

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs at Knoxville on November 19, 2013

STATE OF TENNESSEE v. ASTIN D. HILL

Appeal from the Circuit Court for Madison County
No. 12-101 Donald H. Allen, Judge

No. W2012-02147-CCA-R3-CD - Filed February 19, 2014

The Defendant, Astin D. Hill, contends that the trial court improperly (1) denied all forms of alternative sentencing in direct contravention of Tennessee Code Annotated section 40-35-122, which prohibits continuous confinement for non-violent property offenses, and (2) imposed consecutive sentencing based on its erroneous finding that the Defendant had an extensive criminal history. After a review of the record and the applicable authorities, we conclude that the trial court's failure to follow the dictates of section 40-35-122 was in error and affirm in part, reverse in part, and remand the case for resentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court
Affirmed in Part and Reversed in Part; Case Remanded

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined.

George Morton Googe, District Public Defender; and Gregory D. Gookin, Assistant Public Defender, for the appellant, Astin D. Hill.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; James G. Woodall, District Attorney General; and Brian Gilliam, Assistant District Attorney General; for the appellee, State of Tennessee.

OPINION
FACTUAL BACKGROUND

The Defendant was indicted on January 30, 2012, for the following offenses: Counts 1, 3, 5, and 7, Burglary of an automobile (auto burglary), a Class E felony; Count 2, Theft of Property over \$1,000, a Class D felony; Counts 4, 6, and 8, Theft of Property under \$500, a Class A misdemeanor; Count 9, Evading Arrest, a Class A misdemeanor; and Count 10,

Resisting Arrest, a Class B misdemeanor. See Tenn. Code Ann. §§ 39-14-402(a)(4), -14-103, -16-603(a)(1), -16-602. Pursuant to a plea agreement with the State, the Defendant sought to enter a guilty plea on April 23, 2012; however, the trial court reserved its acceptance of the plea until it had received and had time to review the Defendant's juvenile record. Nevertheless, the trial court proceeded with the guilty plea colloquy, and the following factual basis for the plea was proffered by the State:

. . . [I]n Count 1 the State would show that the [D]efendant, Astin Hill, on October the 29th of 2011, did unlawfully enter a vehicle belonging to Daniel Porter with intent to commit theft of property. In Count 2 did knowingly obtain or exercise control over property over the value of \$1000 from Daniel Porter on the same date of October 29th of 2011. In Count 3 did unlawfully enter a vehicle belonging to Geraldine Bunch without the effective consent of the owner with intent to commit theft o[f] property on October 29th of 2011. In Count 4 did knowingly obtain or exercise control over property on that same date belonging to Geraldine Bunch on October 29th of 2011 under the value of \$500. In Count 5 he did unlawfully enter a vehicle belonging to Rosia Morris without the effective consent of that owner on October the 29th with intent to commit theft of property. In Count 6, he did obtain property belonging to Rosia Morris under the value of \$500 on that same date October the 29th. In Count 7 did unlawfully enter a vehicle belonging to Kimberly Parsons without the effective consent of that owner with intent to commit theft of property. In Count 8 did knowingly obtain or exercise control over property under the value of \$500 belonging to Kimberly Parsons on that same day October the 29th. In Count 9 did intentionally evade officers who were trying to arrest [him] whom he knew to be law enforcement personnel on that same date and[, in Count 10,] did intentionally prevent or obstruct law enforcement officers from making an arrest on that same date.

. . . [T]his all started about 4:00 in the morning on October the 29th of 2011 when employees of the TV station, WBBJ, called the police department saying that they had noticed a vehicle near their office located on Muse Street. Shortly before then Daniel Porter had reported that his vehicle had been taken. It was a 1992 Jeep Cherokee. That's the property over \$1000. It was later recovered there at 346 Muse. Officers did notice the [D]efendant, Astin Hill, in that area. Once they ordered him to stop, he began running and he was found in an area of undergrowth near that area. He had a backpack on him. In that backpack were some GPS[']s that were later determined to be from auto burglaries that also recently occurred that same day. One from Geraldine Bunch. There was a Tom-Tom GPS belonging to Kimberly Parsons that was

taken from her vehicle on Martin Street and Rosia Morris had reported that in her vehicle that there was some change, \$5.49, that had been taken from her vehicle. That amount of money was found in the possession of the [D]efendant He did flee from officers on foot and the officers noted there was a brief struggle before he was finally taken into custody.

Once he was taken into custody, he did give a statement to the officers admitting to the auto burglaries. I think he had stated to the officers that he thought this would be a good way to make some money and also it was noted that all of the vehicles that were broken into had left their doors unlocked so there was no damage to any of the vehicles. He said he was walking down the street and noticed the cars whose doors were unlocked and he opened those and did take those GPS[]s on that day.

The Defendant agreed that the proffer was a substantially accurate account of the offenses to which he was pleading guilty. On June 4, 2012, the trial court advised the parties that he would not accept the plea recommendation of a four-year sentence with nine months to serve and the remaining on probation because it did not believe that was an appropriate recommendation based on the Defendant's prior juvenile criminal history of felonies. The trial court stated that it would allow the Defendant to retract his guilty plea. The Defendant stated that he wished to plead without the agreement with sentencing to be determined by the trial court at a later time. The trial court accepted the Defendant's plea of guilty to all charges.

The Defendant's sentencing hearing was held on July 31, 2012. No witnesses were presented at the hearing; the presentence report, the transcript of the guilty plea hearing, a letter from the Defendant, and the Defendant's allocution were the only evidence considered by the trial court. In the latter, the Defendant stated, "I just want to say that to the victims that I am sorry for what I done." After hearing the arguments of counsel and reviewing the evidence and sentencing considerations, the trial court found that the Defendant was a Range I offender. The trial court also found three enhancement factors applicable. First, the Defendant had a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, noting the Defendant's admission that he had been drinking alcohol since he was thirteen years old and that he had smoked marijuana "everyday for six or seven times a day" and giving this criminal behavior great weight. Second, the Defendant before trial or sentencing failed to comply with the conditions of a sentence involving release into the community, to which the trial court also gave great weight. Third, the Defendant had previously been adjudicated to have committed delinquent acts as a juvenile that would constitute felonies if committed by an adult, finding that the Defendant had approximately nine such juvenile adjudications as well as misdemeanor-type

offenses. The only mitigating factors found by the trial court were that the Defendant was young and that he pled guilty to the offenses, giving the latter slight weight.

The trial court sentenced the Defendant to serve two years for each of the Burglary of an auto offenses, Counts 1, 3, 5, and 7, in the Department of Correction (DOC); four years for the Theft of Property over \$1,000 conviction, Count 2, in the DOC; eleven months and twenty-nine days for the Theft of Property under \$500 offenses, Counts 4, 6, and 8; eleven months and twenty-nine days for the Evading Arrest, Count 9; and six months for the Resisting Arrest, Count 10, in the county jail as with the other misdemeanor convictions. The trial court found that consecutive sentencing was appropriate because of the Defendant's extensive juvenile criminal history and explained, "He's committed basically five different episodes of criminal activity and he needs to be punished for each one." Thus, the trial court ordered,

Counts 1 and 2 will run concurrent to each other . . . [but] consecutive to Counts 3 and 4. Counts 3 and 4 will run concurrent to each other . . . [but] consecutive to Counts 5 and 6. Counts 5 and 6 will run concurrent to each other . . . [but] consecutive to Counts 7 and 8. Counts 7 and 8 will run concurrent to each other . . . [but] consecutive to Counts 9 and 10. And then Counts 9 and 10 will run concurrent to each other. . . [but] consecutive to all of these other sentences.

The trial court denied alternative sentencing, explaining,

. . . So, the Court finds that measures less restrictive than confinement have recently and frequently been applied to this defendant without success.

The Court finds that the interests of society in being protected from this defendant's possible future conduct is great. There's no doubt in my mind that if he wasn't in jail right now he would be out breaking into cars, stealing cars or stealing property. No question that that's the path that he's headed down.

Also the Court finds that the [D]efendant lacks the potential for rehabilitation. You know, he's young. I hope at some point he can turn his life around, but I don't think he can do it on the outside. I don't think he's an appropriate candidate for probation. He's proven that on at least three different occasions. He's not worthy of probation. He can't follow the rules of probation. Each and every time he's ever[] been granted probation, he's committed a new offense. So the Court finds that it appears that the [D]efendant will not abide by any terms or conditions of probation.

The Defendant filed a motion for a new sentencing hearing on August 14, 2012. On October 1, 2012, the trial court heard arguments on that motion and, despite the State's agreement that a new sentencing hearing was warranted, denied the motion on October 10, 2012. The Defendant filed his notice of appeal on October 11, 2012.

ANALYSIS

The Defendant contends that the trial court improperly (1) sentenced him to full confinement in direct contravention of Tennessee Code Annotated section 40-35-122, which prohibits continuous confinement for non-violent property offenses, and (2) imposed consecutive sentencing based on its erroneous finding that the Defendant had an extensive juvenile criminal history. The State agrees that the trial court's sentence of full confinement contravenes the plain language of section 40-35-122 and that the sentence, regarding the four auto burglaries only, is improper; however, the State maintains that trial court did not abuse its discretion in imposing consecutive sentencing.

I. Timeliness of the Notice of Appeal

As a preliminary matter, the Defendant implores this court to waive the untimely filing of his notice of appeal because he was awaiting the trial court's ruling on his motion for a new sentencing hearing filed on August 14, 2012; the State presents no argument on the matter. Tennessee Rule of Appellate Procedure 4(a) provides that the notice of appeal is not jurisdictional and that timely filing may, therefore, be waived in the interest of justice. Given that the motion was not heard until October 1, 2012, and subsequently not ruled upon until October 10, 2012, and that the Defendant filed his notice of appeal the very next day, we conclude that waiving the untimeliness of the Defendant's notice is appropriate in the interest of justice. Tenn. R. App. P. 4(a).

II. Denial of Alternative Sentencing with Respect to the Vehicle Burglary Convictions

Tennessee Code Annotated section 40-35-122 governs sentencing for nonviolent property offenses, and it provides, in relevant part, as follows:

(a) Notwithstanding any provision of law to the contrary, except as provided in subsection (b), the judge sentencing a defendant who commits a non-violent property offense, as defined in subsection (c), on or after July 1, 2010, shall

not be authorized to impose the sentencing alternatives of continuous confinement in a local jail or the department of correction as authorized by § 40-35-104(c)(5), (c)(6), or (c)(8). However, the judge may sentence the defendant to any of the other sentencing alternatives authorized by § 40-35-104(c), which include, but are not limited to, periodic confinement, work release, community corrections, probation, or judicial diversion.

(b)(1) A defendant convicted of an offense set out in subsection (c) may be sentenced to any of the sentencing alternatives authorized by § 40-35-104(c), including a period of continuous confinement, if the sentencing judge determines the defendant:

(A) Has at least one (1) prior conviction at the time the subsection (c) offense is committed; or

(B) Violated the terms and conditions of the alternative sentence originally imposed upon the defendant pursuant to subsection (a).

....

(c) As used in this section, a “non-violent property offense” is:

....

(18) Burglary of an auto under § 39-14-402(a)(4)[.]

Tenn. Code Ann. § 40-35-122(a), (b)(1), (c)(18). As the above-cited statute clearly states, unless a defendant has a prior conviction or has failed to comply with an alternative sentence imposed in accordance with this statute, the trial court is not authorized to order that defendant to continuous confinement. For the purposes of this section, a prior conviction is defined as follows:

(A)(i) “Prior conviction” means that the defendant serves and is released or discharged from, is serving, or is on escape status from a separate period of incarceration or supervision for the commission of a felony offense prior to or at the time of committing an offense on or after July 1, 2010, listed in subsection (c);

(ii) “Prior conviction” includes convictions under the laws of any other state, government or country that, if committed in this state, would

constitute a felony. If an offense in a jurisdiction other than Tennessee is not identified as a felony in this state, it shall be considered a prior conviction if the elements of the offense are the same as the elements for a felony offense in this state; and

(B) “Separate period of incarceration or supervision” includes a sentence to any of the sentencing alternatives set out in § 40-35-104(c)(3)-(9).

Id. at § -122(b)(2).

At the motion for a new sentencing hearing, the Defendant contended, and the State agreed, that the trial court improperly sentenced the Defendant to continuous confinement for Counts 1, 3, 5, and 7, the auto burglary convictions, in direct contravention of section 40-35-122. Denying the Defendant’s request for a new sentencing hearing, the trial court stood by its sentencing determination and declined to follow section 40-35-122, explaining as follows:

. . . You know, I don’t believe the legislature ever intended for a person to accumulate a substantial juvenile history and then when he turns 18 to basically say that we’re going to ignore everything you ever did in the past and we’re going to start out and treat you like a first time offender. I don’t think that is what the legislature intended. You know, when they passed this statute about vehicle burglaries and certain other nonviolent offenses. I don’t think they were considering that fact that somebody might have a substantial juvenile history. . . .

. . . I’m going to stand by my sentencing in this case.

The trial court continued in this vein and reiterated that it believed that the Defendant was a poor candidate for probation.

The standard of review for statutory construction is de novo. State v. Edmondson, 231 S.W.3d 925, 927 (Tenn. 2007). The paramount rule of statutory construction “is to ascertain and give effect to legislative intent without broadening the statute beyond its intended scope.” Carter v. Bell, 279 S.W.3d 560, 564 (Tenn. 2009) (citing State v. Sherman, 266 S.W.3d 395, 401 (Tenn. 2008)). Courts “must always begin with the words that the General Assembly has chosen” and “must give these words their natural and ordinary meaning.” Lee Med., Inc. v. Beecher, 312 S.W.3d 515, 527 (Tenn. 2010). There is a presumption that every word in a statute has meaning and purpose and should be given full effect so long as the obvious intention of the General Assembly is not violated by so doing. State v. Pope, ---

S.W.3d ---, 2013 WL 6869850, at *3 (Tenn. 2013) (citing In re C.K.G., 173 S.W.3d 714, 722 (Tenn. 2005)). When a statute is clear, courts simply apply the plain meaning without complicating the task. Id. (citing Eastman Chem. Co. v. Johnson, 151 S.W.3d 503, 507 (Tenn. 2004)).

Upon thorough review, we conclude that the trial court erred in declining to follow the dictates of section 40-35-122. The statute is clear and unambiguous; therefore, it should have been enforced as written because “it is generally presumed that the legislature acted purposefully in the subject included or excluded.” Id. (citing State v. Loden, 920 S.W.2d 261, 265 (Tenn. Crim. App. 1995); see also State v. Hawk, 170 S.W.3d 547, 551 (Tenn. 2005)). The record reflects that the Defendant, despite having a fairly extensive juvenile record, discussed in further detail below, does not have any qualifying prior convictions. Offenses committed as a juvenile do not qualify as “convictions” because they are adjudications of delinquency. See Tenn. Code Ann. § 37-1-133(a); see also id. at § 40-35-106(b)(3)(A) (expressly precluding the use of juvenile adjudications as prior convictions for range classification purposes). But see Tenn. Code Ann. § 40-35-114(16); State v. Banks, 271 S.W.3d 90, 147-48 (Tenn. 2008); State v. Farmer, 239 S.W.3d 752, 756 (Tenn. Crim. App. 2007) (providing other instances when the juvenile adjudications may be considered in sentencing). Further, because the Defendant was never placed on any alternative sentence for the instant offenses, he fell squarely within the ambit of section 40-35-122. See id. at § 40-35-122(b)(1)(B). Therefore, the Defendant’s convictions for auto burglary were not subject to a sentence of continuous confinement, and the trial court’s failure to impose some form of alternative sentence as to these convictions was in error.

III. Imposition of Partial Consecutive Sentencing

The Defendant challenges the trial court’s imposition of consecutive sentencing, contending that it improperly concluded that the Defendant’s juvenile history was extensive. The State responds that the trial court did not abuse its discretion in imposing consecutive sentencing.

Our supreme court has recently held that “the abuse of discretion standard, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations” “if [the trial court] has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b).” State v. James Allen Pollard, --- S.W.3d ---, No. M2011-00332-SC-R11-CD, 2013 WL 6732667, at *8-9 (Tenn. 2013). Further, “[s]o long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on

appeal.” Id. at *9 (citing see Tenn. R. Crim. P. 32(c)(1) (“The order [for consecutive sentences] shall specify the reasons for this decision and is reviewable on appeal.”); see also State v. Bise, 380 S.W.3d 682, 705 (Tenn. 2012)).

Tennessee Code Annotated section 40-35-115(b) provides that a trial court should consider the following criteria in determining whether to impose consecutive sentencing:

- (1) The defendant is a professional criminal who has knowingly devoted the defendant’s life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant’s criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high;
- (5) The defendant 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;
- (6) The defendant is sentenced for an offense committed while on probation;
or
- (7) The defendant is sentenced for criminal contempt.

Id. The trial court may impose consecutive sentencing upon finding the existence of any one of the criteria contained in Tennessee Code Annotated section 40-35-115(b). Juvenile adjudications may be used to support the imposition of consecutive sentencing. Banks, 271 SW.3d at 147-48 (“When determining whether sentences should run consecutively or concurrently, trial courts are not limited to considering the defendant’s criminal activity or conduct that occurred after the defendant’s eighteenth birthday.”); see State v. Stockton, 733

S.W.2d 111, 112 (Tenn. Crim. App. 1986); see also Tenn. Code Ann. § 37-1-133(b) (2005) (authorizing the use of juvenile records in the preparation of pre-sentence reports).

In the instant case, the trial court found that the Defendant’s “substantial juvenile history” warranted the imposition of consecutive sentencing. The trial court stated,

The Court finds as far as this history that the [D]efendant does have an extensive history of criminal activity as a juvenile. Of course, he’s got an extensive history of criminal activity as an adult considering what he did in this one night back in October of 2011. For those reasons, the Court finds that consecutive sentencing in this case would be appropriate. . . .

I don’t find that concurrent sentencing is appropriate in this case based upon this long extensive criminal history as a juvenile and based upon the fact that he’s committed new offenses while on probation as a juvenile three different times.

Contrary to the Defendant’s argument, the record supports the trial court’s conclusion that the Defendant has an extensive history of criminal activity as a juvenile. The Defendant’s presentence report provides ample evidence of his criminal history:

Age	13:	12/22/06	Theft of Property/F	2/28/07	Guilty
	16:	9/27/09	Burglary/F	11/18/09	Guilty
			Theft of Property/F	11/18/09	Guilty
			Evading Arrest/F	11/18/09	Guilty
	16:	10/10/09	Theft of Property/F	11/18/09	Guilty
			Evading Arrest/F	11/18/09	Guilty
	16:	12/7/09	Theft of Property/F	1/27/10	Guilty
	16:	4/25/10	Burglary/F	6/2/10	Guilty
	17:	4/7/11	Burglary/F	5/18/11	Guilty

Because juvenile adjudications can be considered in determining the appropriateness of consecutive sentencing and the record supports the trial court’s conclusion that the Defendant’s juvenile criminal history was extensive, we cannot conclude that the trial court abused its discretion in imposing consecutive sentencing.

CONCLUSION

Based on our review of the record and the applicable law, we affirm in part and

reverse in part the judgments of the trial court and remand for a new sentencing hearing in accordance with this opinion. We note that this is not simply a case of misapplying Tennessee Code Annotated § 40-35-122; both the State and the defense informed the trial court that the imposition of full confinement in the auto burglary convictions was in direct contravention of that statute and that a new sentencing hearing was warranted. Hence, the trial court understood the dictates of section 40-35-122 but declined to follow it, taking the position that the Legislature could not have intended for it to apply to someone with the Defendant's juvenile criminal history. It is based on this reasoning that we conclude that the Defendant's new sentencing hearing on remand should be conducted by one of the other two judges who preside in the 26th Judicial District.

D. KELLY THOMAS, JR., JUDGE