

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE**

STATE OF TENNESSEE,)	
)	
Appellee,)	Court of Criminal Appeals
)	Case No. M2003-03073-CCA-R3-CD
vs.)	
)	
BRYANT GUARTOS,)	
)	
Appellant.)	

**ON APPEAL AS OF RIGHT FROM THE
DAVIDSON COUNTY CRIMINAL COURT**

THIRD SUPPLEMENTAL BRIEF OF APPELLANT

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THIRD SUPPLEMENTAL BRIEF

In light of recent caselaw, the defendant submits this third supplemental brief on the issue of consecutive sentences which he preserved in the second supplemental brief (which was also raised initially here in this Court).

As noted in the original brief, the defendant received consecutive sentences. He asserts here that consecutive sentences, under Tennessee law, violate the Sixth Amendment.

Where a sentencing scheme mandates an entitlement to a particular sentence in the absence of judge-found facts the Sixth Amendment dictates that only the jury can find these facts so as to impose the greater sentence. This was the case under our former presumptive sentencing scheme which still exists as it relates to the imposition of consecutive sentences. If, on remand, *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) holds that our former presumptive sentencing scheme prohibits sentencing enhancements beyond the statutory minimum then the current presumptive concurrent sentencing scheme similarly runs afoul of the Sixth Amendment.

Gomez originally held that the Tennessee sentencing scheme does not mandate an increased sentence upon the finding of an enhancement factor. While that is true enough, that asks the wrong question. The relevant inquiry is not what the sentencing statute requires but rather, what the sentencing statute forbids See, *Rita v. United States*, --- S.Ct. ----, 2007 WL 1772146 (2007) (“The Sixth Amendment question, the Court has said, is whether the law forbids a judge to increase a defendant's sentence unless the judge finds facts that the jury did not find”).

The determinative constitutional as to the sentencing law here is: Does Tennessee law forbid a trial court from enhancing a sentence unless the court makes a finding of fact, apart from those made by a jury or admitted to by a defendant? As noted, *Gomez* has already held that the judge may not impose a greater sentence in the absence of judicial fact-finding concerning the existence of an enhancement factor.

A Tennessee defendant is entitled to the statutory presumptive sentence and the Sixth Amendment prohibits enhancement factors from increasing a sentence unless they are submitted to and found by a jury. Thus, that the Tennessee enhancements are discretionary – and the result of the calculus is also ostensibly discretionary – makes not a bit of constitutional difference. It is for that reason that the Tennessee sentencing scheme which existed prior to the amendments of 2005 is contrary to the Sixth Amendment.

The preceding analysis applies to consecutive sentences under the current Tennessee law. In short, unless the judge makes a factual finding that one of the consecutive sentencing factors exist, the defendant is absolutely entitled to a concurrent sentence and, more to the point, the judge is forbidden to impose consecutive sentences. Tenn.CodeAnn. § 40-35-115 (d) provides that: “ Sentences shall be ordered to run concurrently, if the criteria noted previously in this section are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure.” This “entitlement” in the absence of judge-found facts is no different than the presumptive minimum sentence under prior Tennessee law.

The statute concerning concurrent or consecutive sentences dates to the Nineteenth

Century. Under the provisions of § 5228 of the Code of 1858, later codified as § 7201 of Shannon's Code, there was no discretion vested in the trial judge. When a defendant was convicted of two or more offenses, before judgment on either, "imprisonment on one commence(d) at the expiration of the imprisonment upon any other of the offences." By Chapter 115 of the Public Acts of 1919, the legislature gave trial judges the authority to order sentences for two or more offenses to be served concurrently or consecutively "in the discretion of the Trial Judge."

The Criminal Sentencing Reform Act of 1989 set forth the statutory criteria for concurrent and consecutive sentencing found in § 40-35-115.

(a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this section.

(b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to

consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

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

(7) The defendant is sentenced for criminal contempt.

(c) The finding concerning the imposition of consecutive or concurrent sentences is appealable by either party.

(d) Sentences shall be ordered to run concurrently, if the criteria noted previously in this section are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure.

It matter not that the Tennessee judge has the authority to run the sentences concurrently even if a consecutive sentence factor may exist. That is not the question. Recall the question posed in *Rita v. United States*, ___ S.Ct. ___, 2007 WL 1772146 (2007): “The Sixth Amendment question, [this] Court has said, is whether the law forbids a judge to

increase a defendant's sentence unless the judge finds facts that the jury did not find” Clearly, the current Tennessee consecutive sentence scheme forbids a consecutive sentence unless a consecutive sentence factor is found by the judge. The judicial “doubling” of every sentence in the case at bar rests not on a finding by the jury but the judge and thus violates the Sixth Amendment. This Court should impose concurrent sentences.

Respectfully submitted this _____ day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief has been furnished via *U.S. Mail* to Assistant Attorney General Mark Fulks, Attorney General's Office, Criminal Justice Division, P.O. Box 20207, Nashville, TN 37202, on this the _____ day of July, 2007.

David L. Raybin