

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
April 29, 2008 Session

**STATE OF TENNESSEE v. BRANDON COMPTON**

**Direct Appeal from the Criminal Court for Knox County  
No. 78832 Mary Beth Leibowitz, Judge**

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**No. E2007-01790-CCA-R3-CD - Filed September 2, 2008**

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The defendant, Brandon Compton, was convicted of two counts of first degree premeditated murder and received consecutive life sentences. On appeal, this court held that the evidence was insufficient as a matter of law to support the jury's finding of premeditation, modified the defendant's convictions to second degree murder, and remanded to the trial court for resentencing. On remand, the trial court imposed consecutive twenty-five-year sentences. The defendant now argues that the trial court erred in sentencing him above the presumptive sentence of twenty years and in imposing consecutive sentencing. Following our review, we affirm the judgments of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and THOMAS T. WOODALL, J., joined.

Robert R. Kurtz, Knoxville, Tennessee, for the appellant, Brandon Compton.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

We derive the relevant factual background from the opinion of this court in the defendant's prior direct appeal:

On June 13, 2003, the victim, Kellan Shown, contacted Timothy Williams about purchasing a pound of marijuana. Williams contacted the Appellant, who agreed to make the sale. It was agreed that the Appellant would come to a house on Burwell Avenue where Williams was staying to complete the transaction. Also

living in the house at the time were a number of individuals, including James and Marla Lindsey and David and Angie Talbot, as well as their families, including Lindsey's sixteen-year-old step-daughter, Whitney. Although not entirely clear from the record, most of these individuals, including the young children, were present on the evening of June 13th into the morning hours of June 14th, along with Whitney's boyfriend, Shane Cantor. Shortly before midnight, the Appellant arrived at the house and was met on the porch by Williams. Williams then accompanied the Appellant inside the house where a number of people were socializing and smoking marijuana in the living room. Prior to entering, the Appellant and Williams noticed a car parked across the street from the house with three men inside, later identified as the two victims, Shown and Clayton Hall, and the driver of the vehicle, Charles Chandler. Williams commented that the individuals in the vehicle were acting funny, and, according to Lindsey, the Appellant patted his side and said, "I ain't got nothin' to worry about." However, the Appellant appeared calm during this encounter. Shortly thereafter, the two victims, whom the Appellant had never met, entered the house, at which time the Appellant proceeded to show Shown and Hall the marijuana. Upon agreeing to the purchase, Shown handed the Appellant \$1000. However, upon inspection of the money, the Appellant thought that it looked suspicious and asked for a bowl of water. Whitney got the Appellant some water, and he proceeded to dip the money into the water causing the ink to run. The Appellant still remained calm and told the victims that apparently someone had given them counterfeit money. He then asked for his drugs back. The victim,<sup>1</sup> still in possession of the marijuana, stood up and said, "Fuck it. I'm going home." Both Shown and Hall then proceeded toward the door with the marijuana. The Appellant followed the pair down the hall and into a small foyer. Whitney was also in the hallway and was pushed out of the way. When Williams and Lindsey caught up with the group, they saw the Appellant with his gun drawn firing at the two victims. At least four shots were heard. According[] to Lindsey, the Appellant said, "That's what you get for stealing my weed." Afterwards, the Appellant retrieved the drugs and then ran out the back door and told everyone that they had not seen him there. The entire event took place in seconds. Once the Appellant was gone, Lindsey began "freaking out" because the deceased were in plain view of the children. The bodies of the victims were then dragged outside the home, and the police were called.

Police recovered four shell casings in the area where the shooting occurred, as well as a bullet found in the living room which had gone through a wall. Additionally, Lindsey later found a fifth shell casing in a plant and called police to collect it as well. Two bullets were recovered from each of the victims during the autopsy. Moreover, investigators found five counterfeit one hundred dollar bills in Shown's pocket, as well as a small quantity of crack cocaine. No weapons were

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<sup>1</sup>The record fails to establish whether it was the victim Shown or the victim Hall who was in possession of the drugs; however, it is clear that one of the victims stood up and prepared to leave with the marijuana.

recovered at the scene. The occupants of the residence identified the Appellant as the shooter, and police proceeded to search for him. Shortly thereafter, the Appellant was arrested at his home without incident.

The autopsies revealed that each victim was shot twice, with each shot being capable of producing death, and each victim died as a result of the wounds received. Shown, age twenty-two, had two gunshot wounds on the left side of his body, one to the head and one to the back. Hall, age eighteen, was shot twice on the right side of his body, one wound to the cheek and one to the back. The medical examiner testified that each wound was a distant gunshot wound, meaning that the weapon was fired from at least three feet away.

The twenty-two year old Appellant also testified at trial and admitted that, while he did maintain employment, his primary source of income was derived from selling drugs. He testified that he had gone to the house on Burwell that evening to sell marijuana to the victims. According to the Appellant, when he followed the victims into the foyer after they attempted to leave with his drugs, his gun was still in his pocket. He stated that he had gotten the nine millimeter pistol approximately one month earlier after his uncle was robbed and shot. The Appellant testified that he shot the victims in self-defense only after the victim Hall turned around in the foyer and fired at him. He testified that after the shootings he panicked, and, upon leaving the house, he picked up Hall's gun and the marijuana and fled.

State v. Brandon Compton, No. E2005-01419-CCA-R3-CD, 2006 WL 2924992, at \*1-2 (Tenn. Crim. App. Oct. 13, 2006), perm. to appeal denied (Tenn. Feb. 26, 2007).

The defendant was convicted of two counts of first degree premeditated murder. On appeal, he argued that the evidence was insufficient to support the verdicts because the State did not provide sufficient proof of premeditation, and the trial court erred in granting the State's request for a special jury instruction and in imposing consecutive sentencing. Holding that the evidence of premeditation was insufficient, the special jury instruction was erroneous, and the imposition of consecutive sentencing was proper, this court vacated the defendant's convictions for first degree murder and remanded to the trial court for entry of convictions for second degree murder and resentencing. Brandon Compton, 2006 WL 2924992, at \*6-10.

At the resentencing hearing, the trial court sentenced the defendant to twenty-five years for each count of second degree murder, to be served consecutively:

The range of punishment is fifteen to twenty-five years in each of those counts, and I'm going to go through what I think the factors are and why I'm doing what I'm doing. So if you'd like to have a seat, please do that, sir.

Mr. Compton, I think the law currently under the Houston case probably does require me to start at the minimum at this point, and I'm going to do that. I think that the following enhancement factors apply in this case:

[The defendant] does have a previous history of criminal convictions and criminal behavior in addition to those necessary to establish the appropriate range. He did have convictions for misdemeanors. He was on probation which is another factor altogether. He had a juvenile history which didn't stop. There was no gap. He went straight on through from his juvenile time at about age 15 right on through these.

That the offense involved more than one victim. I think that under the circumstances of the state of the law that as well as using a firearm are not factors I can consider very much because they are subsumed in the offense itself.

. . . .

. . . That there was no hesitation about committing a crime when the risk to human life was high I think is absolutely there because, if I recall correctly – and I recall it pretty well – [the defendant] discovered that he had funny money as opposed to real money for his drugs. And he took out after these boys and he shot them in the back, and then he went out and he shot them some more.

And in addition to doing that to both of these young men – I don't mean to refer to them as boys inappropriately, but they were very young men. In addition to doing that, as the General put it on several occasions, I think, to the jury, he went back for his dope because . . . what was important to him was whether or not he had his dope.

He had no hesitation about this offense and getting . . . his drugs. Now, [the defendant] right now as he sits in front of me wouldn't do this. But I have to consider the facts that took place in this case.

He did, indeed, have release on probation at the time of the offense. And he did, indeed, fail to comply with the conditions of that sentence involving release into the community. Yes, they were misdemeanors. [The defendant] had had problems, like I said, for several years. And while they didn't build up to a murder case, certainly they existed.

Now, you've asked me to consider what he's done since as well as the closeness of his family and how he has tried to set himself as an example both to himself and to others, and I think that's very important that he did do so. But I don't think those are mitigating factors . . . in my consideration. They may be mitigating

factors when the Parole Board considers [the defendant], and I think they should be. But I don't think in a resentencing that's appropriate. So, Mr. Compton, I think that you have – and I don't think those outweigh the aggravating factors.

So I think there is a previous history. I think that there was a failure to . . . comply with conditions of a sentence involving release. He was revoked from [j]udicial [d]iversion. He was revoked from probation.

He did, indeed, possess a firearm, and the Court found at the time of sentencing . . . that he was a professional criminal who had devoted his life, albeit short, to a criminal act as a source of livelihood.

If I recall the testimony correctly [the defendant] was making his money by . . . selling drugs, and that's how we got into this. There was little indication that he had any desire to control himself and his behaviors when there were children not very far away from him, when there were innocent people out there, plus these two young men. And I think that's a factor.

And as to both of those factors – and I had originally used that he was on probation, but I think that under these circumstances that's part of my consideration in enhancement.

. . . .

. . . Well, I think I have found previously that he . . . was on probation. I think that's pretty clear.

Mr. Compton, fairness in this circumstance and the things that have happened since then and before then I think require a twenty-five year sentence in each of these counts based upon the enhancements that I've just laid out and that they be consecutive.

### ANALYSIS

The defendant argues that the trial court erred in sentencing him to twenty-five years on each count because the court began at the minimum, rather than the middle, of the sentencing range and applied enhancement factors not found by a jury beyond a reasonable doubt. He also contends that the trial court erroneously imposed consecutive sentencing. The State argues that the trial court properly sentenced the defendant. As we will explain, we agree with the State.

When an accused challenges the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review on the record with a presumption that “the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. §

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 presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993), overruled on other grounds by State v. Hooper, 29 S.W.3d 1, 9 (Tenn. 2000). However, this court is required to give great weight to the trial court’s determination of controverted facts as the trial court’s determination of these facts is predicated upon the witnesses’ demeanor and appearance when testifying.

In conducting a *de novo* review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused’s potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103, -210 (2006); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). Enhancement factors may be considered only if they are “appropriate for the offense,” and “not themselves essential elements of the offense.” Tenn. Code Ann. § 40-35-114.

The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Cmts.; Ashby, 823 S.W.2d at 169. In this case, the defendant has the burden of illustrating the sentence imposed by the trial court is erroneous. If our review reflects that the trial court, following the statutory sentencing procedure, imposed a lawful sentence, after having given due consideration and proper weight to the factors and principles set out under the sentencing law and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

## **I. Sentence Length**

The defendant argues that the trial court erred by beginning with a presumptive sentence of fifteen years, the minimum sentence for a Range I offender convicted of a Class A felony. He asserts that the law in effect at the time of his offense required the court to begin with a presumptive sentence of twenty years, the midpoint in the range. He further argues that the trial court erred by increasing his sentence to twenty-five years on the basis of enhancement factors not proven to a jury beyond a reasonable doubt. As we will explain, the defendant is not entitled to relief on these claims.

### **A. Presumptive Sentence**

The defendant committed the offenses on June 14, 2003. At that time, the presumptive sentence for a Class A felony was the midpoint of the range if there were no enhancement or

mitigating factors. Tenn. Code Ann. § 40-35-210(c) (2003). The sentencing range for a Range I offender convicted of a Class A felony was fifteen to twenty-five years. Id. § 40-35-112(a)(1) (2003). If, as here, the trial court found enhancement but no mitigating factors, the court was to set the sentence at or above the midpoint of the range. Id. § 40-35-210(d).

In sentencing the defendant, the trial court began with the minimum fifteen-year sentence on each count and increased the sentences to twenty-five years after applying several enhancement factors. Although the law in effect at the time the offense was committed required the court to begin at the midpoint of the range, the defendant is not entitled to relief because he was not harmed by this error. The trial court began with a shorter sentence than the defendant was entitled to and enhanced that sentence to the maximum of twenty-five years based on the presence of enhancement factors. As we will explain below, the record supports the trial court's enhancement of the defendant's sentence from fifteen to twenty-five years. Therefore, the record equally would have supported an enhancement from twenty to twenty-five years. This issue is without merit.

### **B. Application of Enhancement Factors**

The defendant argues that the trial court erred in enhancing his sentence on the basis of facts found by the court but not proven to the jury beyond a reasonable doubt. While the defendant's first direct appeal was pending, the United States Supreme Court held that facts other than that of a prior conviction may not be used to enhance a defendant's sentence beyond the prescribed statutory maximum, unless proven to a jury beyond a reasonable doubt or admitted by the defendant. Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004); see also Apprendi v. New Jersey, 530 U.S. 466, 488, 120 S. Ct. 2348, 2361 (2000). The Tennessee Supreme Court subsequently held that Tennessee's pre-2005 sentencing statutes violated a defendant's Sixth Amendment right to a jury trial to the extent that they permitted sentence enhancement based on judicially determined facts. State v. Gomez, 239 S.W.3d 733, 740 (Tenn. 2007).

The trial court found applicable the following enhancement factors: the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range; the defendant had no hesitation about committing a crime when the risk to human life was high; the defendant was released on probation at the time the offense was committed; and the defendant failed to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. § 40-35-114(2), (9), (11), (14) (2003). The defendant asserts that the trial court also found applicable enhancement factors (4), that the offense involved more than one victim, and (10), that the defendant possessed or employed a firearm in the commission of the offense. However, it is not clear from our review of the record that the trial court applied these two enhancement factors.

The defendant does not challenge the application of any specific enhancement factor. He argues only generally that "[t]he trial court clearly applied the incorrect law in this case" and that "[t]he trial court, pursuant to Gomez[], could not enhance [the defendant's] sentence based on judicially-found facts." The trial court applied the prior criminal history factor on the defendant's

prior convictions for possession of a controlled substance and of drug paraphernalia. During the defendant's first sentencing hearing, he admitted that he was on probation when he committed the offense. Therefore, the application of these two enhancement factors, one based on prior convictions and one based on a fact admitted by the defendant, did not violate the defendant's Sixth Amendment right to a jury trial. Moreover, the application of these two factors was sufficient to justify enhancing the defendant's sentence to the maximum of twenty-five years. The application of a single factor can justify an enhanced sentence. State v. Shawn McCobb and Marcus Walker, No. W2006-01517-CCA-R3-CD, 2007 WL 2822921, at \*4 (Tenn. Crim. App. Sept. 26, 2007). The defendant is not entitled to relief on this issue.

## **II. Consecutive Sentencing**

The defendant argues that the trial court erred in imposing consecutive sentences because, in his view, the court did not make adequate factual findings and, additionally, the imposition of consecutive sentencing based on judicially-found facts violated his Sixth Amendment right to a jury trial.

A trial court, in its sound discretion, may impose consecutive sentencing in accordance with Tennessee Code Annotated section 40-35-115, if it finds any of the following criteria:

- (1) The defendant is a professional criminal who has knowingly devoted such 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 as 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.



These criteria are stated in the alternative; therefore, only one need exist to support the appropriateness of consecutive sentencing. Criterion four has been specifically discussed by our supreme court in State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), where the court held:

[T]he imposition of consecutive sentences on an offender found to be a dangerous offender requires, in addition to the application of general principles of sentencing, the finding that an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.

Id. at 939. This requirement of additional findings is limited to criterion four. See State v. Lane, 3 S.W.3d 456 (Tenn. 1999).

### **A. Propriety of Consecutive Sentencing**

As we understand, the defendant argues that the trial court erred in imposing consecutive sentencing at his second sentencing hearing because the court did not make specific factual findings justifying consecutive sentencing. However, at the defendant's first sentencing hearing, the trial court imposed consecutive sentencing after making detailed factual findings that the defendant was a professional criminal, a dangerous offender, and on probation when the offenses were committed. On appeal, this court held that the record supported the trial court's finding of each of these three factors. Brandon Compton, 2006 WL 2924992, at \*10.

We may not revisit the issue of whether the trial court erred in imposing consecutive sentencing because this court previously determined that issue on direct appeal. As our supreme court has explained:

The phrase "law of the case" refers to a legal doctrine which generally prohibits reconsideration of issues that have already been decided in a prior appeal of the same case. In other words, under the law of the case doctrine, an appellate court's decision on an issue of law is binding in later trials and appeals of the same case if the facts on the second trial or appeal are substantially the same as the facts in the first trial or appeal. The doctrine applies to issues that were actually before the appellate court in the first appeal and to issues that were necessarily decided by implication. The doctrine does not apply to dicta.

The law of the case doctrine is not a constitutional mandate nor a limitation on the power of a court. Rather, it is a longstanding discretionary rule of judicial practice which is based on the common sense recognition that issues previously litigated and decided by a court of competent jurisdiction ordinarily need not be revisited. This rule promotes the finality and efficiency of the judicial process, avoids indefinite relitigation of the same issue, fosters consistent results in the same litigation, and assures the obedience of lower courts to the decisions of appellate courts.

Therefore, when an initial appeal results in a remand to the trial court, the decision of the appellate court establishes the law of the case which generally must be followed upon remand by the trial court, and by an appellate court if a second appeal is taken from the judgment of the trial court entered after remand. There are limited circumstances which may justify reconsideration of an issue which was [an] issue decided in a prior appeal: (1) the evidence offered at a trial or hearing after remand was substantially different from the evidence in the initial proceeding; (2) the prior ruling was clearly erroneous and would result in a manifest injustice if allowed to stand; or (3) the prior decision is contrary to a change in the controlling law which has occurred between the first and second appeal.

State v. Jefferson, 31 S.W.3d 558, 560-61 (Tenn. 2000) (quoting Memphis Publg. Co. v. Tennessee Petroleum Underground Storage Tank Bd., 975 S.W.2d 303, 306 (Tenn. 1998)).

This court established the law of the case on the issue of consecutive sentencing in the defendant's first direct appeal. None of the three exceptions which may justify reconsideration is present here. The defendant is not entitled to relief on this issue.

#### **B. Consecutive Sentencing – Right to Trial by Jury**

The defendant also contends that the imposition of consecutive sentencing based on facts found by the trial court by a preponderance of the evidence violates his Sixth Amendment right to a trial by jury. He argues that Blakely and Gomez require that any fact used to justify the imposition of consecutive sentencing be proven to a jury beyond a reasonable doubt. However, our supreme court has recently held that Tennessee's procedures regarding the imposition of consecutive sentences do not violate the Sixth Amendment. State v. Allen, \_\_ S.W.3d \_\_, 2008 WL 2497001, at \*17 (Tenn. 2008) (“Apprendi and Blakely should be construed narrowly such that they do not apply to Tennessee's statutory scheme for imposing consecutive sentences.”).

#### **CONCLUSION**

Based on the foregoing authorities and reasoning, the judgment of the trial court is affirmed.

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ALAN E. GLENN, JUDGE