

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER SESSION, 1995

FILED
February 21, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

FRANK EDMUND ARNOLD,)

Appellant.)

C.C.A. NO. 02C01-9506-CC-00161

HARDIN COUNTY

HON. C. CREED MCGINLEY
JUDGE

(Drugs)

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

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right from a jury verdict convicting him of five counts of possession of a controlled substance with intent to sell or deliver. For these Class D felonies, he was sentenced as a Range III persistent offender to five concurrent sentences of ten years each in the Department of Correction. On this appeal, he argues that the evidence is insufficient to support a conviction of possession with the intent to sell or deliver. He also argues that the sentence imposed by the trial court was excessive. We affirm the judgment of the trial court.

On the evening of February 26, 1994, Officers Tim Cunningham and Victor Cherry of the Savannah Police Department were parked in their cars on a city street during their routine patrol shifts. Both officers testified that they noticed a pick-up truck turn onto the one-way street in front of them and park. Two people were in the truck, but neither got out of the vehicle. Officer Cherry testified that he then saw a car traveling backwards down the one-way street. The car parked near the truck.

The officers then testified that the two men in the truck then went over to the car and got in on the passenger's side, one in the front seat and the other in the back. Officer Cunningham testified that he recognized the car and the driver, who was the Defendant. The officers decided to check out the situation and drove across the street. As the officers approached the car, it began rolling, and Officer Cunningham flashed his lights. Officer Cunningham then testified that he jumped out of the patrol car and shined his flashlight inside of the Defendant's car.

Officer Cunningham saw the passenger in the front seat, later identified to be Anthony Cromwell, stuff something into his pocket. The officer testified that he saw the

passenger in the rear seat throw his billfold on the car floor. Officer Cherry also testified that he saw the front passenger move as if he were shoving something into his pocket.

The two officers removed the three men from the car and searched them. They found six bottles of pills on the Defendant. They also found twenty dollars in Mr. Cromwell's pocket, which was apparently what he had been putting in his pocket as the officers approached. While searching the car, the officers found two more bottles of pills in the glove compartment and a wallet on the rear floorboard. None of the pill bottles were open, nor were any of the pills lying out. Officer Cherry testified that all but one of the pill bottles had the Defendant's name, the doctor's name, and the prescription dates.

Kay Sheriff, a forensic scientist for the Tennessee Bureau of Investigation, testified as to the content of the drugs found in the pill bottles. The six bottles found on the Defendant were entered into evidence as Exhibit 1. The first bottle contained twenty-one dihydrocodeine pills, which is a narcotic analgesic and a Schedule III controlled substance, and one oxycodone pill, commonly known as Percoset, which is classified as a Schedule II drug. The second bottle had eight pentazocine pills, which is a narcotic analgesic and a Schedule IV drug, and seven alprazolam pills, a Schedule IV drug known as Xanax. The third bottle contained thirty-eight diazepam pills, a Schedule IV drug known as Valium. The fourth bottle contained thirty-two phentermine pills, which is a Schedule IV weight-loss stimulant.

The contents of the fifth and sixth bottles were not analyzed, but one contained a liquid and was labeled hydrocodone, which is the liquid form of dihydrocodeine. The other bottle appeared to contain the antibiotics amoxicillin and erythromycin. The two bottles that were found in the glove compartment were put into evidence as Exhibit 2.

One of these bottles tested negative for narcotics, and the other contained thirty pills classified as controlled substances.

Anthony Cromwell, one of the three men arrested that night, testified that he had called the Defendant and asked him to meet him and the other passenger, Mr. Easley, so that he could buy dope. Cromwell said that although nothing was mentioned in the phone conversation about buying pills, he specifically wanted to buy Valium. Cromwell testified that he was about to buy the pills from the Defendant with a twenty-dollar bill when the police arrived. The State read from Cromwell's statement made shortly after the arrest in which he said that the pills probably would have been two dollars each. Cromwell testified that this previous statement was correct.

The defense presented one witness, Jamie Easley, the third person arrested with the Defendant and Cromwell on the night of the offense. Mr. Easley testified that he and Cromwell were in his pick-up truck when it began to overheat. He testified that they stopped on Guinn Street and that he had asked Mr. Cromwell to call the Defendant, who runs a taxi stand, for a ride. He maintained that drugs were never mentioned when they got into the Defendant's car. The State, however, in an attempt to impeach this witness, brought up his past criminal record which included charges for possession of marijuana and a prior charge for being a drug courier.¹

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt."

¹The trial court instructed the State to limit its cross-examination and not explore the specifics of this witness's prior criminal record. The State apparently misunderstood the court's directive and questioned the witness as to what crimes he had been convicted of previously. The defense counsel, however, declined the court's offer to give a curative instruction, and the court found that any error was harmless.

T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, 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." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law,

for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

The Defendant contends that the evidence is not sufficient to support a jury verdict of guilt beyond a reasonable doubt for the offense of possession of drugs with the intent to sell or deliver. Tenn. Code Ann. § 39-17-417(a).

The Defendant admits that he had the five drugs in his possession. However, he argues that the evidence is not sufficient to prove that he possessed these pills with the intention of delivering or selling them. The Defendant contends that the police officers saw nothing to suggest that a drug sale was happening; they only saw the front passenger stuff something into his pocket and the back seat passenger throw his wallet onto the floor. The Defendant points out that in Cromwell's phone call to the him, no mention was made of drugs. The Defendant further argues that the pills in the bottles appeared to have been prescribed for him by a physician.

Although the evidence of the Defendant's guilt is circumstantial, it is a well-established principle of law that circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App.), perm. to appeal denied, id. (1988). However, the circumstantial evidence must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence so as to "exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). Additionally, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the Defendant] committed the crime." Id. at 896.

A person's intent concerning a criminal offense is a matter to be determined by the jury from all of the surrounding circumstances and facts. State v. Luellen, 867

S.W.2d 736, 739 (Tenn. Crim. App. 1992). In this jurisdiction, a jury may infer "from the amount of controlled substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." Tenn. Code Ann. § 39-6-417(a)(2); State v. Matthews, 805 S.W.2d 776 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1990).

At the time of the arrest, the Defendant was in possession of 107 pills, all controlled substances, and thirty more pills classified as controlled substances were found in the glove box of his car. Cromwell testified at trial that he called and met the Defendant for the sole purpose of buying drugs. Cromwell testified that he intended to buy twenty dollars worth of pills from the Defendant. Officer Cunningham testified that he saw Cromwell shove something into his pocket as the officer approached, and this was later discovered to be a twenty-dollar bill. Although the pill bottles had the Defendant's name on them, no evidence was presented at trial that the Defendant had a valid prescription for each type of pill found in his possession.

The jury obviously credited the testimony of the State's witnesses and, within their province as jurors, determined that the circumstantial evidence clearly indicated that the Defendant possessed these drugs with the intent to sell or deliver them. Moreover, the circumstantial evidence is consistent with the guilt of the accused. We conclude that the Defendant has failed to overcome his burden of showing that the evidence is insufficient beyond a reasonable doubt.

The Defendant suggests that the jury convicted him based on a prior arrest, made shortly before the trial for this offense, in which the Defendant was arrested for driving a truck that contained marijuana valued at more than two million dollars. However, the Defendant did not present any evidence to show that the publicity for this

arrest tainted the jury's ability to give an impartial verdict. Moreover, this issue was not previously raised by the Defendant, nor did he include this issue in his motion for new trial, thus this issue is now waived. T.R.A.P. 3(e), 36.

The Defendant next contends that the sentence imposed by the trial court was excessive. The trial court sentenced the Defendant as a Range III persistent offender, and imposed concurrent sentences of ten years incarceration on each of the five counts of possession with the intent to sell.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the 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 that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals 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 court found two enhancement factors and no mitigating factors. First, the trial court found that the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, Tennessee Code Annotated section 40-35-114(1), and second, that the Defendant has displayed a previous unwillingness to comply with the conditions of a sentence involving release into the community, Tennessee Code Annotated section 40-34-114(8).

The presentence report reflects that at the time of the offense, the Defendant was fifty-six years old and had an eighth grade education. He apparently worked for his brother, delivering sand and gravel, for several years, in addition to helping his wife in the family shoe store and operating a taxi cab service. The Defendant admitted to using drugs and alcohol in the past, but denied that he used them at the time the presentence report was made.

The Defendant's prior criminal record is extensive and includes several drug offenses, some traffic violations, illegal possession of a firearm, and several alcohol-related offenses. The Defendant also has several past violations of probation. He made no statement for the presentence report.

The trial court properly followed the sentencing procedures and placed his considerations and relevant facts concerning the imposition of the sentence on the record. Thus, the trial court's determinations are clothed with a presumption of correctness. The Defendant was sentenced for committing Class D felonies that

have a sentencing range of eight to twelve years when the person being sentenced is a persistent offender.

The Defendant's primary contention is that the trial court erred in sentencing him to a term in the mid-range of eight to twelve years, and argues that each enhancing factor should have been given equal weight, resulting in a sentence of eight years and five months. However, the Sentencing Commission has said that the enhancing and mitigating factors are to be weighted on the merits rather than by a numeric value. Tenn. Code Ann. § 40-35-210 (Sentencing Commission Comments). The trial court properly weighed the enhancing factors and stated his reasoning on the record. After considering the relevant factors of the case, the trial court set the sentence in the middle of the sentencing range. A certain amount of discretion is afforded to the trial court in determining the length and manner of service of a sentence. The Defendant has not overcome his burden of establishing that the trial court abused this discretion resulting in a sentence that was excessive or improper.

We conclude that the trial court did not err or impose an excessive sentence in ordering concurrent sentences of ten years.

The judgment of the trial court is, therefore, affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE