

IN THE COURT OF CRIMINAL APPEALS

AT NASHVILLE

MARCH SESSION, 2000

FILED

March 17, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)	
)	C.C.A. NO. M1999-00328-CCA-R3-CD
APPELLEE,)	
)	DAVIDSON COUNTY
VS.)	
)	HONORABLE WALTER KURTZ
RICKY DALE KEEN,)	CIRCUIT JUDGE
)	
APPELLANT.)	(AGGRAVATED BURGLARY)

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

WILLIAM B. ACREE, JR., SPECIAL JUDGE

OPINION

This is an appeal as of right by the defendant of the sentence imposed upon him. The trial judge sentenced the defendant to three consecutive sentences of 15 years each or a total of 45 years. The defendant contends the sentence is excessive.

The defendant was indicted in a 13 count indictment for the crimes of aggravated burglary and attempted aggravated burglary. He was charged with burglarizing four separate homes for the purpose of engaging in acts of self gratification while he watched female victims sleep.

Because the burglaries involved different victims, the counts were severed. The defendant was tried by a jury upon Counts 7, 8, 9, 10 and 11, and was convicted upon three of those counts.¹ After the trial, the State and the defendant reached a plea agreement upon the remaining counts. The defendant waived his right to appeal his conviction of the counts for which he was tried and entered pleas of guilty to Counts 3, 12 and 13. The State agreed to dismiss the remaining counts and to recommend a sentence of no more than 45 years. This agreement was accepted by the Court and pleas were entered accordingly.

The evidence in the record consists of the evidence presented at the guilty plea proceedings and at the sentencing hearing. The evidence can be summarized as follows:

Count 3: The defendant pled guilty to aggravated burglary at the Andrea Brachard home. The crime was on October 27, 1997. Ms. Brachard's daughter who is a juvenile had told her mother that a person had been in her bedroom on two previous occasions and had touched her leg on one of those occasions. Ms. Brachard did not initially believe her. However, on October 27th, the defendant came again, and Ms. Brachard

¹The jury returned a verdict of guilty upon Counts 7, 8, 9 and 11 and not guilty upon Count 10. However, Count 8 was merged into Count 7 as it only involved one criminal act.

saw him. A few nights later, she looked out her window and again saw the defendant. Because of the defendant, Ms. Brachard and her children moved to another part of town.

Ms. Brachard's daughter testified that as a result of the defendant's acts, her grades have suffered, she is fearful, and she has undergone treatment by a psychiatrist. She said that her life is now a roller coaster. She dislikes the area of town where they now live because it is far away from her friends and because it is not in a nice part of town. She also had to give up her pet because they could not have pets in the apartment where they live.

Counts 7, 9 and 11: The defendant was found guilty by a jury of aggravated burglary for Count 7 and attempted aggravated burglary for Counts 9 and 11. The crimes in Counts 7 and 9 occurred on October 30, 1997, and involved the home of Dorothy Williams. The crime in Count 11 involved the same home, but occurred on November 5, 1997. Mrs. Williams and her daughter both testified at the sentencing hearing of the fear which the defendant has caused them to have.

Count 12: The defendant pled guilty to aggravated burglary of the home of David and Shannon Layman. The crime occurred on September 27, 1997. Mrs. Layman was awakened by a noise and came face to face with the defendant in her living room. Mr. and Mrs. Layman both testified of the fear which the defendant has caused them to have and that this fear has caused them to move to another part of town.

Count 13: The defendant entered a plea of guilty to the aggravated burglary of the home of Tiffany Miller. The crime was on October 30, 1997. Ms. Miller was asleep and felt someone touching her breasts. When she awoke, she saw a man who she later learned to be the defendant walking out of her bedroom. Ms. Miller did not testify at the sentencing hearing.

The pre-sentence report reflects that the defendant has an extensive criminal history. He has five prior convictions of aggravated burglary; two prior convictions of second degree burglary; one prior conviction for sexual battery; one prior conviction for shoplifting; one prior conviction for loitering; one prior conviction for worthless checks; and one prior conviction for public intoxication. The felony convictions occurred during the time period of 1984 to 1997. The defendant served time in the Tennessee Department of Corrections for the felony convictions.

The defendant's mother testified at the sentencing hearing. She testified that the defendant had been abused sexually by an aunt when he was a child and raped by a male when he was a young teenager. As a result, he developed behavior problems. The defendant has undergone treatment including treatment at Middle Tennessee Mental Health Institute for two years, but none of the treatment has been successful. The defendant's psychiatrist has told her the defendant has an obsessive compulsive disorder.

At the conclusion of the sentencing hearing, the trial court found that the defendant had eight prior felony convictions and several misdemeanor convictions. On multiple occasions, he was placed on probation after serving part of his sentence in confinement. The trial court found the defendant's criminal activity to be extensive and ordered consecutive sentencing. He found that this was necessary to insure that the defendant does not commit additional crimes.

The trial court determined the defendant to be a career offender and sentenced him to mandatory sentences of 15 years for Count 3; 15 years for Counts 7, 9 and 11²; and 15 years for Counts 12 and 13. The sentences were ordered to run consecutively for a sentence of 45 years.

The defendant does not dispute the finding that he is a career

²The sentence was 15 years for the aggravated burglary conviction and 12 years for the attempted aggravated burglaries. The effective sentence was 15 years.

offender nor does he dispute that the length of the sentences are mandatory. His contention is that consecutive sentences make the sentence excessive.

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. T.C.A. §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 the 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.Cr.App. 1991). Herein, the record reflects that trial court followed the sentencing principles, and, therefore, we will conduct a de novo review of the sentence with a presumption of correctness.

Under T.C.A. §40-35-115 (b) (2), the rule has been that consecutive sentences of a defendant with a record of extensive criminal activity were proper only when the court also determined that consecutive sentences: (1) were reasonably related to the severity of the offenses committed; (2) served to protect the public from further criminal conduct of the offender; and; (3) were congruent with general principles of sentencing. State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn.1995). However, the Supreme Court in State v. Lane, 3 S.W.2d 456, 461 (Tenn.1999), held that Wilkerson was limited to cases involving consecutive sentencing of “dangerous offenders”. In other words, in cases which did not involve “dangerous offenders”, it is not necessary to determine whether the consecutive sentences were reasonably related to the severity of the offenses committed, served to protect the public from further criminal

conduct of the offender and were congruent with general principles of sentencing.

The defendant does not take exception with the trial court's finding that his record of criminal activity is extensive. The defendant has eight prior felony convictions and four prior misdemeanor convictions.

Under the decision announced in Lane, consecutive sentencing was proper. However, even under the more restrictive rule in Wilkerson, consecutive sentencing was proper in this case.

The trial court found that the consecutive sentences were necessary to protect the public from further criminal conduct by the defendant. The record supports the trial court's finding. Significantly, the defendant's prior felony convictions (seven were for burglary charges and the eighth was for sexual battery) were for the same criminal conduct involved herein. As stated by the trial judge, the defendant has been released from confinement on probation on several occasions, but none of these efforts at rehabilitation were successful. It is also relevant that the defendant repeatedly broke into the same home and then returned to that home again after he had been observed. We agree that a long period of confinement is necessary to protect the public from further criminal conduct by the defendant.

The defendant insists that a sentence of 45 years is not reasonably related to the severity of the offenses committed. The burden of proof is upon the defendant to show that the sentence is not reasonably related to the severity of the offenses. The defendant has failed to carry this burden of proof. He offers no reason to justify his position other than contending that the sentence is too long.

Finally, we find that the sentence is congruent with the general principles of sentencing. As previously stated, the sentence was imposed

in accordance with the sentencing guidelines.

For the reasons stated herein, we affirm the judgment of the trial court sentencing the defendant to three consecutive sentences of 15 years each or a total of 45 years.

William B. Acree, Special Judge

CONCUR:

Judge Joe G. Riley

Judge Alan E. Glenn