IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1999 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9902-CC-00034**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**HON. DONALD P. HARRIS,**
RICHARD L. MEYER,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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(At Hearing Only)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant pled nolo contendere to one count of statutory rape and one count of sexual battery. Pursuant to a plea agreement, the defendant was sentenced to a term of two years for each count. After a sentencing hearing, the trial court ordered the defendant's sentences to run consecutively. The defendant now appeals the trial court's order of consecutive sentences. After a review of the record and applicable law, we find no merit to the defendant's contentions and thus affirm the judgment of the lower court.

The defendant's convictions stem from his involvement with his girlfriend's daughter, C.M., and C.M.'s babysitter, J.O.[1] According to an interview with C.M., conducted when she was seven years old, the defendant had, on numerous occasions, put his hand on and inside her "privates" while she and her mother were living with him. The defendant had also put his tongue inside her mouth in an effort to "french kiss" her. C.M. further stated that the defendant would not wash his hands before these encounters and, as a result, she developed a rash around her "privates." C.M. stated that the defendant had strong hands and it hurt when he touched her. According to C.M. she said "ouch" while the defendant touched her but he did not stop. C.M. also said that it hurt to urinate after these encounters. According to C.M's mother, Patricia Garcia, C.M. had complained of pain in her "privates" and Ms. Garcia noticed a discharge from C.M.'s genital area during the time of the abuse. Ms. Garcia also noticed a rash in the same area. Ms. Garcia further testified that, as a result of this abuse, C.M. has nightmares, is scared of men, and is afraid of dirty hands.

The defendant's second victim, J.O., was seventeen years old at the time of her sexual encounter with him. According to J.O.'s testimony at the sentencing hearing, she was babysitting C.M. and the defendant's son on June 27, 1995, when the defendant came home around 11:00 p.m. in an intoxicated state. The defendant went downstairs, sat on the couch with J.O., and began fondling her. The defendant then performed oral sex on J.O. During this entire incident, J.O. repeatedly said "no" to the

[1] It is the policy of this Court to use the initials, rather than the full name, of victims who are minors.

defendant. After several attempts to persuade J.O. to accompany him, the defendant retreated upstairs.

The defendant now contends that the trial court erred in ordering him to serve his sentences consecutively. When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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). As it is not clear that the trial court considered these principles, our review is de novo without a presumption of correctness.

It appears that the trial court imposed consecutive sentences under T.C.A. § 40–35-115(b)(5), which states:

> (b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:
>
> (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[.]

From our review of the testimony at the sentencing hearing and the

interview with C.M., it is clear that the defendant qualifies for consecutive sentencing under T.C.A. § 40-35-115(b)(5). The evidence indicated that the defendant's sexual abuse of C.M. lasted over a period of several months, and included digital penetration of the victim. C.M.'s mother was the defendant's live-in girlfriend at the time of the abuse and C.M. lived in the same house with the defendant. The evidence further indicated that, as a result of the abuse, C.M. suffered from nightmares and a fear of men and dirty hands. Although there was only one incident involving J.O. and the defendant, the incident progressed from fondling to oral sex. J.O. testified that this incident has left her feeling disgusted and violated. In addition, J.O. worked as the babysitter for the defendant's son and C.M. Finally, the trial court specifically found that the defendant preys on young women. Based on the foregoing, we find that the trial court correctly applied T.C.A. § 40-35-115(b)(5). As such, we find the trial court did not err in imposing consecutive sentences.[2]

Accordingly, the judgment of the trial court is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

_____
JOHN EVERETT WILLIAMS, Judge

[2] As the defendant was sentenced to consecutive terms under T.C.A. § 40-35-115(b)(5), this Court need not address whether an extended sentence is necessary to protect the public or reasonably related to the severity of the offenses as is required when sentencing a dangerous offender to consecutive terms. See State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995); State v. David Keith Lane, No. 03S01-9802-CC-00013, Bradley County (Tenn. filed September 27, 1999, at Knoxville).