

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1999

**FILED**  
November 29, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
Appellee, )

C.C.A. NO. )  
M1999 00954 C )

VS. )

STEWART COUNTY )

DONALD WALLACE, )  
Appellant. )

HON. LEONARD W. MARTIN, )  
JUDGE )  
(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF STEWART COUNTY

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

## OPINION

The Defendant, Donald Wallace, appeals from the judgment of the trial court sentencing him to twenty-five years for the offense of second degree murder. He argues that the trial court erred in its consideration of enhancement and mitigating factors. We affirm the judgment of the trial court.

The Defendant was originally convicted by a jury of first degree premeditated murder. The murder victim was the Defendant's girlfriend, who was killed by a close-range shotgun blast to the face and head. Although the victim's body was found near an old logging road in a wooded area, the evidence demonstrated that the body was placed there after she was killed at a different location. The Defendant appealed his conviction, and this Court modified the conviction to second degree murder because we concluded that the evidence did not support a finding of premeditation beyond a reasonable doubt. The case was therefore remanded to the trial court for the Defendant to be sentenced for the offense of second degree murder. See State v. Donald Wallace, No. 01C01-9711-CC-00526, 1998 WL 670627 (Tenn. Crim. App., Nashville, Sep. 30, 1998).

After remand, the trial court conducted a sentencing hearing during which, in addition to the evidence presented at the original trial, the trial judge considered information contained in the presentence report along with victim impact testimony from the victim's daughter and statements from friends and family members who testified in support of the Defendant. At the conclusion of the sentencing hearing, the trial court imposed the maximum sentence of twenty-five years, which is to be served at 100% as a violent offender. On appeal, the Defendant argues that his sentence should be reduced to eighteen years.

When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court’s findings of fact are adequately supported by the record, then we may not modify 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 sentencing the Defendant, the trial found that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1). The nine prior felony convictions along with the two prior misdemeanor convictions listed in the presentence report certainly support the application of

this factor. The court next noted that at the time of the commission of the murder, the Defendant was on probation as a result of certain felony convictions, as set forth in the presentence report. See Tenn. Code Ann. § 40-35-114(13)(C). The court further found that the Defendant had possessed a firearm during the commission of the offense. See Tenn. Code Ann. § 40-35-114(9). The trial judge also observed that the Defendant demonstrated an unwillingness to comply with the conditions of a sentence involving release in the community, again noting that the murder was committed while the Defendant was on federal probation. See Tenn. Code Ann. § 40-35-114(8). The court finally pointed out that during the pendency of the Defendant's appeal of his first degree murder conviction, the Defendant had escaped from custody.

On appeal, the Defendant argues that the trial court erred in applying as an enhancement factor that the Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. His argument is apparently based on the fact that the trial court found the existence of this factor based upon the Defendant's commission of the murder while he was on federal probation. This Court has previously noted that the commission of the offense for which a defendant is being sentenced should not make this factor applicable because there must be a previous history of unwillingness. State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995). We must conclude that to the extent the trial court relied upon this enhancement factor, the trial court erred, although the trial court properly relied upon the same factor in enhancing the Defendant's sentence based upon the commission of the murder while he was on federal probation.

Although the Defendant argues that the trial court improperly enhanced his sentence because the shotgun used to kill the victim was "sawed off," we conclude that the trial court did not enhance the Defendant's sentence based upon this fact. The court noted that the shotgun appeared to be an illegal

weapon and illegal for the Defendant to possess because he was on federal probation, but we do not believe the court considered this fact as an enhancement factor for sentencing purposes. The Defendant also argues that the trial court erred in considering the fact that the Defendant had apparently escaped from custody while his case was on appeal. This information was introduced through testimony concerning the preparation of the presentence report. The Defendant does not argue that the trial court specifically used this fact to enhance the sentence, but argues that it was improper for the court to consider it. We believe it was appropriate for the trial court to note this factor and find no indication that the trial court specifically relied upon the escape information to further enhance the sentence.

The Defendant also argues that the trial court erred by not applying as a mitigating factor that the Defendant, although guilty of the crime, committed the offense under such unusual circumstances that is unlikely that a sustained intent to violate the law motivated the criminal conduct. Tenn. Code Ann. § 40-35-113(11). We find no error by the trial court in failing to apply this mitigating factor.

We conclude that the record supports and justifies the sentence of twenty-five years as ordered by the trial court for the Defendant's conviction of second degree murder. The judgment of the trial court is accordingly affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE