IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH SESSION, 1999

FILED

June 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9804-CR-00105**
	)	
Appellee,	)	
	)	**SHELBY COUNTY**
V.	)	
	)	
	)	**HON. JOSEPH B. DAILEY, JUDGE**
FRED DELANEY,	)	
	)	**(ATTEMPTED FIRST**
Appellant.	)	**DEGREE MURDER)**

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OPINION FILED ________________________

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Fred Delaney, appeals as of right following his conviction in the Shelby County Criminal Court. Following a jury trial, Defendant was convicted of attempted first degree murder, a Class A felony, and being a convicted felon in possession of a firearm, a Class E felony. He was sentenced to serve forty (40) years for the attempted first degree murder conviction and four (4) years for the possession of a firearm conviction. Those sentences were ordered to be served consecutively. Defendant appeals both the sufficiency of the evidence and the length of his sentences. We affirm the judgment of the trial court.

When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are

resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987). Nor may this court reweigh or reevaluate the evidence. Cabbage, 571 S.W.2d at 835. A jury verdict approved by the trial court accredits the State's witnesses and resolves all conflicts in favor of the State. Grace, 493 S.W.2d at 476.

Officer Fred Jones of the Memphis Police Department testified he was working with Officer Joseph Lacastro on the evening of April 25, 1996. The two officers were patrolling the area of Orange Mound, including the intersection of Carnes and Hanley, during the midnight shift. Just after they reported for roll call, they drove to the intersection of Carnes and Hanley to check the area as it is a known area for drug activity. When they approached the area, Officer Jones observed two (2) black males walking around the corner of Hanley and Carnes. After a spotlight was shined on the two (2) males, they immediately separated and began walking in two (2) different directions. As Officer Jones grabbed his flashlight and began to get out of the patrol car, he asked one of the men to come over and speak with him. Jones identified this man as the Defendant. Jones stated he believed the Defendant was going to run, so he stepped out of the car.

Jones again asked Defendant to "[C]ome here for a second, let me talk to you." The Defendant began to run and Jones pursued. The Defendant ran between houses on Hanley for approximately three (3) to four (4) seconds. Just as Jones prepared to put his hands on the Defendant, the Defendant turned and Jones saw a flash of chrome coming from his waistband. Jones did not have his gun in his hand, only his flashlight, so he began to slow down. Defendant turned again and shot Jones. As Jones fell to the ground, he attempted to knock the gun out of

Defendant's hand with his flashlight. Defendant shot again and the bullet hit the head of his flashlight, then lodged underneath his armpit.

Jones was on the ground on all fours looking up at the Defendant. Defendant raised the gun again and shot at Jones, but missed. Jones believed the Defendant was going to kill him, so he dove behind a porch and then rolled to try to make himself a difficult target. Jones heard another shot and it lodged in the back of his leg. It was only at that point that Jones was able to pull out his weapon. Jones waited behind the porch with his weapon on his chest, but the Defendant fled the area. Jones' partner, Officer Lacastro, appeared on the scene at that time and Jones was eventually transported to the hospital.

Jones stated that his bulletproof vest caught one of the bullets, but that a deep bruise and indentation marks remain on his chest. Two bullets were still inside of his body, one underneath his arm and one in his leg. Jones was in the hospital for several days, and missed two (2) months of work as a result of his injuries.

Officer Lacastro testified that he also recognized the Defendant as the person Officer Jones pursued on April 25, 1996. When Jones had nearly caught up with the Defendant, the Defendant turned and fired two (2) shots in rapid succession. Jones doubled over and fell to the ground. Lacastro called for some assistance and then went toward the area where Jones fell. As he got closer, two (2) more shots were fired. When Lacastro got to Officer Jones, it was evident he had been shot. After verifying the Defendant had fled the scene from the south portion of the backyard, Lacastro began to administer aid to Officer Jones.

Criminal attempt is committed when a person, "acting with the kind of culpability otherwise required for the offense: (1) [i]ntentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be; (2) [a]cts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or (3) [a]cts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense." Tenn. Code Ann. § 39-12-101(a). At the time of the offense, first degree murder was defined as "a premeditated and intentional killing of another." Tenn. Code Ann. § 39-13-202(a)(1) (1996 Supp.). Defendant only contests the sufficiency of the evidence as to the element of premeditation.

Premeditation is "an act done after the exercise of reflection and judgment." 'Premeditation' means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. . ." Tenn. Code Ann. § 39-13-202(d)(1996 Supp.). Defendant suggests that no direct evidence was presented to the jury regarding his state of mind at the time the shooting occurred. When the charged offense is first degree murder, the element of premeditation is a jury question and may be established by proof of the circumstances surrounding the killing. State v. Bland, 958 S.W.2d 651, 660 (Tenn. 1997), cert denied, 118 S.Ct. 1536, 140 L.Ed.2d 686 (1998) (*citing* State v. Brown, 836 S.W.2d 530, 539 (Tenn. 1992)). Several factors tend to support the existence of premeditation, including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by

the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime and calmness immediately after the killing. Bland, 958 S.W.2d at 660 (citations omitted).

In the case sub judice, considering the proof in this record in the light most favorable to the State, we conclude that there was sufficient evidence whereby a rational trier of fact could have found Defendant guilty beyond a reasonable doubt of criminal attempt to commit first degree murder. Just as the Defendant was about to be apprehended during a chase, he withdrew a concealed weapon and shot the officer at point blank range. As the victim was falling, Defendant shot him again. The Defendant shot at the victim a third time after he had fallen to the ground and was, at that moment, defenseless. Furthermore, when the victim was obviously attempting to escape from the Defendant, seeking refuge behind a porch, Defendant again shot the victim. While Defendant claims that the shooting occurred only during the excitement and passion of the chase, the proof demonstrates that the chase was effectively over when the Defendant began shooting point blank at the victim. Defendant chose not to end his attack, but to continue shooting at the victim even when he tried to seek refuge. See Bland, 958 S.W.2d at 660. The jury could certainly have found that under these circumstances the Defendant had time to reflect upon and choose to shoot the victim during this assault. Id. The record supports the jury's conclusion that Defendant, having refused to stop and answer questions by this police officer, consciously chose to engage in conduct which constitutes attempted first degree murder. This issue is without merit.

Defendant challenges both the length of his sentence and the consecutive nature of his sentences. In determining the sentence for the Defendant, no

additional evidence was presented at the sentencing hearing. After considering the presentence report, arguments of counsel, the entire record and the circumstances surrounding the offense, the trial court sentenced Defendant to serve forty (40) years for the offense of attempted first degree murder and four (4) years for being a convicted felon in possession of a firearm. Defendant was sentenced as a Range II multiple offender in each case. The court ordered Defendant to serve the two (2) sentences consecutively for a total sentence of forty-four (44) years.

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 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 a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

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 principles 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 challenges the application of factors (6), (10), and (16), and argues that the trial court erroneously applied a non-statutory enhancement factor. Factor (6), the personal injuries inflicted upon the victim were particularly great, was applied by the trial court for both offenses. Defendant argues that there was no testimony that the victim's injuries were "particularly great" under the statutory definition of "serious bodily injury." Serious bodily injury is defined as: "(A) [a] substantial risk of death; (B) [p]rotracted unconsciousness; (C) [e]xtreme physical pain; (D) [p]rotracted or obvious disfigurement; or (E) [p]rotracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. § 39-11-106(a)(34). Personal injuries, great or small, are not an element of attempted murder. State v. Alexander, 957 S.W.2d 1, 7 (Tenn. Crim. App. 1997).

The proof reflects that the victim suffered three (3) separate gunshot wounds, two (2) of which resulted in the bullets permanently lodging within the victim's body. The other bullet fired at the victim lodged in his bulletproof vest, perhaps saving the victim's life, and the victim testified that a permanent bruise and two (2) "deep gouges" from the bullet are on his chest. Jones described the gunshot to his chest as feeling "like you are being hit by a bat. Somebody just takes a bat and just swings with all his might." The second shot fired at the victim had sufficient force to bring the victim to his knees. In addition, Jones stated that he tasted blood in his mouth and that his back was hurting so badly that he was afraid for Officer Lacastro

to check for injuries. We believe that the victim's immediate injuries and pain, combined with the two (2) bullets permanently lodged in his body were sufficient justification for application of enhancement factor (6). See State v. Tony Carruthers, No.02C01-9102-CR-00019, Shelby County (Tenn. Crim. App., at Jackson, August 7, 1991) (No Rule 11 application filed).

Enhancement factors (10) and (16), that the defendant had no hesitation about committing a crime when the risk to human life was high and that the crime was committed under circumstances under which the potential for bodily injury to a victim was great, were applied by the trial court in error. Tenn. Code Ann. § 40-35-114. The State concedes these factors were inappropriately applied to the offense of attempted first degree murder. As these factors are elements of the crime of attempted first degree murder, they should not have been applied. State v. Nix, 922 S.W.2d 894, 903 (Tenn. Crim. App. 1995). However, these factors are not elements of the offense of being in unlawful possession of a firearm as a convicted felon and we affirm their application to the sentence for that conviction.

Defendant also contends that the trial court incorrectly applied a non-statutory enhancement factor in that the victim was a police officer and that enhancement was necessary to protect law enforcement officers. However, it does not appear in the record that the trial court used this concern as a means to enhance Defendant's sentence.

In addition to the factors listed above, the trial court relied upon Defendant's history of criminal convictions, his possession of a firearm in the commission of the offense of attempted first degree murder, and that he was on parole at the time of

the offense. Tenn. Code Ann. § 40-35-114(1), (9) and (13). The possession of a firearm is certainly not in dispute, and the other factors are supported by the evidence contained in Defendant's presentence report. The State urges us to consider the application of enhancement factor (8), that the Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. Tenn. Code Ann. § 40-35-114. Under the power of our de novo review, this court is authorized to consider any enhancing or mitigating factors supported by the record even if they were not relied upon by the trial court. State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993) (citations omitted). The State did argue this factor's application at the sentencing hearing, but the trial court did not rule on its applicability.

There is sufficient proof within the record to support the application of factor (8). In 1989, Defendant was convicted of a misdemeanor weapons offense, and while he was on probation for this offense he was arrested for the sale of cocaine on February 13, 1990. On June 4, 1990, Defendant was convicted of this cocaine offense and was sentenced to eight (8) years. Then, Defendant was arrested for a drug offense on May 9, 1991 and convicted on December 16, 1991. From 1991 until October 1994, Defendant had nine (9) additional criminal convictions. These most current convictions occurred during the time Defendant was on parole for a drug offense. There is more than sufficient evidence whereby this enhancement factor should be applied to both offenses.

While two (2) of the above factors were inapplicable to the attempted first degree murder offense, five (5) separate enhancement factors are applicable. As a Range II Offender, Defendant was subject to a sentence of twenty-five (25) to forty

(40) years for the attempted first degree murder conviction and a sentence of two (2) to four (4) years for the possession of a firearm conviction. Tenn. Code Ann. § 40-35-112(b). As attempted first degree murder is a Class A felony, the court must begin at the mid-point of the sentence range and apply the enhancement factors. Tenn. Code Ann. § 40-35-210(c). Defendant does not contend any mitigating factors are applicable, and we agree with the trial court that none were applicable. The maximum sentence for both offenses in light of the application of five (5) enhancement factors for the attempted first degree murder conviction and seven (7) enhancement factors for the possession of a firearm conviction is appropriate for this Defendant under these circumstances.

Defendant also contests the consecutive nature of these sentences. Under the authority of Tennessee Code Annotated section 40-35-115(b), the trial court found the Defendant to have an extensive prior criminal history, acting as a dangerous offender with no hesitation about committing a crime in which the risk to human life was high and that the offenses were committed while Defendant was on parole. Clearly, Defendant falls within the statutory classifications for consecutive sentences. When one (1) or more statutory criteria is present, the imposition of consecutive sentences is within the discretion of the trial court. State v. Taylor, 739 S.W.2d 227, 228 (Tenn. 1987). While the trial court did not specifically enumerate the facts underlying the consecutive sentencing, the record supports a finding that the consecutive sentences are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender. State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). Based upon the foregoing, it is evident that the vicious and unprovoked attack upon a law enforcement officer in light of Defendant's long history of criminal convictions is such

that the consecutive sentences are reasonably related to the severity of the offense. Obviously, society should be protected from any further criminal acts by the offender. This Defendant has been provided many opportunities for reform, and the nature of his offenses do not reflect that his prior sentences have rehabilitated him in any manner. This issue is without merit.

We affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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GARY R. WADE, Presiding Judge

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JOSEPH M. TIPTON, Judge