

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

FILED
NO. M1998 00415 CCA R3 cd
December 10, 1999
DAVIDSON COUNTY
Cecil Crowson, Jr.
Appellate Court Clerk
HON. SETH NORMAN,
JUDGE

STATE OF TENNESSEE,)
)
Appellee,)
)
VS.)
)
TYRONE W. VANLIER, SR.)
)
Appellant.)

NO. M1998 00415 CCA R3 cd
December 10, 1999
DAVIDSON COUNTY
Cecil Crowson, Jr.
Appellate Court Clerk
HON. SETH NORMAN,
JUDGE
(Sentencing)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

The defendant, Tyrone W. Vanlier, Sr., was convicted by a jury of two counts of rape of a child. He was sentenced to twenty-one years on each count, with the sentences to be served consecutively. On appeal, the defendant claims the trial court erred in ordering his sentences to run consecutively. Upon our review of the record, we **AFFIRM** the sentences imposed by the trial court.

FACTS

The defendant and the victim's mother were involved in an ongoing relationship. In June of 1993, the defendant, while staying in the victim's home, raped the eleven-year-old victim anally and vaginally. He was convicted of two counts of rape of a child.

PROCEDURAL BACKGROUND

On January 17, 1996, the trial court entered its judgment imposing two consecutive sentences of twenty-one years for rape of a child. This Court affirmed the two judgments of conviction but remanded for re-sentencing on the issue of consecutive sentences. *See State v. Tyrone W. Vanlier, Sr.*, C.C.A. No. 01C01-9608-CR-00341, Davidson County (Tenn. Crim. App. filed September 19, 1997, at Nashville).

A new sentencing hearing was held on November 19, 1997, and the trial court again ordered consecutive sentences. However, at the request of the state, this Court remanded the case a second time for detailed findings. Following a second re-hearing, the trial court, for the third time, ordered the defendant's sentences to be served consecutively.

At the second re-hearing, the trial court affirmatively found that the defendant was convicted of two or more statutory offenses involving sexual abuse of a minor. The trial

judge stated that he considered the relationship between the victim and the defendant, the age of the victim, the time span of the undetected sexual activity, and the nature and the scope of the sexual activity. *See* Tenn. Code Ann. § 40-35-115(b)(5).

In addition, the trial judge read into the record the defendant's past convictions and criminal charges and stated these acts warranted a finding that the defendant was a professional criminal whose record of criminal activity was extensive. *See* Tenn. Code Ann. § 40-35-115(b)(1) and (2).

STANDARD OF REVIEW

A court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

(1) [t]he defendant is a professional criminal who has knowingly devoted himself [/herself] to criminal acts as a major source of livelihood;

(2) [t]he defendant is an offender whose record of criminal activity is extensive; [or]

...

(5) [t]he 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;

...

Tenn. Code Ann. § 40-35-115(b); *see also* State v. Black, 924 S.W.2d 912 (Tenn. Crim. App. 1995).

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).

CONSECUTIVE SENTENCES

A. Professional Criminal

Defendant contends the trial court improperly found that the defendant was a professional criminal under Tenn. Code Ann. § 40-35-115(b)(1). We agree. A professional criminal is one “who has knowingly devoted [his] life to criminal acts as a major source of livelihood”. Defendant’s present and past criminal acts were not related to a source of livelihood.

B. Extensive Record of Criminal Activity

The defendant complains the trial court improperly found he had an extensive record of criminal activity. *See* Tenn. Code Ann. § 40-35-115(b)(2). We disagree.

In the instant case, the defendant was convicted of two counts of child rape. Defendant conceded in his pre-trial statement to the authorities that he had prior sexual contact with this victim on more than one occasion. In addition, the defendant was convicted of ten offenses between 1976 and 1993, to include three counts of assault, two counts of illegal possession of drugs, driving under the influence, two gambling-related counts, and two counts of driving on a revoked or suspended license. Thus, we find this factor was appropriately considered by the trial court.

C. Sexual Abuse of a Minor

Defendant argues that he must serve his entire sentence without parole pursuant to Tenn. Code Ann. § 39-13-523(b). He argues that a forty-two year effective sentence is not “reasonably related to the severity of the offenses involved,” *see State v. Taylor*, 739 S.W.2d 227, 230 (Tenn. 1987); and is not necessary to protect the public from further criminal conduct, *see Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976). *See also State v. Wilkerson*,

905 S.W.2d 933, 939 (Tenn. 1995).

The defendant was convicted of two separate counts of rape of a child. The trial court found that the defendant met the statutory criteria for consecutive sentences as a sexual offender under Tenn. Code Ann. § 40-35-115(b)(5). The defendant admitted that over a period of two to three years, prior to June of 1993, there were other undetected acts of sexual contact with the victim. Furthermore, the defendant was in a position of authority over the young victim. He lived in the victim's home and, on the night in question, was in charge of picking the child up and caring for her until her mother returned home. Defendant threatened the child with a knife in order to accomplish the rape. In addition, even though the trial court did not consider the residual mental damage to the victim, we find that the testimony at the second sentencing hearing demonstrated that the victim was still suffering from emotional trauma because of these events. She was taken in her sleep, forced at knife point to disrobe, and then raped both anally and vaginally. The trial court properly applied Tenn. Code Ann. § 40-35-115(b)(5).

Specific findings regarding the severity of the offenses and the necessity to protect society is a prerequisite to consecutive sentencing under the "dangerous offender" category as set forth in Tenn. Code Ann. § 40-35-115(b)(4). Wilkerson, 905 S.W.2d at 938. However, such specific factual findings are not required for the other categories of Tenn. Code Ann. § 40-35-115(b). State v. Lane, __S.W.2d __ (Tenn. 1999). Nevertheless, the general principles of sentencing require that the length of sentence be "justly deserved in relation to the seriousness of the offense" and "be no greater than that deserved for the offense committed." *Id.* (citing Tenn. Code Ann. §§ 40-35-102(1) and 103(2)).

We conclude the trial court did not err in ordering the sentences to be served consecutively. The aggregate sentence was justly deserved in relation to the seriousness of the offense and was not greater than that deserved. This issue is without merit.

CONCLUSION

Based upon our review of the record, we **AFFIRM** the judgment of the trial court.

JOE G. RILEY, JUDGE

CONCUR:

THOMAS T. WOODALL, JUDGE

JAMES CURWOOD WITT, JR., JUDGE