IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
November 29, 1999
Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	
	)	
VS.	)	**C.C.A. NO. 03C01-9902-CR-00077**
	)	**MONROE CO. CRIMINAL NO. 97-185**
HUGH R. LATHAM, JR.	)	**HON. STEVEN BEBB, JUDGE**
	)	
APPELLANT	)	

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OPINION FILED:_____

AFFIRMED:
JOE H. WALKER, III, Sp. JUDGE

OPINION

The defendant, Hugh R. Latham, was convicted in a jury trial in the Criminal Court for Monroe County of attempt to commit second degree murder, a Class B felony. As a Range I, standard offender, he received a sentence of eight years.

In this appeal, as of right, the defendant challenges the sufficiency of the evidence, and

the sentence received.

Sufficiency of the Evidence

It is well established that a jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the theory of the state. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); State v. Townsend, 525 S.W.2d 842, 843 (Tenn. 1975). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978).

Moreover, a verdict against the defendant removes the presumption of innocence and raises a presumption of guilt on appeal, State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973); Anglin v. State, 553 S.W.2d 616, 620 (Tenn. Crim. App. 1977), which the defendant has the burden of overcoming. State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977).

Where the sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-92 (1979); Tenn R. App. P. 13; see also, State v. Williams, 657 S.W.2d 405 (Tenn. 1983). This rule applies to findings based upon both direct and circumstantial evidence. State v. Thomas, 755 S.W.2d 838, 842 (Tenn. Crim. App. 1988).

Second degree murder is "[a] knowing killing of another." Tenn. Code Ann. § 39-13-210(a)(1). Tennessee Code Annotated § 39-12-101(a)(3) defines criminal attempt as follows:

> A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense, acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Appellant Latham was found guilty of attempt to commit second degree murder. To be guilty of criminal attempt, the defendant must have acted with the kind of culpability necessary for second degree murder. See T.C.A. § 39-12-101. Second degree murder is defined as the "knowing killing of another." T.C.A. § 39-13-210. A knowing act requires one to be "aware of the nature of the conduct" and "aware that the conduct is reasonably certain to cause the result." T.C.A. § 39-11-302(b).

In addition to the requisite mental state for second degree murder, the defendant must also act "with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be," and the

conduct must constitute a substantial step toward the commission of the offense. T.C.A. § 39-12-101(a)(3).

A rational trier of fact could reasonably conclude that defendant knowingly attempted to kill the victim and acted with the intent to complete the killing. The evidence shows that appellant and the victim were brothers. The victim wanted to borrow some money from appellant to go out, and they got into an argument. The defendant left the house that they were in, and went back to his dad's house and sneaked in and got a handgun. He came back out and ran across the hill to his sister's yard and saw the victim walking down the street. It was about 2:00 a.m. The appellant walked out into the street and approached his brother and shot him one time in the neck with a .38 pistol.

The evidence submitted to the jury consisted of the testimony of the victim, who testified that he had been in prison and been released three days before this happened. Due to his injury, he did not remember arguing with his brother or being shot. He had two operations for the injury to this neck.

An employee of the Sheriff's Office testified that sometime around 2:00 a.m. he was dispatched to the location of the shooting and found the victim lying in the road with a gunshot wound to his neck. The defendant was at the scene. The deputy called for an ambulance and secured the scene.

An officer with the police department testified that he arrived at the scene and observed the defendant with a lot of blood on him acting in an erratic manner. The defendant advised that he was involved in the incident, and was read his Miranda rights. The defendant advised the officer that the weapon could be located at his sister's house. They then went to the house to retrieve the pistol involved in the shooting. They collected other evidence at the scene.

The defendant was removed to the jail, and again an officer explained his Miranda rights, which defendant indicated he understood. Defendant signed a waiver of those rights, and gave a statement, which was taped and the tape was played to the jury. In the taped statement the defendant indicated that he and his brother had been arguing because the victim owed him some money. The defendant indicated he was pretty mad when the victim left the house. Later the victim came back to the house and wanted to borrow more money because he had a girl and wanted to go get a room. The defendant refused, and the victim and the defendant began arguing. The defendant then left and went to his dad's home and sneaked into the house and got his dad's gun and came back out and went across a hill to his sister's yard and saw the victim walking down the street. They were walking toward each other and as the defendant approached the victim the defendant shot the victim in the neck with a pistol. The victim fell into the road and the defendant fled to his sister's house where he left the pistol.

Whether defendant's acts constitute an attempt to commit a knowing killing, or attempt to

commit a killing due to adequate provocation is a question for the jury. State v. Johnson, 909 S.W.2d 461 (Tenn.Crim.App. 1995). In Johnson the court held that the intentional shooting of an unarmed man constitutes adequate evidence of second degree murder.

The court finds that the evidence was sufficient to support the verdict of the jury. This issue has no merit.

Whether the trial court erred in sentencing appellant to a term of eight years.

Appellant was convicted of a Class B felony, and was sentenced as a Range I offender to the minimum sentence of eight years. The trial court ordered the sentence to run consecutive to another judgment entered, and appellant does not challenge the consecutive sentencing. The appellant committed the attempted murder offense while he was out on bail on a cocaine charge for which he was subsequently convicted, and T.C.A. 40-20-111, and Tenn.Rule Crim.P. 32(c)(3) requires consecutive sentencing in that event.

Appellant contends that the trial court erred by failing to impose a sentence of probation.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption 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). "The burden of showing that the sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the "conclusion of the sentencing hearing," determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. § 40-35-103(5)(1990); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The record demonstrates that the trial court considered the relevant principles and factors

and made findings of fact. Accordingly, we review its sentencing determinations with a presumption of correctness.

Appellant committed this attempt at second degree murder while out on bail on a cocaine felony charge, and while this attempted murder charge was pending, he was convicted of three additional cocaine felony charges.

The presentence report indicates that he was unemployed, and had a past history of usage of marijuana and steroids.

This court can not say that the trial judge abused his discretion in denying probation to this defendant.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____
JOE H. WALKER, Sp. JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
ALAN E. GLENN, JUDGE

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JUDGMENT

Came the appellant, Hugh R. Latham, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Monroe County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is AFFIRMED, and the case is remanded to the Criminal Court of Monroe County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

PER CURIAM

DAVID G. HAYES, JUDGE
ALAN E. GLENN, JUDGE
JOE H. WALKER, III, Sp. JUDGE