IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

February 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9505-CC-00150**
Appellee,	)	
	)	**HENRY COUNTY**
VS.	)	
	)	**HON. JULIAN P. GUINN ,**
ROBERT LINTON LAMAR,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was charged in the indictment with first-degree murder and was found guilty at a jury trial of second-degree murder. For this conviction he received a maximum Range I sentence of twenty-five years. It is from this sentence that the defendant appeals as of right.

In appealing his sentence, the defendant contends that it was excessive as a result of the improper application of enhancing factors and the failure to apply mitigating factors. We have reviewed the record and find no error in the sentence set by the trial judge.

There is no transcript of the trial and therefore the only evidence bearing on the sentencing issues is contained in the transcript of the sentencing hearing and the presentence report filed by the Department of Correction. It appears that the killing arose out of a drug transaction between the defendant and the victim. The record indicates that the victim was stabbed fourteen times and died four weeks later from these stab wounds. The record also establishes that at the time of the stabbing the victim was robbed of his motor vehicle.

Witnesses were offered at the sentencing hearing on behalf of the defendant who testified to the effect that the defendant was a good family man who owned his own roofing business and was a good provider for his wife and his stepchildren. The presentence report, however, indicates that the defendant owes back child support for his own child in the amount of twenty-four thousand two hundred eleven dollars and eighty cents ($24,211.80).

The presentence report also indicates that the defendant had been previously convicted of at least two drug offenses, four charges of receiving stolen property, petit larceny, and a burglary charge that was reduced to a misdemeanor. The defendant, who was thirty-six years of age at the time of preparation of the report, admitted to periodic use of marijuana and to having purchased crack cocaine on a regular basis from the victim for his own use over the past year. In addition, the defendant admitted to having been under the influence of crack cocaine at the time of the commission of this offense.

The trial court found that the defendant had a significant prior record, that he had treated the victim with exceptional cruelty and that he had employed a deadly weapon in the commission of the offense. See T.C.A. § 40-35-114(1),(5),(9). The trial court further found that there were no applicable mitigating factors.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

(1) The evidence, if any, received at the trial and the sentenc-

> ing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

Our review of the record indicates that the trial judge followed the procedures required by the Sentencing Reform Act. He obviously considered the nature and characteristics of the criminal conduct when he found that the defendant had treated

the victim with exceptional cruelty. Our review of the record concerning the numerous stab wounds inflicted on the victim supports the application of this factor. Although the defendant contends otherwise, we agree also that the defendant's prior criminal record is significant and obviously a deadly weapon was employed in the commission of this offense.

The defendant contends that his criminal history is not significant and that he has no history of violent acts. Our review of the record supports the trial judge's finding that no statutory mitigating factors existed.

The record supports the sentence imposed by the trial judge. The defendant has failed to overcome the presumption that the determinations made by the trial court are correct. The sentence of the trial court is therefore affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID H. WELLES, Judge