

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1999

FILED
December 15, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

JOHN E. COX, JR.

Appellant.

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NO. M1998-00460-CCA-R3-CD

MONTGOMERY COUNTY

HON. ROBERT W. WEDEMEYER

(THEFT; PUBLIC INTOXICATION;
AGGRAVATED ASSAULT)

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Montgomery County Grand Jury indicted Defendant John E. Cox, Jr., for theft of property worth less than \$500.00, public intoxication, and aggravated assault. Defendant subsequently pled guilty to theft of property worth less than \$500.00 and public intoxication. Following a bench trial, Defendant was convicted of aggravated assault. After a sentencing hearing, the trial court sentenced Defendant as a Range I standard offender to 346 days for theft, thirty days for public intoxication, and five years for aggravated assault. In addition, the trial court ordered these three sentences to run concurrently with each other and ordered the sentence for aggravated assault to run consecutively to a sentence that had previously been imposed in another case. Defendant challenges his conviction and sentence for aggravated assault, raising the following issues:

- 1) whether the evidence was sufficient to support his conviction;
- 2) whether the trial court imposed a sentence of excessive length; and
- 3) whether the trial court erred when it imposed consecutive sentencing.

After a review of the record, we affirm the judgment of the trial court.

I. FACTS

Thomas Scott Carpenter testified that he was working at a Montgomery County Food Lion on February 25, 1997, when he saw Defendant conceal some steaks in his coat and walk past the cash registers at the front of the store. When Carpenter approached Defendant and asked where he was going with the steaks,

Defendant said, "What Steaks?" Defendant then attempted to leave and Carpenter grabbed Defendant's coat. At this point, the two men began scuffling.

Carpenter testified that during the scuffle, he saw Defendant move his hand up from his back pocket and he saw that Defendant had a closed pocketknife in his hand. Carpenter subsequently grabbed Defendant's arms and held tight and a customer knocked the knife out of Defendant's hand. Shortly thereafter, Carpenter subdued Defendant and called the police. Carpenter testified that when he saw the knife in Defendant's hand, he was afraid that he would be stabbed.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the evidence was insufficient to support his conviction for aggravated assault. We disagree.

When reviewing the trial court's judgment, this Court will not disturb a verdict of guilt unless the facts of the record and inferences which may be drawn from it are insufficient as a matter of law for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this Court is required to afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and

legitimate inferences which may be drawn from the evidence. State v. Tuttle, 914 S.W.2d 926, 932 (Tenn. Crim. App.1995). Since a verdict of guilt removes the presumption of a defendant's innocence and replaces it with a presumption of guilt, the defendant has the burden of proof on the sufficiency of the evidence at the appellate level. Tuggle, 639 S.W.2d at 914.

Under Tennessee law, a person commits Class C felony aggravated assault when he or she intentionally or knowingly displays or uses a deadly weapon to cause another to reasonably fear imminent bodily injury. Tenn. Code Ann. § 39-13-101(a), -102(a)(1) (1997). The indictment in this case alleged that Defendant committed aggravated assault by “intentionally, knowingly, or recklessly [causing] Scott Carpenter to reasonably fear imminent bodily injury, by use of a deadly weapon.” Defendant contends that the evidence was insufficient because the indictment in this case only charged him with the “use” of a deadly weapon and the proof only established that he “displayed” rather than “used” a deadly weapon.

We conclude that when the evidence is viewed in the light most favorable to the State, as it must be, the evidence was sufficient for a rational trier of fact to find beyond a reasonable doubt that Defendant had committed the offense of aggravated assault. The evidence in this case showed that after Carpenter confronted Defendant about the concealed steaks, Defendant tried to escape, Carpenter grabbed Defendant, and the two men began struggling. During the struggle, Defendant pulled a closed pocket knife out of his pocket and moved the knife in an upward direction. Carpenter then feared that he would be stabbed, so he prevented Defendant from opening the knife and a customer subsequently knocked it away.

The above evidence was clearly sufficient to support the trial judge's finding that Defendant had a deadly weapon and he intentionally or knowingly caused Carpenter to reasonably fear imminent bodily injury. See, e.g., State v. Dale E. Phillips, No. 01C01-9303-CC-00106, 1993 WL 539140, at *1 (Tenn. Crim. App., Dec. 30, 1993), perm. to appeal denied, (Tenn. 1994) (holding that evidence that defendant pulled a closed fold-out knife from his pocket when confronted by a security guard was sufficient to support a conviction for aggravated assault). We also conclude that the above evidence was sufficient to support the trial judge's finding that Defendant "used" the knife rather than just "displayed" it. We hold that when Defendant pulled a knife out of his pocket during a struggle with Carpenter and moved the knife in an upward direction intending or knowing that Carpenter would fear imminent bodily injury, Defendant was using the knife to assist his attempted escape. Thus, Defendant's conduct constitutes "use" of a deadly weapon under the relevant statute. Defendant is not entitled to relief on this issue.

III. LENGTH OF SENTENCE

Defendant contends that the trial court erroneously sentenced him to a longer term than he deserves for his aggravated assault conviction. We disagree.

"When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (1997). "However, the presumption of correctness which accompanies the trial court's action 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). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant’s statements, the nature and character of the offense, and the defendant’s potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1998); Ashby, 823 S.W.2d at 169. “The defendant has the burden of demonstrating that the sentence is improper.” Id. Because the record in this case indicates that the trial court properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

_____ In this case, Defendant was convicted of Class C felony aggravated assault. The sentence for a Range I offender convicted of a Class C felony is between three and six years. Tenn. Code Ann. § 40-35-112(a)(3) (1997). If the court finds that enhancement and mitigating factors are applicable, the court must begin with the minimum and enhance the sentence to appropriately reflect the weight of any statutory enhancement factors and then the court must reduce the sentence to appropriately reflect the weight of any mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1997).

The record indicates that in determining to impose a sentence of five years, the trial court found that the following enhancement factors applied: (1) Defendant has a history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, (8) Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the

community, and (13) Defendant committed the felony offense in this case while on probation for other felony convictions. See Tenn. Code Ann. § 40-35-114(1), (8), (13) (1997). The trial court also found one mitigating factor, that the circumstances of the offense were not extremely serious. See Tenn. Code Ann. § 40-35-113(13) (1997).

Defendant does not challenge the application of enhancement factor (1) and we conclude that it was properly applied. Indeed, the record indicates that Defendant's criminal record consists of six prior felony convictions and twenty-three prior misdemeanor convictions. In addition, Defendant does not challenge the application of enhancement factor (8) and we also conclude that it was properly applied. In fact, the record indicates that Defendant has been placed on probation numerous times and he has continued to commit new offenses while on probation. Defendant also does not challenge the application of enhancement factor (13) and we conclude that it was properly applied because the record indicates that Defendant committed the aggravated assault in this case while he was on probation for two burglary convictions from a previous case. Finally, neither Defendant nor the State contends that the trial court erred when it applied mitigating factor (13) or when it determined that no other mitigating factors were applicable. We conclude that, under the particular facts of this case, the trial court properly applied mitigating factor (13) and we also conclude that no other mitigating factors applied.

Defendant's only contention in regard to the length of his aggravated assault sentence is that the trial court erroneously gave too much weight to the enhancement factors and too little weight to the mitigating factor. However, it is well-established that the weight to be given to each enhancement and mitigating factor

is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Baxter, 938 S.W.2d 697, 705 (Tenn. Crim. App. 1996). The record indicates that in determining the weight of these factors, the trial court complied with the sentencing purposes and principles. In addition, the record supports the trial court's findings. The trial court did not abuse its discretion when it determined the weight of the enhancement and mitigating factors in this case.

In our de novo review, we conclude that three enhancement factors and one mitigating factor are applicable. Under these circumstances, we hold that a sentence of five years for aggravated assault is entirely appropriate in this case. Defendant is not entitled to relief on this issue.

IV. CONSECUTIVE SENTENCING

Defendant contends that the trial court erred when it ordered his aggravated assault sentence to run consecutively to sentences that had previously been imposed in another case. We disagree.

Consecutive sentencing is governed by Tennessee Code Annotated section 40-35-115, which provides:

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

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life 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 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). The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). In addition, consecutive sentencing may be imposed even though the sentences are for convictions arising out of separate proceedings. State v. Moore, 942 S.W.2d 570, 572 (Tenn. Crim. App. 1996).

The record indicates that the trial court based its imposition of consecutive sentencing on findings that Defendant's criminal record is extensive and that Defendant committed the aggravated assault while he was on probation. See Tenn. Code Ann. § 40-35-115(b)(2), (6) (1997). There is absolutely no question that Defendant is an offender with an extensive record of criminal activity. As previously mentioned, Defendant has six prior felony convictions and twenty-three prior misdemeanor convictions. In addition, there is no question that Defendant committed the aggravated assault while he was on probation.

Defendant concedes that the trial court properly determined that he has an extensive criminal record and that he committed the aggravated assault while he was on probation. However, Defendant contends that it was improper for the trial court to order consecutive sentencing based on the same factors (his criminal record and the fact that the offense was committed while on probation) that it used to enhance the length of his sentence. This Court has previously rejected this argument. In State v. Meeks, 867 S.W.2d 361, 377 (Tenn. Crim. App. 1993), this Court stated that “[t]here is no prohibition in the 1989 Sentencing Act against using the same facts and circumstances both to enhance sentences under applicable enhancement factors and to require those sentences to be served consecutively.”

Defendant also contends that the trial court erred in imposing consecutive sentences because it failed to determine whether the consecutive sentences (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing as required by State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). However, the Tennessee Supreme Court has recently held that “Wilkerson is limited to cases involving consecutive sentencing of ‘dangerous offenders’” pursuant to Tennessee Code Annotated section 40-35-115(b)(4). State v. David Keith Lane, --- S.W.2d ---, No. 03S01-9802-CC-00013, slip op. at 8–9 (Tenn. Sept. 27, 1999). Thus, the Wilkerson test is not applicable in this case. Defendant is not entitled to relief on this issue.

Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, Judge

CONCUR:

JOE G. RILEY, JR., Judge

JAMES CURWOOD WITT, JR., Judge