IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1999 SESSION

FILED

December 29, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. ~~No.M19990035~~3CCAR3CD
	)	
Appellee,	)	
	)	Williamson County
vs.	)	
	)	Hon. Timothy L. Easter, Judge
JOHNNIE SHANE CAPLEY,	)	
	)	(simple possession of marijuana,
Appellant.	)	burglary, theft over $1,000,
	)	aggravated burglary, theft over
	)	$10,000, evading arrest, auto
	)	burglary)

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Johnnie Shane Capley, appeals from his sentences imposed for his Williamson County Criminal Court convictions. The defendant pleaded guilty to simple possession of marijuana, a Class A misdemeanor; burglary, a Class D felony; theft of property valued over $1,000, a Class D felony; aggravated burglary, a Class C felony; theft of property valued over $10,000, a Class C felony; evading arrest, a Class A misdemeanor; and auto burglary, a Class E felony. After a sentencing hearing, the defendant was sentenced to an effective term of 25 years in the Department of Correction as a Range III, persistent offender. In this direct appeal, the defendant complains that his sentences were improper. Following a review of the record, the briefs of the parties, and the applicable law, we affirm the defendant's sentences.

Despite being only 25 years old at the time of his sentencing hearing, the defendant in the case at bar has an extensive criminal history. When the defendant was eighteen years old, he went on a crime spree, committing a string of auto burglaries and theft offenses over a seven month period.[1] He received an effective sentence of five years for those offenses. After serving almost two years of that sentence in the Department of Correction, the defendant was granted parole. He violated parole and served another year before his sentences expired in 1996.

In 1997, he was arrested for marijuana possession and driving with a revoked license. He was subsequently convicted of those offenses. The defendant was placed on probation for two years after his conviction on March 30, 1998 for marijuana possession. While out on bail for the marijuana possession offense and

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[1]The defendant's pre-sentence report showed that he was convicted of one aggravated burglary, nine auto burglaries, nine thefts, and one DUI offense, all committed when the defendant was eighteen years old. That same year he was also convicted of driving while his license was suspended.

during the first week of January, 1998, the defendant burglarized a church and stole various tools. He was indicted for burglary and theft of property valued over $1000.

On May 5, 1998, after being placed on probation for the marijuana possession conviction, the defendant was arrested for driving on a revoked license and simple possession of marijuana. The defendant was indicted for simple possession.[2] As a result of this arrest, his car was impounded. A week later when the defendant was picking up his car from the impound lot, he saw a VCR in the car next to his. He broke into that car and stole the VCR. The defendant was indicted for auto burglary.[3]

Less than a week after stealing the VCR, the defendant burglarized the home and workplace of Vernon Patterson. Mr. Patterson testified at the sentencing hearing that approximately $30,000 of personal property and tools were stolen. He has recovered less than one-fifth of his property, and his automobile repair business suffered because of his lack of tools. The defendant was arrested in Davidson County, and while being transported to Williamson County, he escaped from the officers when he was being transferred from a Metro patrol car to a Williamson County patrol car. He was apprehended the following day. The defendant was indicted for aggravated burglary, theft of property valued over $10,000, and evading arrest.[4]

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[2]He was also indicted for driving on a revoked license, but that charge was subsequently nolle prosequied as part of the plea agreement.

[3]The defendant's indictment included a charge for theft of property valued under $500, but the charge was subsequently nolle prosequied as part of the plea agreement.

[4]The defendant's indictment included a charge for escape, but that charge was subsequently nolle prosequied as part of the plea agreement.

While in jail awaiting trial for the above offenses, the defendant escaped from jail. His girlfriend smuggled a saw into the jail and he escaped, taking six other prisoners with him. After his recapture, he was convicted of escape and sentenced to six years as a career offender.

The defendant pleaded guilty to the above indicted offenses which were committed in 1998. As part of the plea agreement, he was to be sentenced as a Range III, persistent offender. The defendant received an effective sentence of 25 years for the five felony and two misdemeanor convictions.

Sentencing

The defendant complains that he received excessive sentences. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record 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). "The burden of showing that the sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, 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).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then

determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the 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 involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. § 40-35-103(5) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App.1993).

The record reflects that the trial court considered the relevant factors in determining the defendant's sentences. Accordingly, its determination is entitled to the presumption of correctness.

a) Sentencing Considerations

The defendant complains that the trial court improperly considered the sentencing considerations contained in Code section 40-35-103. We disagree. The trial court found that the defendant was not presumed to be a favorable candidate for alternative sentencing options because he was not an especially mitigated or standard offender. See Tenn. Code Ann. § 40-35-102(6) (1997). Also, the defendant was not eligible for probation for his sentences which exceeded eight years in length. See Tenn. Code Ann. § 40-35-303(a) (1997).

The pertinent portion of Code section 40-35-103 provides that

> (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.

Tennessee Code Annotated § 40-35-103 (1997). In the case at bar, the trial court found, and the record amply supports its finding, that the defendant has a long history of criminal conduct and measures less restrictive than confinement have been unsuccessful in the past. See Tenn. Code Ann. §§ 40-35-103(1)(A) & -103(1)(C) (1997). The trial court also found that the defendant's past record showed his lack of potential for rehabilitation. See Tenn. Code Ann. § 40-35-103(5) (1997). The record shows that the defendant violated parole and committed numerous offenses while out on bail and on probation. This issue is without merit.

b) Length of Sentence

In determining the sentences, the trial court applied three enhancement factors to all the convictions: (1) a previous history of criminal convictions and behavior, (8) a previous history of unwillingness to comply with the conditions of release in the community, and (13) the offenses were committed while on bail or probation. See Tenn. Code Ann. § 40-35-114(1), (8), (13) (1997). Also, the trial court applied enhancement factor (6) to the convictions of aggravated burglary and theft of property valued greater than $10,000. See Tenn. Code Ann. § 40-35-114(6) (1997) (the amount of damage to property was particularly great). The trial court found mitigation factor (1) applicable, but found that it was outweighed by the enhancement factors. See Tenn. Code Ann. § 40-35-113(1) (1997) (conduct neither caused nor threatened serious bodily injury).

Considering both the defendant's prior criminal conviction history and his admission of the use of marijuana and cocaine, the record adequately supports

the application of enhancement factor (1), that the "defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1) (1997). The defendant's plea agreement was for him to be sentenced as a Range III, persistent offender, although he had been convicted as a career offender for escaping from jail while awaiting trial for the current offenses. Compare Tenn. Code Ann. § 40-35-107 (1997) (persistent offender) with § 40-35-108 (1997) (career offender). Also, during the sentencing hearing, the defendant testified to illegal drug use, even while he was incarcerated. See, e.g., State v. Vanderford, 980 S.W.2d 390, 407 (Tenn. Crim. App. 1997) (holding enhancement factor (1) proper when defendant admitted to a history of drug use).

The trial court applied enhancement factor (6), that "the amount of damage to property sustained by or taken from the victim was particularly great," to the convictions of aggravated burglary and theft of property valued over $10,000. See Tenn. Code Ann. § 40-35-114(6) (1997). This court has held that normally it would be improper to further enhance a sentence by applying factor (6) to a theft offense, which is graded by the value of property taken. See Tenn. Code Ann. § 39-14-105 (theft of property valued over $10,000, but under $60,000, is a Class C felony); State v. Jeffery A. Mika, No. 02C01-9508-CR-00244 (Tenn. Crim. App., Jackson, Feb. 25, 1997) (holding that offense of theft is graded according to the amount of property taken); State v. Mike Wayne Tate, No. 03C01-9204-CR-127 (Tenn. Crim. App., Knoxville, Mar. 4, 1993) (holding that value of property taken is element of theft). However, there was testimony by the victim of these offenses that he suffered particularly great losses other than the value of the property taken. Vernon Patterson testified that his automobile repair business was shut down for three weeks and his one employee could not be paid for the month following the theft. He stated that he lost customers because his shop was shut down. He further

testified that he had to have other shops repair the cars that he was working on at the time of the aggravated burglary and theft, and this was done at his expense. Because of these great losses suffered by the victim which were separate from the value of the property taken, we conclude that the record supports the application of enhancement factor (6) to the convictions for aggravated burglary and theft of property valued over $10,000. See State v. Mason Thomas Wilbanks, No. 01C01-9804-CR-00184, slip op. at 8 (Tenn. Crim. App., Nashville, May 21, 1999) (holding factor (6) applicable because there was evidence, aside from the value of property taken, that the "losses were particularly devastating to the students and staff . . . in that school pride was diminished, educational opportunities and benefits were lost"); State v. Barbara D. Frank, No. 03C01-9209-CR-00303, slip op. at 9 (Tenn. Crim. App., Knoxville, Dec. 22, 1993) (enhancement factor (6) applied because embezzlement theft of $52,000 approached the Class B felony range and losses were particularly damaging to owners of the victim business).

The record properly supports 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(8) (1997). The defendant was released on parole from his 1992 convictions and was subsequently incarcerated in 1995 after violating parole. The defendant alleges that a sentence in which the prisoner is granted parole is not a "sentence involving release in the community." However, we are mindful of the definition of the term "parole." Code section 40-28-105(4) defines parole as "the release of a prisoner to the community . . . prior to the expiration of such prisoner's term." Tenn. Code Ann. § 40-28-102 (1997 & Supp. 1999).

The defendant argues that applying factor (8) to parole violations would be overbroad because almost all incarcerative sentences involve parole.

However, the defendant cites no authority for this argument, and we are not persuaded. We note that the purpose of enhancement factors is to provide greater penalties for those whose conduct justifies a departure from the minimum sentence. See Tenn. Code Ann. § 40-35-114, Sentencing Comm'n Comments (1997); § 40-35-210 (Supp. 1999). It is no matter that almost every incarcerative sentence involves parole because it is the defendant's conduct while on parole that determines the application of the enhancement factor. Accordingly, we conclude that factor (8) is supported by the defendant's previous parole violation. See, e.g., State v. Adams, 973 S.W.2d 224, 230 (Tenn. Crim. App. 1997) (holding enhancement factor (8) established by evidence of parole violation and supported by evidence of juvenile probation violations); State v. Kern, 909 S.W.2d 5, 7 (Tenn. Crim. App. 1993) (holding enhancement factor (8) appropriate where appellant admitted to a pending parole violation).

The defendant complains that the trial court found that enhancement factor (13) applied because the offenses were committed while the defendant was on probation. The defendant alleges that he was not on probation, but he was out on bail at the time of the offenses, and he admits that the enhancement factor applies in his case. The pre-sentence report, which was uncontested at the sentencing hearing, clearly shows that the defendant was on probation for his marijuana possession conviction when he committed all the offenses except for the two Class D felonies, which the defendant committed while he was out on bail for the marijuana possession charge. Accordingly, we conclude that enhancement factor (13) applies.

Finally, the trial court applied mitigating factor (1), that the defendant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997). The defendant testified at the sentencing hearing that

before committing the aggravated burglary, he determined that the homeowners were not home. This factor weighs in favor of the defendant.

The trial court sentenced the defendant to the maximum (15 years) for the two Class C felonies. See Tenn. Code Ann. § 39-13-103 (1997) (theft of property valued over $10,000); § 39-14-403 (1997) (aggravated burglary). For the two Class D felonies, the trial court sentenced the defendant to the mid-point (10 years). See Tenn. Code Ann. § 39-14-103 (theft of property over $1000); § 39-14-402 (burglary). The trial court sentenced the defendant to the maximum (6 years) for the single Class E felony. See Tenn. Code Ann. § 39-14-402 (1997) (auto burglary).

For the two misdemeanors, the trial court sentenced the defendant to eleven months, twenty-nine days. See Tenn. Code Ann. § 39-17-418 (1997) (simple possession of marijuana); § 39-16-603 (evading arrest); § 40-35-302 (1997) (misdemeanor sentencing). However, the trial court did not set a percentage of the sentence which must be served as required by statute. The misdemeanor sentencing statute provides that the trial court "shall fix a percentage of the sentence which the defendant shall serve." Tenn. Code Ann. § 40-35-302(d) (1997). Further, the statute provides, "If no percentage is expressed in the judgment, the percentage shall be considered zero percent (0%)." Id. Accordingly, we conclude that the misdemeanor sentences are to be served at zero percent.

Given the trial court's proper application of the enhancement and mitigating factors, we agree with the state that the defendant has failed to carry his burden of overcoming the presumption of correctness of the trial court's decision.

c) Consecutive Sentences

The defendant also complains about the imposition of consecutive sentences. Consecutive sentences may be imposed in the discretion of the trial court only upon a determination that one or more of the following criteria exist:

> (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 and mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
>
> (4) The defendant is a dangerous offender whose behavior indicates 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 with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
>
> (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). In State v. Wilkerson, 905 S.W.2d 933, 937-38 (Tenn. 1995), the supreme court imposed two additional requirements for consecutive sentencing under the dangerous offender category--the court must find consecutive sentences are reasonably related to the severity of the offenses committed and are necessary to protect the public from further criminal conduct. See State v. Lane, ___ S.W.2d ___ (Tenn. 1999).

The trial court imposed consecutive sentences based upon three grounds which are amply supported by the record. First, the trial court found the defendant to be a professional criminal based on the defendant's prior record and

lack of proof of any substantial income other than that of criminal activity. See Tenn. Code Ann. § 40-35-115(b)(1) (1997). Second, the defendant has an extensive criminal history. See Tenn. Code Ann. § 40-35-115(b)(2) (1997). Third, the defendant was on probation when the present offenses were committed, except for the two Class D felonies which were committed while he was out on bail. See Tenn. Code Ann. § 40-35-115(b)(6) (1997). Any of these grounds is sufficient to support the trial court's determination that the sentences for the Class C felony convictions are to be served consecutively to the other sentences. Additionally, ignoring the third ground above, the first two grounds amply support the trial court's determination that all of the defendant's sentences are to run consecutively with the sentence he received for his conviction of escape while awaiting trial on the instant offenses.

In consideration of the foregoing and the record as a whole, the sentence imposed by the trial court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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ALAN E. GLENN, JUDGE