IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1999 SESSION

FILED

December 16, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. # M1998 00464 CCA R3 CD
Appellee,	*	HICKMAN COUNTY
VS.	*	Honorable Donald P. Harris, Judge
HOWARD D. HICKMAN,	*	(Burglary, Vandalism, Theft)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED

JOHN EVERETT WILLIAMS, Judge

OPINION

The defendant, Howard D, Hickman, after pleading guilty, appeals from the sentences he received from the Hickman County Circuit Court. He was sentenced, as a Range I standard offender, to three consecutive four year sentences for three Class D felony offenses, and three concurrent 11 month 29 day sentences for three Class A misdemeanors, for an effective sentence of 12 years. The defendant contends that the trial court erred in ordering consecutive service of his three felony convictions. We AFFIRM the sentences imposed by the trial court.

FACTS

On October 27, 1998, the defendant pled guilty to two counts of burglary, Class D felonies; one count of theft of property over $1000, a Class D felony; and three misdemeanors. The trial court sentenced the defendant after receiving the pre-sentence report and hearing argument from both sides; both the state and the defense relied upon the presentence report and elected not to call any additional witnesses. The trial court ordered the defendant to serve four years for each of the felonies, consecutive to each other, and to serve 11 months and 29 days for each of the misdemeanors, concurrent to the felonies.

The defendant was sentenced as a Range I offender despite his lengthy criminal history, as the state failed to file proper notice for enhancement. See Tenn. Code Ann. § 40-35-202. Considering the pre-sentence report, the trial court found three enhancement factors applicable:

(1) the defendant has a previous history of criminal convictions in addition to that necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1).
(2) the offenses were committed while the defendant was on probation. See Tenn. Code Ann. § 40-35-114(13)(C); and

(3) the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. See Tenn. Code Ann. § 40-35-114(8).

The trial court found no mitigating factors. Accordingly, the court ordered the defendant to serve four years, the maximum within the applicable range, for each offense. Further, the trial court ordered these sentences to run consecutively; in support of this order of consecutive service, the trial court found that:

(1) the defendant has an extensive criminal record. See Tenn. Code Ann. § 40-35-115(b)(2).
(2) the sentence was necessary to protect the public from further criminal activity by the defendant; and
(3) the sentence was reasonably related to the seriousness of the offenses.

ANALYSIS

The defendant argues that imposition of consecutive service was improper and excessive. We disagree.

When a defendant challenges the length or manner of service of a sentence, this Court's review of the sentence imposed by the trial court is de novo with a presumption of correctness. See Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. See State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review id de novo. See State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper.

See Tenn. Code Ann. § 40-35-401(d). In conducting our review, we are required,

pursuant to Tenn. Code Ann. § 40-35-210, to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing;
> (2) [t]he presentence report;
> (3) [t]he principles of sentencing and arguments as to sentencing alternatives;
> (4) [t]he nature and characteristics of the criminal conduct involved;
> (5) [e]vidence and information offered by the parties on enhancement and mitigating factors in 40-35-113 and 40-35-114; and
> (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

If no mitigating or enhancement factors for sentencing are present, Tenn. Code Ann. § 40-35-210(c) provides that the presumptive sentence shall be the minimum sentence within the applicable range. See State v. Lavender, 967 S.W.2d 803, 806 (Tenn. 1998); State v. Fletcher, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991). However, if such factors do exist, a trial court should start at the minimum sentence within the range for enhancement factors and then reduce the sentence within the range for the mitigating factors. See Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute, as the weight given to each factor is left to the discretion of the trial court as long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record. See State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Leggs, 955 S.W.2d 845, 848 (Tenn. Crim. App. 1997). Nevertheless, should there be no mitigating factors, but enhancement factors present, a trial court may set the sentence above the minimum range. See Tenn. Code Ann. § 40-35-210(d); State v. Lavender, 967 S.W.2d at 806.

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after giving due consideration and weight to the factors and principles set out under sentencing law, and the trial court's findings of fact are 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 at 789.

Our review reveals that the trial court followed the proper sentencing procedure and did not err in ordering four year sentences on each Class D felony. The range of punishment for a Class D felony is two to four years. See Tenn. Code Ann. § 40-35-112(a)(4). In determining the sentence, the trial court found three enhancement factors and no mitigating factors; this finding is supported by the record and in accord with proper sentencing principles. Starting from the minimum sentence of two years, the trial court then enhanced each sentence to four years, the maximum within the range. We find no error in this approach.

Next, the trial court ordered these sentences to run consecutively. In this order, the defendant alleges error. Again, we disagree.

The trial court imposed consecutive service on the basis of three findings, most notably, the defendant's extensive criminal history. See Tenn. Code Ann. § 40-35-115(b)(2). This criminal history included, among others, nineteen previous felony convictions, over twenty convictions for public intoxication, three convictions for driving under the influence, and several probation revocations. This criminal history plainly supports the trial court's determination, and while the defendant is heard to complain that consecutive assignment was error, he has not presented any convincing argument. We also note that the defendant was sentenced while on probation for another felony offense. See Tenn. Code Ann. § 40-35-115(b)(6). Accordingly, we find no error.

CONCLUSION

We AFFIRM the sentences imposed by the trial court.

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JOHN EVERETT WILLIAMS, Judge

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JOHN H. PEAY, Judge

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DAVID H. WELLES, Judge