IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 14, 2006

STATE OF TENNESSEE v. JAMES A. MELLON

Direct Appeal from the Criminal Court for Knox County
No. 64113B Mary Beth Leibowitz, Judge

No. E2006-00791-CCA-R3-CD - Filed May 7, 2007

A Knox County Criminal Court jury convicted the appellant, James A. Mellon, of first degree felony murder and especially aggravated robbery, and the trial court sentenced him to life in prison and twenty-three years, respectively. On appeal, the appellant claims that the trial court erred by (1) admitting his initial statement to police into evidence because he gave the statement involuntarily; (2) allowing the State to read into evidence an "unavailable" witness's testimony from a prior proceeding; and (3) enhancing his sentence for the especially aggravated robbery conviction based upon his being a leader in the commission of the offense and ordering consecutive sentencing. Upon review of the record and the parties' briefs, we affirm the judgments of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID H. WELLES and JOHN EVERETT WILLIAMS, JJ., joined.

Susan E. Shipley, Knoxville, Tennessee, for the appellant, James A. Mellon.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Leslie Nassios, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

The record reflects that in 1998, the appellant pled guilty to the first degree felony murder and especially aggravated robbery of twenty-year-old Robert Scott Loveday. In exchange for his guilty pleas and agreeing to testify against his codefendants, the State agreed to recommend concurrent sentences of life and twenty-five years in confinement, respectively. However, the appellant subsequently refused to testify and moved to withdraw his guilty pleas. The trial court denied that motion, the State withdrew its sentencing recommendation, a sentencing hearing was

held, and the appellant was sentenced to death for the murder conviction and twenty-five years for the robbery conviction. This court affirmed the appellant's convictions and sentences. See State v. James A. Mellon, No. E1999-01505-CCA-R3-DD, 2002 Tenn. Crim. App. LEXIS 795 (Knoxville, Sept. 19, 2002). However, our supreme court concluded that the appellant had not pled guilty voluntarily and intelligently and reversed his convictions. State v. Mellon, 118 S.W.3d 340 (Tenn. 2003). In January 2005, the appellant was tried for the offenses.

The appellant does not contest the sufficiency of the evidence. Taken in the light most favorable to the State, the evidence at trial revealed that on the night of August 23, 1997, David Jones picked up the twenty-one-year-old appellant; fourteen-year-old Ernest Rogers; and Anthony "T-Bone" Jones, who was unrelated to David Jones. The group planned to rob the "dope man" and drove to a drug house in Knoxville but found it empty. In the early morning hours of August 24, 1997, David Jones drove the group to west Knoxville. They were searching for a person to rob and spotted the victim near a gas station payphone. The victim had just paged a friend, was sitting in his Chevrolet Camaro with the driver's door open, and was waiting for the friend to call him at the payphone. David Jones pulled up behind the victim's car, and the appellant and Ernest Rogers got out and approached the victim's Camaro.

The appellant pointed a nine millimeter pistol at the victim, and the victim began pulling items out of his pockets. Anthony Jones, who had been waiting impatiently in David Jones' car, got out and ran up to the victim's car. David Jones heard gunshots and saw the appellant bend down. Anthony Jones, Ernest Rogers, and the appellant ran back to David Jones' car, and the group drove away. Soon after the shooting, a motorist waiting at a stoplight across the street from the gas station saw the victim and pulled into the gas station parking lot. He found the victim sitting on the ground and gasping for air. The motorist opened the victim's shirt, saw that he had been shot, and telephoned 911. A police investigation resulted in the arrests of the four individuals, and the police found nine millimeter handguns at Anthony Jones' and Ernest Rogers' homes. Forensic analysis of two cartridge cases recovered from the crime scene and two bullets recovered from the victim showed that the casings and bullets were fired from the handgun police found in Anthony Jones' home. In interviews with police on August 25 and 26, 1997, the appellant admitted participating in the robbery but said he never intended for the victim to be killed.

A forensic pathologist who performed the victim's autopsy testified that the victim was shot once in the left chest through the heart and once in the upper left arm. He stated that either of the wounds would have been fatal but that the victim could have survived briefly. The robbers obtained only a watch and a one-dollar-bill from the victim. The jury convicted the appellant of first degree felony murder committed during the perpetration of aggravated robbery and especially aggravated robbery. Although the State had been seeking a sentence of life without the possibility of parole for the murder, the jury was unable to agree unanimously on that punishment, and the trial court sentenced the appellant to life in confinement. After a second sentencing hearing, the trial court sentenced the appellant to twenty-three years for the especially aggravated robbery conviction and ordered that it be served consecutively to the life sentence.

II. Analysis

A. Appellant's Initial Statement to Police

The appellant contends that the trial court erred by concluding his initial statement to police on August 25, 1997, was admissible evidence. Specifically, he contends that his statement was involuntary because it was the product of "promises and representations which led him to believe he was a cooperating witnesses against his co-defendant, Anthony 'T-Bone' Jones." The State argues that the appellant understood his rights, waived those rights, and voluntarily confessed. We conclude that the trial court properly admitted the appellant's statement into evidence.

The appellant filed a pretrial motion to suppress a statement he gave to Knox County Sheriff's Department Lieutenant Bernie Lyon and Sheriff Tim Hutchison on August 25, 1997. In the motion, he claimed that the officers interrogated him without informing him of his constitutional rights and that the officers got him to admit participating in the crime by making "representations and promises" to him. At a hearing on the motion, Lieutenant Lyon testified that on the afternoon of August 25, 1997, police officers arrested the appellant at home, brought him to an area off Baxter Avenue, and put the appellant into the backseat of Sheriff Hutchison's police vehicle. Sheriff Hutchison was sitting in the front driver's seat, and Lieutenant Lyon was sitting in the front passenger seat. Lieutenant Lyon told the appellant who he was and that he was investigating a shooting at the Cone Station on Lovell Road. Lieutenant Lyon told the appellant that he believed the appellant had been involved in the shooting and wanted to speak with him about it. Lieutenant Lyon said he then read the appellant Miranda warnings from a card.

Lieutenant Lyon testified that the appellant said he understood his rights and that they had an audiotaped conversation about the shooting. Lieutenant Lyon asked the appellant about the other suspects and about the crime, and the appellant told the officers "what went on." Lieutenant Lyon stated that the appellant never asked for an attorney and never said he did not want to speak with them. The appellant was "kind of nervy but super nice" and was very cooperative. Lieutenant Lyon said the appellant appeared to understand what was going on and did not appear to be under the influence of an intoxicant.

On cross-examination, Lieutenant Lyon testified that he did not take notes during the interview and that the audiotape did not record his entire conversation with the appellant. He stated that when the appellant first arrived at the location on Baxter Avenue, Lieutenant Lyon did not have a tape recorder and had to call for another officer to bring him one, which took five to ten minutes. He acknowledged that he talked with the appellant "at length" before he received the tape recorder. He said that to his knowledge, he did not talk with the appellant about the appellant's being a prosecution witness for the State. He also denied telling the appellant that the appellant and David Jones were going to testify as witnesses for the State and denied making any threats or promises to the appellant. He acknowledged that he and Sheriff Hutchison did not have the appellant sign a written waiver of rights form. He said that Sheriff Hutchison also spoke with the appellant but that he did not remember what Sheriff Hutchison said to the appellant.

The appellant testified that he could read and write but had only a ninth-grade education. On the afternoon of August 25, 1997, police officers came to his home, arrested him, and took him to speak with Lieutenant Lyon and Sheriff Hutchison. The interview took place in the sheriff's police vehicle. The appellant stated that he also talked with "some officer" about "me and Mr. Jones being prosecution witnesses in exchange for them to come and testify in our trials." He stated that he believed the police were "going to come and help us" and were promising to testify for him in court. He stated that no one read him Miranda warnings before his interview with Lieutenant Lyon and Sheriff Hutchison and that his conversation with the officers began "way before the tape was turned on."

On cross-examination, the appellant testified that he did not remember who made the promises to him and that he would not have spoken with the officers had the promises not been made. He acknowledged that according to a transcript of the audiotaped conversation, Lieutenant Lyon referred to having read the appellant Miranda rights. However, the appellant did not remember being Mirandized. He stated that he also asked for an attorney but that his request was not on the audiotape. He stated that he spoke with Lieutenant Lyon and Sheriff Hutchison for about an hour and that he told them the truth. However, he later acknowledged that he did not tell the officers the whole truth at that time. He stated that he also gave a statement to Officer Darrell Johnson later that evening and that he gave a third statement to police the next day. The appellant acknowledged that he signed written waiver of rights forms for both of those interviews.

At trial, the State played the audiotape for the jury and introduced the transcript of the taped conversation into evidence. According to the transcript, the appellant told the officers that David Jones drove the group to west Knoxville and that Anthony Jones ordered David Jones to stop the car near the victim's car. Anthony Jones got out, walked up to the victim, told the victim to "give me all your shit," and shot the victim. The appellant told the officers that at the time of the shooting, he and David Jones were sitting in David Jones' car. The transcript shows that toward the end of the interview, Lieutenant Lyon asked the appellant, "I've read you your rights and you understand your rights, correct?" and the appellant answered, "Yeah." At the end of the interview, Lieutenant Lyon asked the appellant, "And you've given me a voluntary statement uncoerced or anything, correct?" and the appellant answered, "Right."

In a written order, the trial court concluded that the appellant "understood and knew what he was saying" and that he made his initial statement to the officers in an attempt to "cast off the suspicion upon himself and to become a prosecuting witness for others." The trial court concluded that the appellant had been read Miranda warnings before he gave his statement to Lieutenant Lyon and Sheriff Hutchison, that the appellant understood his rights, and that he voluntarily waived this rights. The trial court denied the appellant's motion to suppress.

In reviewing a trial court's determinations regarding a suppression hearing, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). Thus, "a trial court's findings of fact in a suppression hearing will be upheld unless

the evidence preponderates otherwise." Id. Nevertheless, appellate courts will review the trial court's application of law to the facts purely de novo. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001). Furthermore, the State, as the prevailing party, is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." Odom, 928 S.W.2d at 23. Moreover, we note that "in evaluating the correctness of a trial court's ruling on a pretrial motion to suppress, appellate courts may consider the proof adduced both at the suppression hearing and at trial." State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998).

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612 (1966), the United States Supreme Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." These procedural safeguards require that police officers must advise a defendant of his or her right to remain silent and of his or her right to counsel before they may initiate custodial interrogation. State v. Sawyer, 156 S.W.3d 531, 533 (Tenn. 2005). If these warnings are not given, statements elicited from the individual may not be admitted in the prosecution's case-in-chief. Stansbury v. California, 511 U.S. 318, 322, 114 S. Ct. 1526, 1528 (1994). A waiver of constitutional rights must be made "voluntarily, knowingly and intelligently." Miranda, 384 U.S. at 444, 86 S. Ct. at 1612. In determining whether a defendant has validly waived his Miranda rights, courts must look to the totality of the circumstances. State v. Middlebrooks, 840 S.W.2d 317, 326 (Tenn. 1992).

In this case, the parties do not dispute that a custodial interrogation occurred. Lieutenant Lyon testified that he Mirandized the appellant before the interview, that he never promised the appellant anything or threatened the appellant, and that he did not tell the appellant that the appellant and David Jones would testify for the State against Anthony Jones. The trial court obviously accredited the officer's testimony, and our review of the audiotape transcript supports his testimony. Although the beginning of the interview was not audiotaped, the transcript confirms that toward the end of the interview, Lieutenant Lyon made a reference to his having given Miranda warnings to the appellant earlier and the appellant acknowledged he had received the warnings. Moreover, during the interview, the appellant never referred to any promise that the police had allegedly made to him. Based upon the totality of the circumstances, we believe the trial court properly concluded that the appellant received Miranda warnings at the beginning of the interview; that he knowingly, intelligently, and voluntarily waived his rights; and that the officers did not promise him anything in return for his confession. Therefore, the trial court properly denied the appellant's motion to suppress his initial statement to police.

B. "Unavailable" Witness' Testimony

Next, the appellant claims that the trial court erred by allowing the State to read into evidence an "unavailable" witness' testimony from a prior proceeding. He contends that he did not have a prior opportunity to sufficiently cross-examine the witness and that the trial court's failing to explain to the jury why the witnesses was unavailable resulted in prejudice to the defense. We conclude that

the appellant is not entitled to relief.

During the trial, the State told the trial court that it wanted to call Edward Beeler, who had testified against the appellant during the appellant's prior sentencing hearing, to testify in front of the jury but that Beeler was refusing to testify. The trial court requested that Beeler be brought into the courtroom, and the State asked him in a jury-out hearing if he was refusing to testify. Beeler stated that if called to testify, he would "take the Fifth" to every question asked of him and told the trial court, "I don't want to be up here." The trial court told Beeler that it was ordering him to testify, but he refused, stating, "I'm worried . . . about my health."

The trial court declared Beeler to be an unavailable witness and, over the defense's objection, ruled that the State could read his prior sentencing hearing testimony into evidence. Before the State read Beeler's prior testimony to the jury, the trial court instructed the jury as follows:

> I don't know how many of . . . you . . . heard, but the Attorney General is going to -- would have called a witness by the name of Edward Beeler, who has been declared by the Court as unavailable. For the purpose of unavailability, that allows the Attorney General to read the transcription of some testimony that he gave at a prior hearing involving this case. And I'm going to allow the Attorney General to read that.
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> . . . .
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> And the Attorney General will ask the questions that are in the transcript, and Detective Johnson will read [Beeler's answers]. And you may accept this as the sworn testimony of Edward Beeler at a prior occasion.

According to Beeler's prior sentencing hearing testimony, on the afternoon of August 24, 1997, the appellant told Beeler, "I killed this boy last night." The appellant then told Beeler the following: The victim was near a phone booth and did not have any money. The appellant shot the victim, saw blood, and shot the victim again. Three other individuals were with the appellant at the time of the shooting, including a man named "T-Bone" and a man named "David." Beeler testified that he did not believe the appellant at first but later learned about the victim's death and came forward with his information. On cross-examination, Beeler testified that at the time of the sentencing hearing, he was serving a three-year prison sentence for an aggravated robbery he committed in 1997 and that he also had prior convictions for aggravated burglary and theft. He stated that the appellant claimed to have been drunk and smoking crack on the night of the shooting. Beeler acknowledged that he told a detective that the appellant claimed to have shot the victim three times, and he stated that the appellant sounded "excited" when talking about the shooting. Beeler said that he did not like being in prison, that the district attorney had promised to "see what [he] could do" about Beeler's situation, and that no one had offered to help him when he appeared before

the parole board.

On appeal, the appellant does not contest the trial court's ruling regarding Beeler's being an unavailable witness but argues that the State's reading Beeler's prior testimony into evidence violates his right to confrontation and Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), because his defense attorneys did not have a sufficient opportunity to cross-examine Beeler at the sentencing hearing. Moreover, he contends that because the trial court failed to explain to the jury why Beeler was unavailable, "the jury . . . was allowed to speculate as to [the] reasons and nature of Beeler's 'unavailability,' leading to undue prejudice."

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Generally, hearsay statements are inadmissible unless they fall under one of the recognized exceptions to the hearsay rule. Tenn. R. Evid. 802. Although Beeler's sentencing hearing testimony was hearsay, in limited circumstances, prior testimony may be admissible at trial via a hearsay exception if the declarant is unavailable and if the party against whom the testimony is offered had an opportunity and a similar motive to develop the testimony through methods such as cross-examination. Tenn. R. Evid. 804(b)(1). A witness is "unavailable" if the witness "[p]ersists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." Tenn. R. Evid. 804(a)(2).

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him" and Article I, Section 9 of the Tennessee Constitution provides that "in all criminal prosecutions, the accused hath the right to . . . meet the witnesses face to face." In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), the Supreme Court examined the right to confrontation. The Court held that "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68, 127 S. Ct. at 1374.

The appellant argues that his prior defense attorneys did not have a sufficient opportunity to cross-examine Beeler at the sentencing hearing because counsel's questions "were geared at mitigating a potential death sentence" and were not asked "to determine issues of the defendant's guilt or innocence." However, we have reviewed a transcript of Beeler's prior testimony, and we conclude that the trial court did not abuse its discretion by denying the appellant's motion to exclude the testimony from evidence at trial. See State v. Summers, 159 S.W.3d 586, 597 (Tenn. Crim. App. 2004) (analyzing error in the admissibility of 804(b)(1) former testimony under an abuse of discretion standard). Beeler's direct examination testimony spans approximately five pages, and his cross-examination testimony spans over seventeen pages. The transcript reveals that the appellant's attorneys not only had a prior opportunity to cross-examine Beeler, but that they thoroughly cross-examined him about his motives for coming forward with information about the appellant's confession, the appellant's use of alcohol and drugs on the night of the crimes, and Beeler's use of alcohol on the afternoon of August 24. The trial court did not err by admitting the sentencing

hearing testimony into evidence.

As for the appellant's claim that the trial court's failing to explain to the jury why Beeler was unavailable was prejudicial, we disagree. Beeler's statements and a discussion between the trial court, the State, and the defense indicate that Beeler refused to testify because he was afraid the appellant and/or his codefendants would retaliate against him. Under those circumstances, we believe the trial court mitigated any prejudice by not explaining to the jury the reason for Beeler's unavailability. In any event, the appellant has failed to give any explanation for the jury's potential prejudice, and it would be pure speculation to conclude that the jury was prejudiced by the trial court's not explaining why Beeler was unavailable. The appellant is not entitled to relief.

C. Sentencing

Finally, the appellant claims that the trial court erred by enhancing his sentence for the especially aggravated robbery conviction based upon his being a leader in the commission of the offenses and by ordering consecutive sentencing based upon his being a dangerous offender and a professional criminal. The State argues that the trial court properly sentenced the appellant. We conclude that the appellant is not entitled to relief.

After the trial, the trial court immediately held a sentencing hearing in order for the jury to determine whether the appellant should be sentenced to life in confinement without the possibility of parole for the murder conviction. At the hearing, the victim's mother and grandmother testified about the impact of the crimes on the victim's family. Virginia Williams, the appellant's mother, testified for the appellant that she married the appellant's father when she was sixteen years old, that they separated when the appellant was thirteen months old, that she abused drugs and alcohol when the appellant was young, and that she suspected the appellant was sexually abused. Dr. Mary Pamela Auble, a licensed psychologist, testified that she interviewed the appellant three times and conducted numerous tests on him. Dr. Auble stated that the appellant had an I.Q. of eighty-five, slightly below average; that he was physically, emotionally, and sexually abused as a child; and that the appellant suffered from post-traumatic stress disorder and anti-social personality disorder. Darlene Flatford, the appellant's maternal aunt, and her son Kenny Flatford, the appellant's first cousin, testified about Virginia Williams' lack of parenting skills and their suspicions about the appellant's being sexually molested. The jury was unable to agree unanimously as to the appellant's being sentenced to life without the possibility for parole, and the trial court sentenced him to life.

At a second sentencing hearing for the appellant's especially aggravated robbery conviction, no witnesses testified, but the State introduced the appellant's presentence report into evidence. The report shows that the appellant dropped out of high school after the ninth grade and never obtained his GED but received vocational and educational training while in prison. In the report, the appellant stated that he began drinking alcohol when he was twelve years old, began using marijuana and cocaine when he was fifteen, and worked as a self-employed painter from 1995 to 1997. According to the report, the appellant has prior convictions for aggravated robbery, theft of property valued more than ten thousand dollars but less than sixty thousand dollars, criminal impersonation, reckless

driving, driving on a revoked license, evading arrest, misdemeanor reckless endangerment, misdemeanor vandalism, fraudulent use of a credit card, possession of a weapon with the intent to go armed, criminal trespass, and several misdemeanor theft convictions. The appellant received sentences of probation for some of those offenses, and the report shows that his probation was revoked in Knox and Sevier Counties. In addition, the report shows that the appellant was adjudicated delinquent of offenses as a juvenile.

The trial court applied enhancement factor (1), that the appellant "has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range." Tenn. Code Ann. § 40-35-114(1) (2006). The trial court also concluded that the appellant and Anthony "T-Bone" Jones were leaders in the offense and applied enhancement factor (2), that the appellant "was a leader in the commission of an offense involving two (2) or more actors." Tenn. Code Ann. § 40-35-114(2) (2006). In mitigation, the trial court concluded that the appellant cooperated with the police and was the victim of poor parenting and possibly sexual abuse. See Tenn. Code Ann. § 40-35-113(13). The trial court concluded that the enhancement factors outweighed the mitigating factors and sentenced the appellant to twenty-three years for the especially aggravated robbery conviction. Regarding consecutive sentencing, the trial court held that the appellant was a "professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood," that he has an extensive record of criminal activity, and that he is a dangerous offender. See Tenn. Code Ann. § 40-35-115(b)(1), (2), (4). It ordered that the appellant serve the twenty-three-year sentence consecutively to his life sentence and that he serve both of those sentences consecutively to a twelve-year sentence he had received for a prior aggravated robbery conviction.

The appellant contends that the trial court erred by enhancing his sentence on the basis that he was a leader in the commission of the offense, arguing that the evidence preponderates against that finding because the "random, chaotic actions of all of the participants . . . do not indicate that Mellon exercised any leadership over the other members of the group." The appellant also contends that the trial court erred by ordering consecutive sentencing, arguing that there was insufficient proof he made a substantial portion of his livelihood through criminal activity or that he is a dangerous offender.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the

trial court's determinations a presumption of correctness. Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169.

Especially aggravated robbery is a Class A felony. See Tenn. Code Ann. § 39-13-403(b). At the time of the appellant's sentencing, the trial court was required to begin a sentencing determination regarding a Class A felony at the midpoint of the range, then "enhance the sentence within the range as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors." Tenn. Code Ann. § 40-35-210(e) (2003). The presumptive sentence for a Class A felony was the midpoint within the appropriate range if no enhancement or mitigating factors were present. See Tenn. Code Ann. § 40-35-210(c) (2003). The appellant was sentenced as a Range I offender. Accordingly, the presumptive sentence was twenty years. See Tenn. Code Ann. § 40-35-112(a)(1).

The appellant first contends that the trial court erred by applying enhancement factor (2), that he was a leader in the commission of the offense, because the facts do not support the application of that factor. We note that at the appellant's sentencing hearing, he also questioned the application of factor (2) in light of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). In Blakely, the United States Supreme Court concluded that the "'statutory maximum' for Apprendi [v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000),] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. Blakely, 542 U.S. at 303, 124 S. Ct. at 2537. Subsequently, in State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005), a majority of our state supreme court concluded that, unlike the sentencing scheme in Blakely, "Tennessee's sentencing structure does not violate the Sixth Amendment." However, the United States Supreme Court recently vacated our supreme court's ruling in Gomez and remanded the case for reconsideration in light of its recent decision in Cunningham v. California, ___ U.S. ___, 127 S. Ct. 856 (2007). Given the Supreme Court's directive, we no longer feel compelled to follow Gomez and conclude that the trial court's application of enhancement factor (2) violated the dictates of Blakely. In any event, the application of enhancement factor (1), which was based upon the appellant's numerous prior convictions, does not violate Blakely. Moreover, given the appellant's extensive criminal history, we conclude that even if the application of enhancement factor (2) was error, the application of enhancement factor (1) was entitled to sufficient weight and warrants the twenty-three-year sentence.

Regarding the appellant's consecutive sentencing arguments, we initially note that "[w]hether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court." State v. Adams, 973 S.W.2d 224, 230-31 (Tenn. Crim. App. 1997). Tennessee Code Annotated section 40-35-115(b) contains the discretionary criteria for imposing consecutive sentencing. See also State v. Wilkerson, 905 S.W.2d 933, 936 (Tenn. 1995). The trial court may impose consecutive sentencing upon finding the existence of any one 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 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 R.E. or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b)(1)-(7).

In ordering consecutive sentencing, the trial court stated as follows:

> It is the finding of this Court that based upon 40-35-115 that Mr. Mellon has in part two been an offender whose record of criminal activity is extensive, as I've reviewed. Who in number one has appeared to be a professional criminal, albeit a young man who was--three years before this occurred, had a consistent criminal record all the way through and some of which acts as a major source of livelihood or to obtain drugs or money.
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> Number one, in multiple convictions would apply in that statute. And that at the time of the commission of this offense Mr. Mellon was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing the crime when the risk of human life was high. That these--that the

sentences that I'm about to impose should be consecutive.

In order to support consecutive sentencing based upon a defendant's being a dangerous offender, a court must find that "(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and (2) 'the terms are reasonably related to the severity of the offenses.'" Wilkerson, 905 S.W.2d at 938; see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). In the instant case, the trial court failed to state explicitly on the record its findings concerning the Wilkerson factors. Nevertheless, exercising our power of de novo review, we conclude that the appellant is a dangerous offender. The appellant and his three accomplices drove around on the night of August 23, 1997, looking for someone to rob. Seeing the victim near the phone booth, David Jones pulled in behind the victim's car, and the appellant and Ernest Rogers, who were armed with pistols, approached the victim and demanded money. Anthony Jones became impatient, got out of David Jones' car, approached the victim, grabbed one of the guns, and shot the victim twice. Before fleeing, the appellant bent down and picked up items that the victim had been emptying from his pockets. The proceeds of the victim's murder and robbery amounted to a watch and a one-dollar-bill. The record reflects that earlier in the evening, the group also had robbed another man, which resulted in the appellant's conviction and twelve-year-sentence for aggravated robbery. The circumstances of the offense demonstrate that consecutive sentencing is necessary in order to protect the public from further misconduct by the defendant and is reasonably related to the severity of the offenses.

As to the trial court's conclusion that the appellant is a professional criminal, we question whether there is sufficient evidence in the record to support this finding. See Gray v. State, 538 S.W.2d 391, 393 (Tenn. 1976) (defining a professional criminal as "one who has knowingly devoted himself to criminal acts as a major source of livelihood or who has substantial income or resources not shown to be derived from a source other than criminal activity"). However, given that the appellant is a dangerous offender and given his extensive criminal history, consecutive sentencing is appropriate in this case.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE