLANTS:

For Kedrick D. Taliaferro:  
William D. Massey  
3074 East Street  
Memphis, TN 38128

For Fabian J. Taliaferro:  
C. Michael Robbins  
46 North Third Street  
Suite 719  
Memphis, TN 38103

FOR THE APPELLEE:

John Knox Walkup  
Attorney General & Reporter

Elizabeth T. Ryan  
Assistant Attorney General  
425 Fifth Avenue North  
Cordell Hull Building, Second Floor  
Nashville, TN 37243-0493

William L. Gibbons  
District Attorney General

Paul F. Goodman  
Assistant District Attorney General  
Criminal Justice Complex  
201 Poplar Street, Suite 301  
Memphis, TN 38103

OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**PAUL G. SUMMERS,**  
Judge

**OPINION**

The appellants, Kedrick D. Taliaferro and Fabian J. Taliaferro, appeal their sentences of six years for the 1993 killing of Veto Young. They, along with Kedrick's brother, Ervin J. Johnson, were indicted for first degree murder. On April 28, 1997, each appellant pled guilty to aggravated assault pursuant to a negotiated plea agreement, and each received a six-year sentence as a Range I, standard offender. The court sentenced each appellant to serve six years in the local workhouse. A hearing was held on July 17, 1997 to determine whether to place the appellants on probation. The trial court denied the appellants' request for probation.

The appellants present two issues for our review on appeal: (1) whether the trial court properly denied their petition for suspension of their sentences, and (2) whether the trial court erred by allowing the state to ask Fabian Taliaferro who was responsible for killing Veto Young. We affirm the judgment of the trial court.

Both the state and the appellant stipulated to the following facts. On April 27, 1993, a Memphis police officer was conducting a radar traffic unit near the intersection of Winchester and Interstate 55, which is an area west of Winchester and Millbranch, in Shelby County. The officer saw several persons get out of a car and go into a field on the northwest corner of Winchester and Millbranch. The officer saw those individuals chase another individual and then heard shots. He notified someone by radio of the disturbance, and another officer responded to the scene. By the time the other officer arrived on the scene, Kedrick Taliaferro and Fabian Taliaferro, together with their codefendant, Ervin Johnson, and Wesley Springfield, were coming up from an area to where their car was located on Winchester. Those three men were taken into custody, and disarmed.<sup>1</sup>

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<sup>1</sup> Ervin Johnson pled guilty to second degree murder for the shooting death of Veto Young. He was sentenced to twenty years in prison.

Officers found Veto Young near a fence below the street level. He had been shot one time. The three men were advised of their Miranda rights. All four men gave statements to the police. They stated that on the night before, a robbery occurred at the residence of one of the four men, and the man they were chasing was the person that they believed to be responsible. When the crime scene unit arrived, they found a stocking mask near the victim, which the defense would have posited was used by the victim during the perpetration of the robbery the night before. Both appellants admitted they were armed. Kedrick Taliaferro stated that he shot at the victim, and Fabian Taliaferro stated that he had shot into the ground.

The appellant Kedrick Taliaferro argues that the trial court erred in denying him probation. He contends that there is no evidence in the record of the need for deterrence, so the trial court erred by basing its decision in part on this ground. Also, he asserts that the trial court incorrectly based its decision to deny probation largely on the fact that a death occurred in this case, arguing that this “was the single greatest factor influencing [the court’s] decision.” However, he concedes that the need to avoid depreciating the seriousness of the offense and measures less restrictive than confinement had recently been used were applicable.

The state insists that the trial court properly denied probation for Kedrick Taliaferro “because of the facts of the case, the defendant’s prior criminal record, the fact that measures less restrictive than confinement have previously been unsuccessful and probation would not benefit Kedrick or society.” In support of its position, the state notes the trial court’s concern about the appellant’s vigilante justice, his prior drug conviction, and the fact that he was on probation at the time of the shooting.

Appellant Fabian Taliaferro argues that the trial court erred in denying him probation. He contends that he has no prior criminal history and asserts that “only the principle dealing with avoiding the depreciation of the seriousness of

the offense would have any application.” Furthermore, with regard to the trial court’s finding that Fabian Taliaferro was not remorseful for his actions, the appellant insists that he stated that he regretted that the whole incident occurred. He contends that when he answered the prosecutor’s question about who was responsible for the killing of the victim, he “spoke figuratively of the deceased as having put in motion a chain of events which led to his demise.” This appellant also notes four mitigators relevant to his sentencing and notes that he has served 434 days in pretrial confinement, which “amounts to more than a sufficient time of confinement to avoid any notion of depreciating the seriousness of the offense.”

This appellant argues in the third issue presented for our review that the trial court erred by allowing the state to ask him who was responsible for killing Veto Young. He contends that the form of the question required a legal conclusion, not a factual conclusion, and therefore, was improper. He further argues that all he really stated “was that it could be looked at as if Veto Young brought on his own death by his misconduct in the first place.”

When an appellant challenges the length, range, or manner of service of a sentence, this Court conducts 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). However, this presumption is conditioned on an affirmative indication 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 appellant bears the burden of showing that the sentence was improper. Id. In determining whether the appellant has met this burden, this Court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel; (e) the nature and characteristics of the offense; and (f)

the appellant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997).

For a defendant to be entitled to the statutory presumption that he is a favorable candidate for alternative sentencing, three criteria must be met under Tennessee Code Annotated §§ 40-35-102(5) and -102(6) (1997): the defendant must be an especially mitigated or standard offender; he or she must be convicted of a Class C, D, or E felony; and he or she must not fall within the parameters of Tennessee Code Annotated § 40-35-102(5), which states that a defendant cannot have a criminal history that shows a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." The trial court found each appellant to be a standard offender of a Class C felony. The trial court found that Kedrick Taliaferro did not have a significant prior criminal record.<sup>2</sup> It found that Fabian Taliaferro had no prior criminal record.

By providing evidence to the contrary, the state may rebut the presumption that the defendant is a favorable candidate for alternative sentencing. Tenn. Code Ann. § 40-35-102(6) (1997). Insight regarding what constitutes "evidence to the contrary" is provided at Tennessee Code Annotated § 40-35-103:

(1) Sentences involving confinement should be based on the following considerations:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995) (citing State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991)). However, the court, in its oral and detailed written findings of fact and conclusions of law, did find that confinement was necessary to avoid depreciating the seriousness of the offense and to provide an effective deterrence to others likely to commit similar offenses. Tenn. Code Ann. § 40-35-103(1)(B) (1997).

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<sup>2</sup> At the time of the instant offense, this appellant was on probation for a drug conviction.

For a trial court to deny an alternative sentence based on the seriousness of the offense, the circumstances of the offense “must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree,’ and the nature of the offense must outweigh all factors favoring a sentence other than confinement.” Bingham, 910 S.W.2d at 454 (quoting State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)). The occurrence of a death cannot alone constitute sufficient evidence to the contrary under Tennessee Code Annotated § 40-35-102(6). Id. at 455. The trial court’s denial of an alternative sentence based on the seriousness of the offense under Tennessee Code Annotated § 40-35-103(1)(B) (1997) can only be upheld if the Hartley conditions are in the record.

The circumstances of the offense in the case sub judice indicate that the appellants had not one but several opportunities to call the police: after the robbery at the apartment, after the shooting of their car later the same night of the robbery, and most significantly, the day of the shooting when there was a police officer in the vicinity of the location that the appellants saw the victim. However, the appellants, along with their codefendant Ervin Johnson, decided to take the law into their own hands and exercise vigilante justice. We agree with the trial court that the circumstances of the offense in this case are reprehensible and shocking, thus meeting the Hartley conditions.

The trial court also denied alternative sentencing based on deterrence. However, the record must contain some evidence that the sentence imposed will have a deterrent effect within the jurisdiction before a trial court can deny alternative sentencing based on this ground. State v. Bonestel, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993).

The trial court stated that these appellants should be denied probation in part based on the deterrent effect such a decision would provide. The court noted that individuals cannot be permitted to engage in lawless behavior and then be granted probation. Specifically, the court stated in its written findings that “confinement is particularly suited to provide an effective deterrence to

others likely to forgo reporting, such offenses to proper authorities and seek out suspects and use deadly weapons to rectify their grievances.” We agree.

Tennessee Code Annotated § 40-35-103(5) (1997) provides the “potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” Furthermore, a defendant’s failure to accept responsibility for his crimes is relevant to his rehabilitation potential. State v. Zeolia, 928 S.W.2d 457 (Tenn. Crim. App. 1996).

Appellant Fabian Taliaferro contends that the trial court erred by allowing the state to ask him who was responsible for the killing of Veto Young. In his response, this appellant, in essence, stated that the victim was responsible for his own death. Although this appellant at the probation hearing made a general statement of remorse for what happened, his statement that the victim was responsible for his own death clearly illustrates his failure to take responsibility for his conduct. This issue is without merit.

We affirm the judgment of the trial court.

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PAUL G. SUMMERS, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JOE G. RILEY, Judge