

IN THE NEBRASKA COURT OF APPEALS

**MEMORANDUM OPINION AND JUDGMENT ON APPEAL
(Memorandum Web Opinion)**

STATE V. HAYNES

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STATE OF NEBRASKA, APPELLEE,

v.

DAMMON T. HAYNES, APPELLANT.

Filed August 4, 2015. Nos. A-14-1082, A-14-1083.

Appeals from the District Court for Douglas County: SHELLY R. STRATMAN, Judge. Judgment in No. A-14-1082 affirmed. Judgment in No. A-14-1083 affirmed in part, and in part sentence vacated and cause remanded for resentencing.

Thomas C. Riley, Douglas County Public Defender, and John P. Ashford for appellant.

Douglas J. Peterson, Attorney General, and George R. Love for appellee.

INBODY, PIRTLE, and BISHOP, Judges.

BISHOP, Judge.

I. INTRODUCTION

Dammon T. Haynes appeals from the decisions of the district court for Douglas County that convicted him of tampering with a juror, witness, or informant (case No. A-14-1082) and of stalking and terroristic threats (case No. A-14-1083) based on his no contest pleas, and sentenced him to terms of incarceration. Haynes alleges that the district court imposed excessive sentences. We affirm Haynes' sentence for tampering in case No. A-14-1082. In case No. A-14-1083, we affirm Haynes' sentence for terroristic threats, but we reverse his sentence for stalking and remand the matter for resentencing on that conviction only.

II. BACKGROUND

In January and February 2014, Haynes continually harassed his ex-girlfriend, Sharyce Smith, who was the mother of one of his children. During that timeframe, Smith obtained a protection order against Haynes. Haynes continued to call and text Smith, saying he wanted her back. Haynes repeatedly drove by Smith's home, prompting Smith to call the police multiple times. On one drive-by of Smith's home, Haynes yelled, "hey, bitch, I'm coming back. This house is going to get shot up tonight." On another drive-by of Smith's home, Haynes pointed his fingers out of the car window as if to mimic a gun. During this timeframe, Haynes also filled out changes of address forms for Smith, sent mail to her residence, called Cox Communications pretending to be Smith to have her cable turned off, and sent "jitney cabs" to her house all hours of the night.

In February and March 2014, after Haynes had been arrested and put in jail, he continued to call Smith repeatedly from jail, and used others to get in contact with Smith via phone or to get mail to her. Haynes told Smith not to talk to detectives or prosecutors, and not to show up for court.

In district court case No. CR-14-701, the State filed an amended information charging Haynes with (1) "stalking, prior conviction" (Class IV felony), (2) terroristic threats (Class IV felony), and (3) being a habitual criminal.

In district court case No. CR-14-1202, the State filed an amended information charging Haynes with (1) tampering with a juror, witness, or informant (Class IV felony), and (2) being a habitual criminal.

Pursuant to a plea agreement, Haynes pled "no contest" to the "stalking, prior conviction" and terroristic threat charges in case No. CR-14-701, as well as the tampering with a juror, witness, or informant charge in case No. CR-14-1202; an enhancement hearing on the habitual criminal charges was to be held at a later date. In exchange for his pleas, the State agreed to dismiss two other pending cases against Haynes. The district court accepted Haynes' pleas and adjudged him guilty of the above crimes.

At the combined enhancement and sentencing hearing, the State offered into evidence Exhibit 7, a "pen packet," and such was received into evidence. The "pen packet" showed that Haynes had previously been convicted of: (1) possession with intent to deliver a controlled substance (cocaine), a Class II felony, and sentenced to 12 to 14 months' imprisonment (June 2007); (2) stalking, first offense, a Class I misdemeanor, and sentenced to 1 year in prison (September 2009); (3) stalking, a Class IV felony (pursuant to a plea agreement), and sentenced to 20 to 60 months' imprisonment (March 2011); and (4) burglary and identity theft, each a Class III felony, and sentenced to 1-1 year imprisonment on each count (March 2012). The district court found Haynes to be a habitual criminal.

In case No. CR-14-701, the district court sentenced Haynes to 12 to 24 years' imprisonment, with 289 days' credit for time served, on each count of "stalking, prior conviction" and terroristic threats; the sentences were to be served concurrently.

In case No. CR-14-1202, the district court sentenced Haynes to 12 to 24 years' imprisonment on the count of tampering with a juror, witness, or informant; the sentence was to be served consecutively to the sentences in case No. CR-14-701.

Haynes now appeals. His appeal of district court case No. CR-14-701 is docketed as appellate court case No. A-14-1083. His appeal of district court case No. CR-14-1202 is docketed as appellate court case No. A-14-1082. These appeals have been consolidated for disposition.

III. ASSIGNMENTS OF ERROR

Haynes assigns that the trial court imposed excessive sentences.

IV. STANDARD OF REVIEW

An appellate court will not disturb a sentence imposed within the statutory limits absent an abuse of discretion by the trial court. *State v. Pereira*, 284 Neb. 982, 824 N.W.2d 706 (2013).

V. ANALYSIS

Haynes asserts that the district court imposed excessive sentences. Factors a judge should consider in imposing a sentence include the defendant's age, mentality, education, experience, and social and cultural background, as well as his or her past criminal record or law-abiding conduct, motivation for the offense, nature of the offense, and the amount of violence involved in the commission of the crime. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011).

Haynes was 37 years old at the time of the instant stalking and terroristic threats crimes, 38 years old at the time of the tampering crime and at the time of sentencing. At the sentencing hearing, Haynes claimed that he was raised in a home where his mother was the victim of violent and repeated domestic attacks, which Haynes observed. He claims his stepfather would beat him on a nightly basis. He said that eventually, when he was in the 10th grade, his grandmother forcibly removed him from his mother's care. Haynes reported completing college, but there is some question as to whether he actually earned a degree. Prior to his arrest, Haynes reported working at Vick's Corn Popper.

Haynes has an extensive criminal history. His adult convictions include negligent driving, obstructing the administration of law (7 times), assault and battery (2 times), weapon concealment, flight to avoid arrest (2 times), open container, disorderly conduct, protection order violation (6 times), criminal mischief, intimidation by phone call, failure to appear, leaving the scene of property damage, harass[ment] by phone, destruction of property, possession with intent to deliver/manufacture crack, stalking (2 times), theft of services, burglary, and identity theft--\$1,500 or more. Regarding his current convictions, Haynes repeatedly contacted Smith despite a protection order. He called her repeatedly and drove by her home, threatening to shoot up her home. Even after Haynes was arrested and put in jail, he continued to reach out to Smith, and used others to get mail to her. He indicated to her that "his boys" might come after her, and that there was nothing he could do to stop them.

As part of the presentence investigation for his current convictions, the probation office conducted a level of service/case management inventory. Haynes was assessed in the "very high risk" category for community based interventions. The probation officer noted that Haynes was one of the worst domestic violence offenders that this officer has seen in almost 22 years of working with probation. He has been arrested on at least 23 different occasions for crimes of Domestic Violence including: assaults, protection order violations, criminal

mischievous charges, destruction of property, Identity theft, Burglary, and Terroristic Threats. He has had at least 16 protection orders filed on him by 14 different people in the last 18 years.

The probation officer noted that Haynes continued to harass Smith even after being arrested and placed in jail. Haynes called Smith at least 44 times from jail. Haynes used other inmates' identification numbers to mail letters to multiple people from jail, asking them to reach out to Smith. Haynes tried to get his son to "Swiss Cheese" (shoot up) the house in which Smith was residing. Haynes also offered \$1,000 to a woman to get two of her friends and go "beat [Smith's] ass." The probation officer recommended that the court sentence Haynes to "extensive" periods of incarceration to run consecutively.

The district court stated that it had considered all of the sentencing factors. The court stated that it reviewed the presentence investigation "numerous times" and said it was "nothing short of unbelievable." The court, like the probation officer, said that Haynes was one of the worst domestic violence offenders it had ever seen.

A sentence imposed within statutory limits will not be disturbed on appeal absent an abuse of discretion by the trial court. *State v. Williams*, 282 Neb. 182, 802 N.W.2d 421 (2011). And it is the minimum portion of an indeterminate sentence which measures its severity. *State v. Nevels*, 235 Neb. 39, 453 N.W.2d 579 (1990).

Subject to certain exceptions not applicable in the present case, Nebraska's habitual criminal statute, Neb. Rev. Stat. § 29-2221 (Reissue 2008), provides:

(1) Whoever has been twice convicted of a crime, sentenced, and committed to prison . . . for terms of not less than one year each shall, upon conviction of a felony . . . be deemed to be a habitual criminal and shall be punished by imprisonment . . . for a mandatory minimum term of ten years and a maximum term of not more than sixty years

Generally, it is within a trial court's discretion to direct that sentences imposed for separate crimes be served either concurrently or consecutively. *State v. Berney*, 288 Neb. 377, 847 N.W.2d 732 (2014). Unless prohibited by statute or unless the sentencing court states otherwise when it pronounces the sentences, multiple sentences imposed at the same time run concurrently with each other. *Id.* The habitual criminal statute does not require a court to impose the enhanced sentences consecutively to each other. *Id.*

1. CASE NO. A-14-1082

Haynes was convicted of tampering with a juror, witness, or informant, a Class IV felony, and was also found to be a habitual criminal. Because the district court determined that Haynes was a habitual criminal, § 29-2221 provides for a sentence of 10 to 60 years' imprisonment. Haynes was sentenced to 12 to 24 years' imprisonment; and his sentence was to be served consecutively to his sentences in case No. A-14-1083. Haynes' sentence is in the low range of the permissible sentencing range. Having considered the relevant factors in this case, as discussed above, we find that the sentence is not excessive or an abuse of discretion and such sentence is therefore affirmed.

2. CASE NO. A-14-1083

(a) “Stalking, Prior Conviction”

Haynes was convicted of “stalking, prior conviction,” a Class IV felony, and was also found to be a habitual criminal. Haynes argues, and the State agrees, that his Class IV felony stalking conviction was not subject to habitual criminal enhancement.

Neb. Rev. Stat. § 28-311.04 (Reissue 2008) states in relevant part:

(1) Except as provided in subsection (2) of this section, any person convicted of violating section 28-311.03 [stalking] is guilty of a Class I misdemeanor.

(2) Any person convicted of violating section 28-311.03 [stalking] is guilty of a Class IV felony if: (a) The person has a prior conviction under such section or a substantially conforming criminal violation within the last seven years; . . .

In the instant case, Haynes pled no contest to and was convicted of “stalking, prior conviction,” a Class IV felony (he had previously been convicted of stalking in 2009 and 2011). The specific penalty enhancement for subsequent stalking offenses as set forth in § 28-311.04 precludes application of the general enhancement provisions set forth in the habitual criminal statute (§ 29-2221); otherwise Haynes would be subject to a double penalty enhancement on his stalking conviction. See *State v. Chapman*, 205 Neb. 368, 287 N.W.2d 697 (1980) (recognizing that penalty enhancement provisions set forth for subsequent offenses of specific crimes must be used when applicable instead of enhancement under a habitual criminal statute, thus avoiding “double penalty enhancement”). See, also, *State v. Hittle*, 257 Neb. 344, 598 N.W.2d 20 (1999) (a defendant should not be subjected to double penalty enhancement through application of both a specific subsequent offense statute and a habitual criminal statute).

The statutory sentencing range for a Class IV felony is up to 5 years’ imprisonment, a \$10,000 fine, or both. See Neb. Rev. Stat. § 28-105 (Cum. Supp. 2014). Accordingly, the district court abused its discretion when it sentenced Haynes to 12 to 24 years’ imprisonment for “stalking, prior conviction.” We note that Haynes’ sentence for “stalking, prior conviction” was ordered to be served concurrently with his sentence for terroristic threats which we affirm below; therefore, the sentencing error regarding “stalking, prior conviction” was for all practical purposes harmless, but nevertheless needs to be corrected. Because Haynes was improperly sentenced as a habitual criminal, we vacate the sentence imposed for “stalking, prior conviction” and remand the cause to the district court for resentencing.

(b) Terroristic Threats

Haynes was convicted of terroristic threats, a Class IV felony, and was also found to be a habitual criminal. Because the district court determined that Haynes was a habitual criminal, § 29-2221 provides for a sentence of 10 to 60 years’ imprisonment. Haynes was sentenced to 12 to 24 years’ imprisonment. Haynes’ sentence is in the low range of the permissible sentencing range. Having considered the relevant factors in this case, as discussed above, we find that the sentence is not excessive or an abuse of discretion and such sentence is therefore affirmed.

VI. CONCLUSION

In case No. A-14-1082, we affirm Haynes' sentence for tampering with a juror, witness, or informant.

In case No. A-14-1083, we affirm Haynes' sentence for terroristic threats. However, because his sentence for "stalking, prior conviction" should not have been enhanced under the habitual criminal statute, we vacate that sentence and remand the cause to the district court for resentencing.

JUDGMENT IN NO. A-14-1082 AFFIRMED.
JUDGMENT IN NO. A-14-1083 AFFIRMED
IN PART, AND IN PART VACATED AND
REMANDED FOR RESENTENCING.