Document A

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

STATE OF TENNESSEE v. VERN BRASWELL

No. W2006-01081-CCA-R3-CD.
July 10, 2007 Session
Filed January 28, 2008

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed Denied by Supreme Court August 25, 2018

Direct Appeal from the Criminal Court for Shelby County
No. 05-03038 Joseph B. Dailey, Judge

Robert L. Parris, Memphis, Tennessee, (on appeal); and J. Bailey and Walter Bailey, Memphis, Tennessee, (at trial), for the appellant, Vern Braswell.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; William L. Gibbons, District Attorney General; Betsy Carnesale, Assistant District Attorney General; and Amy Weirich, Assistant District Attorney General, for the appellee, the State of Tennessee.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and NORMA MCGEE OGLE, JJ., joined.

OPINION

*1 Defendant, Vern Braswell, was indicted for first degree premeditated murder. Following a jury trial, Defendant was found guilty of the lesser included offense of second degree murder. After a sentencing hearing, Defendant was sentenced as a Range I, standard offender, to twenty-four years. On appeal, Defendant argues that (1) the evidence is insufficient to support his conviction; (2) the trial court erred in certain evidentiary rulings; and (3) his sentence is excessive. After a thorough review, we affirm the judgment of the trial court.

I. Background

Pauline Washburn testified that her daughter Sheila Braswell, the victim, had been married to Defendant for ten years, and the couple had two young sons. Defendant and the victim resided together with their children in Cordova, Tennessee. Ms. Washburn said that she received a telephone call from Defendant on November 5, 2004, at 4:34 a.m. Defendant told Ms. Washburn that the victim was not breathing. Defendant said that he had fallen asleep around 1:30 a.m., and when he woke up at approximately 3:30 a.m., the victim was floating in the bathtub.

*23 At the sentencing hearing, the State relied upon the presentence report and a victim impact statement which was prepared by Ms. Washburn. **Neither the presentence report** nor the victim impact statement **is included in the record**. Ms. Washburn, however, read her statement into the record at the sentencing hearing. In her statement, Ms. Washburn described the effects of the victim's death on the victim's children and other members of her family and described the victim's community and church activities. We glean from the record that Defendant's prior criminal convictions include a 1992 conviction of theft of property under $500 and a 1990 conviction of simple assault. **Defendant also submitted for the trial court's consideration certain letters written on his behalf in connection with his pre-trial bond hearing** and requested the trial court to take notice of the testimony presented at the bond hearing from Defendant's employer, Dr. Ruby Payne, and other persons who described Defendant's character and his work in the community. **Neither the letters nor the transcript of the bond hearing are included in the record on appeal**. *See State v. Charles Humphries*, No. W2005-00016-CCA-R3-CD, 2006 WL 561414, *6 (Tenn. Crim. App., at Jackson, Mar. 7, 2006), *no perm. to appeal filed* (observing that "[c]ertainly, the presentence report is vital in appellate review of the trial court's imposition of consecutive sentencing; therefore, in its absence, we presume the accuracy of the trial court's findings"). At the conclusion of the sentencing hearing, the trial court considered in mitigation of Defendant's sentence, his education, his responsible job, the numerous character letters, and the testimony of witnesses on his behalf at the bond hearing and the trial. The trial court applied enhancement factor (2), that Defendant has a previous history of criminal convictions. T.C.A. § 40- 35-114(2) (2005). The trial court considered both Defendant's assault conviction and his theft conviction very "relevant" in its sentencing determinations. The trial court also observed that Defendant's offense was "heinous" and "required considerable effort" to commit and "that was followed up by some very defective [sic] and questionable conduct on his part as borne out by the proof in the bond hearing and the trial."

The trial court continued:

> [a]nd I think was well this isn't an enhancement factor . . . but just as an observation there's been little of what I would consider to be genuine remorse expressed in this case. Notwithstanding his conduct on the witness stand during the trial I think if one were to listen to those tapes of those phone calls from the jail one would have to question the degree of remorse that [Defendant] exhibited with regard to this offense.

Considering both the mitigating factors and the one enhancement factor based on Defendant's prior convictions, the trial court sentenced Defendant to twenty-four years.

Our supreme court has recently concluded that other than a defendant's prior criminal convictions (or other enhancement factors admitted to by the defendant), the application of enhancement factors by the trial court rather than a jury, which increases the defendant's sentence beyond the statutorily presumptive minimum sentence, deprives the defendant of his or her Sixth Amendment right to have a jury determine whether those enhancement factors apply. *State v. Gomez*, ___ S.W.3d___, 2007 WL 2917726, at *6

CONCLUSION

After a thorough review of the record, we affirm the judgment of the trial court.

_____

THOMAS T. WOODALL, JUDGE