IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2009

STATE OF TENNESSEE v. CALVIN JEROME OLIVER

Direct Appeal from the Circuit Court for Marshall County
No. 14989 Robert Crigler, Judge

No. M2008-01824-CCA-R3-CD - Filed February 26, 2010

On June 19, 2002, Defendant, Calvin Jerome Oliver, entered pleas of guilty to aggravated robbery, a Class B felony; aggravated burglary, a Class C felony; two counts of attempted aggravated robbery, a Class C felony; and three counts of aggravated assault, a Class C felony, with sentencing determinations left to the trial court. The trial court merged the two attempted aggravated robbery convictions into the aggravated robbery conviction and sentenced Defendant as a Range II, multiple offender, to eighteen years for his aggravated robbery conviction. The trial court sentenced Defendant to seven years for the aggravated burglary conviction and eight years for each aggravated assault conviction, all to be served concurrently to each other but consecutively to the eighteen-year sentence, for an effective sentence of twenty-six years. Defendant's convictions and sentences were affirmed on appeal. *State v. Calvin Jerome Oliver*, No. M2002-02438-CCA-R3-CD, 2003 WL 21997736 (Tenn. Crim. App., at Nashville, Aug. 21, 2003). The denial of Defendant's petition for post-conviction relief was affirmed on appeal. *Calvin Jerome Oliver*, No. M2004-01564-CCA-R3-PC, 2005 WL 552897 (Tenn. Crim. App., at Nashville, May 3, 2005), *perm. to appeal denied* (Tenn. May 23, 2005). Defendant filed a petition for habeas corpus relief in federal court. The United States District Court for the Middle District of Tennessee held that Defendant received ineffective assistance of counsel at the sentencing phase because his trial counsel failed to introduce expert medical testimony concerning Defendant's mental condition as a mitigation factor in determining the length of Defendant's sentence and remanded for a new sentencing hearing. *Calvin Oliver v. Tony Parker, Warden*, No. 1:05-00058, 2007 WL 4570355, at *1 (M. D. Tenn. Dec. 21, 2007). Following a resentencing hearing, the trial court again sentenced Defendant to an effective sentence of twenty-six years. On appeal, Defendant argues that the length of his sentences violate the principles of *Blakely v. Washington,* 542 U.S. 296, 124 S. Ct. 2531 (2004). After a thorough review, we conclude that the trial court improperly considered enhancement factors other than Defendant's prior convictions in determining the length of Defendant's sentences. Accordingly, we remand for resentencing on all convictions in compliance with *Blakely*,

Cunningham v. California, 549 U.S. 270, 127 S. Ct. 856 (2007), and *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007).

Tenn. R. App. P. Appeal as of Right; Judgment of the Circuit Court Remanded

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which DAVID H. WELLES and J.C. MCLIN, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Calvin Jerome Oliver.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

The State gave the following factual basis in support of Defendant's pleas of guilty at the guilty plea submission hearing:

> On the night of March 18, 2002, the victim and her boyfriend were in bed when some men kicked open the victim's back door and forced their way into her home. The victim's boyfriend was awakened, poked in the back with a rifle, and told that he was going to be shot. The gun also was pointed at the victim, the victim's young daughter, and another woman who was staying in the home. The victim gave the men her pocketbook, and they fled the scene. When the police arrived, they found masks, gloves, and a rifle. The police also stopped a car that they had seen in the area immediately before the crimes and arrested two of the robbers. At some point, the police arrested the defendant, who gave a statement and admitted his involvement in the offenses.

Calvin Jerome Oliver, 2003 WL 21997736, at *1.

At Defendant's second sentencing hearing, the State introduced the presentence report prepared in 2002 for Defendant's first sentencing hearing as an exhibit without objection. The transcripts of Defendant's guilty plea submission hearing and first sentencing hearing were also introduced as exhibits.

Jamie Staggs testified at the second sentencing hearing that she was employed by the Tennessee Board of Probation and Parole and reviewed Defendant's presentence report which had been prepared in 2002 by a fellow employee who had since passed away. Ms. Staggs said that the report contained statements by Defendant's three co-defendants, Donald Wayne Harris, Mark Beard, and Chad McLean, all of which were inconsistent as to the details of the offense. Mr. Harris said that Defendant, Mr. Beard, and Mr. McLean entered the victim's house, and Defendant carried a gun. Mr. Beard said that Mr. McLean and Defendant entered the victim's house, and Mr. McLean was armed. Mr. McLean stated that he, Mr. Harris, and Mr. Beard entered the victim's house, Mr. Harris was armed, and Defendant remained outside during the offense. In his statement, Defendant said that Mr. McLean, who was armed, and Mr. Harris entered the victim's house while he and Mr. Beard waited outside.

According to the presentence report, Defendant, who was twenty-four years old at the time of sentencing, committed his first offense of shoplifting when he was eleven years old. When he was twelve years old, Defendant had three juvenile adjudications for theft of property valued at $500 or less, and one juvenile adjudication for theft of property valued between $500 and $1,000. Defendant had one juvenile adjudication the following year for criminal trespassing, and he was found in violation of his probation when he was fourteen years old. When he was sixteen years old, Defendant had one juvenile adjudication for joyriding. In addition, the report revealed that Defendant was placed in the custody of the Department of Human Services on several occasions and escaped numerous times from the facility in which he was then residing. On one occasion, Defendant stole the facility's van to effectuate his escape. Defendant was apprehended on each occasion and returned to the Department's custody. Defendant was released from the Wilder Youth Center on December 19, 1995 when he turned eighteen.

In 1996, Defendant was convicted of delivery of more than 0.5 grams of cocaine, a Class B felony, and was sentenced to ten years. In 1996, Defendant was also convicted of theft of property valued between $1,000 and $10,000, a Class D felony; burglary of a vehicle, a Class E felony; and simple assault, a Class A misdemeanor. He was sentenced to three years for the theft conviction, two years for the burglary conviction, and eleven months, twenty-nine days for the misdemeanor conviction. In 1997, Defendant was convicted of criminal impersonation, a Class B misdemeanor. In 2002, Defendant was convicted of theft of property valued at $500 or less, a Class A misdemeanor, and evading arrest, a Class A misdemeanor. Defendant was sentenced to eleven months twenty-nine days for each conviction. His sentences were suspended after service of a short period of time in confinement, and Defendant was placed on probation. According to the presentence report, Defendant was on probation for these misdemeanor offenses when he committed the charged offenses. The presentence report indicates that Defendant was sentenced in 1996 to ten years

for his drug conviction, and he was transferred to Boot Camp later that year. Defendant was released from Boot Camp on probation on February 12, 1997. His probation was revoked on October 8, 1997, and he was returned to the Department of Correction. The presentence report indicates that Defendant was paroled on September 10, 2001, for this conviction.

According to the presentence report, Defendant dropped out of high school in his senior year. Defendant reported that he had completed two anger management courses and one course in substance abuse. Defendant refused to complete the personal questionnaire form during the preparation of his presentence report, and he, therefore, provided no information concerning his family, financial, or employment history.

Christy Lee Colvert, one of the victims of the offenses, testified that in 2002, she was living with her three children, Jonathan Osteen, and Megan Hooten. Ms. Colvert said that her husband, John Moore, was killed in a work-related accident in 2001, and Ms. Colvert received monthly payments of $933 from an insurance policy on her husband's life. Ms. Colvert subsequently decided to take a lump sum payment under the policy and received approximately $43,000 after payment of expenses. Ms. Colvert said that only family members, including Mr. Harris, knew about the insurance settlement.

Ms. Colvert said that the family was in bed on the night of the offenses when she heard heavy footsteps running down the hallway. Her bedroom door flew open and someone said, "Give me your money." Ms. Colvert stated that the house was dark, and she saw only a shadow and a rifle. Ms. Colvert told the intruder repeatedly that she did not have any money, and the man pointed the rifle at her face. Ms. Colvert told the man she would go to the living room and retrieve her purse. The man let her get up and as she walked out of the bedroom, Ms. Colvert saw a man in the hall with a pistol pointed toward her four-year-old daughter's head. Ms. Colvert also heard two other men in the back of the house. Ms. Colvert walked into the living room and flipped on the light switch. The two men who were armed rushed into the room and turned out the light. The man with the pistol returned to the hallway and stepped on her daughter's puppy. The child picked up the puppy, and the man told her that he would shoot both her and the puppy if the puppy did not stop barking. Ms. Colvert said that the men also pointed their weapons at Ms. Hooten and Mr. Osteen. Ms. Colvert gave the man with the rifle her purse, and all four men ran out of the house. Ms. Colvert said that she had approximately thirty dollars in her purse. Ms. Colvert stated that she was unable to identify any of the perpetrators because they wore handkerchiefs over their faces and dark, heavy jackets.

Ms. Colvert said the incident was the most frightening event of her life, "and seeing a gun to [her] child's head [was] the worst experience [she] could have ever gone through." Ms. Colvert said that she was subpoenaed to testify approximately five days before the

second sentencing hearing, and she immediately called the assistant district attorney. Ms. Colvert said she was crying and "pretty much" hysterical because she could not understand why she had to face Defendant again. Ms. Colvert said that neither she nor her daughter would ever forget the incident. Ms. Colvert said that Mr. Harris was the cousin of two of her children, and she grew up with Mr. Beard. Ms Colvert stated that she just wanted to be left alone. She said, "I just – I want him to go away. I want him to leave me alone. I don't ever want to have to see his face again, ever."

On cross-examination, Ms. Colvert stated that she was sure that it was Mr. McLean with the rifle and Defendant with the pistol because Mr. Osteen had grown up with Mr. Harris and she had grown up with Mr. Beard. Ms. Colvert said that she and Mr. Osteen would have recognized Mr. Harris's and Mr. Beard's voices if they had been the ones with the weapons. Ms. Osteen also said that Mr. Beard was Caucasian and the men with the guns were African-American.

James Whitsett testified that he was the lead detective in Defendant's case for the Lewisburg City Police Department. Detective Whitsett stated that Mr. Beard, Mr. Harris and Mr. McLean were apprehended the night of the offenses, and during their respective interviews, confessed to their involvement in the offenses. Detective Whitsett said that Defendant was also developed as a suspect but he remained in hiding for two months. Detective Whitsett stated that both the police department and the Marshall County Sheriff's Department conducted a thorough search in Lewisburg and the surrounding communities during the two-month interval until Defendant was finally apprehended. The officers talked frequently with members of Defendant's family during this period of time. Detective Whitsett said that although the rifle used during the commission of the offenses was found, the pistol was never recovered.

Defendant called Pamela Mary Auble, a clinical neuro-psychologist, as a witness. Dr. Auble testified that she conducted a mental evaluation of Defendant in August 2006 during the pendency of his petition for writ of habeas corpus in federal court. Dr. Auble stated that she also reviewed Defendant's prior psychiatric and educational evaluations which had been conducted periodically during the 1980's and 1990's. Dr. Auble administered several tests to Defendant including the Wechsler Adult Intelligence Scale, the Wechsler Memory Scale, the Wide Range Achievement Test, the Rorschach and Incomplete Sentences Blank, and the McArthur Competency Assessment Tool. Dr. Auble stated that she diagnosed Defendant as mentally retarded based on the results of her tests and her review of Defendant's medical and educational records. Dr. Auble noted that Defendant was certified as mentally retarded by the school system when he was nine years old, and the certification continued throughout his schooling. Four of the seven evaluations showed that Defendant had a full scale IQ of 64.

Dr. Auble testified that in Tennessee, an individual with an IQ of 70 or below is considered mentally retarded.

Testing revealed that Defendant was deficient in communication and socialization skills and read at a first grade level. Dr. Auble said that these deficits were "above and beyond even what you would expect for someone of his IQ." Specifically, Dr. Auble pointed to Defendant's inability to learn to read beyond a first grade level despite attending special education classes until the eleventh grade. Dr. Auble acknowledged that Defendant "does understand simple things," but he "confused easily." Defendant's lack of socialization skills indicated that he experienced difficulty in forming and maintaining relationships "in an adaptive and a reasonable manner."

Dr. Auble stated that "to some extent [one's] intellectual capabilities are inherited." Based on Defendant's records, Dr. Auble said that Defendant's mother was mentally retarded and unable to provide a nurturing home for Defendant. Defendant's twin sisters had been institutionalized at an early age because of mental retardation, and it appeared that three of Defendant's five other siblings were mentally retarded.

Dr. Auble said that as a result of Defendant's mental retardation, he was easily manipulated and displayed poor judgment. Dr. Auble described Defendant as "impulsive" and "a follower." Dr. Auble stated that Defendant was able to reason, but this ability was more limited than the population at large. Dr. Auble also described Defendant as "manipulative" and "self-serving," and stated that Defendant did not always try to complete the tests adequately.

On cross-examination, Dr. Auble said there were different levels of mental retardation, and people with an IQ score of between 50 and 70, the highest level, were classified as mildly mentally retarded. Dr. Auble stated that people within this level can communicate and have adequate motor skills. Most are able to attend special education classes and reach, at best, a sixth grade level. An individual's skills increase at the higher end of the spectrum, and Dr. Auble said that a person with an IQ of 70 would be able to be employed at simple, repetitive tasks. Dr. Auble acknowledged that Defendant's inability to read may have been caused, in part, by his attitude, but she attributed his inability to learn primarily to his mental retardation which impeded his communication and verbal skills. Dr. Auble stated that there was something wrong in Defendant's brain that made "him actually unable to learn [to read] despite putting effort into it and in spite of much exposure to it."

Dr. Auble acknowledged that on two IQ tests Defendant's full scale IQ was reported as 71 and 75 respectively. Dr. Auble, however, said that these IQ scores were, in her opinion, inflated because both tests were administered within months of another test

reflecting an IQ in the mid 60's. Dr. Auble attributed the inflation to "the practice effect." That is, Defendant was able to perform better on the later tests because he had retained some knowledge of how to take the tests. Dr. Auble acknowledged that Defendant was able to provide information about his childhood during his interview, but Dr. Auble said that Defendant was incorrect in many of the details. Dr. Auble stated that Defendant's mental retardation would make him susceptible to the influence of others, but said that "as far as [she] kn[e]w," Defendant was able to distinguish between right and wrong.

On redirect examination, Dr. Auble reiterated that Defendant's mental retardation impaired his judgment and reasoning, which, in turn, adversely affected his responsibility for his conduct. In response to the trial court's questions, Dr. Auble stated that the extent of Defendant's mental retardation represented a significant impairment to his mental abilities. On recross-examination, Dr. Auble said that Defendant's mental retardation was a constant presence, and it would have significantly affected his judgment, decisions, and reasoning on the night of the offense.

Defendant testified that he was initially reluctant to join the group on the night of the commission of the offenses. Defendant said that Mr. Harris kept begging him to go to the victim's house, and Defendant finally agreed. Defendant said that Mr. Harris kicked in the back door, and Mr. McLean and Mr. Beard ran into the house. Defendant stated that he and Mr. Harris stayed by the back door. Defendant said that Mr. McLean was armed with a rifle, but none of the participants carried a pistol. Defendant stated that he lived in Columbia after the incident, and he was unaware that the police officers were looking for him until he received a telephone call from his brother. Defendant stated that Mr. McLean lived with Defendant while Defendant was in Columbia.

On cross-examination, Defendant clarified that Mr. McLean was arrested when he returned to Lewisburg. Defendant said that he had lived in Columbia for approximately six months before the incident. Defendant acknowledged that he was aware the police officers were looking for him. Defendant said that after the offenses, he lived in a trailer and worked for the State picking up trash on the roadways. Defendant stated that one of his girlfriends filled out the rental application, and he paid his rent in cash on a weekly basis. Defendant said that he could not remember where he reported to work, but he stated that his girlfriend drove him to his workplace, and his supervisor assigned him his duties for the day. Defendant stated that he never missed a day of work. Defendant said that the victim was mistaken when she testified that she saw four men in her house. Defendant stated that Mr. Harris and Mr. Beard were not telling the truth when they told the investigating officers that Defendant went inside the victim's house.

On cross-examination, Defendant said that most of his prior crimes were committed at the urging and encouragement of others. Specifically, Defendant said that Mr. Harris was present during the theft of an automobile in 1996. Defendant acknowledged that he was convicted of the delivery of cocaine in 1996, but he stated that he was merely with the person who actually sold the cocaine. Defendant stated that he would not become involved in crime again if he were released from prison. Defendant acknowledged, however, that since his incarceration on the current charges, he had been disciplined in prison for assaulting another inmate. Defendant maintained, however, that another inmate with the same nickname as Defendant actually committed the offense.

As discussed below, Defendant elected to be sentenced in accordance with the law at the time he committed the offenses. *See* Tenn. Pub. Acts Ch. 353, § 18; T.C.A. § 40-35-210 (Supp. 2005). Accordingly, the statutes cited in this opinion are those that were in effect in 2002 unless otherwise noted.

The trial court declined to attribute any weight to Defendant's confession following his arrest. The trial court noted that Defendant evaded apprehension for two months after the offense, and Defendant acknowledged that he had not initially been truthful during his interview with the investigating officers. The trial court found Dr. Auble's testimony credible. The trial court found, however, that although mitigating factor (8), that Defendant was suffering from a mental condition that significantly reduced his culpability for the offense, was applicable, the factor was entitled to only slight weight. T.C.A. § 40-35-113(8). The trial court observed that Defendant's IQ was at the top of the scale for those considered mentally retarded, and, based on his testimony at the hearing, Defendant appeared able to understand the proceedings and to articulate his responses during questioning.

As enhancement factors, the trial court placed great weight on Defendant's history of criminal convictions which exceeded those necessary to classify him as a Range II, multiple offender, for sentencing purposes. *Id.* § 40-35-114(2). The trial court found that Defendant had displayed a previous unwillingness to comply with the conditions of a sentence involving release into the community; that the offenses were committed while Defendant was on parole; and that Defendant had been adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult. *Id.* § 40-35-114(9), (14), and (21). The trial court applied these enhancement factors to each of Defendant's sentences. In addition, the trial court found as to Defendant's aggravated burglary sentence that Defendant had no hesitation about committing the crime when the risk to human life was high, and the crime was committed under circumstances under which the potential for bodily injury to a victim was great. *Id.* § 40-35-114(11), (17).

Based on the foregoing, after deducting one year based on the one mitigating factor, the trial court sentenced Defendant to eighteen years for his aggravated robbery conviction, seven years for his aggravated burglary sentence, and eight years for each aggravated assault conviction. The trial court found that Defendant had an extensive record of criminal activity and that he committed the offenses while on probation. *Id.* § 40-35-115(2), (6). Accordingly, the trial court ordered Defendant to serve his sentences for aggravated burglary and aggravated assault concurrently with each other but consecutively to his sentence for aggravated robbery, for an effective sentence of twenty-six years.

II. Analysis

Defendant argues that the length of his sentence violates the principles set forth in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), because the trial court relied on enhancement factors which were not determined by a jury. In addition, Defendant contends that the trial court erred in not attributing more weight to the one applicable mitigating factor. The State submits that *Blakely* does not retroactively apply to resentencing hearings which are granted after a collateral review of the defendant's sentence. Alternatively, the State argues that there are sufficient *Blakely*-compliant enhancement factors to support the trial court's sentencing determinations.

Certain provisions of the 1989 Sentencing Act were amended in 2005. *See e.g.* T.C.A.§§ 40-35-114, -210. The 2005 amendments provided that the amended provisions applied to sentencing for criminal offenses committed on or after June 7, 2005, but that offenses committed prior to June 7, 2005, would be governed by prior law. It was also noted that a defendant who is sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, may elect to be sentenced under the amended provisions of the Act by executing a waiver of ex post facto protections. *See* Pub. Acts, Ch. 353, § 18; T.C.A. § 40-35-210 (Supp. 2005). At the resentencing hearing, Defendant elected to be sentenced pursuant to the sentencing statutes in effect at the time the offense was committed.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. *See* T.C.A. § 40-35-401, Sentencing Comm'n Comments; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant 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. T.C.A. § 40-35-401(d). This presumption of correctness, however, "'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. Carter*, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991)). "If, however, the trial court applies

inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails," and our review is de novo. *Carter*, 254 S.W.3d at 345 (quoting *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); *State v. Pierce*, 138 S.W.3d 820, 827 (Tenn. 2004)).

In conducting a de novo review of a sentence, this Court must consider "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 the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing. T.C.A. § 40-35-210(b); *see also State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002).

Under the pre-2005 statutory sentencing scheme, the trial court is required to begin with a presumptive sentence, which for a Class B or Class C felony is the minimum sentence in the sentencing range. The trial court must then adjust the sentence within the range as appropriate based upon the presence or absence of mitigating and enhancement factors set out in sections 40-35-113 and 40-35-114. T.C.A. § 40-35-210(c) - (e). As a Range II, multiple offender, Defendant is subject to a sentence of between twelve and twenty years for his Class B felony conviction, and a sentence of between six and ten years for each Class C felony conviction. *Id*. § 40-35-112(b)(2), (3).

Under the applicable sentencing scheme, a number of enhancement and mitigating factors could be considered by the trial court in determining the length of a defendant's sentence. *Id*. §§ 40-35-113, -114. However, in *Blakely*, the Supreme Court held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)). The "statutory maximum" to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, but rather, other than the fact of a prior conviction, the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id*. at 303, 124 S. Ct. at 2537 (emphasis omitted). Under *Blakely*, then, the "statutory maximum" sentence which may be imposed is the presumptive sentence applicable to the offense. *See id*., 124 S. Ct. at 2537. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant.

In *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), our supreme court held that "to the extent the [1989 Criminal Sentencing] Reform Act permitted enhancement based on judicially determined facts other than the fact of a prior conviction, it violated the Sixth Amendment as interpreted by the Supreme Court in *Apprendi*, *Blakely* and *Cunningham* [*v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007)]. *Gomez*, 239 S.W.3d at 740. Nonetheless, the State argues that *Blakely* and its progeny do not apply when a defendant is granted a resentencing hearing following collateral review of his sentence. As support for its position, the State relies on this Court's opinions in *Donald Branch v. State*, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894 (Tenn. Crim. App., at Jackson, Dec. 21, 2004), *perm. to appeal denied* (Tenn. May 23, 2005) (involving post-conviction review), and *Billy Merle Meeks v. Bell*, No. M2005-00626-CCA-R3-HC, 2007 WL 4116486 (Tenn. Crim. App., at Nashville, Nov. 13, 2007), *perm. to appeal denied* (Tenn. Apr. 7, 2008) (involving habeas corpus review).

In both cases, we concluded that "*Blakely* should not be retroactively applied to cases which have already become final on direct appeal" and are on collateral appeal. *Donald Branch*, 2004 WL 2996894, at *10; *Billy Merle Meeks*, 2007 WL 4116486, at *6; *see also Bobby Taylor v. State*, No. M2008-00335-CCA-R3-PC, 2009 WL 2047331 (Tenn. Crim. App., at Nashville, July 14, 2009), *perm. to appeal denied* (Tenn. Oct. 19, 2008); *Gary Wallace v. State*, No. W2007-01949-CCA-R3-CO, 2008 WL 2687698, at *2 (Tenn. Crim. App., at Jackson, July 2, 2008), *no perm. to appeal filed*; *Glen Cook v. State*, No. W2006-01514-CCA-R3-PC, 2008 WL 821532, at *10 (Tenn. Crim. App., at Jackson, Mar. 27, 2008), *perm. to appeal denied* (Tenn. Sept. 29, 2008).

In the instant case, however, although Defendant's resentencing hearing was the result of a successful collateral attack on his sentences in federal court on a non-*Blakely* related issue, the case was remanded to state court for the purpose of conducting a de novo sentencing hearing. Although case law establishes that a defendant is not entitled to collateral relief based on a *Blakely* challenge, it does *not* say that the constitutional principals articulated in *Blakely* cannot be applied at a resentencing hearing simply because the resentencing hearing was granted after collateral review. At the sentencing hearing, Defendant elected to be sentenced under the provisions of the 1989 Sentencing Act which were in effect at the time the offense was committed in 2002. In *Gomez*, our supreme court confirmed that *Blakely-Cunningham* precedents apply to our pre-2005 sentencing scheme. *Gomez*, 239 S.W.3d at 740. Thus, the trial court was required to sentence Defendant under the 1989 Sentencing Act in effect in 2002 and subject to the constitutional principles articulated in *Gomez* and *Blakely*.

A. Mitigating Factor

Defendant argues that based on Dr. Auble's testimony, the trial court erred in not assigning more weight to his mental retardation as a mitigating factor. As a mitigating factor, the trial court may consider whether "[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense." T.C.A. § 40-35-113(8). Initially, we note that the defendant has the burden of proving applicable mitigating factors. *State v. Richard Levron Campbell*, No. E2007-01239-CCA-R3-CD, 2009 WL 1409978, at *10 (Tenn. Crim. App., at Knoxville, May 20, 2009), *perm. to appeal denied* (Tenn. Aug. 17, 2009) (citing *State v. Mark Moore*, No. 03C01-9403-CR-00098, 1995 WL 548786, at *6 (Tenn. Crim. App., at Knoxville, Sept. 18, 1995)). This court has stated that "while Tennessee Code Annotated section 40-35-113(8) allows a court to consider any mental condition that significantly reduced the Appellant's culpability, the Appellant must sufficiently establish not only the presence of a defect, but also a causal link between his ailment and the offense charged." *State v. Robert James Yoreck, III*, No. M2004-01289-CCA-R3-CD, 2003 WL 23613823, at *4 (Tenn. Crim. App., at Nashville, June 29, 2004), *perm. to appeal denied* (May 23, 2005).

Dr. Auble testified that Defendant was mildly retarded based on his IQ scores and medical records. As a result, Dr. Auble stated that Defendant would tend to be susceptible to the influence of others and display poor judgment. Dr. Auble said, however, that there was no indication that Defendant did not know right from wrong.

In assigning little weight to Defendant's mental condition, the trial court found that "the degree of mental retardation is extremely important." The trial court observed that Defendant:

> is barely mentally retarded. I will add, based upon his testimony today, he seems to be pretty able to understand what is going on. Were it not for the report of mentally retarded, I don't think I would have even had an inkling. Just to hear him testify I didn't detect it, to be honest with you.

According to his statement to the police and his testimony at the sentencing hearing, Defendant knew that a robbery was going to occur when the group drove to the victim's house on the night of the offenses. The trial court noted that Defendant testified during his first sentencing hearing that he understood the wrongful nature of his conduct. At this sentencing hearing, Defendant expressed his regret over the incident and stated that he understood why the victim would want to see him prosecuted for his role in the offenses. The trial court observed that Defendant had no difficulty articulating the concept of prosecution.

Under the sentencing structure prior to 2005, the weight given to each enhancement or mitigating factor is in the discretion of the trial court, assuming the trial court has complied with the purposes and principles of the sentencing act and its findings are supported by the record. *State v. Madden*, 99 S.W.3d 127, 138 (Tenn. Crim. App. 2002). The statutes prescribe no particular weight for an enhancement or mitigating factor. *State v. Gosnell*, 62 S.W.3d 740, 750 (Tenn. Crim. App. 2001). A defendant's sentence "is not determined by the mathematical process of adding the sum total of enhancing factors present then subtracting from this figure the mitigating factors present for a net number of years." *State v. Alder*, 71 S.W.3d 299, 306 (Tenn. Crim. App. 2001) (quoting *State v. Boggs*, 932 S.W.2d 467, 475 (Tenn. Crim. App. 1996)).

Based on our review, we conclude that the trial's finding that enhancement factor (8) is only entitled to slight consideration in mitigation of the length of his sentence is supported by the record. Defendant is not entitled to relief on this issue.

B. Enhancement Factors

Defendant submits that he sufficiently raised *Blakely* concerns at the sentencing hearing to preserve the issue for appeal. Alternatively, Defendant urges this Court to review his *Blakely* challenge as plain error.

After the conclusion of Dr. Auble's testimony, a discussion was held concerning the applicable sentencing statutes, and the following colloquy occurred as part of that discussion:

> [DEFENSE COUNSEL]: I think there are two things that are going on here, Judge. One is the *Booker* fix. My thought is . . . that the potential enhancing or mitigating factors that were in effect at the time of this offense are the ones that the Court should apply or not apply, but that the Court should do that under the methodology that the Court uses now where there is no mandatory or presumptive sentencing.
>
> THE COURT: I think if that is the case ya'll [sic] need to sign a waiver of ex post facto, I believe. Is that not correct? We have such a form.
>
> [DEFENSE COUNSEL]: My thought is we are dealing with a mixture of those two things. . . . [I]t seems like the fix in 2005 with our sentencing scheme changed . . .

> presumptions in sentencing and any sort of mandatory sentencing it took away from the Court, so I think technically the Court is now – if the Court finds enhancing factors, the Court is not bound necessarily to enhance if the Court doesn't feel [it] is appropriate; whereas I think in the past the Court shall enhance. So I think to be constitutionally valid I think the Court has to sentence the way the Court has been sentencing for the last two or three years, since 2005. I think that the enhancing factors, mitigating factors that the Court considers are the ones that were in effect in 2002.

The discussion ended at this point and resumed after the presentation of Defendant's proof. The trial court informed defense counsel that if Defendant chose not to waive his ex post facto rights, he would be sentenced under the sentencing scheme in effect at the time of the commission of the offenses.

> [DEFENSE COUNSEL]: Judge, as I understand this waiver . . . what Your Honor is saying by executing this waiver that Your Honor would sentence him under the law as it changed since June 7th, 2005.
>
> THE COURT: I think that is correct.
>
> [DEFENSE COUNSEL]: And so, with that understanding, we don't intend on executing the waiver.
>
> THE COURT: Okay. It would be the law [that] exist[ed] prior to that.

Defendant did not raise any further objections to the trial court's sentencing determinations. Specifically, Defendant did not object to the trial court's application of the enhancement factors which he maintains on appeal were applied contrary to the constitutional principles announced in *Blakely* and *Gomez*. Nonetheless, this Court may consider plain error upon the record under Rule 36(b) of the Tennessee Rules of Appellate Procedure. *See Gomez*, 239 S.W.3d at 737 (reviewing the defendants' sentencing challenges based on *Blakely* under plain error analysis). Relief is granted under plain error review "only where five prerequisites are met: (1) the record clearly establishes what occurred in the trial court;

(2) a clear and unequivocal rule of law was breached; (3) a substantial right of the accused was adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is "necessary to do substantial justice." *Id*. (quoting *State v. Smith*, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)).

In the present case, the record clearly establishes what transpired in the trial court, a clear and unequivocal rule of law was breached with the application of enhancement factors other than prior criminal history or admissions by Defendant, a substantial right of Defendant was affected because he was denied his Sixth Amendment right to a jury trial, and the record fails to reflect waiver for tactical reasons. With regard to the fifth factor, our supreme court in Gomez has concluded that consideration of a *Blakely* infraction is necessary to do substantial justice when the trial court increases the length of a defendant's sentence based on "constitutionally inappropriate" enhancement factors. *Gomez*, 239 S.W.3d at 742. To make that decision in this case, pursuant to *Gomez*, we must look at what sentence we might impose on the basis of the *Blakely*-compliant enhancement factors alone to decide if substantial justice requires plain error review in this case. *See State v. Randall A. Myers*, No. E2007-01810-CCA-R3-CD, 2009 WL 21033, at 5 (Tenn. Crim. App., at Knoxville, Jan. 5, 2009).

The trial court's consideration of Defendant's prior convictions, enhancement factor (2), in determining the length of Defendant's sentence does not offend constitutional principles. *Blakely*, 542 U.S. at 301, 124 S. Ct. at 2536; *Gomez*, 239 S.W.3d at 740. It appears from the certified copies of the judgments for Defendant's adult felony convictions that the theft offense and the theft of an automobile offense occurred on the same day and would be considered as one conviction for the purposes of determining Defendant's sentencing range. T.C.A. § 40-35-106(b)(4). However, only two felony convictions are required in order to sentence Defendant as a Range II, multiple offender. *Id*. § 40-35-106(a)(1). Thus, a multiple offender classification is supported by Defendant's Class B felony drug conviction and his Class D theft conviction in 1996. In addition to these convictions, Defendant has one prior Class E felony conviction and four misdemeanor convictions. Thus, we conclude that the trial court did not err in considering Defendant's prior criminal history in addition to those necessary to establishing his sentencing range in determining the length of Defendant's sentence. *See id*. § 40-35-114(2).

The State on appeal agrees that *Blakely* and *Gomez* prohibit the trial court's application of enhancement factors (9), (11) and (17), all of which require consideration of a judicially determined fact other than Defendant's prior convictions or admissions. The State argues, however, that the trial court properly considered Defendant's commission of

the charged offenses while on parole, enhancement factor (14), and Defendant's history of juvenile adjudications, enhancement factor (21).

As for enhancement factor (14), the State relies on the introduction at the second sentencing hearing of a certified copy of Defendant's judgment of conviction on August 8, 1996, for the delivery of more than 0.5 grams of a Schedule II drug, a Class B felony. According to the judgment, Defendant received a sentence of ten years. Because the current offenses were committed in 2002, the State argues that a finding that Defendant was on parole in 2002 does not offend *Blakely*.

We observe initially that in its brief, the State relies as support for its argument solely on *State v. Barry Ronnell Smelly*, No. M2007-001884-CCA-R3-CD, 2009 WL 2357146 (Tenn. Crim. App., at Nashville, Feb. 24, 2009) (not for citation), *perm. to appeal denied* (Tenn. Aug. 24, 2009). In fairness to the State, permission to appeal, with the "not for citation" designation, was denied approximately five months after the State filed its brief. However, no supplemental brief was filed with additional citations. *See* Tenn. R. Sup. Ct. 4(F)(1) ("If an application for permission to appeal is hereafter denied by this Court with a 'Not for Citation' designation, the opinion of the intermediate appellate court has no precedential value.").

Nonetheless, we reiterate that *Blakely* precludes consideration of any enhancement factor that requires consideration of "judicially determined facts other that the fact of a prior conviction" or an unequivocal admission by the defendant at trial or at the sentencing hearing. *Gomez*, 239 S.W.3d at 740. The State argues that Defendant did not object to Ms. Skaggs' testimony at the sentencing hearing that he was on parole at the time he committed the current offenses. However, various panels of this Court have previously held "that an admission sufficient to support the enhancement of a defendant's sentence under *Blakely* must rest upon a defendant's unequivocal testimony, at trial or at the sentencing hearing, or a factual acknowledgment in the presentence report when the presentence report is introduced as an exhibit at the sentencing hearing without objection." *State v. Anthony Riggs*, No. M2007-02322-RM-CD, 2008 WL 1968826, at *4 (Tenn. Crim. App., at Nashville, May 7, 2008), *no perm. to appeal filed*; *see also State v. Marquette Houston*, No. W2008-00885-CCA-R3-CD, 2009 WL 2357146, at *3 (Tenn. Crim. App., at Jackson, July 30, 2009), *no perm. to appeal filed*; *State v. Mohamed Medhet Karim*, No. M2006-00619-CCA-R3-CD, 2007 WL 1435390, at *5 (Tenn. Crim. App., at Nashville, May 16, 2007), *perm. to appeal denied* (Tenn. Aug. 13, 2007). Mr. Skaggs acknowledged at the sentencing hearing that Defendant refused to participate in the preparation of the sentencing report. The absence of such an admission by the defendant "requires the trial court to make an additional finding as to credibility" and thus violates *Blakely* principles. *Anthony Riggs*, 2008 WL

1968826, at *4. Therefore, based on our review, we conclude that the trial court erred in considering enhancement factor (14) under the principles articulated in *Blakely* and *Gomez*.

Relying on *State v. Kevin Swift*, No. W2007-00673-CCA-R3-CD, 2008 WL 4117951 (Tenn. Crim. App., at Jackson, Feb. 23, 2009), the State argues that the trial court did not err in enhancing Defendant's sentences based on his history of juvenile adjudications. *See* T.C.A. § 40-35-114(21) (providing for enhancement if the defendant "was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult"). However, *Kevin Swift* is not instructive to the case *sub judice*. In that case, the defendant conceded on appeal that enhancement factor (21) applied and did not contest the trial court's application of this factor.

Various panels of this Court, however, have concluded that juvenile adjudications do not qualify as prior convictions under *Blakely*. *See e.g. State v. Brandon Wallace*, No. W2003-01967-CCA-R3-CD, 2005 WL 195086, at *10 (Tenn. Crim. App., at Jackson, Jan. 28, 2005), *perm. to appeal denied* (Tenn. May 23, 2005); *State v. Christopher Kirkendall*, No. W2003-02393-CCA-R3-CD, 2004 WL 2726026, at *5 (Tenn. Crim. App., at Jackson, Nov. 30, 2004), *no perm. to appeal filed*. Therefore, prior juvenile adjudications may withstand *Blakely* scrutiny only if the defendant unequivocally admits at trial or at the sentencing hearing to the commission of a juvenile offense that would be a felony if committed as an adult. *Anthony Riggs*, 2008 WL 1968826, at *4*; Christopher Kirkendall*, 2004 WL 2726026, at *5. Thus, in order for the trial court's application of this enhancement factor to withstand a *Blakely* challenge, we must look to see whether Defendant unequivocally admitted to the commission of an applicable juvenile adjudication.

In the case *sub judice*, the presentence report indicates that Defendant has numerous juvenile adjudications for offenses committed between the ages of twelve and sixteen. Only one adjudication, however, the theft of property valued between $500 and $1,000 in 1990, would be a felony if he had committed the offense as an adult. *See* T.C.A. § 39-14-105(2) (providing that theft of property valued between $500 and $1,000 is a Class E felony). Defendant admitted at the sentencing hearing that he stole a vehicle during one of his escapes from state custody, but it is unclear whether this testimony concerned the 1990 juvenile adjudication for theft when he was twelve years old, or the notation in the presentence report that he "stole [a] van and ran from Our House" in 1993. The report indicates that a petition for "theft of property (auto) and escape" for the 1993 offense was issued by the Madison County Juvenile Court, but the report does not indicate a monetary value for the property stolen or whether there was a final adjudication on this petition. Accordingly, we conclude that the trial court erred in considering enhancement factor (21) in determining the length of Defendant's sentence.

After review, we conclude as plain error, that the trial court erred in considering enhancement factors other than Defendant's prior convictions in determining the length of Defendant's sentences. Other than a specific finding that Defendant's prior criminal history was entitled to "great weight," the trial court did not state what weight, if any, was assigned to those enhancement factors which were not compliant with *Blakely* principles. Accordingly, it is necessary to remand this matter for resentencing in compliance with *Blakely*, *Cunningham*, and *Gomez* and our standard principles of sentencing in order to ensure substantial justice.

CONCLUSION

After a thorough review, we conclude that as a result of plain error it is necessary to remand Defendant's sentences for aggravated robbery, aggravated burglary, and three counts of aggravated assault for resentencing in compliance with *Blakely*, *Cuningham*, and *Gomez*.

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THOMAS T. WOODALL, JUDGE