

ARKANSAS COURT OF APPEALS
JUDGE DAVID M. GLOVER
NOT DESIGNATED FOR PUBLICATION

DIVISION II

CACR06-87

September 27, 2006

MATTHEW RUSAK

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

APPEAL FROM THE GREENE
COUNTY CIRCUIT COURT
[CR-04-187]

HONORABLE DAVID R. GOODSON,
JUDGE

AFFIRMED

Appellant Matthew Rusak entered unconditional pleas of guilty to the offense of committing a terroristic act and to a sentencing enhancement penalty for committing a felony with a firearm pursuant to Arkansas Code Annotated section 16-90-120 (Supp. 2001). Rusak elected to be sentenced by the trial court rather than a jury. After the sentencing hearing, the trial judge sentenced Rusak to ten years in the Arkansas Department of Correction, followed by a ten-year suspended imposition of sentence for the offense of committing a terroristic act; ordered Rusak to pay \$200 in court costs and \$250 in restitution to one of the victims; and sentenced him to five years in the Arkansas Department of Correction on the enhancement penalty for utilizing a firearm in the commission of a felony, with that sentence to be served consecutively to the ten-year

sentence for the commission of a terroristic act. After the sentencing hearing, Rusak filed a verified petition to correct, vacate, or modify sentence, in which he argued that his sentence was excessive relative to the presumptive sentence for the offenses; that the trial court failed to weigh any mitigating factors; and that the trial court incorrectly applied the aggravating factors set forth in the departure report. The trial court denied Rusak's petition. Rusak timely filed his notice of appeal, arguing that the trial court erred because it either did not exercise its discretion or abused its discretion by failing to consider the mitigating factors presented at his sentencing hearing. We affirm.

We first note that appellant only abstracted testimony that is favorable to his position on appeal; he failed to abstract any of the testimony from the State's case-in-chief at the sentencing hearing; and the State failed to supplement the abstract with this testimony. However, this missing evidence is very helpful in piecing together the events that formed the basis both for appellant's guilty pleas and the trial court's sentencing, and we can go to the record to affirm, *see Advocat, Inc. v. Sauer*, 353 Ark. 29, 111 S.W.3d 346 (2003), *cert. denied*, 540 U.S. 1012 (2003); therefore it is not necessary to prolong the disposition of this case by remanding it due to abstracting deficiencies.

An overview of the facts and testimony set forth at the sentencing hearing is necessary. On March 8, 2004, at about 10:15 or 10:30 p.m., Rusak, who was eighteen at the time, fired three shots at cars on Highway 412 in Paragould. One shot went through the window of a duplex across the street; one shot went through a washer box in the bed of a truck occupied by Sarah Baker and David Hynuh; and the third shot pierced the back

of a Ford Expedition occupied by Rebecca Hancock, her parents, her husband, and her two small children, who were three and one at the time of the incident.

At the sentencing hearing, Sarah Baker testified that she and her boyfriend, David Hynuh, were on their way home after purchasing a new washing machine when she heard three shots. When they pulled over to inspect their truck, they noticed a bullet hole in another vehicle that had pulled over, and then they saw a bullet hole through the washing machine box in the back of their truck. Baker said that the box was located only a few inches from where she was sitting in the truck, and that since the incident she had been paranoid and scared of being shot again.

Rebecca Hancock testified that she and her family were on their way home; that her father was driving and her husband was in the front passenger seat; that her son and her mother were in the second row of seats; and that she and her infant daughter were in the third row of seats. Hancock heard a noise and thought that her father had run over something; as she was looking around, a second shot hit directly over her right shoulder. Hancock exclaimed that they were being shot at; her father pulled over in a parking lot; Hynuh's truck pulled in behind them; and Hynuh got out and told them that someone was shooting at them. Hancock said that her father got out and found the bullet hole about an inch and a half below the glass on the back hatch; she further stated that the bullet hole was less than one foot from where she had been sitting in the vehicle.

Hancock said that she had become a very angry person since the incident, and that she kept thinking that one of her children could have been killed. She said that she missed

several days of work, and that she can no longer sleep. She said that she did not know if her anger and frustration would ever end, and she explained her frustration about not being able to protect her children from a person standing on the side of the road with a gun shooting at people. Hancock also described physical problems she had experienced since the incident, including spikes in her blood pressure and difficulties with her vision.

Paragould police officer Brent Cox testified that he was called to the scene after the shots were fired, and that he found a hole in the back of Hancock's Expedition hatch about an inch and a half or two inches below the glass next to the opening. Cox said that the bullet was stopped by the plastic interior in the Expedition, and that if it had penetrated the plastic interior or had it been two inches higher, it would have hit where Hancock's daughter had been sitting. Cox also located a bullet hole in the top corner of the washer box that was in the bed of David Hynuh's truck

Detective Greg Trout of the Paragould Police Department testified that he investigated the incident in question, recovered a bullet from the Hancock vehicle, and that the bullet hole was approximately three quarters of an inch wide. Trout said that he determined that the shooter had fired the shots from thirty-five to forty yards away, and he recovered three spent .22 caliber rifle casings from the scene. Trout learned the next day that a third bullet had gone through a window at a residence on West Kingshighway.

Detective Trout said that he had several conversations with Diana Schrick, which led him to Rusak as the shooter. Based upon information learned from Schrick, Trout obtained a search warrant for Rusak's residence, where he found three firearms, including

a .22 semi-automatic rifle, ammunition, and a small amount of marijuana. The state crime lab verified that the casings found at the scene were fired by the .22 rifle found in Rusak's apartment.

Arkansas State Police Agent Phil Carter testified that he was called in to assist in the investigation; he interviewed Schrick, and that conversation led him to Rusak. Carter said that he talked to Rusak after his arrest and that Rusak gave him a statement about the shootings. He said that Rusak told him that he shot three times; that he thought that he hit a maroon truck; that he shot at a white car; and that his third shot missed the vehicle. Rusak also told Carter that he had a forty-ounce beer on the night of the incident but had not smoked any marijuana; that he had lost his vehicle and his girl and had nothing to live for; that he was very unhappy; and that he was angry and it was "eating at him." Carter later learned that Rusak had wrecked his car a few nights before in a high-speed chase with local police. Carter said that Rusak never told him that the reason for the shootings was because he was under the influence of drugs.

Rusak testified that he had never been in trouble with the law prior to this incident, except for a DUI and related offenses and some school-related trancies. He recounted that he started using drugs when he was fourteen. He said that his grandparents, with whom he had lived since he was thirteen months old, knew about his drug problem and had sent him to Texas to live to get him away from drugs, but that he resented being sent away and came back to Paragould because he did not like Texas, even though his grandparents did not want him to come back. He said that his grandparents

were financing his living expenses but did not know the extent of his drug use. Rusak said that he obtained his GED in February 2004, but that all he cared about before the incident was going to drug houses and using drugs and alcohol; however, since he had been locked up, he had no desire to be near drugs or alcohol and wanted to get his life back on track.

Rusak said that on the night of the incident, he had been “eating large amounts of Xanax” and drinking alcohol. He did not deny shooting at the cars, and he said that if he had hit one of the children in the car, he did not know how he could live with himself. He professed that he was deeply sorry for what he did and wished that he could go back and take it all away. He asserted that he was not trying to hurt anyone that night; that it was just a cry for help. He said that he was stressed because his girlfriend, Deanna, had moved back in with her old boyfriend the night before the incident, and he stated that she probably figured into why this had happened and his drug use. He said that one of his friends was at his apartment when he left and saw him go out the door with the rifle, but if he had wanted to go out and kill people he would have used one of the other weapons at his house – a .30 caliber carbine or a 6.5 millimeter Swedish Mouser.

Rusak said that since he had been imprisoned, he had found a new relationship with God; had been taking additional GED classes; had been attending AA meetings; had been trying to get into drug recovery programs; and had been a trustee at the jail. He told the trial court that when he was released from prison, he wanted to attend a technical

institute for mechanical automotive training, and that he would abide by all of the terms and conditions set by the court if he were placed in an alternative-sentencing program.

Jeff Ruso, a jail minister and the founder of Biblical Approach to Addictions, testified that Rusak “touched his heart”; that he had seen a lot of growth in Rusak; and that Rusak really wanted to do something with himself. He said that based upon his interaction with Rusak, he believed that Rusak could be rehabilitated with proper guidance and instruction; that Rusak had been accepted into four different programs pending the outcome of the sentencing hearing; and that he did not think that the Department of Correction would be a good place for Rusak.

Dr. Allen Battle, a professor of psychiatry and a board-certified psychologist, testified that he had seen Rusak on two occasions; that he thought Rusak was open and honest with him on both occasions; and that Rusak was trying to answer all of his questions to the best of his ability. He stated that he gave Rusak a series of tests, and that Rusak’s answers were indicative of the long-standing substance problems in which Rusak had been involved since he was fourteen. Battle stated that he believed Rusak could be rehabilitated if given the proper guidance and instruction, although Battle could not guarantee that Rusak would be 100% successful or that Rusak would not go out and use drugs again. Battle explained that the fact that Rusak felt the need to use drugs as an escape mechanism for as long as he had suggested that Rusak needed help in his own mental adjustment. Battle told the trial court that his recommendation from the treatment

point of view was that Rusak should be in an inpatient facility in a drug-free environment in intensive psychotherapy for a minimum of one year.

At the close of all of the evidence at the sentencing hearing, the trial judge made the following ruling:

Mr. Rusak, you appeared before this court on April 26, 2005, and at that time you entered an unconditional plea of guilty to charges of terroristic – Committing a Terroristic Act which is a Class B Felony and Committing a Felony with a Firearm which carries an enhancement. If it's determined that that would be appropriate, an additional enhanced sentence or enhancement up to 15 years for committing an offense with a firearm.

Having heard the testimony and evidence in court today, considering the nature of the offense, the court has to take – and I think when we deal with criminal cases, the first thing the court has to consider is public safety, and what type of possible or potential public safety risk does an individual present to the general public. You know, here, Mr. Rusak, but for a matter of a few inches – and bailiff, you can tell the witnesses that's been excluded they can come back in the courtroom – you know, maybe 12 inches, three inches, something, you know, a matter of not a very big distance, as your attorney said and as Mr. Philhours has said, you wouldn't be in this court looking at a possible 20 or 20-year sentence with a 15-year enhancement for a firearm. You might possibly be charged with Capital Felony Murder looking at either the death penalty or life without parole.

The Good Lord or fate was on your side and the side of those individuals that you decided to draw down on and fire at for no reason other than the fact that you were under the influence of drugs and alcohol, and you were upset over the fact that your girlfriend had broken up with you and you'd wrecked your car while you were running from the police, and you were depressed, and you were upset over the fact that your grandparents had sent [you] to the State of Texas to live with your mother who'd rejected you when you were an infant and things just weren't going too well in your life.

I live in this community. I utilize the service station or the gas place that you were shooting from that night on a regular basis. I could've been the one driving down that street, or one of my children, or my spouse, or a member of my family or one of my friends. You know, any of those individuals. And I have to consider that since you've laid this on my doorstep and you've waived a jury trial and said,

[“]Judge, I’m gonna plead guilty, and I’m gonna let you be the conscious [sic] of the community here,[”] that’s what I have to do. And I have to think if we had 12 people sitting over here in this jury box and they were determining your fate, what would they do, because I also live in this community.

Having considered all those factors, Mr. Rusak, this will be the order and judgment of the court. You’re sentenced to 10 years in the Arkansas Department of Correction with 10 years suspended imposition of sentence on the Count One for the Terroristic Act. You’re ordered to pay \$200 in court costs. You’re ordered to pay \$250 restitution to Rebecca Hancock. Those sums are to be paid at the rate of \$50 a month with your first payment due 90 days after you’ve been released from the custody of the Department of Correction.

On the enhancement for utilizing a firearm, you’re sentenced to five years and that’s under Arkansas Code 16-90-120, and pursuant to law that will be consecutive to the ten-year sentence so you’re effectively sentenced to a 15-year sentence in the Arkansas Department of Correction. You’ll be given your jail-time credit, and I won’t know what that is but we can figure out what that is. That will be the order and judgment of the court.

You have the right to appeal the sentence on the enhancement, and you can discuss with your attorneys the nature in which that might be appealed. You don’t have the right to file an appeal with regard to the sentence on the Terroristic Act.

On appeal, Rusak argues that the trial court abused its discretion in departing upward from the presumptive sentence because the trial court did not duly consider the mitigating circumstances he presented at the sentencing hearing. We disagree. The trial judge’s ruling from the bench, as set forth verbatim above, indicates that he did consider the mitigating circumstances, but nevertheless believed that the seriousness of the crime warranted the sentence imposed.

Rusak tries to lessen the seriousness of his actions by pointing out that no one was hurt in the incident; however, that argument ignores the victims’ testimony about the repercussions suffered by them as a result of his actions and the fact, as pointed out by the

trial judge, that but for “the Good Lord or fate,” Rusak could have had capital murder charges pending against him instead of a charge of committing a terroristic act.

Rusak also contends that he lacked capacity of judgment because of his voluntary use of narcotics; however, the trial judge also covered that issue when he went through the laundry list of reasons given by Rusak for his actions. The trial judge did not find that to be a legitimate excuse. Furthermore, the finder of fact is not required to find mitigating circumstances merely because the defendant puts forth evidence that could serve as the basis for finding mitigating circumstances – the finder of fact determines the weight to give the evidence, and may reject or accept any or all of the evidence as true. *See Dansby v. State*, 350 Ark. 60, 84 S.W.3d 857 (2002); *Hill v. State*, 331 Ark. 312, 962 S.W.2d 762 (1998), *cert. denied*, 525 U.S. 860 (1998). The trial judge obviously considered all of the testimony and determined that the seriousness of Rusak’s offense outweighed any of the factors he claims should have mitigated his sentence.

Affirmed.

HART and CRABTREE, JJ., agree.