

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1995

FILED
March 11, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE)

Appellee,)

VS.)

DAVID LEWIS MAYES,)

Appellant.)

C.C.A. NO. 03C01-9505-CR-00134

SULLIVAN COUNTY

HON. FRANK L. SLAUGHTER
JUDGE

(Direct Appeal)

FOR THE APPELLANT:

NAT H. THOMAS
317 Shelby Street, Suite 304
Kingsport, TN 37660

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

CLINTON J. MORGAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243

H. GREELEY WELLS
District Attorney General
Blountville, TN 37617

OPINION FILED _____

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

OPINION

In this direct appeal, the Appellant challenges his sentence. He asserts that the trial court failed to place on the record the mitigating and enhancement factors which it found, failed to properly consider the proposed mitigating factors, and erroneously ordered consecutive sentences. We find this case must be remanded for resentencing for the reasons that follow. On October 19, 1994, the Sullivan County Grand Jury indicted the Appellant, David L. Mayes, for conspiracy to distribute cocaine and for possession of cocaine with the intent to deliver or sell. Approximately one month later, three more indictments were returned charging the Appellant with two counts of selling cocaine and a misdemeanor, possession of drug paraphernalia. The Appellant pled guilty to all of these charges. After a sentencing hearing, he was sentenced as a Range I Standard offender with an effective sentence of eighteen years.

All four of the felonies to which the Appellant pled guilty are class B felonies. As a range I Standard offender, the sentencing range for each offense was from eight to twelve years. The break down of the Appellant's eighteen-year sentence is as follows. For each of his two convictions for selling cocaine, he received the minimum sentence of eight years to run concurrently with one another. For both his conspiracy and possession convictions, he received two ten-year concurrent sentences. However, the judge ordered the two eight-year sentences to be served consecutive to the two ten-year sentences. Finally, for the Appellant's misdemeanor conviction, the judge ordered him to serve eleven months and twenty-nine days concurrently to his other sentences.

This court reviews criminal sentences in accordance with the Tennessee Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §40-35-117 (1990).

Our supreme court has summarized the appropriate procedure as follows:

To facilitate meaningful appellate review, the Act provides that the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990). . . . Where the trial court has complied with these provisions of the statute, the sentence is reviewed de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990).

State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994). On the other hand, no presumption of correctness applies when there is no "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 this case, the trial judge made a finding at the close of the sentencing hearing that the Appellant had a criminal history. See Tenn. Code Ann. § 40-35-114(1) (Supp. 1995). He stated that it was "not sufficient to elevate him to a Range II Offender, but nevertheless, he has a history of being involved in various law violations, assault, larceny, drug problems." Additionally, the judge had noted earlier in the hearing that the record revealed that the Appellant had a previous history of unwillingness to comply with conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(8) (Supp. 1995).^{*}

*The State indicates in its brief that the Appellant was on parole from the State of Virginia for a conviction of cocaine possession. The State's brief references p. 8 of the technical record as substantiating this allegation. (State's Brief p. 8). The record reflects however that p. 8 appears in presentence report on the Appellant's co-defendant. Appellant apparently has no prior felony convictions.

With regard to mitigators, the record is unclear as to the trial court's findings. The Appellant urged the court to consider the fact that he was instrumental in assisting the police to obtain a conviction against another drug dealer. See Tenn. Code Ann. § 40-35-113(9). The judge felt that this factor was entitled to some consideration, however, he noted the possibility that the Appellant was motivated by a plan to take over this other drug dealer's business. Additionally, the trial judge indicated that the fact that the Appellant committed the two counts of selling cocaine subsequent to his police cooperation negated the mitigating effect of any cooperation to the extent that it indicated remorse.

While the trial judge acknowledged that the Appellant was educated and possessed certain marketable skills, these factors were apparently not treated as mitigators in light of the judge's feeling that "a smart aggressive drug dealer is a real danger to this community and others."

While the trial judge apparently found two enhancement factors in this case, he was not specific as to the interplay of enhancement and mitigating factors in the final sentencing determination. Furthermore, the judge failed to make separate findings as to which enhancement factors applied to which offenses. This court has held that in cases involving multiple convictions the record should reflect, which factors were applied to which crimes, if this court is to review a sentence adequately. State v. Chrisman, 885 S.W.2d 834, 839 (Tenn. Crim. App. 1994).

In reviewing the Appellant's challenge to the trial court's decision to order consecutive sentencing, we are faced with the same problem. Because the judge did not expressly state any reason for imposing consecutive sentences, we are unable to discern the legal basis upon which he felt they were justified.

In ordering sentences to run consecutively, a trial judge is to consider the statutory criteria established in Tenn. Code Ann. § 40-35-115. See also Tenn. R. Crim. P. 32(c). In addition, our supreme court recently held that

the imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

State v. Wilkerson, 1995 WL 495921, at *7 (Tenn. 1995). The record fails to demonstrate the trial judges adherence to these principles of consecutive sentencing.

At the resentencing hearing the trial judge shall expressly state which enhancement and mitigating factors he finds applicable in this case. He shall also expressly set forth in the sentencing order which enhancement factors he finds applicable to each of the varying offenses of which the Appellant was convicted, and how the enhancement and mitigating factors relate to each other in the final sentencing determination.

Finally, should the trial judge still be of the opinion that consecutive sentencing is warranted in this case, he shall expressly set forth in the sentencing order the statutory basis in Tenn. Code Ann. § 40-35-115. See also Tenn. R. Crim. P. 32(c). The judge shall also state in the sentencing order findings indicating that an extended sentence is necessary to protect the public and that the consecutive sentences reasonably relate to the severity of the offenses. State v. Wilkerson, supra.

Because the trial court's findings are insufficient to allow for adequate review, this case must be reversed and remanded to the trial court for resentencing pursuant to the principles set forth in this opinion.

JERRY L. SMITH, JUDGE

CONCUR:

WILLIAM M. BARKER, JUDGE

DAVID G. HAYES, JUDGE