

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 22, 2007

STATE OF TENNESSEE v. DANIEL RAY CLAYTON

Appeal from the Circuit Court for Blount County
Nos. C-15865 & C-15866 D. Kelly Thomas, Jr., Judge

No. E2006-01274-CCA-R3-CD - Filed August 30, 2007

The defendant, Daniel Ray Clayton, pleaded guilty to theft of property over \$1,000 but less than \$10,000, *see* T.C.A. §§ 39-14-103, -14-105(3) (2006), a class D felony and aggravated robbery, *see id.* § 39-13-402, a class B felony. According to the plea agreement, the sentences were to run concurrently, but the length and manner of service were to be determined by the trial court. The trial court held an evidentiary hearing on June 7, 2006, and sentenced the defendant to two years for the theft conviction and nine years for the aggravated robbery conviction for an effective nine-year sentence to be served in confinement. On appeal, the defendant argues that the trial court erred in failing to consider certain mitigating factors and claims that his sentence should be reduced to eight years. We disagree and affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Raymond Mack Garner, District Public Defender; and Stacey Nordquist, Assistant District Public Defender (at trial); and J. Liddell Kirk, Knoxville, Tennessee (on appeal), for the Appellant, Daniel Ray Clayton.

Robert E. Cooper, Jr., Attorney General & Reporter; Rachel West Harmon, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Tammy Harrington, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

At the sentencing hearing, the State's proof showed that the defendant, who lived in Chattanooga at the time, was visiting a friend, who lived in Blount county. The defendant arrived in Blount county driving a stolen vehicle, which he abandoned upon arrival. On January 8, 2006, after ingesting crack cocaine, the defendant walked to a Wal-Mart store in Alcoa and stole another vehicle. On January 9, 2006, the defendant drove this stolen vehicle to Discount Tobacco Store, and inside the store, he selected candy and paid the clerk, Debbie Riley. When Ms. Riley, the victim, opened the cash register drawer, the defendant pulled a knife, instructed the victim to step back, jumped on the counter, and stole approximately \$300. At one point, he asked the victim about the store's security video camera. After he saw a car pull into the store's parking lot, he left with the money.

The victim contacted the police, and after investigation and media attention, the defendant was arrested on January 14. The defendant confessed to the robbery and to stealing the car from the Wal-Mart store. In his statement, the defendant said he stole the money to obtain crack cocaine.

The defendant presented several witnesses who testified that he moved various times during his childhood due to his mother's unstable relationships and marriages. Witnesses testified that as a child the defendant was outgoing and did well in school, especially while living with his grandparents from third grade to sixth grade. The defendant was diagnosed with Attention Deficit Disorder and Attention Deficit Hyperactivity Disorder and took appropriate medication. After sixth grade, when the defendant was approximately 12 years old, he moved with his mother to Blount county. After some time, the defendant's mother moved into a shelter for abused women, and the defendant had to live with his mother's friend. The defendant dropped out of high school in the ninth grade and eventually lived with a friend in Georgia while trying to obtain his General Education Degree (GED). He never received this degree and returned to Chattanooga. For the most part, these witnesses neither knew nor suspected that the defendant had a drug problem.

The defendant, who was 19 years old at the time of sentencing, stated that he received a drug charge, which was later dismissed, for taking his prescription medication to school. In 2003, his driver's license was suspended for truancy, and he subsequently received a driving on a suspended license conviction and a reckless driving conviction. At age 17, the defendant received a driving under the influence conviction and a child endangerment conviction for driving his friend home from a teenage club while being under the influence of marijuana. He further stated that he was on probation for these crimes when he committed the present offenses.

The defendant further testified that he started using illegal drugs at a young age. He first used crack cocaine after his stepfather gave it to him at age 12 or 13. He also used marijuana, various pills, and methamphetamine. The defendant testified that he stole the car at the Wal-Mart store and the money from Discount Tobacco because he had been on a "cocaine binge." He further testified that the keys had been left in the vehicle, and he neither damaged the

vehicle nor damaged the Discount Tobacco store. The defendant also testified that he cooperated with the police after his arrest and confessed to both crimes.

The defendant also testified that since being incarcerated, he had submitted three request forms to receive his GED and attended church regularly. He also was diagnosed as bipolar and stated that he wanted to seek treatment for his drug problem. Further, the defendant stated that he understood that he may have to serve jail time, but he wanted to get treatment so he could eventually work, go to school, and raise his child.

The trial court found that the defendant was a violent offender and ineligible for probation and community corrections. The court found in mitigation that the defendant was young and had time to turn his life around. The court applied two enhancement factors, that the defendant had a previous history of criminal convictions and behavior, *see* T.C.A. § 40-35-114(1) (2006), and that the defendant failed to comply with conditions of a sentence involving release into the community, *see id.* § 40-35-114(8). Thus, the trial court sentenced him to two years for the theft conviction and nine years for the aggravated robbery conviction for an effective nine-year sentence to be served in confinement.

The defendant filed a timely notice of appeal and argues that the trial court erred in not considering mitigating factors that the defendant “caused no real physical harm to anyone” and that he cooperated with authorities after his arrest. Thus, he requests this court reduce his sentence to eight years.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006). 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. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). The burden of showing that the sentence is improper is upon the appellant. *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, “even if we would have preferred a different result.” *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. After the sentencing hearing, the trial court “shall first determine the appropriate range of sentence.” T.C.A. § 40-35-210(a) (2006). To determine the specific sentence within the range, the court is required to consider (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the mitigating and enhancement factors, (6) any statistical information provided by the administrative office of the courts regarding sentencing practices for similar offenses, (7) any statements the defendant wishes to make in the defendant’s behalf about sentencing, and (8) the potential for rehabilitation or treatment. *Id.* §§ 40-35-210(b), -35-103(5).

Moreover, the trial court shall impose a specific sentence within the appropriate range of punishment depending upon whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. *Id.* § 40-35-210(c). In so doing, the court is required to consider, but is not bound by, advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in [sections] 40-35-113 and 40-35-114.

Id. The trial court must also consider enhancement factors listed in Code section 40-35-114 if appropriate for the offense and if not already an essential element of the offense. *See id.* § 40-35-114. The court is not bound by these factors; they are advisory. *See id.* In addition, “[t]he sentence length within the range should be consistent with the purposes and principles of [the Sentencing Reform Act of 1989].” *Id.* § 40-35-210(d).

The defendant is a Range I, standard offender, and according to the record, the trial court followed the correct procedures and considered the appropriate sentencing principles, facts, and circumstances. The court heard the evidence regarding the robbery and the defendant’s confession. The court also found that two enhancement factors applied: the defendant committed the present offenses while on probation, *see id.* § 40-35-114(8), and he had a history of criminal convictions and conduct, *see id.* § 40-35-114(1). These factors are supported in the record, and the sentence, as imposed, is “consistent with the purposes and principles of [the Sentencing Reform Act of 1989].” *Id.* § 40-35-210(d). We affirm the defendant’s sentence.

JAMES CURWOOD WITT, JR., JUDGE