

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 22, 2001 Session

STATE OF TENNESSEE v. CHARLES R. BLACKSTOCK

Appeal from the Criminal Court for Hamilton County
Nos. 230316 – 230318 Douglas A. Meyer, Judge

No. E2000-01546-CCA-R3-CD
August 27, 2001

The defendant, Charles R. Blackstock, pled guilty to especially aggravated kidnapping and two counts of rape of a child. See Tenn. Code Ann. §§ 39-13-305, 39-13-522. The trial court imposed 25-year sentences on each offense. The sentences were ordered to be served consecutively, for an effective sentence of 75 years. The sentence for especially aggravated kidnapping and the consecutive sentencing order are affirmed. Because the trial court erroneously applied certain enhancement factors to each of the sentences for rape of a child, the terms are modified to 23 years.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed as Modified

GARY R. WADE, P.J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

C. Leland Davis and David W. Wallace, Chattanooga, Tennessee, attorneys for the appellant, Charles R. Blackstock.

Paul G. Summers, Attorney General & Reporter; Angele M. Gregory, Assistant Attorney General; and Kelli L. Black and Rodney C. Strong, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The defendant was indicted on two counts of especially aggravated kidnapping and two counts of rape of a child. By plea agreement, the defendant pled guilty to one count of especially aggravated kidnapping and two counts of rape of a child. The agreement provided that the trial judge would determine the lengths of the sentences and the manner of service. At the submission hearing, the assistant district attorney summarized the facts as follows:

[T]hat on July 18th of 1999, the defendant came in contact with a child, a black female, date of birth 8/13 of 1989, in the 2600 block of Market Street where the victim was riding her bicycle. . . . The defendant got out of his vehicle, grabbed the

victim, and threw her in the trunk of his vehicle; while she was kicking and screaming he turned up the music and proceeded to drive around and ended his location at 409 Cameron Circle, at which point the rape proceeded The defendant . . . indicate[d] that he went by a washateria in that area and proceeded on the freeway, got off heading toward Red Bank near the Marriot which could have concluded five miles or plus that the child was locked in the trunk of the car On the proceeding with the rape of the child, once they reached Cameron Circle the defendant got the child out of the trunk of the vehicle, took her to an area back by the woods in a secluded area where he had the child's clothes taken off of her, he proceeded to lay her down on the ground where he made the child perform oral sex on him And in the other case on the anal penetration, he proceeded to place the child face down on the mud, penetrate her anally, and then when the child continued to scream and got up and started to run away he got into his car and proceeded to leave the scene.

At the sentencing hearing, C. T. Ward testified for the state. While he was walking on Cameron Hill near 6th Street, he heard a child calling for help. When he turned, he saw the victim,¹ completely unclothed, staggering in his direction. Several bruises and abrasions were visible. Ward flagged down a passing car and the driver contacted the police by cell phone. He helped wrap the victim in a towel and waited until the police arrived at the scene.

Janice Atkinson, of the Chattanooga Police Department child abuse division, saw the nine-year-old victim in the examination room at the hospital. The victim's face was swollen and she was bleeding from her vaginal area. Detective Atkinson described her as "traumatized" and "hysterical."

The defendant was initially questioned in November of 1999. During the course of the investigation, he gave three different statements to the police. In his second statement, which was read aloud at trial, the defendant admitted to abducting the victim and then forcing her into the trunk of his car. He claimed that when he opened the trunk, the victim had removed her clothing and said, "I'll do anything you want me to, just don't kill me. I won't tell nobody." He acknowledged that the victim performed oral sex on him and conceded that he struck the victim, explaining that he did so because she pulled his penis. He denied anal penetration. In his third statement, the defendant admitted that earlier on the date of the offenses, he had approached children on a playground in East Lake Courts but was interrupted by a mother calling to her daughter.

Linda Elligan, the Clinical Director of the Children's Advocacy Center of Hamilton County, Inc., testified that she provided psychological treatment to the victim. She described abduction by a stranger as rare and made a diagnosis of post-traumatic stress disorder. Ms. Elligan observed that the victim felt responsible for the attack because she had been warned not to talk to strangers.

¹It is the policy of this court not to use the name of a minor who has been the victim of a sex crime.

Natalie Cooper, the victim's aunt, testified that the victim was fearful following the attack. She recalled that the victim would not allow any of her own family members to see her at the hospital. Speaking on behalf of the family of the victim, Ms. Cooper asked the trial court to impose the maximum possible sentence.

Evelyn Robinson, the defendant's mother, apologized for her son's misdeeds and asked for mercy. During cross-examination by the state, she acknowledged that while the defendant completed Tennessee Preparatory School, he had engaged in disruptive behavior and had failed drug screens. Ms. Robinson stated that she did not become aware that the defendant had a drug problem until after his discharge from the Navy.

Dr. David Solovey, a clinical psychologist, testified that the defendant's problems began at the age of eight or nine, following his father's death in prison. Dr. Solovey stated that because of difficulties with his mother, the defendant ultimately moved in with the director of a community center who sexually abused him from age 11 to age 17. Dr. Solovey testified that later, while the defendant was in the Navy, he was involved in a serious automobile accident, sustaining a head injury. After the accident, the defendant became "reinvolved" with drugs and was "discharged under less than honorable conditions." It was Dr. Solovey's opinion that the defendant suffered from long-term depression, post-traumatic stress disorder, and schizotypal personality disorder. He believed that the defendant would require intensive sexual offender treatment. On cross-examination, Dr. Solovey acknowledged that the defendant had admitted that he was "out cruising" for little girls prior to the abduction and rape of the victim.

The defendant read aloud a statement wherein he expressed remorse for his actions. He specifically asked for "help" and treatment relative to his history of sexual abuse.

In sentencing the defendant, the trial court applied the following enhancement factors to both of his convictions:

- (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
- (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense;
- (6) The personal injuries inflicted upon or the amount of damage to property sustained by or taken from the victim was particularly great;
- (7) The offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement;
- (10) The defendant had no hesitation about committing a crime when the risk to human life was high; and
- (16) The crime was committed under circumstances under which the potential for bodily injury to a victim was great.

See Tenn. Code Ann. § 40-35-114. The trial court also applied enhancement factor (4), that the victim was particularly vulnerable because of age or physical or mental disability, to the aggravated kidnapping offense.

The trial court applied three mitigating factors: that the defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offenses; that the defendant cooperated with law enforcement; and that the defendant was a victim of child abuse himself. See Tenn. Code Ann. § 40-35-113(8), (13).

The trial court sentenced the defendant to the maximum 25-year term for each offense:

[S]tarting with the fact that the presumptive sentence in this case is 20 years, I believe that the enhancing factors outweigh the mitigating factors so greatly that the proper sentence would be 25 years in each of the child rape cases, and the kidnapping case, aggravated kidnapping.

The trial court ordered consecutive sentencing, concluding that the defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life. The trial court also determined that the defendant had been convicted of two or more statutory offenses involving sexual abuse of a minor, observing that "[t]he nature and scope of the sexual acts are, and the extent of the residual mental damage is particularly great, so I will order the sentences to be served consecutively." See Tenn. Code Ann. § 40-35-115(b)(4) – (5).

I

The defendant initially challenges the length of each of his sentences. 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 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); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Because the trial court failed to make adequate findings of fact, our review is de novo.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the

defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class A felony conviction, the presumptive sentence is the midpoint within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement factors but no mitigating factors, the trial court shall set the sentence at or above the midpoint. Tenn. Code Ann. § 40-35-210(d). If there are mitigating factors but no enhancement factors, the trial court shall set the sentence at or below the midpoint. Id. A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The defendant does not contest the application of enhancement factor (1), that he has a history of criminal convictions or behavior beyond that necessary to establish the appropriate range. Instead, he argues that the trial court erred by applying Tennessee Code Annotated § 40-35-114(4), that the victim was particularly vulnerable because of her age. Because the state did not present specific proof of the victim's vulnerability or show that it was a factor in the commission of the crime, as is required, this court must agree. The vulnerability enhancement factor relates more to the natural physical and mental limitations of the victim than to age. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997). The state bears the burden of showing that specific limitations made a victim particularly vulnerable or that the vulnerability was a factor in the commission of the crime. Id. Here, there was only a showing that the victim was young. When the offense is rape of a child or kidnapping that is especially aggravated due to the victim's age, that the victim is young is an element of the offense. Because that factor has been taken into account by the legislature in establishing the range of possible sentences for those offenses, courts may not use that factor to enhance. Moreover, proof age, standing alone, is insufficient to establish particular vulnerability. See State v. Collins, 986 S.W.2d 13 (Tenn. Crim. App. 1998). Thus, the trial court erred by the application of Tennessee Code Annotated § 40-35-114(4).

The defendant next argues that the trial court misapplied enhancement factor (5), that he treated the victim with exceptional cruelty during the commission of the offense. Recently, in State v. Arnett, our supreme court held that before enhancement factor (5) may be applied, the facts must support a "finding of cruelty under the statute 'over and above' what is required to sustain a conviction for [the] offense." ___ S.W.3d ___, No. E1998-00051-SC-R11-CD, slip op. at 7 (Tenn. 2001); see also State v. Poole, 945 S.W.2d at 98 (holding that facts must "support a finding of 'exceptional cruelty' that 'demonstrates a culpability distinct from and appreciably greater than that incident to' the crime") (quoting State v. Jones, 883 S.W.2d 597, 603 (Tenn. 1994)); State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995) (holding that enhancement factor (5) "requires a finding of cruelty over and above that inherently attendant to the crime"). The trial court "should state what actions of the defendant, apart from the elements of the offense, constituted "exceptional cruelty.'" Poole, 945 S.W.2d at 98 (quoting State v. Goodwin, 909 S.W.2d 35, 45 (Tenn. Crim. App. 1995)). This rule is intended to "avoid enhancing the length of [a] sentence[] based on factors the

[l]egislature took into consideration when establishing the range of punishment for the offense." Id. Exceptional cruelty is "usually found in cases of abuse or torture." State v. Williams, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1995). In Manning v. State, the defendant pled guilty to four counts of aggravated rape, armed robbery, and aggravated kidnapping. 883 S.W.2d 635, 639 (Tenn. Crim. App. 1994). While noting that other enhancement factors had been correctly applied, this court ruled that application of the exceptional cruelty enhancement factor was erroneous where the defendant had "abducted the victim in broad daylight and forced her to participate in four separate sexual acts while holding a knife to her side:"

While there is no doubt that the actions of the [defendant] were cruel, most of the facts relied upon in applying this enhancement factor to the appellant are the very facts which made these crimes aggravated under the law.

Id.

In the case at issue, the trial court applied factor (5) based upon a finding that the defendant treated the victim with exceptional cruelty "by throwing her in the trunk, by throwing her in the bushes." The record establishes that the defendant initially placed the victim in the passenger compartment of his vehicle. Because of her screaming, however, he forced her into the trunk. When she continued to scream, he played his radio loudly so as to drown out her voice. During the rape, the victim broke free. The defendant became fearful and drove away. Abandoned in the street, the victim tried to cover her naked body with her arms. The defendant admitted to striking the victim. Her face was swollen and she had several bruises and abrasions. Photographs demonstrated that the victim sustained a black eye and a split lip. There was extensive bruising and redness. In our view, the record establishes that the defendant treated the victim with cruelty "over and above" that necessary to sustain the conviction of especially aggravated kidnapping. Moreover, enhancement factor (5) was clearly applicable to each of the sentences for rape of a child.

Next, the defendant contends that the trial court erred by applying enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great. Because he has failed, however, to make any argument or cite any authority in support of his position, the issue is waived. See Tenn. Ct. Crim. App. 10(b). Furthermore, our supreme court recently affirmed that the term "personal injury" contained in enhancement factor (6) embraces psychological or emotional injuries in addition to physical injuries. See Arnett, ___ S.W.3d at ___, slip op. at 9; see also State v. Melvin, 913 S.W.2d 195, 203 (Tenn. Crim. App. 1995). Before this factor may be applied, though, the proof must demonstrate that the emotional injuries and psychological scarring were "particularly great." Melvin, 913 S.W.2d at 203. Expert proof is not necessary so long as the record includes objective examples of the victim's mental injuries. Arnett, ___ S.W.3d at ___, slip op. at 10. Here, Linda Elligan diagnosed the victim with post-traumatic stress disorder as a result of the attack. In our view, her testimony established that the victim's psychological injuries were "particularly great."

The defendant next asserts that the trial court erred by applying enhancement factor (7), that the offense involved a victim and was committed to gratify a desire for pleasure or excitement.

Because there is no evidence in the record to support its application, this court must agree. Our supreme court has held that enhancement factor (7) may be applied to rape convictions because rape is frequently committed for reasons other than sexual pleasure or excitement. See Arnett, ___ S.W.3d at ___, slip op. at 10; State v. Kissinger, 922 S.W.2d 482, 490 (Tenn. 1996); State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). The critical inquiry in determining the applicability of this factor "is the determination of the defendant's motive for committing the offense." Arnett, ___ S.W.3d at ___, slip op. at 10 (emphasis in original). Further, "[t]he motive [for commission of the offense] need not be singular for the factor to apply, so long as [the] defendant is motivated by [a] desire for pleasure or excitement." Kissinger, 922 S.W.2d at 490.

In applying enhancement factor (7), the trial court ruled as follows:

I find number 7, because the appellate courts have said that rape can be committed for reasons other than to gratify a defendant's desire for pleasure or excitement, so that is not necessarily an element included in that offense

The trial court failed to elaborate further or to articulate the specific facts supporting application of the factor. After a thorough review of the record, this court must conclude that the record does not include specific evidence, as is required, that the defendant was motivated to commit the offenses by a desire for pleasure or excitement. The state argues that Dr. David Solovey's cross-examination testimony describing the defendant as "feeling these internal impulses, and . . . crazy desires" demonstrates that the crimes were committed for pleasure or excitement. Notably, however, Dr. Solovey's testimony is devoid of any indication that the "impulses" and "desires" were related to pleasure or excitement. To the contrary, Dr. Solovey testified that the defendant suffered from a previous head injury and was a victim of prior sexual abuse. It was his opinion that the defendant suffered from depression, traumatic stress disorder, and schizotypal personality disorder. In our view, factor (7) cannot be used to enhance the sentences.

Next, the defendant claims that enhancement factor (10), that he had no hesitation about committing a crime when the risk to human life was high, should not have been applied because it is an element of especially aggravated kidnapping. He also complains that the trial court was unclear as to whether it was applying the factor solely to the especially aggravated kidnapping sentence or to the rape of a child sentences as well. The state maintains that enhancement factor (10) is applicable to all three sentences.

In our assessment, the trial court properly applied enhancement factor (10) to the especially aggravated kidnapping sentence. False imprisonment is committed when a person "knowingly removes or confines another unlawfully so as to interfere substantially with the other's liberty." Tenn. Code Ann. § 39-13-302(a). False imprisonment becomes kidnapping where it occurs "[u]nder circumstances exposing the other person to substantial risk of bodily injury," or "[w]here the confinement . . . is in a condition of involuntary servitude." Tenn. Code Ann. § 39-13-303(a). Kidnapping is aggravated when, among other things, it occurs to facilitate the commission of any

felony. Tenn. Code Ann. § 39-13-304(a)(1). The crime is especially aggravated if any of the following conditions apply:

- (1) [it is] [a]ccomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon;
- (2) the victim was under the age of thirteen (13) at the time of the removal or confinement;
- (3) [it is] committed to hold the victim for ransom or reward, or as a shield or hostage; or
- (4) the victim suffer[ed] serious bodily injury,

Tenn. Code Ann. § 39-13-305(a). Here, the defendant was initially charged with two counts of especially aggravated kidnapping, the first alleging that the victim was under the age of 13 and the second alleging that the victim suffered serious bodily injury. The judgment form reflects that the defendant pled guilty to the first count. Thus, a high risk to human life was not an element of the especially aggravated kidnapping conviction. Cf. State v. Kern, 909 S.W.2d 5 (Tenn. Crim. App. 1993) (holding that enhancement factor (10) was inapplicable to sentences for especially aggravated kidnapping and especially aggravated robbery where it was based on the defendant's use of a deadly weapon, an element of the offenses). Additionally, the record supports the application of enhancement factor (10) to the especially aggravated kidnapping sentence. During the heat of the summer, the defendant transported the victim in the locked trunk of a car. He struck her and administered several injuries during the course of the sexual assault. Any application of enhancement factor (10) to the aggravated rape sentences, however, was erroneous. The record does not support a finding that the commission of these offenses, as heinous as they were, involved a high risk to human life, as traditionally defined. Enhancement factor (10) is properly applicable only to the especially aggravated kidnapping conviction.

Finally, the defendant maintains that enhancement factor (16), that the crime was committed under circumstances where the potential for bodily injury to a victim was great, was erroneously applied because it is an "implied element" of both especially aggravated kidnapping and child rape. Criminal offenses are statutorily defined in Tennessee. See Tenn. Code Ann. § 39-11-102(a). Our criminal code is intended to replace common law offenses. Id., Sentencing Commission Comments. That the crime was committed under circumstances where the potential for bodily injury to a victim was great is not a statutory element of either of the offenses for which the defendant was convicted. See Tenn. Code Ann. §§ 39-13-305, 39-13-522. In our view, there is no "implied element."

The trial court properly applied enhancement factor (16) to the especially aggravated kidnapping. Enhancement factor (16) may be considered when the proof establishes harmful or physically threatening conduct clearly beyond what is necessary to prove the underlying offense. State v. Williams, 920 S.W.2d 247, 260 (Tenn. Crim. App. 1995). That the defendant locked the victim in the trunk of his vehicle created a great potential for bodily injury beyond that necessary to effectuate the offense. The record does not, however, support the application of enhancement factor (16) to the convictions for rape of a child. In our view, the circumstances appearing in the record,

as egregious as they are, do not establish that the defendant exposed the victim to potential bodily harm beyond that inherent in practically every child rape.

In summary, enhancement factors (1), (5), (6), (10), and (16) are applicable to the especially aggravated kidnapping sentence. Enhancement factors (1), (5), and (6) are applicable to the sentences for rape of a child. Three mitigating factors – that the defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offenses; that the defendant cooperated with law enforcement; and that the defendant was a victim of child abuse himself – are applicable to all three sentences.

The defendant was sentenced as a Range I offender. A Range I sentence for especially aggravated kidnapping and rape of a child, both Class A felonies, is not less than 15 nor more than 25 years. See Tenn. Code Ann. § 40-35-112. Beginning at the midpoint of the range and considering the relative weight of the applicable enhancement and mitigating factors, the 25-year sentence for especially aggravated kidnapping is supported by the record. In assessing the appropriate sentence for each child rape, it is our view that enhancement factors (5) and (6) are entitled to considerable weight. Because some mitigating factors exist, as the trial court found, a 23-year sentence, three years above mid-range, is warranted on each of the two convictions.

II

The defendant next contends that the trial court erred by ordering consecutive sentencing. The state argues that consecutive sentencing is warranted because the defendant is a dangerous offender and has been convicted of two or more statutory offenses involving sexual abuse of a minor.

Prior to the enactment of the Criminal Sentencing Reform Act of 1989, the limited classifications for the imposition of consecutive sentences were set out in Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976). In that case our supreme court ruled that aggravating circumstances must be present before placement in any one of the classifications. Later, in State v. Taylor, 739 S.W.2d 227 (Tenn. 1987), the court established an additional category for those defendants convicted of two or more statutory offenses involving sexual abuse of minors. There were, however, additional words of caution:

[C]onsecutive sentences should not routinely be imposed . . . and . . . the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved.

Id. at 230. The Sentencing Commission Comments adopted the cautionary language. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. The 1989 Act is, in essence, the codification of the holdings in Gray and Taylor; consecutive sentences may be imposed in the

discretion of the trial court only upon a determination that one or more of the following criteria² exist:

(1) The defendant is a professional criminal who has knowingly devoted [his] 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).

The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense," Tenn. Code Ann. § 40-35-102(1), and "no greater than that deserved" under the circumstances, Tenn. Code Ann. § 40-35-103(2); State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

In Gray, our supreme court ruled that before consecutive sentencing could be imposed upon the dangerous offender, considered the most subjective of the classifications and the most difficult to apply, other conditions must be present: (a) that the crimes involved aggravating circumstances; (b) that consecutive sentences are a necessary means to protect the public from the defendant; and (c) that the term reasonably relates to the severity of the offenses. In State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995), our high court reaffirmed those principles, holding that consecutive sentences cannot be required of the dangerous offender "unless the terms reasonably relate[] to the severity of the offenses committed and are necessary in order to protect the public (society) from further

²The first four criteria are found in Gray. A fifth category in Gray, based on a specific number of prior felony convictions, may enhance the sentence range but is no longer a listed criterion. See Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments.

criminal acts by those persons who resort to aggravated criminal conduct." The Wilkerson decision, which modified somewhat the strict factual guidelines for consecutive sentencing adopted in State v. Woods, 814 S.W.2d 378, 380 (Tenn. Crim. App. 1991), described sentencing as a "human process that neither can nor should be reduced to a set of fixed and mechanical rules." Wilkerson, 905 S.W.2d at 938.

Here, the trial court failed to make all of the findings of fact necessary to support consecutive sentencing on dangerous offender grounds:

I do find Number 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." I do find that.

While our review is, therefore, de novo, the record supports consecutive sentencing on dangerous offender grounds. In our assessment, the circumstances of these offenses demonstrate that 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. While he attributes his criminal behavior to his prior sexual abuse and his head injury, there is no indication that the defendant had pursued medical treatment for either condition. This is particularly disturbing in light of his admission that he had sought potential child victims on other occasions. In our view, consecutive sentences are necessary to protect the public from the defendant. The severity of the offenses warrants consecutive sentencing.

Further, the trial court properly relied upon Tennessee Code Annotated § 40-35-115(b)(5), that the defendant is convicted of two or more offenses involving sexual abuse of a minor, in ordering consecutive sentences. Although there are no aggravating circumstances arising from the defendant's relationship to the victim and there was no period of undetected sexual activity, the nature and scope of the sexual acts forced upon the nine-year-old victim – fellatio and anal penetration – support consecutive sentencing. In addition, testimony established that the victim sustained substantial psychological damage as a result of the attack. Accordingly, the defendant is not entitled to relief on this issue.

In summary, the two sentences for rape of a child are modified from 25 to 23 years. The 25-year sentence for especially aggravated kidnapping is affirmed. Because the trial court properly imposed consecutive sentencing, the effective term is 71 years.

GARY R. WADE, PRESIDING JUDGE