

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1999 SESSION

FILED

June 17, 1999

**Cecil Crowson, Jr.
Appellate Court Clerk**

STATE OF TENNESSEE,)
)
Appellee,)
)
v.)
)
LEONARD RAY FERGUSON,)
)
Appellant.)

No. 02C01-9808-CC-00244
Obion County
Honorable William B. Acree, Jr., Judge
(Evading arrest)

For the Appellant:

Joseph P. Atnip
District Public Defender
121 E. Main, P.O. Box 734
Dresden, TN 38261

For the Appellee:

Paul G. Summers
Attorney General of Tennessee
and
R. Stephen Jobe
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

Thomas A. Thomas
District Attorney General
and
Allen A. Strawbridge, Jr.
Assistant District Attorney General
121 W. Main Street
Dresden, TN 38225-0218

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendant, Leonard Ray Ferguson, appeals as of right from his conviction by a jury in the Obion County Circuit Court of evading arrest, a Class D felony. The defendant was sentenced as a Range III, persistent offender to eleven years confinement in the custody of the Department of Correction and was fined three thousand dollars. The defendant contends that (1) the evidence is insufficient to support the conviction for evading arrest and (2) the trial court erred in sentencing. We affirm the judgment of conviction.

At trial, Officer Jeff Jackson of the Union City Police Department testified that he was on patrol at about 2:00 a.m. on November 14, 1997. He testified that he stopped at a three-way stop at the intersection of Nash and College streets. He said the defendant's car approached the intersection, stopped, then turned. He said that as the defendant turned, the defendant looked at him and honked the horn. He stated that because he did not know if the defendant wanted to talk to him, he backed up to follow him. He said the defendant then sped away, driving through an intersection. He said people were everywhere and traffic was heavy because a night club had just closed. He said a crowd was standing at the intersection when the defendant drove through it. He said he followed the defendant and turned on his blue lights and horn.

Officer Jackson testified that the defendant drove through a stop sign and another intersection at about forty-five miles per hour. He said traffic was heavy, and he had to stop to let some traffic pass through the intersection. He said the defendant ran two more stop signs and was speeding. He testified that the defendant came to a curve and was traveling so fast that he missed the curve and skidded across a schoolyard. He stated that the defendant came out of a parking lot at the school and continued driving at fifty to sixty miles per hour.

Officer Jackson testified that he had radioed the dispatcher for assistance, and other units reported that they were responding. He said he followed the defendant as he drove through another intersection. He said that at one point during the chase, he managed to get in front of the defendant and position his car such that the defendant would be blocked. He said the defendant ran through two more stop signs and then approached the blocked intersection. He said another officer had pulled in behind the defendant. He said the defendant stopped, and the officers got out of their cars. He testified that the defendant then accelerated toward them. He said he jumped back into his car and put it in reverse. He stated that the defendant put his car in reverse, spun around and sped away.

Officer Jackson testified that Lieutenant Michael Shannon followed behind the defendant and that he followed Lieutenant Shannon because his brakes were getting too hot. He said three police cars were following the defendant with their lights and sirens activated. He said the defendant finally came to an intersection, stopped and was arrested. He said that there was a passenger in the defendant's car and that the passenger said he had begged the defendant to stop. He said the defendant had a valid driver's license, had no warrants against him and had no contraband in the car. Officer Jackson estimated that the defendant drove through nineteen stop signs and that the chase lasted about six or seven miles. He testified on cross-examination that the people standing on the street corners had to run to get out of the way of the defendant.

Officer Kevin Buchanan of the Union County Police Department testified that he rode with Officer Jackson during the chase. He testified that when they approached the first intersection at Nash and College streets, the defendant was stopped at the intersection. He said that as the defendant proceeded through the intersection, the defendant blew his horn. He said Officer Jackson backed up to see

what the defendant wanted, and the defendant sped away. He said pedestrians were nearby and traffic was heavy. He said the defendant ran through stop signs and intersections. He said Officer Jackson tried to block the defendant at an intersection, but the defendant drove toward them. He said the defendant was eventually apprehended.

Lieutenant Michael Shannon testified that Officer Jackson began pursuit of the defendant. He stated that he caught up with them during the last five blocks of the chase. He stated that he saw the defendant run through a stop sign. He said the defendant was speeding, and he had difficulty catching him.

The defendant testified that the streets were empty that morning. He said Officer Jackson was at the stop sign first and was being nose-y by trying to see who he was. He said that the car he was driving had a Kentucky license plate and that officers would pull over cars with out-of-state plates. He admitted that he accidentally blew his horn at the intersection, but he said he did not know that Officer Jackson was following him because he did not see blue lights or hear sirens. On cross-examination, the defendant testified that he did not run any stop signs and that the officers were lying.

I. SUFFICIENCY OF THE EVIDENCE

The defendant summarily contends that the evidence is insufficient to support his conviction. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing 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, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable

inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The statute proscribing evading arrest states as follows:

It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop.

Tenn. Code Ann. § 39-16-303(b)(1). Evading arrest is a Class D felony if the flight or attempt to elude arrest creates a risk of death or injury to innocent bystanders or other third parties. Tenn. Code Ann. § 39-16-303(b)(2).

Initially, we note that the defendant makes no argument with respect to how the evidence is insufficient. It is the duty of the appellant to provide an argument “setting forth the contentions . . . with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief”

T.R.A.P. 27(a)(7). Nevertheless, our review of the record shows that the evidence sufficiently supports the conviction for evading arrest. The evidence shows that the defendant sped away from Officer Jackson and continued to speed through stop signs and intersections after Officer Jackson activated his blue lights and horn. Pedestrians had to jump out of the defendant’s path. The chase continued for six or seven miles, and the passenger in the defendant’s car said he begged the defendant to stop. During the last several blocks of the chase, the defendant was followed by three patrol cars with flashing blue lights and sirens. We hold that the evidence sufficiently supports the conviction for Class D felony evading arrest.

II. SENTENCING

The defendant contends that the trial court erred by enhancing his sentence based on the use of a deadly weapon, i.e., the car, during the offense. See

Tenn. Code Ann. § 40-35-114(9). He argues that this is an element of the offense of evading arrest. The state concedes that the trial court erred by applying this enhancement factor but argues that the eleven-year sentence is supported by the record.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, “the presumption of correctness which accompanies the trial court's action 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 this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1995).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the

principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court for a Class D felony is presumptively the minimum in the range when there are no enhancement or mitigating factors present. Tenn. Code Ann. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

At the sentencing hearing, Dale Green, an employee of the Department of Correction, testified that he prepared the presentence report. He testified that the defendant had four previous felony drug convictions and one misdemeanor drug conviction. He stated that the defendant was on probation for drug convictions at the time of the present offense. He said he could verify only two places of employment for the defendant.

Margie Martin, the defendant's mother, testified that the defendant was a good son. She testified that the defendant always did what she asked him to do and helped his grandmother. She stated that she thought the defendant would straighten up if given another chance. On cross-examination, Ms. Martin testified that the

defendant was looking for a job but was disabled because of a back injury. She testified that she supported the defendant when he was unemployed.

Randy Ferguson, the defendant's younger brother, testified that the defendant had been a good brother and had been respectful toward him. He stated that the defendant was trying to raise the defendant's four-year-old daughter.

The defendant testified that he did not run any stop signs or evade arrest. He said he would have stopped if the officers had turned on their blue lights. He testified that he had just received custody of his four-year-old daughter and that he needed to raise her because her mother was in jail.

The presentence report reveals that the defendant left high school in the ninth grade and completed a Job Corps program in 1992. He was employed for two weeks in 1995 as a janitor and for one week in 1993 washing clothes. The defendant has four convictions for possession of cocaine in 1996 and 1995, convictions for possession of marijuana and failure to appear in 1995, and two convictions for traffic offenses in 1994. The defendant was twenty-four years old at the time of sentencing.

The trial court found the following enhancement factors applicable, as listed in Tenn. Code Ann. § 40-35-114:

(1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

(8) The defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community;

(9) The defendant possessed or employed a firearm, explosive device or other deadly weapon during the commission of the offense; [and]

(13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:

. . . .

(C) Probation

The trial court found no applicable mitigating factors.

The defendant contends that the trial court erred by applying enhancement factor (9) regarding the use of a deadly weapon because that is an element of the offense of evading arrest. The state concedes that the trial court should not have applied this factor. We agree. The operation of a car while fleeing that creates a risk of death or injury is a necessary element of the offense of evading arrest. See Tenn. Code Ann. § 39-16-603(b)(1), (3). This risk necessarily contemplates that a car is being used as a deadly weapon. Thus, enhancement factor (9) is inherent in the offense.

Nevertheless, we believe that an eleven-year sentence is appropriate. The defendant has three enhancement factors and no mitigating factors. A sentence at the higher end of the defendant's range is justified by the defendant's lengthy history of criminal convictions and the fact that he was on probation at the time he committed the present offense.

In consideration of the foregoing and the record as a whole, we affirm the judgment of conviction.

Joseph M. Tipton, Judge

CONCUR:

David G. Hayes, Judge

L.T. Lafferty, Senior Judge