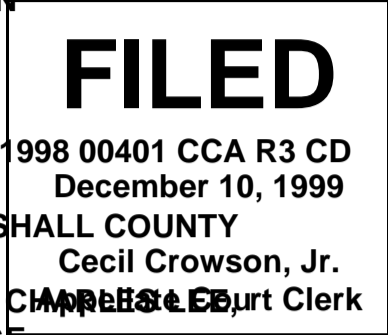


IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION



STATE OF TENNESSEE,)
)
Appellee,)
)
VS.)
)
JAMES THOMAS TYREE,)
)
Appellant.)

NO. M1998 00401 CCA R3 CD
December 10, 1999
MARSHALL COUNTY
Cecil Crowson, Jr.
HON. CHARLES E. APPELLEE, Court Clerk
JUDGE

(Sentencing)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

Appellant, James Thomas Tyree, pled guilty to vehicular assault and received a sentence of three years. In this appeal as of right, appellant contends his sentence is excessive. In addition, appellant asks this Court to remand his case to the trial court for clarification as to whether the present sentence runs consecutively to a probationary sentence, which he contends was not revoked. Upon our review of the record, we **AFFIRM** the sentence imposed by the trial court.

FACTS

On October 24, 1997, the appellant attempted to illegally pass a van, crossed the yellow line, and struck the victim's vehicle head-on. Appellant subsequently entered a plea of guilty to vehicular assault and was sentenced to three years as a Range I standard offender. The trial court found no mitigating factors, but found the following enhancement factors:

1. The defendant had 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).
2. The defendant had 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).
3. The defendant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10).
4. The felony was committed while the defendant was on bail from a prior felony of which he was later convicted. Tenn. Code Ann. § 40-35-114(13).

At the time of commission of the present offense, appellant was on bail for a felony theft charge. At the time of sentencing on the present offense, appellant had already been sentenced to a two-year probationary sentence for the felony theft. The trial court set the instant sentence to run consecutive to the prior theft

conviction. This appeal followed.

STANDARD OF REVIEW

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. 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. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

IMPROPER ENHANCEMENT

Appellant argues that the trial court improperly found he had a previous history of unwillingness to comply with the conditions of release in the community. See Tenn. Code Ann. §40-35-114(8). He claims that "previous history" refers to a history of noncompliance prior to the commission of the instant offense.

Appellant cites State v. Hayes, 899 S.W.2d 175 (Tenn. Crim. App. 1995), as support for his contention. We disagree. Hayes holds that the use of the present conviction, as evidence of an unwillingness to comply with the conditions of a previous release into the community, is insufficient to make the factor applicable. *Id.* at 186. The panel noted that the legislature specifically addressed such circumstances under factor 13(C) by allowing enhancement of a sentence for a felony committed while a defendant is on probation from a previous felony conviction. See Tenn. Code Ann. § 40-35-114(13)(C). However, this Court did not conclude that any previous history of noncompliance must occur before the present offense was committed.

The trial judge applied factor (8) because the probation officer testified that the appellant had failed to make the appropriate payment of court fees and restitution fees and had failed to maintain steady employment as required by the conditions of his release. Even though these failures occurred after commission of the vehicular assault, we find no error in applying factor (8).

However, even if factor (8) were excluded from the trial court's consideration, the trial court found, and the appellant does not contest, the existence of three additional enhancement factors. The appellant had a previous history of criminal conduct; the appellant committed a crime with a high risk to human life;¹ and the appellant was on bail for a felony, of which he was later convicted, when he committed the present felony offense. These factors provided sufficient basis for the trial court to sentence the appellant to three years, which is only one year above the minimum.

REVOCAION OF PRIOR SENTENCE

The appellant asks this Court to remand this case to the trial court to clarify whether his prior theft conviction is to be served on probation or active confinement.

At the sentencing hearing, the trial court made the following statement:

The Court feels that the appropriate overall sentence in this case should be five years... and for that reason, given the two year sentence that the defendant already has, the Court will sentence him to three years which will mean he will serve five years overall since these sentences must be run consecutively one with the other.

This Court ordered that the record of the prior theft case be supplemented to the present vehicular assault case. The record reflects that the appellant

¹Only one victim was listed in the indictment. However, for purposes of factor (10), the trial court considered the risk to the victim's husband and child, who were also in the vehicle and suffered injuries. Thus, this factor was properly applied.

received a two year suspended sentence for this theft. The record further reflects that the revocation warrant, which was based upon commission of the present offense, was dismissed prior to sentencing on the present offense. Thus, it is unclear whether there has been a proper revocation.

Nevertheless, the theft case is not before this Court on appeal. Even though the record of that case was a supplement to the present record, this Court has not assumed appellate jurisdiction of the theft case.

Since the instant felony offense was committed while appellant was on bail for the felony theft conviction, the instant offense must run consecutively to the theft sentence. See Tenn. R. Cr. P. 32(c)(3)(C).² The judgment in the instant case properly reflects consecutive sentencing. If the parties are uncertain as to whether the prior theft sentence has been revoked, this should be brought to the attention of the trial court.

The judgment of the trial court is **AFFIRMED**.

JOE G. RILEY, JUDGE

CONCUR:

²We note that it is possible to run a custodial sentence consecutively to a probationary sentence. In that event, the probationary sentence would recommence upon completion of the custodial sentence, including both confinement and parole. See State v. Malone, 928 S.W.2d 41, 44 (Tenn. Crim. App. 1995).

THOMAS T. WOODALL, JUDGE

JAMES CURWOOD WITT JR., JUDGE