IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 18, 2009 Session

STATE OF TENNESSEE v. KENNETH L. PEACHMAN

Direct Appeal from the Circuit Court for Montgomery County
No. 40700798 Michael R. Jones, II, Judge

No. M2008-01057-CCA-R3-CD - Filed January 6, 2010

Defendant, Kenneth L. Peachman, along with seven co-defendants, was indicted in count one of the indictment for first degree, premeditated murder. The co-defendants' cases are not part of this appeal. Defendant entered a plea of guilty in count one to the lesser included offense of second degree murder, with sentencing left to the discretion of the trial court. Pursuant to the negotiated plea agreement, the State agreed to enter a nolle prosequi as to the remaining counts of the indictment. Defendant filed a pro se motion to withdraw his plea of guilty before sentencing, which was denied by the trial court. Following a sentencing hearing, the trial court sentenced Defendant, as a Range One, standard offender, to twenty-four years, six months. On appeal, Defendant argues that the trial court erred in denying his motion to withdraw his plea of guilty, and that the trial court erred in its sentencing determinations. After a thorough review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, Kenneth L. Peachman.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; John Wesley Carney, Jr., District Attorney General; and Helen O. Young, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

At the guilty plea submission hearing on July 18, 2007, the State offered the following factual basis in support of Defendant's plea of guilty:

> at about 3:00 a.m. in the morning of July 14, of last year – actually, it started on July 13th at a bar known as Tipper's. There was an altercation between various what we will refer to as Gang Members, one being the Birchwood Boys with which the Defendant was associated with [sic], and the Greenwood Boys, which stayed in the area of Greenwood and Caldwell Lane. There was some altercation at the Club, words were exchanged, and I think one person from the Greenwood perhaps tried to hit [Defendant] according to the statements that I have. However, everyone left. However, two of the female members that were with the Birchwood, Defendant's gang, went to the Dodge Store. As they were leaving Dodge Store, an [Alonza] Slayden, I believe is one of the individuals, he is listed as the victim on the attempted murder [charge] and I think one of the [Rugante] twins is the other individual? Maybe another one? Is driving into the parking lot of Dodge's and made a statement to the girls to the effect of, tell your boyfriends they're a bunch of bitches. If they really want to get down instead of firing shots up in the air, come to Greenwood. We are ready to die.
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> They go – the girls leave Dodge Store and go to a trailer that is occupied by all nine [sic] of these defendants at this point in time. It actually belongs to Deon Murray. There is some discussion about going to Greenwood. Another individual by the name of Ronald Cowling is called by Jecory Leonard, a co-defendant, to say we are going to go to Greenwood to take care of business. Cowling, from all accounts, including the Defendant himself, as well as Cowling, says that he told them not to go, it was a bad idea, stay home.
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> Instead, the defendants loaded up in three cars. One car was driven by Jermaine Smith, it belonged to Deontrea Milligan. Milligan was in the car with him with a gun. Another car was driven by Jecory Leonard. That car was occupied by [John] Buggs, [Tyrece] Lowry, and Deon Murray. The other car was driven by Roger Harper, and it was occupied by the Defendant and Gregory Shawn Robinson.

The cars proceeded to the area – the Greenwood area, via Edmondson Ferry Road. As they rolled up to the stop sign that intersects with Caldwell Lane, the cars – a couple of cars cross into the intersection, slowed down, and started firing shots. The victim, Sylvester Hockett, Jr., was on the porch of 208 Caldwell Lane, which is approximately [one] hundred and sixty feet from the intersection, Your Honor.

There were a couple of people closer to the corner, much closer to the cars, and the others were up, as I said, [one] hundred and fifty to [one] hundred and sixty feet. The front door of 208 was just pounded by shotgun pellets as well as other rounds. A number of casings – I think at least two shotgun shells were recovered in the intersection.

When the shots began, the people that were on the porches took off running between 208 and 210. As Mr. Hockett was running away, he was struck by what turned out to be a single shotgun pellet in the back of his head, and he died from those injuries.

All defendants were apprehended pretty shortly after this. All but two initially gave a statement implicating themselves. At that point in time, it was the belief of everyone that the victim had been killed by a .380. All individuals identified who had guns and what guns they had. All defendants put the gun in the hands of [Defendant], but for [Defendant]. We also have a witness that was a female that was simply at the trailer, is not a defendant, not a co-conspirator, and she states that when they left the trailer, the gun was in [Defendant's] hands. Since then, we have gotten statements from three of the defendants who are willing to testify that [Defendant] did, in fact have the shotgun. . . . [T]he pellet was recovered from the victim. It was a shotgun pellet and the Medical Examiner would testify the two casings, two shotgun shell casings that were found at the scene were matched to a shotgun that was recovered under the couch in the trailer of Deon Murray. . . . That's the only shotgun found and that's the only shotgun alleged to have been taken and based on the evidence recovered, that is consistent – again, there were numerous shell casings, .380's and other guns, but the shotgun shells indicated that there were two shots fired.

There was also reason to believe, and the State has not made a deal with him, but Jecory Leonard stated that when . . . [Defendant] got out of the car, he kept saying, I got him, I got him, I know I got him, I saw him fall.

The trial court explained to Defendant that under the terms of the negotiated plea agreement, the length of his sentence for second degree murder would be determined after a sentencing hearing, and Defendant stated that he understood. Defendant acknowledged that the range of punishment as a Range One, standard offender, was fifteen to twenty-five years, and that he would be required to serve one hundred percent of his sentence as a violent offender. The trial court explained the constitutional rights Defendant was foregoing by entering a plea of guilty, and Defendant stated that he understood. The trial court asked Defendant if he "unlawfully, feloniously, and knowingly kill[ed] [the victim]," and Defendant responded "Yes, sir." The trial court accepted Defendant's plea of guilty to second degree murder in count one of the indictment.

On September 12, 2007, Defendant filed a pro se motion to withdraw his plea alleging that (1) he received ineffective assistance of counsel during the guilty plea submission hearing; (2) trial counsel coerced Defendant into entering his plea; (3) his plea was involuntarily entered because of the coercion and erroneous advice of trial counsel; and (4) "exculpatory evidence (NOT SPECIFIED) (sic) was withheld." Defendant contended generally that his plea of guilty created a "manifest of injustice," and that he was "a victim of vindictive and selective prosecution."

On September 19, 2007, Defendant filed a second motion to withdraw his guilty plea, adding the allegations that trial counsel promised Defendant he would "get a lesser charge and lesser time" if he entered a plea of guilty, and that trial counsel told Defendant "his life was over with."

Defendant contended that if he proceeded to trial, "his counsel was going to mislead and withhold evidence as he is doing now." Defendant's motion to remove counsel was granted on September 26, 2007, and new counsel was appointed to represent him at the hearing on his motion to withdraw his guilty plea.

At the hearing, Defendant testified that he thought he would be required to serve thirty percent, instead of one hundred percent, of his sentence for second degree murder. Defendant stated that on the plea agreement under the section, "type felony offender," the box for "Mitigated – 30%" was checked. Defendant said that he did not understand the meaning of "open plea – 100% RED" which was handwritten under the space for "punishment" Defendant said that he spoke with trial counsel on the morning of the guilty plea submission hearing. Trial counsel told Defendant that he (Defendant) "had to think about it that day," because Defendant "had to cop out that day." Defendant reiterated that he accepted the plea offer because he thought he would serve only thirty percent of his sentence for second degree murder. Defendant said that he spoke with his mother after the hearing and learned that he would have to serve a minimum of eight-five percent of his

sentence. Defendant stated that he was not guilty of the charged offense, and he only entered a plea of guilty because he thought it was the "best deal."

On cross-examination, Defendant stated that at the guilty plea submission hearing, he did not hear the trial court inform him that he would have to serve one hundred percent of his sentence. Defendant acknowledged that his two motions to withdraw his plea did not raise an allegation concerning the percentage of his sentence he would have to serve. At the guilty plea submission hearing, Defendant also entered a plea of guilty in case no. 40601230 to solicitation of the first degree murder of Tyrece Lowry, one of Defendant's co-defendants and a potential witness against Defendant, in case no. 40700798 after a letter from Defendant to "Ruby" had been intercepted by jail personnel on July 10, 2007. Defendant denied that the charge in case no. 40601230 played any role in his decision to enter a plea of guilty in case no. 40700798.

Defendant acknowledged that he cooperated with law enforcement officials after the guilty plea submission hearing and gave information about members of his gang concerning drug deals. Defendant agreed that he hoped his cooperation would reflect favorably on the length of his sentence in case no. 40700798, the second degree murder case.

The State introduced a letter from Defendant to the victim's mother which was written on July 23, 2007, as an exhibit at the hearing. In the letter, Defendant apologized for the victim's death and asked for forgiveness. Defendant wrote, "It was two things [I] had to do and now there [sic] both complete, and that was come forward and admit my guilt like a man and write you and apologize." At the hearing, however, Defendant denied that he had killed the victim, and he stated that he was only apologizing in the letter "for being involved with the situation." Defendant said that he agreed to enter a plea of guilty to second degree murder because he knew, if he went to trial, that he would lose because his trial counsel was not "trying to help [him] at all." On redirect examination, Defendant stated he was willing to risk a higher sentence if he was allowed to withdraw his plea.

Trial counsel testified that he had practiced criminal law for approximately eighteen years and was appointed to represent Defendant on the first degree murder charges. Trial counsel said that he met with Defendant between eight and twelve times, and Defendant wrote him numerous letters. Trial counsel acknowledged that he thought Defendant would not fare well if the case proceeded to trial. Trial counsel said that there was a heightened sense of public outrage against gang violence in Montgomery County during the summer Defendant's case was scheduled for trial. Trial counsel acknowledged that he learned of the pending solicitation of first degree murder charge from the State, and he agreed not to speak with Defendant about the matter until Defendant's cell mate, who had agreed to wear a wire tape, was placed in protective custody.

Trial counsel stated that before he was charged with solicitation, Defendant wanted to proceed to trial on the murder charges. Trial counsel said that Defendant insisted that he was innocent of the charges. Trial counsel said that initially he was "not impressed with the letter" to "Ruby" because it was unsigned. Trial counsel then listened to the taped conversations between Defendant and his cell mate in which Defendant admitting writing the letter and calling for the murder of Mr. Lowry. Trial counsel met with Defendant and told him about the taped conversations. Defendant told trial counsel, "Go back and tell that lady we'll take the deal."

Trial counsel acknowledged that the initial offer of settlement included an agreed upon sentence of between fifteen and twenty years. After the solicitation charge, the State altered its offer to include an "open" plea with a sentence of between fifteen and twenty-five years, with an agreed upon sentence of eight years for the solicitation charge. Trial counsel stated that it was his recollection that Defendant was aware that the sentence for a second degree murder charge would be served at one hundred percent because Defendant repeatedly asked trial counsel to get the State to accept a lesser included offense that could be served at thirty percent. Trial counsel stated that he facilitated Defendant's decision to speak with investigating officers about gang activities in Montgomery County but later learned that Defendant had not revealed any useful information. Trial counsel stated that he had a good relationship with Defendant throughout the guilty plea submission hearing.

II. Withdrawal of Plea of Guilty

Tennessee Rule of Criminal Procedure 32(f) permits a defendant to withdraw a guilty plea under certain circumstances. If a sentence has yet to be imposed, the trial court may grant a motion to withdraw "for any fair and just reason." Tenn. R. Crim. P. 32(f)(1). The decision whether to allow the defendant to withdraw the plea is within the discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. State v. Crowe, 168 S.W.3d 731, 740 (Tenn. 2005). "An abuse of discretion exists if the record lacks substantial evidence to support the trial court's conclusion." Id. (citing Goosby v. State, 917 S.W.2d 700, 705 (Tenn. Crim. App.1995)). A guilty plea will not be set aside simply because the defendant experiences a change of heart. State v. David W. Bass, No. E2001-01146-CCA-R3-CD, 2002 WL 1305590, at *1 (Tenn. Crim. App., at Knoxville, June 14, 2002), no perm. to appeal filed (citing Ray v. State, 224 Tenn. 164, 170, 451 S.W.2d 854, 856 (1970)).

The law is well established that a guilty plea may be withdrawn if it was not knowingly, voluntarily, and understandingly made. Boykin v. Alabama, 395 U.S. 238, 242-44, 89 S. Ct. 1709 (1969). A plea which is the product of "ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats" is not voluntary. Id., 395 U.S.

at 242-43. "[T]he core requirement of Boykin is 'that no guilty plea be accepted without an affirmative showing that it was intelligent and voluntary.'" Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting Fontaine v. United States, 526 F.2d 514, 516 (6th Cir. 1975)). When examining the voluntariness of a guilty plea, a reviewing court must consider the age of the defendant, the defendant's familiarity with the criminal justice system, the reasons for his decision to plead guilty, and whether the defendant was given ample opportunity to confer with counsel about all options available to him. Blankenship, 858 S.W.2d at 904. Further, before a plea may be considered knowingly and voluntarily entered, the defendant must be informed of the rights and circumstances involved and nevertheless choose to waive or relinquish those rights. State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977).

Defendant contends that his plea of guilty to second degree murder was not knowingly entered because of his misunderstanding of the amount of time he would have to serve before he is eligible for parole, and that such misunderstanding provides a "fair and just reason" for withdrawing his plea of guilty. See State v. Virgil, 256 S.W.3d 235, 240 (Tenn. Crim App. 2008) (concluding that the defendant's pleas of guilty were not knowingly or voluntarily entered into because the record showed that the defendant misunderstood the effects of his pleas).

The State claims initially that Defendant has waived the issue pursuant to Rule 10(b) of the Tennessee Rules of the Court of Criminal Appeals by not including citations to the record in his brief. Nonetheless, we will review Defendant's issues on the merits.

The trial court found that the plea petition clearly "showed an open plea – 100 RED 15-25 years," and that the erroneously checked box classifying Defendant as a "mitigated - 30%" felony offender did "not amount to a showing to the court that Defendant misunderstood the direct statements" made to him by the trial court during the guilty plea submission hearing. The trial court observed:

> [t]he entry of the plea occurred within a few days of the defendant's finding out that his cell mate had taped his conversations and that his letter to other gang members had been intercepted. His trial date was the next week. There was nothing unusual about his circumstances; he had trapped himself into a corner. The defendant was not a first timer in the criminal justice system. He was on probation for a felony at the time that he committed this crime.

At the guilty plea submission hearing, the trial court informed Defendant that he was entering an open plea to the lesser-included offense of second degree murder with a range of punishment of fifteen to twenty-five years, and that as a violent offender, Defendant was

required to serve one hundred percent of his sentence. Trial counsel stated at the hearing that he had explained the length of time Defendant must serve his sentence, and Defendant agreed that he understood the terms of his plea. Defendant testified at the guilty plea submission hearing that he was guilty of second degree murder, and he believed it was in his best interest to enter a plea of guilty.

Based on our review, we conclude that the trial court did not abuse its discretion in denying Defendant's motion to withdraw his plea of guilty. Defendant is not entitled to relief on this issue.

III. Sentencing Issues

At the sentencing hearing, the State relied upon the presentence report which was introduced as an exhibit without objection. Defendant offered no evidence at the hearing. According to the presentence report, Defendant was eighteen years old at the time he committed the offense. Defendant reported that he dropped out of high school in the eleventh grade when he was incarcerated after committing a series of felony offenses in September and October 2005. The presentence report reflects that Defendant was convicted of these offenses as an adult even though he was seventeen years old at the time of the commission of the offenses. These offenses included theft of property valued at between one thousand and ten thousand dollars committed on September 26, 2005; aggravated assault committed on September 29, 2005; felony reckless endangerment committed on September 29, 2005; and possession of not less than one-half ounce of a Schedule VI drug, committed on October 7, 2005. Defendant received probated sentences for each conviction and was on probation at the time he committed the second degree murder which is the subject of this appeal.

In the presentence report, Defendant reported that he did not use alcohol and that he used cocaine "occasionally." Defendant stated that he began using marijuana when he was fifteen years old and would use the drug three to four times each day. Defendant reported attending anger management counseling between the ages of twelve and fourteen, but he stated that "he did not benefit from his counseling." Defendant reported a sparse work history which included one month each at two fast food restaurants and four months with a company that manufactured cabinets.

The trial court rejected Defendant's request that it consider Defendant's youth in mitigation of his sentence. See T.C.A. § 40-35-113(6). The trial court found that based on Defendant's prior experience with the criminal justice system, his youth did not cause him to lack substantial judgment in committing the offense. The trial court noted that "[t]here's absolutely nothing to show that youth had anything to do with his offense." The trial court,

however, considered Defendant's entry of a plea of guilty as a mitigating factor. See id. § 40-35-113(13).

Defendant entered a plea of guilty to second degree murder, a Class A felony. As a Range I, standard offender, Defendant is subject to a sentence range of between fifteen and twenty-five years. T.C.A. § 40-35-112(a)(1). The trial court applied enhancement factor (1) based on Defendant's prior criminal history of four felony convictions which were committed within a short period of time and a few months before he committed the current offense. The trial court placed "very heavy emphasis" on Defendant's prior convictions and gave "great weight" to the fact that a deadly weapon was used in the reckless endangerment offense. See id. § 40-35-114(1). The trial court also found that Defendant committed the current offense while on probation for the four prior felony convictions. See id. § 40-35-114(13)(C). The trial court observed that it was "not going to go through all of those [enhancement] factors because [it] did not believe it [was] necessary." Based on the presence of two enhancement factors, the great weight attributed to these factors, and the presence of one mitigation factor, the trial court sentenced Defendant, as a Range One, standard offender, to twenty-four years, six months.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See T.C.A. § 40-35-401, Sentencing Comm'n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a Defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court form which the appeal is taken are correct. T.C.A. § 40-35-401(d). This presumption of correctness, 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. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). "If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004); State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992)).

A trial court is mandated by the Sentencing Act to "impose a sentence within the range of punishment." T.C.A. § 40-35-210(c). A trial court, however, "is no longer required to begin with a presumptive sentence subject to increase and decrease on the basis of enhancement and mitigating factors." Carter, 254 S.W.3d at 346. Therefore, an appellate court is "bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." Id.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced 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) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the Defendant wishes to make in the Defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

On appeal, Defendant contends that the trial court mentioned other enhancement factors but failed to make the appropriate findings as to the weight attributed to these factors. Defendant also argues that the trial court failed to consider all of the relevant circumstances of the case in making its sentencing determinations.

In State v. Carter, the Tennessee Supreme Court clarified the 2005 changes in Tennessee sentencing law and stated:

> [A] trial court's weighing of various mitigating and enhancement factors has been left to the trial court's sound discretion. Since the Sentencing Act has been revised to render these factors merely advisory, that discretion has been broadened. Thus, even if a trial court recognizes and enunciates several applicable enhancement factors, it does not abuse its discretion if it does not increase the sentence beyond the minimum on the basis of those factors. Similarly, if the trial court recognizes and enunciates several applicable mitigating factors, it does not abuse its discretion if it does not reduce the sentence from the maximum on the basis of those factors. The appellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a defendant's sentence.

Carter, 254 S.W.3d at 345-46.

Thus, a trial court's "fail[ure] to appropriately adjust" a sentence in light of applicable, but merely advisory, mitigating or enhancement factors, is no longer an appropriate issue for appellate review. Id., 254 S.W.3d at 345 (citing State v. Banks, No. W2005-02213-CCA-R3-DD, 2007 WL 1966039, at *48 (Tenn. Crim. App., at Jackson, July 6, 2007) (noting that "[t]he 2005 amendment [to the Sentencing Act] deleted appellate review of the weighing of

the enhancement and mitigating factors, as it rendered the enhancement and mitigating factors merely advisory, not binding, on the trial courts")).

The record reflects that the trial court considered the factual basis for the entry of a guilty plea submitted by the State, the nature and characteristics of the offense, the presentence report, the arguments of counsel presented at the sentencing hearing, and the principles of sentencing. Although the trial court believed that other enhancement factors were applicable, the great weight assigned to Defendant's prior criminal history and the fact that he was on probation when he committed the current offense made it, in the trial court's opinion, unnecessary to engage in further analysis. Of particular concern to the trial court was Defendant's accumulation of four felony convictions, one of which involved a deadly weapon, over a short period of time, and the escalating severity of the offenses.

The record clearly shows that the trial court followed the statutory sentencing procedure, made findings of facts that are adequately supported in the record, and gave due consideration to the principles that are relevant to sentencing. Based on our review, we conclude that the two enhancement factors considered by the trial court adequately support the trial court's discretionary decision to impose a sentence of twenty-four years, six months for second degree murder. Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

THOMAS T. WOODALL, JUDGE