

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs July 11, 2017

**FILED**  
01/05/2018  
Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. CURTIS JOHNSON, JR.**

**Appeal from the Circuit Court for Madison County  
No. 15-477 Donald H. Allen, Judge**

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**No. W2016-02439-CCA-R3-CD**

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Following a bench trial, the Defendant, Curtis Johnson, Jr., was convicted of three counts of aggravated robbery, one count of aggravated burglary, and one count of employing a firearm during the commission of a dangerous felony and was sentenced to twenty-four years' imprisonment. The sole issue presented for our review is whether the trial court abused its discretion by imposing partially consecutive sentences. Upon review, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Lloyd R. Tatum, Henderson, Tennessee (on appeal) and Scott Kirk, Jackson, Tennessee (at trial) for the Defendant-Appellant, Curtis Johnson, Jr.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Counsel; Jerry Woodall, District Attorney General; and Aaron J. Chaplin, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

On November 2, 2015, a Madison County Grand Jury returned an eleven-count indictment against the Defendant for three counts of aggravated robbery, one count of especially aggravated kidnapping, one count of aggravated burglary, and one count of employing a firearm during the commission of a dangerous felony. The Defendant was also indicted for five counts of violating the gang enhancement statute, which were subsequently dismissed. The Defendant waived his right to a jury trial and, as relevant to the issue raised by the Defendant in this appeal, the facts presented at the August 11, 2016 bench trial were as follows:

Investigator Nicholas Donald with the Jackson Police Department testified that, on August 8, 2015, he responded to a residential burglary call. The three victims, Robert Smith, Cynthia Smith, and their grandson T.A.,<sup>1</sup> told Investigator Donald that a man had followed T.A. inside the apartment, held them at gunpoint, and taken several items, including various electronics and cell phones. Investigator Donald testified that, a few days later, one of the stolen cell phones was located in Memphis and officers determined that the Defendant was a suspect. The victims subsequently identified the Defendant in photographic lineups, and the Defendant was arrested.

Investigator Donald interviewed the Defendant on August 15, 2015. After signing a waiver of his Miranda rights, the Defendant provided the following written statement:

I was with some partners from Memphis on Saturday and we came down to Jackson. My partner, KO, was driving. Me, Shawn Wright, Montrell Henry, Floyd Smith, and Levert were all in the truck. We were in a white SUV and we stopped at a gas station off of the interstate. We got to Jackson and were riding around. Montrell and Shawn jumped out on a guy in a parking lot and robbed him. It was in the evening time and it was about to get dark[,] I believe. After that we went to Cherry Grove apartments. We were sitting in the car and everybody saw this young black male and a young female. Montrell was about to rob the young female but she drove off before he could. I got out of the car and walked toward the young black guy and Shawn, and Floyd followed me. I walked in the apartment behind the dude and saw an older dude in the house too. I locked the door behind me. I asked the young dude if he knew me and the old dude asked me if I wanted to play tennis. I pulled out a black handgun from my waist and I told them to put everything in the bag. The older guy dumped some boxes of bullets out of a bag. Everybody got on the ground. I was surprised when I seen [sic] the older lady and the little boy. I put the Xbox in the bag and the older guy put the cell phones and [i][P]ads in the bag. I took some keys too. I started going through the house and I saw a safe in the backroom. I saw a sticker on the safe that was a sheriff's department star or something. I didn't know what to think when I saw it. I got everything in the bag and left. I dropped the bags off by the dumpster and ran to jump in the truck. KO drove around and Shawn picked up the bags and put them in the truck. Montrell threw the car keys in the dumpster. We all got in the truck and got back on the highway and headed to Memphis. Montrell and me started going through bags and threw out bullets and the [i][P]ad on the highway. On Sunday I met a girl named

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<sup>1</sup> It is this court's policy to refer to minor victims by their initials.

Erica in east Memphis and gave her a ride to Northwood Hills and sold her one of the phones.

Sixteen-year-old T.A. testified that, on the evening of August 8, 2015, he was walking home to the apartment he shared with his parents and four-year-old brother, A.A. At the time, T.A.'s grandparents, Robert and Cynthia Smith, were staying at the apartment while T.A.'s parents were on vacation. T.A. said that he noticed a group of men "looking at [him]" while he was walking back, but he did not think it was unusual. T.A.'s grandfather was standing outside the apartment and, once they both walked inside, T.A. noticed the Defendant standing in the doorway. The Defendant asked T.A. if he knew him, and T.A. told him he did not. The Defendant then pulled out a gun and told T.A., A.A., and their grandparents to get on the floor. T.A. testified that the Defendant began taking items from the apartment, including an iPad, cell phones, an Xbox, a watch, car keys, and cash. The Defendant saw some ammunition and demanded guns; however, the guns were locked in a safe that T.A. could not open. After the Defendant left, T.A. locked the door and called the police. T.A. confirmed giving a description of the Defendant and a written statement to Investigator Donald. T.A. also confirmed identifying the Defendant in a photographic lineup a few days later.

T.A.'s grandparents testified similarly. Robert Smith said that the Defendant patted him down and began demanding guns. Smith said that the Defendant took his watch, cell phone, laptop, and his car and house keys. The Defendant also told the family to stay inside because he had friends waiting for them outside. Cynthia Smith corroborated her husband's testimony and said that she was holding A.A. during the robbery.

At the conclusion of the bench trial, the trial court found the Defendant guilty of all three counts of aggravated robbery, aggravated burglary, and employing a firearm during the commission of the aggravated burglary. The trial court found the Defendant not guilty of the especially aggravated kidnapping of A.A.

**Sentencing Hearing.** At the sentencing hearing, the Defendant's presentence report was admitted without objection. The State presented testimony from Investigator Michael Byrd with the Jackson Police Department Gang Enforcement Team. Investigator Byrd testified that he was present for the Defendant's arrest in Memphis and that, on the way to Jackson, the Defendant told Investigator Byrd that he was a member of a gang known as the "Unknown Vice Lords." Investigator Byrd said that he confirmed the Defendant's gang membership with the Memphis Gang Unit.

At the hearing, Investigator Byrd identified multiple photographs from Facebook showing the Defendant, individually and with other men, displaying guns with extended

magazines, AR-style guns, large amounts of cash, and “known Vice Lord gang sign[s].” Investigator Byrd also identified three Facebook videos – one video uploaded in July 2015 showed the Defendant assaulting another individual and the other videos showed the Defendant talking about being out on bond and displaying a firearm. On cross-examination, Investigator Byrd said that the photos and videos appeared to be posted on Facebook in 2014 and 2015 and that he could not definitively say when they were taken.

The Defendant presented testimony from his sister, Simone Dotson. Dotson testified that the Defendant’s older sister was murdered in August 2014 and that, after her death, the Defendant began abusing alcohol and drugs. Dotson said that the Defendant appeared optimistic since his incarceration and wanted to finish school and provide for his son. The Defendant’s mother, Catherine Sutton, also testified that the Defendant had “changed” and was remorseful for what he did.

The trial court sentenced the Defendant as a Range I, standard offender to twelve years for each aggravated robbery conviction, six years for the aggravated burglary conviction, and six years for employing a firearm during the commission of the aggravated burglary. The court ordered the twelve-year sentences to run concurrently and each six-year sentence to run consecutively to the twelve-year sentence for an effective sentence of twenty-four years. The trial court also ordered the Defendant to pay restitution to the victims. This timely appeal followed.

### **ANALYSIS**

The Defendant argues that the trial court erred by imposing a partially consecutive sentence as to his aggravated burglary conviction based upon the trial court’s finding that the Defendant is a dangerous offender and has an extensive criminal record. He also states that he did not raise the issue in his motion for new trial and that this court may only review the issue for plain error. The State argues that the trial court properly sentenced the Defendant. We note that issues related to sufficiency of the evidence and sentencing are not waived by failure to raise them in a motion for new trial, and we proceed to address the Defendant’s challenge to sentencing. Tenn. R. App. P. 3; State v. Bough, 152 S.W.3d 453, 460 (Tenn. 2004) (citing State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997)).

Where a defendant is convicted of one or more offenses, the trial court has discretion to decide whether the sentences shall be served concurrently or consecutively. T.C.A. § 40-35-115(a). The Tennessee Supreme Court has held, “[T]he abuse of discretion standard, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations.” State v. Pollard, 432 S.W.3d 851, 860 (Tenn. 2013). A trial court may order multiple offenses to be served consecutively if it finds by

a preponderance of the evidence that a defendant fits into at least one of seven categories enumerated in code section 40-35-115(b). Those categories include:

(1) The defendant is a professional criminal who has knowingly devoted the 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.

T.C.A. § 40-35-115(b). An order of consecutive sentencing must be “justly deserved in relation to the seriousness of the offense.” Id. § 40-35-102(1); see State v. Imfeld, 70 S.W.3d 698, 708 (Tenn. 2002). In addition, the length of a consecutive sentence must be “no greater than that deserved for the offense committed.” T.C.A. § 40-35-103(2); Imfeld, 70 S.W.3d at 708.

Here, the trial court ordered consecutive sentencing based on section 40-35-115(b)(4), that “[t]he 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.” Regarding this subsection, the Tennessee Supreme Court has stated:

Proof that an offender's behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, is proof that the offender is a dangerous offender, but it may not be sufficient to sustain consecutive sentences. Every offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences; consequently, the provisions of [s]ection 40-35-115 cannot be read in isolation from the other provisions of the Act. The proof must also establish that the terms imposed are reasonably related to the

severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender.

Pollard, 432 S.W.3d at 863 (quoting State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)). In other words, the record must show that “the aggregate sentence is ‘reasonably related to the severity of the offenses’ and ‘necessary in order to protect the public from further criminal acts.’” Pollard, 432 S.W.3d at 863 (quoting Wilkerson, 905 S.W.2d at 938); see State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999) (stating that the need for the trial court to make additional findings before imposing consecutive sentences pursuant to this factor stems from the fact that the dangerous offender category “is the most subjective and hardest to apply”).

The record shows that the trial court made the additional factual findings required to determine that the Defendant was a dangerous offender. In considering the first factor, whether the aggregate sentence was reasonably related to the severity of the offenses, the trial court found the circumstances surrounding the offenses were aggravated because the Defendant robbed three individuals at gunpoint in front of four-year-old A.A. The trial court also considered that the Defendant’s “sole purpose” in coming to Madison County was to commit the aggravated robberies and then return to Memphis.

In support of the second factor, whether the sentencing terms imposed were necessary in order to protect the public from further criminal acts by the offender, the trial court noted that the Defendant committed the instant offenses while he was out on bond for other violent offenses, aggravated assault, vandalism, and reckless endangerment. Additionally, the day after the Defendant committed the aggravated robberies, he was charged with additional aggravated assault and vandalism charges, which were dismissed. The court also considered the Facebook videos introduced at the sentencing hearing which showed the Defendant displaying weapons while out on bond and assaulting another individual. The trial court noted that the Defendant also had an extensive juvenile criminal history, had dropped out of high school, and was involved in gang activity.

Although the Defendant claims that the trial court failed to consider the two Wilkerson factors, the trial court clearly discussed both factors at length before determining that the Defendant was a dangerous offender. Accordingly, the trial court properly exercised its discretion in ordering the Defendant to serve his aggravated burglary sentence consecutively.

The Defendant also argues that the trial court improperly concluded that he has an extensive record of criminal activity. However, while the trial court generally considered the Defendant’s criminal activity, including his prior juvenile offenses, the record does

not reflect that the trial court applied Tennessee Code Annotated section 40-35-115(b)(2) as grounds for imposing a consecutive sentence. Additionally, we need not address the issue because the trial court's finding that the Defendant is a dangerous offender is alone sufficient to impose consecutive sentencing. T.C.A. § 40-35-115(b); see State v. Gann, 251 S.W.3d 446, 464 (Tenn. Crim. App. 2007) (citing State v. Adams, 973 S.W.2d 244, 231 (Tenn. Crim. App. 1997)). The Defendant is not entitled to relief.

### **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the trial court.

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CAMILLE R. McMULLEN, JUDGE