IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

January 30, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
APPELLEE,	)	No. 01-C-01-9602-CR-00053
	)	Davidson County
v.	)	Ann Lacy Johns, Judge
	)	(Sentencing)
RICHARD L. DARNELL,	)	
APPELLANT.	)	

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OPINION FILED:______________________________

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The sole issue presented for review is whether the sentence imposed by the trial court is excessive. The appellant, Richard L. Darnell, contends the sentence is excessive because the trial court erroneously used certain enhancement factors to increase the sentence within the appropriate range. After a thorough review of the record, the briefs of the parties, and the authorities governing the issue presented for review, this Court is of the opinion that the judgment of the trial court should be affirmed.

The appellant was convicted of murder in the first degree by a jury of his peers. He subsequently appealed as of right. This Court reduced the conviction for murder in the first degree to murder in the second degree. This case was remanded to the trial court for a sentencing hearing. See State v. Darnell, 905 S.W.2d 953 (Tenn. Crim. App. 1995). On remand, the trial court found that the appellant was a standard offender and imposed a Range I sentence consisting of confinement for twenty-five (25) years in the Department of Correction. The appellant has appealed the length of this sentence pursuant to Tenn. Code Ann. § 40-35-401(d).

The trial court applied four enhancement factors in determining the appropriate sentence. The court found (a) the appellant has a previous history of criminal convictions, Tenn. Code Ann. § 40-35-114(1), (b) he treated the victim with exceptional cruelty during the commission of the offense, Tenn. Code Ann. § 40-35-114(5), (c) he has a history of unwillingness to comply with the conditions of a sentence involving release in the community, Tenn. Code Ann. § 40-35-114(8), and (d) the victim was particularly vulnerable due to age and mental disability, Tenn. Code Ann. § 40-35-114(4). The appellant contends the trial court abused its discretion by applying factors (5) and (8).

Before a trial court may apply factor (4) to enhance a sentence within the appropriate range, the State of Tennessee must prove (a) the victim was particularly vulnerable, State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993), and (b) the age, physical disability, and/or mental disability of the victim was a factor during the commission of the crime. State v. Butler, 900 S.W.2d 305, 313 (Tenn. Crim. App. 1994); State v. Seals, 735 S.W.2d 849, 853-54 (Tenn. Crim. App. 1987). In the context of this case, the State of

Tennessee failed to establish either of these prerequisites.

The victim, sixty-six years of age at the time of her death, lived alone. A member of the family described the victim as being "healthy." She described the victim as "slightly, maybe mentally slow, but not, she was not retarded or unable to care for herself." In fact, the victim could "pay her bills" and was able to perform most of the routine tasks required by life.

These facts, standing alone, are not sufficient to support the use of factor (4). Consequently, the trial court abused its discretion by applying this factor to enhance the appellant's sentence within the appropriate range.

This Court has previously held factor (5) is not an element of murder. This factor has been used to enhance the sentence within the appropriate range in numerous homicide cases. See, for example, State v. Hicks, 835 S.W.2d 32, 39 (Tenn. Crim. App. 1992); State v. Robert E. Sanderson, Davidson County No. 01-C-01-9308-CR-00269 (Tenn. Crim. App., Nashville, September 27, 1995), per. app. denied (Tenn. 1996)(murder second degree). Consequently, this factor may be used in a homicide case to enhance a sentence within the appropriate range if supported by the evidence.

In the context of this case, the trial court properly applied factor (5) to enhance the appellant's sentence. The conduct of the appellant during the commission of this crime was mean-spirited, despicable, hideous, and revolting. The evidence established the appellant stabbed the victim on four occasions. An examination of the victim's body revealed she had been stabbed twice in the back as well as once in the neck and once in the abdomen. These wounds did not result in the victim's death instantaneously. To the contrary, the victim was left lying on the floor and bled profusely for a period of time. These facts are sufficient to support factor (5). They illustrate the appellant treated the victim with exceptional cruelty.

Neither the transcript of the sentencing hearing nor the presentence report reveals whether the appellant's probation or parole had been previously revoked. The State of Tennessee indicated it would establish factor (8) through the records of the clerk. However, the state did not offer any evidence. Thus, the trial court abused its discretion in using factor (8) to enhance the appellant's sentence within the appropriate range.

The record reflects a knife was used to kill the victim. Since the use of a weapon is not an element of murder in the second degree, the trial court should have used enhancement factor (9) to increase the appellant's sentence. This factor is applicable when the accused employs a dangerous weapon to commit the offense. Tenn. Code Ann. § 40-35-114(9). A knife is a "dangerous weapon" within the meaning of this factor.

The fact two enhancement factors were erroneously used to enhance the sentence does not equate to a reduction in the sentence. See State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). This Court has found enhancement factor (9) is applicable and should have been used to enhance the appellant's sentence. In addition, the appellant, who was thirty-three years of age when he was sentenced by the trial court, has an extensive history of prior convictions. He has been convicted of assault, five counts, malicious mischief, four counts, public intoxication, four counts, criminal trespass, two counts, resisting arrest, two counts, driving while license revoked, two counts, driving under the influence, disorderly conduct, contributing to the delinquency of a minor, possession of dangerous weapon with the intent to go armed, possession of stolen property, attempt to commit a felony, two counts, theft under $500, larceny, larceny from the person, and petit larceny. This factor, which was not challenged, is entitled to great weight. The trial court accorded this factor great weight in sentencing the appellant. Factor (5) is also entitled to great weight.

The judgment of the trial court is affirmed.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

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J. STEVEN STAFFORD, SPECIAL JUDGE