

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 15, 2003

STATE OF TENNESSEE v. MICHAEL WALLS

**Direct Appeal from the Circuit Court for Franklin County
No. 14,230 J. Curtis Smith, Judge**

No. M2002-01796-CCA-R3-CD - Filed January 30, 2004

Defendant, Michael Walls, was indicted for the following offenses: count one, forgery; count two, passing a forged instrument; count three, forgery; count four, passing a forged instrument; count five, forgery; count six, passing a forged instrument; count seven, theft of property under \$500; and count eight, forgery. The offense of theft of property under \$500 is a Class A misdemeanor. The seven forgery offenses are Class E felonies. The State entered a nollo prosequi as to counts three and four. Following a jury trial, Defendant was convicted of the remaining counts. The trial court merged count one with count two, and count five with count six, leaving Defendant with convictions for three forgery offenses and one conviction for theft of property under \$500. Following a sentencing hearing, the trial court found that the following enhancement factors were applicable: that Defendant has a previous history of criminal convictions and activity; that Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community; and that Defendant was adjudicated to have committed delinquent acts as a juvenile that would constitute a felony if committed by an adult. Tenn. Code Ann. §§ 40-35-114(2), (9) and (21). The trial court considered Defendant's request for leniency and his mental stability as mitigating factors, but assigned these factors little weight. *See id.* -35-113. The trial court declined to consider alternative sentencing as an option and sentenced Defendant to two years incarceration for each of the forgery convictions and eleven months and twenty-nine days for the misdemeanor theft conviction. The trial court ordered Defendant's sentence for count one to run consecutively to his conviction for count five, and counts seven and eight to run concurrently with his other sentences, for an effective sentence of four years. Defendant now appeals, arguing that the evidence was insufficient to support his convictions. Defendant also challenges the length of his sentences for his forgery convictions and the imposition of consecutive sentencing. Defendant does not challenge the length of his sentence for his theft conviction. After a careful review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Phillip A. Condra, District Public Defender; and David O. McGovern, Assistant Public Defender, Jasper, Tennessee, for the appellant, Michael Walls.

Paul G. Summers, Attorney General and Reporter; Kathy D. Aslinger, Assistant Attorney General; James Michael Taylor, District Attorney General; and William Copeland, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

Mary Jean Hall, an assistant manager at SunTrust Bank, testified that Glennia Fay Walls and Dennis Walls held a joint checking account entitled “Glennia Fay Walls or Dennis Walls.” Both parties were authorized signatories on the account.

Defendant’s grandmother, Glennia Faye Walls, testified that she did not give Defendant permission to take her checkbook or to use any of the blank checks contained in the checkbook. On cross-examination, Ms. Walls explained that Dennis Walls, her son, was a signatory on her checking account so that he could pay the bills associated with her farm or to take care of any emergencies that might arise. Ms. Walls said that she had given Defendant money before “from her purse,” but did not give him blank checks to cash unless she was with him.

Ms. Walls said that some time after Christmas 2001, Ricky Hill, the owner of J & R Market, called Ms. Walls’ daughter-in-law and asked her if Ms. Walls had given Defendant a check. Ms. Walls said that she had not given any checks to Defendant but paid the returned check in the amount of \$100.00. Ms. Walls believed at the time that the check presented to Mr. Hill was the only check Defendant had tried to cash.

At trial, Defendant strenuously maintained, however, that his grandmother had given him the check book and told him to sign his uncle’s name to the checks. In support of his contention, Defendant introduced a hand-written affidavit at trial bearing the purported signature of Ms. Walls and stating that “I Glennie Fay Walls say I give Michael Walls some checks and will pay the checks off I old and forget thing [sic].” The affidavit was not notarized. Ms. Walls said that the signature on the affidavit presented by Defendant at trial was not hers. Ms. Walls explained that she signed her legal documents “Glennia Faye Walls,” not “Glennia F. Walls.” Ms. Walls also said that she did not write the letters “w” and “g” in the manner reflected on the affidavit.

Ms. Walls admitted that she was taking “Alzheimer’s pills” and that she did not “think good.” When asked, Ms. Walls could not say what day of the week it was but thought it was January. Defendant’s trial actually took place in February. Ms. Walls was seventy-five years old and had lived in her own home until shortly before the trial, when she moved in with her daughter.

Trella Crawford, an assistant manager with Kroger’s, testified that Defendant gave her a check signed by “Dennis Walls” in the amount of \$25.00. The check was returned to the store by

the bank because the signature did not correspond with Mr. Walls' signature on file at the bank. Ms. Crawford identified Defendant from a photographic line-up as the person who presented the check.

Ricky Hill said that he had known Defendant since he was born. Defendant gave him a check signed "Dennis Walls" in the amount of \$100 and made out to "cash." Mr. Hill thought that the check was probably stolen because Defendant did not usually present checks signed by his uncle or grandmother. Nonetheless, Mr. Hill cashed the check, then called Defendant's grandmother. The check was eventually returned to the store because the signature on the check did not match the signature on the bank's authorized signatory card.

Brian Brewer, an officer with the Franklin County Sheriff's Department, found Ms. Walls' checkbook laying on the seat of Defendant's vehicle and loose checks scattered in the floorboard of the car. Officer Brewer found a check on Ms. Walls' checking account in Defendant's pocket. The check was made out to cash in the amount of \$40.00, purportedly signed by Dennis Walls, and endorsed by Defendant on the back.

Dennis Walls testified that he did not write the three checks bearing his purported signature, nor did he authorize Defendant to sign his name to the checks presented to Kroger's and R & J Market or the check made out to "cash" in the amount of \$40.00. Mr. Walls said that only he and Ms. Walls were authorized signatories on Ms. Walls' checking account.

On cross-examination, Mr. Walls said that he did not use the checking account for any of his personal expenses. He admitted that his mother had memory problems and often became upset. Mr. Walls said that Ms. Walls had not experienced any problems managing her checkbook.

Defendant called Nancy Silvertooth, the Franklin County Circuit Court Clerk, to testify. Ms. Silvertooth said that Ms. Walls came to the courthouse one day and asked if she could pay off the checks so that the charges against Defendant would be dropped. Ms. Silvertooth told her she would have to speak with the district attorney. Ms. Silvertooth sat with Ms. Walls for a few minutes. At some point, Ms. Walls told Ms. Silvertooth that she had given the checks to Defendant, but Ms. Silvertooth interpreted this comment as an expression of Ms. Walls' desire to help get Defendant out of trouble. Ms. Silvertooth also said that Ms. Walls was tired and just wanted to go home. Ms. Silvertooth did not know who wrote or filed the affidavit with Ms. Walls' signature.

Freda Clark, Ms. Walls' daughter, testified that her mother was taking medicine for Alzheimer's disease. She said that Ms. Walls had difficulty remembering when to take her medication and where she put things. Ms. Clark said that Ms. Walls' lack of memory increased when she was upset. Ms. Walls was upset the morning of the trial because Ms. Clark had to dress her. Ms. Clark denied, however, that her mother would say something happened if it did not. Ms. Clark said that Ms. Walls signed her own checks. Although her mother gave Defendant cash periodically, Ms. Clark did not know of any time when Ms. Walls had given Defendant a blank check.

Defendant testified that his grandmother often gave him money for gas or other expenses and had previously given him blank checks. One evening when he asked for money, Ms. Walls said that she did not have any “green money” and told Defendant to take the checks. She warned him not to write the checks for “too much.” Defendant pointed out that if he planned to steal the checks he would have written the checks for \$1,000.00, not \$174.00. Defendant said that his grandmother told him to sign either her name or his uncle’s name but advised him that the checks would be easier to cash with Mr. Walls’ signature since Defendant was not a “lady.” Defendant did not deny that he had the checkbooks and checks in his possession or that he signed his uncle’s name on the checks. He vigorously maintained, however, that his grandmother voluntarily gave him the checks and told him he could cash the checks by signing his uncle’s name.

At the conclusion of the testimony, the jury found Defendant guilty on all counts.

Sufficiency of the Evidence

Defendant contends that the State failed to lay a proper foundation for the introduction into evidence of the three checks bearing Dennis Walls’ signature. Without these checks, Defendant argues that the evidence is insufficient to sustain his convictions for forgery. In addition, Defendant argues that the State failed to prove that Mr. Walls was either defrauded or injured by Defendant’s actions. Finally, Defendant contends that Ms. Walls’ testimony is not credible because Ms. Walls suffers from Alzheimer’s disease.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S.307, 319, 99 S. Ct. 2781, 2789, 61 L. Ed. 2d 560 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Black*, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. *Id.*; *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997).

Defendant’s first challenge to the sufficiency of the evidence is essentially an objection to the introduction of the three checks written on Ms. Walls’ checking account and bearing the purported signature of Dennis Walls. Defendant argues that only Ms. Walls could authenticate the checks in question. Defendant, however, made no objection to the introduction of this evidence at trial. A defendant is required to make a timely objection at trial in order to preserve issues concerning the admission of evidence for purposes of appeal. Tenn. R. App. P. 36(a); *State v. Duncan*, 698 S.W.2d 63, 67 (Tenn. 1985). The issue is thus waived.

Forgery is committed when a person “forges a writing with intent to defraud or harm another.” Tenn. Code Ann. § 39-14-114(a). As relevant here, “forge” means to “[a]lter, make, complete, execute or authenticate any writing so that it purports to . . . [b]e the act of another who did not authorize the act.” *Id.* -114(b)(1)(A). An offense for forgery requires that the person act with the intent to either defraud or to harm another person. Tenn. Code Ann. § 39-14-114(a). “Thus, forgery ‘is complete by the forgery with fraudulent intent, whether any third person be actually injured or not.’” *State v. Odum*, 64 S.W.3d 370, 371 (Tenn. Crim. App. 2001) (quoting *State v. Jones*, 688 S.W.2d 463, 466 (Tenn. Crim. App. 1984)).

Mr. Walls was an authorized signatory on Ms. Walls’ account granting him power of attorney over and access to the funds in the account. *See* Tenn. Code Ann. 45-2-703(e)(2). Defendant admitted that he signed Mr. Walls’ name to the checks in order to cash the checks. Mr. Walls’ denied that Defendant had authority to execute the checks in his name. Although Defendant strenuously maintained that he had permission to do so, whether or not Defendant had the present intent to defraud Dennis Walls is a question of fact for the jury. *See State v. Patterson*, 755 S.W.2d 815, 818 (Tenn. Crim. App. 1984) (Whether the defendant’s disavowal of intent [to defraud] was sufficient to overcome the state’s proof was a question of fact for the jury). The jury obviously resolved this issue in favor of the State. Viewing the evidence in a light most favorable to the State, the evidence is sufficient to support Defendant’s convictions for forgery. Defendant is not entitled to relief on this issue.

Defendant challenges the sufficiency of the evidence supporting his conviction of theft of property less than \$500 because he contends that Ms. Walls’ testimony was not credible. Ms. Walls identified the checkbook and six loose checks which were found in Defendant’s vehicle as hers and testified that she did not give Defendant permission to take the check book. The offense of theft is committed when a person, “with the intent to deprive the owner of property, . . . knowingly obtains or exercises control over the property without the owner’s effective consent.” Tenn. Code Ann. § 39-14-103.

Defendant argues that Ms. Walls’ testimony was not credible because her memory was impaired as a result of Alzheimer’s disease. Although no medical testimony was presented, Ms. Walls and her family members generally attributed Ms. Walls’ memory lapses to the disease. Alzheimer’s disease is a slowly progressive disorder that varies widely from individual to individual both in the course of the disease and the rate with which it progresses. *In re Conservatorship of Groves*, 109 S.W.3d 317, 338 (Tenn. Ct. App. 2003). In the early stages of the disease, the patient, although suffering a certain degree of memory impairment, may very well be able to live alone and care for his or her own needs. *Id.* at 339.

Defendant had ample opportunity to probe into Ms. Walls’ mental stability. Both Ms. Walls and her family members frankly admitted that Ms. Walls suffered from memory problems. However, Ms. Clark and Mr. Walls testified that their mother was capable of managing her own affairs, including maintaining her checking account and signing her own checks. Ms. Walls testified that she limited her financial assistance to Defendant to gifts of cash and only gave Defendant her

personal check if she were with him. Ms. Walls denied giving Defendant the checkbook or permission to write checks on her account. The jury was in a position to view Ms. Walls' demeanor at trial and the extent to which she presented any indications of confusion or disorientation. Questions concerning the credibility of witnesses are left to the trier of fact, and this Court does not reevaluate credibility determinations. *State v. Holder*, 15 S.W.3d 905, 911-12 (Tenn. Crim. App. 1999). Viewing the evidence in a light most favorable to the State, the evidence is sufficient to support Defendant's conviction for theft of property under \$500.00. Defendant is not entitled to relief on this issue.

Sentencing Issues

Defendant's trial was held in February, 2002, and the sentencing hearing was held in May of that year. During the interval between the two proceedings, Defendant was arrested on eleven charges over a four-day period for public intoxication, evading arrest, resisting arrest, reckless endangerment, two D.U.I. charges, reckless driving, joyriding, theft of property between \$1,000 and \$10,000, leaving the scene of an accident with injuries, and violation of the implied consent law. As a result of these arrests, Defendant's appeal bond was revoked.

Laura Prosser with the Board of Probation and Parole testified that Defendant was convicted of aggravated assault and sentenced to five years in the Tennessee Department of Correction prior to the current offenses. Defendant was released on an appeal bond under the supervision of the Board. Ms. Prosser said that Defendant's bond was revoked because of additional criminal activity, and Defendant served the remainder of his sentence in incarceration.

At the sentencing hearing, Ms. Walls said that she had taken out a warrant for Defendant's arrest on March 25 because Defendant had taken her car without permission and wrecked it. She said, however, that she hoped the trial court would sentence Defendant as leniently as possible.

Tommy Brazleton, an officer with the Franklin County Sheriff's Department, said that he responded to a call about an automobile wreck on March 23. When he arrived at the scene, Defendant had moved his car about two hundred yards from the accident site and was attempting to change the vehicle's left tire. Officer Brazleton, however, observed that the right tire, not the left tire, was flat. Defendant asked to go to the hospital but refused to take a blood test to determine his blood alcohol level. Based on his observations and years of experience, Officer Brazleton concluded that Defendant was under the influence of an intoxicant at the time of the accident. Officer Brazleton later discovered that the vehicle belonged to Ms. Walls.

On March 25, Michael Kerr testified that he was washing his employer's van when he spotted Defendant sitting in Mr. Kerr's truck. He yelled at Defendant, but Defendant sped away in the truck. Lieutenant Danny Fay, with the Winchester Public Safety Department, pursued Defendant as he traveled the wrong way on the interstate. Defendant ran another vehicle off the highway before crashing into an embankment. Lieutenant Fay ordered Defendant to "freeze," but Defendant ran up the embankment. Lieutenant Fay finally caught up with Defendant and managed to handcuff him.

Officers Hal Hall and Randy Wilkerson helped subdue Defendant. Officer Hall said that Defendant was loud, boisterous, and unsteady on his feet. Defendant said that his chest hurt, and he was transported to the hospital. He was x-rayed and given a blood test to determine his blood alcohol level, and Defendant admitted that he had been drinking. Lieutenant Fay said that Defendant continued to drink from a bottle of liquor while he was in the hospital.

Nina Jean Perry, Defendant's mother, said that Defendant had experienced problems with drugs and alcohol since high school. Defendant was in special education classes in high school, but did not graduate. She believed he suffered from dyslexia. Ms. Perry said that Defendant had no concept of how to make a living or how to take care of himself. At one point, Defendant was on disability because of his mental problems, but the disability was discontinued because Defendant did not participate in the required work programs. Ms. Perry said that she has to support Defendant. Ms. Perry said that Defendant was a good person when he was not using drugs or alcohol but agreed during her cross-examination that Defendant was rarely sober.

Defendant also testified at the sentencing hearing and attempted to explain why he had incurred so many convictions. He said that he had been doing "pretty good" until he was convicted of aggravated assault against his former wife in 1996. He believed that his sentence of five years for this offense "was real harsh for a little knot like that." Defendant attributed his problems with alcohol and drugs to a malfunctioning penile shunt. He kept asking the doctors to take the device out, but nobody believed he had one. Defendant explained that he used drugs and alcohol to stop the pain from the shunt so that he could "have at least a part of a life or maybe possibly another wife."

We note initially that, effective July 2002, the legislature amended Tennessee Code Annotated section 40-35-114 by adding "terrorism" as factor (1) and renumbering the other enhancement factors accordingly. 2002 Tenn. Pub. Acts, ch. 849 §2(c). Our opinion refers to the enhancement factors as they existed at the time of Defendant's sentencing hearing in Tennessee Code Annotated section 40-35-114 (1997).

At the conclusion of the testimony, the trial court considered three enhancement factors applicable to each of Defendant's convictions: factor (1), that Defendant has an extensive history of criminal convictions; factor (8) that Defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community; and factor (20), that Defendant was adjudicated to have committed delinquent acts as a juvenile which would constitute a felony if committed by an adult. Tenn. Code Ann. §§ 40-35-114(2), (9) and (21). The trial court placed great weight on factors (1) and (8) and little weight on factor (20) because of Defendant's extensive adult criminal record. The trial court acknowledged that Defendant requested leniency in sentencing in the presentence report and appeared to have some mental difficulties but placed little weight on these factors in mitigation of Defendant's sentence. The trial court declined to consider probation as an alternative sentence to incarceration based on Defendant's numerous failures in the past to comply with the terms of his probation.

The trial court sentenced Defendant to two years for each felony forgery conviction, and eleven months and twenty-nine days for the misdemeanor theft conviction. Based on Defendant's extensive history of criminal convictions, the trial court ordered Defendant to serve his sentences for count one and count five consecutively, and ordered his sentences for count eight and count seven to run concurrently with count one, for an effective sentence of four years.

Defendant now appeals the length and manner of service of his sentence. When a defendant appeals the manner of service of a sentence imposed by the trial court, this court conducts a *de novo* review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). The presumption of correctness 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 defendant has the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the sentence is purely *de novo*. *Ashby*, 823 S.W.2d at 169. Because we conclude that the trial court misapplied enhancement factor (20) and failed to consider mitigating factor (1), our review is *de novo* without the presumption of correctness. See Tenn. Code Ann. §§ 40-35-113(1) and -114(20).

In conducting our review, this Court must consider: (1) the evidence presented at the trial and sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. Tenn. Code Ann. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995).

Defendant was convicted of forgery, a Class E felony and sentenced as a Range I standard offender. The sentencing range for a class E felony for a Range I standard offender is not less than one nor more than two years. Tenn. Code Ann. § 40-35-112(a)5). The presumptive sentence to be imposed for a Class E felony is the minimum within the applicable range unless there are enhancement or mitigating factors present. *Id.* § -35-210(c). If there are enhancement or mitigating factors, the court must start at the presumptive sentence, enhance the sentence as appropriate for the enhancement factors, and then reduce the sentence in the range as appropriate for the mitigating factors. *Id.* § -210(e). The weight to be given each factor is left to the discretion of the trial court. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

Defendant argues that the trial court failed to properly consider the fact that Defendant's conduct did not cause or threaten to cause serious bodily injury. Tenn. Code Ann. § 40-35-113(1). As Defendant points out, this Court has previously concluded that mitigating factor (1) may be considered in sentencing determinations for property offenses. *State v. Daniel James Cosgrove*, No. M2001-02127-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 992 (Tenn. Crim. App., Nashville, Nov. 15, 2002), *perm. to appeal denied* (Tenn. 2003). While this factor was available for consideration

by the trial court, a review of the record indicates that this mitigating factor would be entitled to little weight in determining the length of Defendant's sentences.

After consideration of the enhancement factors listed above, the trial court sentenced Defendant to two years, the maximum of the range for a Range I standard offender of a Class E felony. We note that the trial court erroneously applied enhancement factor (20), that Defendant was adjudicated to have committed delinquent acts as a juvenile that would constitute a felony if committed by an adult. The record indicates that Defendant's juvenile acts consisted of one D.U.I. offense and one simple possession of marijuana offense, both of which would only be considered misdemeanors if Defendant were an adult when he committed the offenses.

Nonetheless, this does not necessarily lead to a reduction in Defendant's sentences. *State v. Winfield*, 23 S.W.3d 279, 284 (Tenn. 2000). Defendant has an extensive criminal history of thirty-six convictions spanning a fifteen-year period, three probation revocations and two appeal bond revocations. In addition, Defendant was arrested on eleven charges since his trial on the current offenses. *See id.* at 283 (Sentencing court may consider past criminal behavior that did not result in a conviction). Accordingly, the weight given to the two remaining enhancement factors, and the little weight assigned to mitigating factor (1), support the two-year sentences imposed by the trial court for Defendant's forgery convictions.

Defendant also contends that the trial court erred in not sentencing him to the Community Corrections Program pursuant to Tennessee Code Annotated § 40-36-106. As Defendant argues, a standard offender convicted of a Class E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). Furthermore, unless sufficient evidence rebuts the presumption, "[t]he trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration is a priority is subject to alternative sentencing and that a sentence other than incarceration would result in successful rehabilitation." *State v. Byrd*, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 19093); *see also* Tenn. Code Ann. § 40-35-303(a). Defendant, as a standard offender convicted of a Class E felony is presumed to be a favorable candidate for alternative sentence.

"When a defendant contends that he should have been sentenced pursuant to the Community Corrections Act of 1984, this Court must consider whether or not he is eligible." *State v. Grandberry*, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990). The following offenders are eligible to serve their probation in a community based program: (1) persons who, without this option, would be incarcerated in a correctional institution; (2) persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5; (3) persons who are convicted of nonviolent felony offenses; (4) persons who are convicted of felony offenses in which the use or possession of a weapon was not involved; (5) persons who do not demonstrate a present or past pattern of behavior indicating violence; (6) persons who do not demonstrate a pattern of committing violent offenses; and persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible. Tenn. Code Ann. § 40-36-106(a).

Based on the statutory criteria, Defendant is eligible for consideration to be placed in the community corrections program. Not all offenders, however, who meet the statutory requirements are entitled to such relief. *Grandberry*, 803 S.W.2d at 707.

The trial court clearly considered Defendant's lengthy criminal record as well as his past failures to comply with the terms of his probations in determining that the option of participation in the community corrections program should not be extended to Defendant. Defendant has amassed a substantial criminal record since becoming an adult with thirty-six convictions, including public intoxication, driving under the influence, theft of property under \$500, vandalism, evading arrest, resisting arrest, driving while license is revoked, simple possession of drugs, failure to stop at the scene of an accident involving injury or death, assault, receiving stolen property and various other traffic offenses. In addition, Defendant was convicted of aggravated assault, a Class C felony, in 1995. He was released on an appeal bond which was subsequently revoked, and he served his sentence in the Tennessee Department of Correction. Defendant has also been placed on probation both as an adult and as a juvenile and failed to comply with the terms of his probation. Defendant has no formal employment record, and Ms. Perry testified that Defendant does not support himself.

The trial court observed that "it would be impossible, absolutely impossible for a probation officer to deal with [Defendant]. He's just not a candidate given the fact that he's failed so many times in the past. Given the record that he has, he's not likely to be rehabilitated in the least." Although the trial court did not specifically refer to the principles of sentencing, Defendant's long history of criminal conduct, his past failures at rehabilitation and his continued disregard for the laws of this state support a sentence of incarceration.

Regardless of his extensive criminal history, Defendant argues that he is eligible for community corrections under Tennessee Code Annotated section 40-36-106(c) because he has a long history of drug and alcohol abuse and suffers from a learning disability. This subsection creates a "special needs" category of eligibility for felony offenders not otherwise eligible for community corrections "and who would usually be considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems . . ." Tenn. Code Ann. § 40-36-106(c). A defendant may only rely on the special needs criteria for eligibility in a community based program, however, if he or she does not qualify under subsection (a). *State v. James R. Horn, Sr.*, No. M1999-00301-CCA-R3-CD, 2000 WL 680377 (Tenn. Crim. App., Nashville, May 25, 2000). Subsection (c) does not provide Defendant any relief since he qualified for eligibility under subsection (a), even though the option was not appropriate in this case.

Finally, Defendant argues that the trial court erred in ordering two of his forgery convictions to be served consecutively. When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories listed in Tennessee Code Annotated section 40-35-115. In this instance, the trial court found that Defendant "is an offender whose record of criminal activity is extensive." Tenn. Code Ann. §40-35-115(a)(2).

The imposition of consecutive sentences is also guided by the general sentencing principles that the length of a sentence be “‘justly deserved in relation to the seriousness of the offense’ and ‘no greater than that deserved for the offense committed.’” *Imfeld*, 70 S.W.3d at 708 (quoting Tenn. Code Ann. §§ 40-35-102(1) and -103(2)); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999). Although the trial court did not specifically refer to these sentencing principles, our *de novo* review of the record supports the imposition of consecutive sentences.

Defendant relies on this Court’s opinion in *State v. Jeffrey Smith*, No. E2002-01147-CCA-R3-CD, 2003 WL 1233431 (Tenn. Crim. App., Knoxville, Mar. 18, 2003) in support of his position that consecutive sentencing is inappropriate. In *Smith*, among other issues, this Court found the record did not support the State’s argument that the defendant is an offender whose record of criminal activity is extensive. *Smith*, 2003 WL 1233431, at *4. The defendant’s offense occurred in 2001. The presentence report indicated that the defendant had two prior convictions, one in 1992 and one in 1991. Although the defendant failed to comply with the terms of his probation for the assault conviction or his parole for the robbery conviction, the violations were not predicated upon subsequent criminal activity. *Id.*

The factual situation presented in *Smith* is clearly distinguishable. Defendant has consistently and frequently disregarded the laws of this State, even continuing his criminal activity while waiting for his sentencing hearing on the current offenses. Defendant clearly qualifies as an offender whose record of criminal activity is extensive. Furthermore, the sentence imposed is no greater than that deserved for the offenses committed and justly related to the seriousness of the offenses. The record amply supports the imposition of consecutive sentencing. Defendant is not entitled to relief on this issue.

CONCLUSION

Following our review of the entire record in this matter, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE