

I. RANGE OF SENTENCE

By stipulation of the parties, the Defendant is found to be a Range II Multiple Offender (T.C.A. § 40-35-106) in Case No. F-68537, and a Range I Standard Offender (T.C.A. § 40-35-105) in Case No. F-68538.

II. ENHANCEMENT FACTORS (T.C.A. § 40-35-114)

With regard to enhancement factors, the State argued that the following factors should be applied: (1) Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; (10) Defendant had no hesitation about committing a crime when the risk to human life was high; (13) at the time the felony was committed, the Defendant was released on parole; and (24) the offense involved the theft of property and, as a result of the manner in which the offense was committed, the victim suffered significant damage to other property belonging to the victim or for which the victim was responsible.

Having considered all potential enhancement factors under the statute, the Court finds the following enhancement factors that are not themselves essential elements of this offense: (1) Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; and (13) at the time the felony was committed, the Defendant was released on parole.

The Court respectfully declines to find that enhancement factor (10) applies in this case, because to do so would essentially adopt a *per se* rule that all Aggravated Burglaries should be enhanced due to the inherent risk to human life involved in such crimes. Certainly, the State is correct in that such crimes are extremely dangerous, both to the homeowners and the burglars, but the legislature presumably considered this fact in classifying home invasions as aggravated crimes in the first place. The Court believes that the State's reliance on State v. Black, 618 S.W.2d 526 (Tenn. Crim. App. 1981) is misplaced. In that case, the Court of Criminal Appeals upheld consecutive sentencing for burglary in the first degree and rape after finding that both crimes carried "an indicia of high risk to human life *coupled with* the threat of [Defendant] that if the [victim] moved, he would kill her." Id. at 528 (Emphasis Added). In other words, the Black Court found that something more was required, aside from the fact that a home burglary had been committed, to support consecutive sentencing. In Mr. Mikita's cases, while his conduct in committing the burglaries was deplorable, this Court does not find that his additional behavior during the incidents rose to the level necessary to apply enhancement factor (10).

The Court further declines to find that enhancement factor (24) applies in this case. Although a theft of property did indeed occur in these cases, there was nothing in particular about the manner in which Mr. Mikita's offenses were committed that resulted in significant damage to other property belonging to the victims. Had Mr. Mikita made good on his threat to return and burn down the Melvins' home, this case would be in a much different posture; as it stands, however, there is insufficient proof for the Court to apply enhancement factor (24).

III. MITIGATING FACTORS (T.C.A. § 40-35-113)

The Court finds no mitigating factors in these cases. The burden of proving applicable mitigating factors rests upon the Defendant. State v. Salters, No. E2012-00035-CCA-R3-CD (Tenn. Crim. App. December 6, 2012) at *6. Although the Defendant argued that his conduct neither caused nor threatened serious bodily injury, the Court finds that Mrs. Melvin was threatened with serious bodily injury by virtue of the physical struggle which ensued upon her confrontation of Mr. Mikita in the hallway of her home. As a result of this struggle, which began in the hallway and ended up with Mr. Mikita pushing Mrs. Melvin into the master bedroom and onto the bed, Mrs. Melvin suffered bruising on both arms. Furthermore, during this confrontation, Mr. Mikita threatened to return and burn Mrs. Melvin's house down. Looking at this incident as a whole, the Court finds that Mr. Mikita's conduct threatened Mrs. Melvin with serious bodily injury.

IV. CONSECUTIVE SENTENCING

DISCRETIONARY CONSECUTIVE SENTENCING (T.C.A. § 40-35-115):

When a defendant is convicted of multiple crimes, the Court, in its discretion, may order the sentences to be served consecutively if it finds by a preponderance of the evidence that the Defendant falls into one of seven categories listed in T.C.A. § 40-35-115. The existence of a single category is sufficient to warrant the imposition of consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997).

In the case at bar, the Court finds, in ordering consecutive sentencing, that:

- (1) Defendant is a professional criminal who has knowingly devoted his or her life to criminal acts as a major source of livelihood;
- (2) Defendant is an offender whose record of criminal activity is extensive;
- (3) 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) 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, and all three of the following factors apply:
 - (a) the circumstances surrounding the commission of the offense are aggravated, and
 - (b) confinement for an extended period of time is necessary to protect society from the defendant's unwillingness to lead a productive life and the defendant's resort to criminal activity in furtherance of an anti-societal lifestyle, and

(c) the aggregate length of the sentences reasonably relates to the offense of which the defendant stands convicted.

(5) 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 the defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical, and mental damage to the victim or victim;

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

(7) Defendant is sentenced for criminal contempt.

MANDATORY CONSECUTIVE SENTENCING (Tenn. R. Crim. P. 32(c)(3)):

The Court further finds that:

(A) Defendant committed a felony while on parole or other release program.
• New felony sentences must be run consecutive to paroled offense

(B) Defendant committed an escape or a felony committed while on escape.
• New felony conviction committed on escape must run consecutive to the prior conviction from which the defendant escaped; or if convicted of the felony of escape or attempted escape, the new conviction must run consecutively to the sentence the defendant was serving when he escaped.

(C) Defendant committed a felony while released on bail for a felony and the defendant is convicted of both offenses.
• New felony conviction must be consecutive to felony conviction for which Defendant was on bail.

(D) Any other ground provided by law: N/A.

V. PROBATION CONSIDERATIONS

A defendant shall be eligible for probation under the provisions of this chapter, if the sentence actually imposed upon such defendant is ten (10) years or less. However, no defendant shall be eligible for probation under the provisions of this chapter if convicted of a violation of T.C.A. §§ 39-13-304, 39-13-402, 39-13-504, 39-15-402, or 39-17-417(b) or (i). The burden of establishing suitability for probation rests with the defendant. T.C.A. § 40-35-303(b).

The Court has also considered the following if deciding to grant or deny an alternative sentence to incarceration:

The presentence report if not waived.

Defendant's physical/mental condition and social history. The Court finds nothing remarkable in the Defendant's physical or mental condition. With regard to social history, it appears that the Defendant has been unable to maintain stable employment, having relied mostly on his parents for financial support. The Defendant quit his most recent job at "Bar Louie" in Murfreesboro; initially, he testified that he quit that job so that he could stay home and babysit his girlfriend's children while she worked, but he later changed his testimony and asserted that he quit that job because he was exposed to drugs by some co-workers. In any event, the Court is not encouraged by Mr. Mikita's past social history.

The facts and circumstances surrounding the offense, and the nature and circumstances of the criminal conduct involved. This offense involved the forcible entry into both victims' homes, in broad daylight, presenting a clear disregard for the safety of both the victims and the Defendant. Although Ms. Harmon (the victim in Case No. F-68538) was fortunately not at home at the time of the invasion, Mrs. Melvin (the victim in Case No. F-68537) was home and was physically assaulted by the Defendant, resulting in bruising on both of her arms. Ms. Harmon testified that she now feels less secure in her home, has changed her locks, keeps her doors locked at all times, and never recovered a silver rosary which had tremendous sentimental value to her. Mrs. Melvin testified that she asked the Defendant to leave her home multiple times during the 20-minute encounter, that the Defendant grabbed her phone away when she tried to call 9-1-1, and further that he physically prevented her from fleeing the residence. Additionally, the Defendant threatened to come back and burn the Melvins' house down. Mrs. Melvin testified that she suffered anxiety and nightmares as a result of this burglary, and that she underwent 8 weeks of counseling afterwards. Additionally, Mrs. Melvin testified that she and her husband installed an alarm system as a result of this incident. Mr. Melvin, who was not at home during the burglary, testified that the burglary of his home has caused him to have feelings of insecurity and mistrust of people in general. The Defendant testified that he is addicted to illegal drugs, and that he broke into these victims' homes in hopes of obtaining money to purchase drugs. The Defendant further testified that he did not expect to find anyone at home in these residences; however, he had no explanation for why he did not leave the Melvins' residence when asked to do so by Mrs. Melvin. The Defendant acknowledged that it was "stupid" to threaten to burn down the Melvins' home. Defendant testified that he used drugs while on bond in this case.

The prior criminal history of the Defendant, or lack thereof. Prior Convictions/Dates of Convictions: Aggravated Burglary (Sullivan County, TN, 6/5/08); Theft Over \$1,000 (Sullivan County, TN, 6/5/08); Aggravated Burglary (Sullivan County, TN, 6/5/08); Theft Over \$500 (Sullivan County, TN, 6/5/08); Burglary (Pennsylvania, 1/25/11).

The previous actions and character of the Defendant. As set forth above, the Defendant has demonstrated very little by way of his previous actions and character.

Whether or not the Defendant might reasonably be expected to be rehabilitated, and the Defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the Defendant will commit another crime. The Defendant has now been convicted of nine felonies by the age of 25. The Defendant has already been given the opportunity to succeed on probation and parole. Further, the Defendant has participated in three drug rehabilitation programs, to no avail. The Defendant's drug addiction persists, and he is now unable to control its effects not only on himself, but on society at large. The Court finds, sadly, that, the Defendant is no longer a good candidate for rehabilitation, and that there is a substantial risk that the Defendant would commit additional crimes if released on probation (as evidenced by his admitted drug use while on bond awaiting trial in this case).

Whether or not the interests of society in being protected from possible future criminal conduct of the Defendant are great. As set forth above, the interests of society in this regard are great.

Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the Defendant. As set forth above, less restrictive measures have been frequently and recently applied.

Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense. A sentence of full probation would unduly depreciate the seriousness of these offenses. As explained above, these offenses had a tremendous adverse impact on the victims (particularly Mrs. Melvin).

Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses. A period of confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses. The detective in this case testified that Aggravated Burglaries are a "huge problem" in the City of Murfreesboro, and provided the following statistical data from the Murfreesboro Police Department records to support her testimony: in 2012, 919 burglaries were committed in Murfreesboro; in 2013, 738 burglaries were committed in Murfreesboro; and in 2014, over 100 burglaries have been committed thus far in Murfreesboro. Although the number of reported burglaries has decreased, these numbers are still substantial, and it is important for potential offenders to understand that such crimes will be punished in a serious manner consistent with the protection of the community.

Whether or not the offense was particularly enormous, gross, or heinous. This factor does not apply.

VI. SENTENCE

With regard to Aggravated Burglary, the possible range for a Range I offender is 3-6 years, and the possible range for a Range II offender is 6-10 years. *See* T.C.A. §§ 40-35-112(a)(3) & (b)(3). With regard to Theft over \$1,000, the possible range for a Range II offender is 4-8 years. *See* T.C.A. § 40-35-112(b)(4). With regard to Theft over \$500, the possible range for a Range I offender is 1-2 years. *See* T.C.A. § 40-35-112(a)(5). Considering all of the foregoing findings, the Court finds that partial consecutive sentencing is appropriate pursuant to T.C.A. § 40-35-115, and that probation and alternative sentencing are denied.

Therefore, the Defendant is hereby sentenced to a term of eight (8) years in the Department of Correction for the conviction of Aggravated Burglary in Case No. F-68537. Additionally, the Defendant is sentenced to a term of five (5) years in the Department of Correction for the conviction of Aggravated Burglary in Case No. F-68538. Additionally, the Defendant is sentenced to a term of four (4) years in the Department of Correction for the conviction of Theft over \$1,000 in Case No. F-68537. Finally, the Defendant is sentenced to a term of one (1) year in the Department of Correction for the conviction of Theft over \$500 in Case No. F-68538. The eight-year and five-year sentences shall be served consecutively to each other; the remaining sentences will be served concurrently therewith.

VII. FINES & RESTITUTION

The Defendant has retained counsel in this case, but has a limited employment history and has largely been supported by his parents. Defendant reported his vehicle as an asset worth \$7,000.00, and reported one credit card debt in the amount of \$1,300.00, along with restitution owed in an undisclosed amount for an insurance deductible in Pennsylvania. A defendant's ability to pay a fine is not, however, the controlling factor, and a fine may be used for punitive effect. *See State v. Marshall*, 870 S.W.2d 532, 542 (Tenn. Crim. App. 1993). In the case at bar, considering the foregoing factors, the Defendant is hereby fined \$250.00 for each Aggravated Burglary conviction, plus \$125.00 for each Theft conviction, for a total fine of \$750.00. Restitution in the amount of \$500.00 is awarded to Mrs. Melvin.

IT IS SO ORDERED.



M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been delivered via U.S. Mail (to last address on file), postage prepaid, to the following:

Drew Justice, Esq.
Attorney for Defendant
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Nathan Nichols, Esq.
Assistant District Attorney General
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On this the _____ day of _____, 20____.

Deputy Clerk