IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2006 Session

STATE OF TENNESSEE v. EDD STEPP

Appeal from the Circuit Court for Cocke County
No. 9522 Ben W. Hooper II, Judge

No. E2005-02178-CCA-R3-CD - Filed November 2, 2006

The Appellant, Edd Stepp, appeals from the sentencing decision of the Cocke County Circuit Court. In 2005, the trial court accepted Stepp's pleas of guilty to nine counts of aggravated sexual battery. After a sentencing hearing, the trial court sentenced Stepp, as a violent offender, to the maximum sentence of twelve years for each of the Class B felony convictions. The court further ordered four of the sentences to be served consecutively, resulting in an effective sentence of forty-eight years in confinement. In this appeal as of right, Stepp argues that the trial court imposed excessive sentences for each conviction and erred by imposing consecutive sentences. Upon *de novo* review of the record, we find error with regard to: (1) the application of enhancing factors; (2) the non-application of a mitigating factor; and (3) the imposition of consecutive sentences. Accordingly, Stepp's sentences are modified to reflect sentences of eight years for each count of aggravated sexual battery, with two of the nine counts to be served consecutively for an effective sentence of sixteen-years confinement in the penitentiary. We remand the case to the trial court for entry of amended judgments to reflect these sentencing modifications.

Tenn. R. App. P. 3; Judgments of the Circuit Court Modified and Remanded for Entry of Judgments of Conviction

DAVID G. HAYES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

Edward C. Miller, Public Defender, Dandridge, Tennessee, for the Appellant, Edd Stepp.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and Tracy Stone, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background

On November 24, 2004, a Cocke County grand jury returned an indictment charging the Appellant with nine counts of aggravated sexual battery of the female victim, who was a child under thirteen years of age. On April 4, 2005, the trial court ordered the Appellant to submit to a forensic evaluation at Cherokee Health Systems in Morristown. On June 21, 2005, the Appellant pled guilty, as indicted, to nine counts of aggravated sexual battery, submitting all sentencing issues to the trial court for its determination. At the sentencing hearing, the State introduced letters from the victim's mother reciting the emotional impact of the crimes upon the victim and her family, the Appellant's statement to the police, the Appellant's mental health evaluation from Cherokee Health Systems, and the presentence report. The Appellant submitted copies of his medical records from the University of Tennessee Hospital and the Family Practice Center referencing numerous health problems and injuries from which the Appellant suffered. At the conclusion of the hearing, the trial court sentenced the Appellant to serve twelve years for each conviction. The court further ordered that the first four sentences be served consecutively to each other and the remaining five sentences be served concurrently, resulting in an effective sentence of forty-eight years.

The Appellant is a single, seventy-year-old man who is unable to read or write with the exception that he can write his name. He attended three years of public schooling. He lives with Faye Etherton, an invalid, and assists her with her daily chores. He earns spending money by mowing yards and picking up aluminum cans. The Appellant states that he is in poor health, and medical reports establish that he has been treated for hypertension, chronic obstructive pulmonary disease, and stomach problems.

The Appellant and Ms. Etherton are friends of the victim's mother and grandmother. In 2003, the victim's grandmother moved to a location near Ms. Etherton. When the victim's mother worked weekends, the victim would stay with her grandmother. The victim was six and a half years old when the first offense occurred in November 2003, with the subsequent offenses occurring at least once a month over an eight-month period of time.

The victim's mother began to notice changes in the victim after the victim would return home from her weekend visits with her grandmother. The victim objected to being touched, and she stopped wearing little girl's dresses and would wear only big T-shirts and sweat pants. She became frightened when separated from her mother and ultimately was placed on medication for anxiety attacks.

The Appellant gave the following statement describing his action in the crimes to Detective Ball of the Newport Police Department:

> [The victim] would come visit Faye, who is sick . . . . The first time [it] happened I touched [the victim's] private area on top of her clothes. I didn't know what I was doing. [The victim] would visit a couple of times a week. Since then I have touched [the victim's] private part on top of her clothes 8 - 10 times. . . . Also during this time I showed [the victim] my private or my penis on other occasions around 5 times. The last time I touched [the victim] was the beginning of July 2004. The last time I showed her my private part . . . [was] near the end of June 2004. I did touch myself in front of her.

The victim's parents testified that the Appellant's sexual contacts with the victim have left deep, emotional scars on both her and the family. The victim and her mother are attending counseling sessions as a result of the Appellant's conduct.

Ms. Mary Brady, the Appellant's half-sister, testified on his behalf. She described the Appellant as kind and compassionate and stated that he had helped a lot of people during his life. He takes care of Ms. Etherton by taking her to the doctor, picking up her medication, and cooking for her.

The Appellant was evaluated at Cherokee Health Systems, and the forensic evaluator concluded that a defense of diminished capacity based upon mental retardation could not be supported. The evaluator opined that "[the Appellant] does have the mental ability to appreciate the wrongfulness of the crime of Aggravated Sexual Battery." The Appellant's full scale IQ was 62, which placed him in the Extremely Low Range of intellectual functioning, but "[t]his score reflects the fact that [the Appellant] has a third grade education."

In pronouncing the sentences, the trial court found as follows:

> There are no mitigating circumstances in this case. There are enhancement
> factors. . . .
>
> Enhancement Factor #8 and #16 I find to be applicable. That is, that the offense involved a victim, and was committed to gratify the Defendant's desire for pleasure or excitement. And then, #16, that the Defendant abused a position of private trust, as was mentioned. . . .
>
> . . . .
>
> It is unfortunate that the Court is dealing with a case where a man is 70 years of age, apparently; if he's got any criminal record, I'm not aware of it. It's very slight, if any.
> . . .
>
> . . . .
>
> In applying the principles of sentencing to the range of punishment, . . . 8 to 12 years, the Court will set the punishment for each count of this indictment at 12 years.

The trial court then ordered that four of the twelve-year sentences for aggravated sexual battery be served consecutively.

Analysis

The Appellant argues on appeal that imposition of the maximum sentence of twelve years for each of his nine convictions is excessive and that the trial court erred in imposing consecutive sentences. 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 that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2003); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).[1] 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." *Ashby*, 823 S.W.2d at 169. When 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 Appellant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2003); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Carico*, 968 S.W.2d 280 (Tenn. 1998)). The party challenging a sentence bears the burden of establishing that the sentence is erroneous. T.C.A.§ 40-35-401(d), Sentencing Commission Comments.

If our review reflects that the trial court, following the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that 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). However, where the trial court fails to comply with the statutory provisions of sentencing, appellate review is *de novo* without a presumption of correctness. In this case, the presumption of correctness is not afforded.

Prior to conducting our review of the sentencing issues, we are constrained to note that the plea agreement contained a provision which would permit the trial court to enter a finding of guilt to the lesser offense of attempted sexual battery if the trial court believed it appropriate. The plea agreement provision recites:

> The Defendant agrees to plead guilty to Plea, upon stipulated facts, to the charge of Aggravated Sexual Battery x 9 and/or its lesser included offense of Attempted Aggravated Sexual Battery x 9 with court to decide guilt of which offense(s) and the State agrees to recommend to the Court the following sentence: No recommended sentence.

A guilty plea agreement of this nature is froth with uncertainties and should be discontinued. Rule 11, Tennessee Rules of Criminal Procedure, which governs guilty pleas and plea

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1 We note that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102(6), -210 -401. *See* Tenn. Pub. Acts ch. 353, §§ 1, 6, 8. However, the amended code sections are inapplicable to the Appellant's appeal because the crimes occurred before the effective passage of the act, and no waiver was executed by the Appellant.

agreements, contains no authority for this type of agreement. The plea agreement procedure of Rule 11 provides that the district attorney general and the attorney for the defendant may engage in discussions with a view toward reaching an agreement for entry of a plea of guilty to an offense, not to multiple offenses or optional offenses. *See* Tenn. R. Crim. P. 11(c) (emphasis added). Rule 11 specifically requires that, prior to accepting the guilty plea, the court is to inform the defendant of and determine that he understands the "nature of the charge to which the plea is offered" and to inform the defendant of the minimum and maximum sentence of the crime. Tenn. R. Crim. P. 11(c)(1) (emphasis added).

Moreover, the voluntariness of a guilty plea of this nature is brought into question as the defendant is informed by trial counsel, during plea negotiations, that he could receive a lesser sentence if the trial judge chooses to reduce the conviction. This is an unrealistic assumption. Moreover, it is not the function of the trial judge to select the appropriate crime at the guilty plea hearing. Finally, this procedure promotes uncertainty with regard to punishment as illustrated in this case where trial counsel argued at the sentencing hearing that the Appellant should receive a total sentence of three to six years with placement in a group home, and the trial court actually imposed a sentence of forty-eight years confinement in the state penitentiary.

I. Length of Sentence

The Appellant asserts that the trial court imposed an excessive sentence of twelve years for each of the nine counts of aggravated sexual battery, Class B felonies. As applicable to this case, a Class B felony carries a sentencing range of eight to twelve years. T.C.A. § 40-35-112(a)(2) (2003). The presumptive sentence to be imposed by the trial court for a Class B felony is the minimum sentence within the applicable range absent the presence of enhancement or mitigating factors. T.C.A. § 40-35-210(c). If the trial court finds enhancement factors but no mitigating factors, the court may set the sentence above the presumptive minimum sentence. *Id.* at (d). However, if both enhancement and mitigating factors are present, the court must start at the minimum sentence, enhance as appropriate for enhancement factors, and then reduce the sentence as appropriate for applicable mitigating factors. *Id.* at (e).

In arriving at a sentence of twelve years for each of the nine convictions, the trial court applied enhancing factor (8), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, and enhancing factor (16), that the defendant abused a position of private trust. *See* T.C.A. § 40-35-114(8), (16) (2003). With regard to enhancement factor (8), the State concedes that this factor is not applicable as "desire for pleasure or excitement" is an element of the offense of aggravated sexual battery. *State v. Kissinger*, 922 S.W.2d 482, 489-90 (Tenn. 1996); *see also* T.C.A. § 39-13-504 (2003).

The Appellant argues that enhancement factor (16), that the Appellant "abused a position of public or private trust," is also inapplicable. We agree. In *State v. Gutierrez*, 5 S.W.3d 641 (Tenn. 1999), our supreme court held that:

> Application of [this] factor requires a finding, first, that the defendant occupied a position of trust, either public or private. The position of parent, step-parent, babysitter, teacher, coach are but a few obvious examples. The determination of the existence of a position of trust does not depend on the length or formality of

> the relationship, but upon the nature of the relationship. Thus, the court should look to see whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability or faith.

5 S.W.3d at 645 (quoting *Kissinger*, 922 S.W.2d at 488).

The record establishes that the minor victim lived with her parents but visited her maternal grandmother on weekends. The grandmother was a friend of Ms. Etherton and the Appellant. While visiting her grandmother, the seven-year-old victim would routinely visit Ms. Etherton and the Appellant, who lived "maybe five apartments down" from the grandmother. These visits occurred over a period of "several years," and it is undisputed that a friendship existed between the Appellant and the victim. As an example of the relationship, the trial court noted that on occasion the victim helped the Appellant put up groceries at the residence. The mere existence of a friendship, however, does not establish "private trust". *See Gutierrez,* 5 S.W.3d at 646 (holding that a "live-in" relationship, where two people live together as man and wife, does not establish a "private trust"). During the victim's visits to the Etherton residence, the record does not establish that the Appellant was functioning as a babysitter, custodial figure, or in any position of supervisory authority over the victim. Accordingly, the State has not met its burden of proving that this enhancement factor should be applied.

As previously noted, the trial court found insufficient evidence to apply enhancement factor (2), that the Appellant had a previous history of criminal convictions and criminal behavior. However, the presentence report indicates that the Appellant was convicted of several driving violations and was also convicted of DUI in 1997. Thus, we conclude this factor is established by the record. Nonetheless, little weight is afforded this enhancement factor due to the nature of the offenses.

The Appellant also argues that the trial court erred in failing to apply various mitigating factors, including factor (8), that the defendant was suffering from a mental condition that significantly reduced the defendant's culpability for the offense. *See* T.C.A. § 40-35-113(8) (2003). Although the forensic evaluation concluded that a defense of mental retardation could not be supported because the Appellant was able to appreciate the wrongfulness of his acts, the evaluation, nonetheless, noted that the Appellant's I.Q. score of 62 placed him in the "Extremely Low Range of intellectual functioning," which is further evidenced by his level of vocational skills. We conclude that the sentencing proof supports a finding that the Appellant's culpability for the crimes was significantly reduced. Accordingly, mitigating factor (8) is applied. No other applicable mitigating factors are found.

In sum, following *de novo* review, we conclude that, based upon a finding of one enhancing factor, which is afforded little weight, and one mitigating factor, the Appellant's sentences require modification. After review, we conclude that a sentence of eight years is appropriate for each aggravated sexual battery conviction.

II. Consecutive Sentencing

The Appellant asserts that the trial court erred by imposing consecutive sentences. The trial court ordered four of his nine sentences to be served consecutively, resulting in an effective forty-eight-year sentence.

The trial court may order consecutive sentences if it finds by a preponderance of the evidence that:

> [The Appellant] is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

T.C.A.§ 40-35-115(b)(5) (2003). In this case, the trial court found:

> This case involves offenses involving sexual abuse of a minor. It's been classified by my ruling as an aggravating sexual battery that did arise out of a relationship that had been established between these two people, the victim and the [Appellant]. The offenses continued over a period of time, several months.
>
> The nature of the offense is not as bad as an actual penetration-type offense. But, then, the physical and mental damage, particularly the mental damage that has been done to the victim, is extensive. . . .
>
> Count 2 of the indictment will run consecutive to Count 1. Count 3 of the indictment will run consecutive to Count 2. Count 4 of the indictment will run consecutive to Count 3. That will then be a total of 48 years, to be served at 100%. And the other counts will run concurrently with Count 1. And that's the judgment.

We conclude that the trial court was authorized to impose consecutive sentences under the provisions of Tennessee Code Annotated section 40-35-115(b)(5). The Appellant was convicted of nine offenses involving sexual abuse of a minor, which occurred at least once a month, over an eight- month period of time. The record clearly establishes that the victim sustained residual mental damage as a result of the abuse.

Notwithstanding the finding that the Appellant meets the consecutive sentencing classification of Tennessee Code Annotated section 40-35-115(b)(5), the trial court is also required to determine if the aggregate length of the sentences is "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." T.C.A. § 40-35-102(1), -103(2); *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). In addition, the sentence "should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40-35-103(4); *State v. Desirey*, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995).

Based upon the above considerations, we modify the imposition of the effective forty-eight-year sentence to reflect an effective sentence of sixteen years in confinement. Accordingly, we order that Counts 1 and 2 shall run consecutively to each other, and Counts 3 through 9 shall run concurrently with Count 2, resulting in an aggregate sentence of sixteen years in confinement. We conclude that an effective sixteen-year sentence is justly deserved and achieves the purposes for which the sentence is imposed.

CONCLUSION

Based on the foregoing and the record as a whole, we reduce each of the Appellant's sentences from twelve years to eight years, and we modify the number of consecutive sentences from four to two, as provided *supra*. We remand the case for entry of amended judgments consistent with this opinion.

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DAVID G. HAYES, JUDGE