

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 21, 2008

STATE OF TENNESSEE V. ROBERTO MARQUICE HORTON

**Appeal from the Criminal Court for Sullivan County
No. S50724 R. Jerry Beck, Judge**

No. E2007-01460-CCA-R3-CD

Appellant, Roberto Marquice Horton, pled guilty in the Sullivan County Criminal Court to one count of failure to appear, a Class E felony. The trial court subsequently sentenced him to a two-year sentence. Appellant appeals his sentence, arguing that it is excessive and that the trial court erred by denying an alternative sentence. We determine that the record supports Appellant's sentence and, therefore, affirm the judgment of the trial court.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JOHN EVERETT WILLIAMS, JJ., joined.

Terry L. Jordan, Assistant Public Defender, Blountville, Tennessee, for the appellant, Roberto Marquice Horton.

Robert E. Cooper, Jr., Attorney General and Reporter; Renee W. Turner, Assistant Attorney General; Greeley Wells, District Attorney General; and James F. Goodwin, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

Appellant was indicted by the Sullivan County Grand Jury in April of 2005 for one count of failure to appear. Appellant pled guilty to the offense on December 11, 2006, and agreed to let the trial court determine the sentence at a later hearing. At the plea acceptance hearing, the parties stipulated that the facts:

[W]ould show that [Appellant] knowingly failed to appear on April 15th, 2005, as directed by lawful authorities for the purposes of an appearance in Case #S50362, which was a Class A misdemeanor charge of domestic assault occurring in Sullivan County, Tennessee.

At the sentencing hearing, Appellant agreed that two enhancement factors applied: (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and (16) The defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. T.C.A. § 40-35-114(1) & (16). The trial court also noted that Appellant had four sets of untried cases that were pending in the court, but chose not to utilize those cases to enhance Appellant's sentence. The trial court applied one mitigating factor, that Appellant's conduct neither caused nor threatened serious bodily injury. T.C.A. § 40-35-115(1). On the basis that the issue was resolved by Appellant's guilty plea, the trial court rejected the application of an additional mitigating factor, that substantial grounds existed to excuse or justify the defendant's criminal conduct, though failing to establish a defense. T.C.A. § 40-35-115(3). In ordering Appellant to serve two years in incarceration, the trial court stated:

[Appellant's] 21 years of age at this time. He has four [sets of] cases pending in the untried cases which I read into the record. I don't feel comfortable giving that much weight But, nonetheless, at his age, that he has cases, one of the most - worst - I guess [one of the] the worst misdemeanor records that he could accumulate as an adult.

. . . .

And these aren't - taking them individually, they aren't earthshaking convictions. I'm not considering anything that's dismissed. Is [sic] how many offenses you could possibly commit in that short a period of time. And he's set some kind of record. And cumulatively that's - all those offenses deserve great weight when you put them all together. One individually wouldn't be worth a feather's worth. But that many, he's just absolutely - how you could even get caught that many times.

. . . .

And that's the valuable enhancer, the overwhelming enhancer in this case, is his prior criminal record and criminal conduct.

Now, the Court is going to accept the juvenile record as an adult, if he had been an adult it would have been a crime. I think that's valid. But it all falls within his record. And the Court is of the opinion he deserves a two-year sentence. And based upon - again, based on his just prior record he's been convicted of, not what's pending, he doesn't deserve probation or alternative sentencing.

Appellant filed a timely notice of appeal. He is challenging his sentence as excessive and the trial court's decision to deny an alternative sentence.

Analysis

On appeal, Appellant argues that the trial court imposed an excessive sentence. Specifically, he contends that his sentence was not imposed "in accordance with the statutory chapter governing sentencing" and that the "enhancement and mitigating factors were not weighed properly" so the sentence is excessive under the statutory sentencing considerations. To support his argument, Appellant points out that his prior criminal record only shows convictions for traffic offenses, possession of marijuana and possession of drug paraphernalia. In other words, Appellant states that prior to the conviction herein, he had not been convicted of any felonies. Appellant claims that the drug offenses arose out of the same incident which occurred when Appellant was eighteen years old. Further, Appellant argues that the fact that none of his convictions involved acts of violence should have reduced his sentence. The State disagrees.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action 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). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

We begin our analysis with a brief discussion of recent changes in Tennessee's sentencing statutes. In response to the United States Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee General Assembly amended Tennessee Code Annotated section 40-35-210. Compare T.C.A. § 40-35-210(c) (2003) with T.C.A. § 40-35-210(c) (2006); see also 2005 Tenn. Pub. Act ch. 353, § 18. This amendment became effective on June 7, 2005. The General Assembly also provided that this amendment would apply to defendants who committed a criminal offense on or after June 7, 2005. 2005 Tenn. Pub. Acts ch. 353, § 18. In addition, the legislation provides that a criminal defendant who committed a criminal offense on or after July 1, 1982, but is not sentenced until after June 7, 2005, may elect to be sentenced under these provisions by executing a waiver of their ex post facto protections. *Id.* In the case sub judice, Appellant committed his offense prior to June 7, 2005, and did not sign a waiver, therefore, the new act does not apply in our review of his sentencing.¹

¹ We note that Appellant has not challenged his sentence in light of the United States Supreme Court decisions in *Blakely v. Washington*, 542 U.S. 296 (2004), or, more recently *Cunningham v. California*, 549 U.S. 270 (2007), which called into question our supreme court's decision in *State v. Gomez*, 163 S.W.3d 632, 661 (Tenn. 2005), in which the Tennessee Supreme Court determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury nor admitted by

In enhancing Appellant's sentence for failure to appear from one year to two the trial court determined that Appellant had a previous history of criminal convictions in addition to those necessary to establish the appropriate range. T.C.A. § 40-35-114(1). Further, the trial court determined that Appellant committed an offense as a juvenile that would have been punishable as a felony if he were an adult. T.C.A. § 40-35-114(16). The trial court accepted one mitigating factor, that Appellant's conduct neither caused nor threatened serious bodily injury. T.C.A. 40-35-115(1).

Appellant does not contest the application of the enhancement and mitigating factors but argues that the trial court failed to properly weigh the factors in imposing the two-year sentence. The weight given each enhancement and mitigating factor, however, is left to the discretion of the trial court as long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record. T.C.A. § 40-35-210, Sentencing Comm'n Comments; *State v. Moss*, 727 S.W.2d 229, 238 (Tenn. 1986); *State v. Kelley*, 34 S.W.3d 471, 479 (Tenn. Crim. App. 2000). Here, the trial court's findings are supported by the record. Appellant had over fifteen convictions as an adult at the young age of twenty-one. Further, Appellant was convicted of multiple offenses as a juvenile, including felony reckless endangerment, evading arrest, assault on a police officer, and resisting arrest. The weight given to the enhancement and mitigating factors is in the discretion of the trial court. The trial court properly enhanced Appellant's sentence from one year to two years after finding the existence of two enhancement factors and one mitigating factor. Appellant is, therefore, not entitled to relief on this issue.

Appellant also complains that the trial court erred by failing to grant an alternative sentence. With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration.

A defendant who does not fall within this class of offenders "and who is an especially mitigated offender or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(6). A defendant is eligible for an alternative sentence if his sentence is eight years or less. T.C.A. § 40-35-303.

a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with *Blakely*. Shortly after the release of *Cunningham*, the United States Supreme Court vacated the judgment in *Gomez* and remanded the case to Tennessee Supreme Court in light of *Cunningham*. *Gomez v. Tennessee*, ___ U.S. ___, 127 S.Ct. 1209 (2007). On remand, the Tennessee Supreme Court determined that the failure of a defendant to properly raise a Sixth Amendment challenge to their sentence could result in review of the sentence on Sixth Amendment grounds via a plain error review only. *Gomez v. State*, 239 S.W.3d 733 (Tenn. 2007). Herein, due to Appellant's failure to raise the challenge to his sentence via *Blakely*, *Cunningham*, or *Gomez*, we decline to address any issue in that regard.

In determining a defendant's suitability for a non-incarcerative sentencing alternative, the court should consider whether:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). Furthermore, unless sufficient evidence rebuts the presumption, the trial court must presume that a defendant sentenced to eight years or less is an offender for whom incarceration would result in successful rehabilitation. *See* T.C.A. § 40-35-303(a).

With that in mind, we note that Appellant herein pled guilty to failure to appear, a Class E felony. Appellant was sentenced to serve less than eight years in incarceration. He was eligible for probation. At the conclusion of the sentencing hearing, the trial court stated that it considered the presentence report, the prior criminal history and social history, and determined that Appellant would not receive full probation. The trial court noted the problems Appellant had in the past, especially noting the extensive criminal history that Appellant had amassed in his short lifetime. The trial court made this decision based solely on Appellant's prior record, not counting the eleven charges that were pending against Appellant at the time of sentencing. Furthermore, measures less restrictive than confinement have been applied to Appellant unsuccessfully in the past. T.C.A. § 40-35-103(1)(C). The presentence report indicates that Appellant had at least one conviction in which the sentence was mostly suspended and Appellant was ordered to attend alcohol and drug counseling. Appellant had also been placed on probation as a juvenile and then received several charges for violating court orders. Appellant's repeated disregard for compliance with measures less restrictive than confinement would alone support the trial court's denial of an alternative sentence. The trial court appropriately considered the factors upon which to base the denial of an alternative sentence, and the evidence does not preponderate against the trial court so doing.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE