

## State v. Neal

Decided Jan 18, 2000

C.C.A. No. 01C01-9809-CR-00377.

January 18, 2000.

Appeal from Wilson County, No. M1998-00600-CCA-R3-CD, HONORABLE JAMES O. BOND, Judge.

AFFIRMED

### **FOR THE APPELLANT:**

V. Michael Fox, Bruce, Weathers, Corley, Dughman

### **FOR THE APPELLEE:**

Paul G. Summers, Attorney General Reporter  
Lyle, General Doug Hall, Assistant District Attorney, Georgia Blythe Felner, Counsel for the State, Criminal Justice Division

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L. T. LAFFERTY, SENIOR JUDGE

### **OPINION**

The appellant, David Neal, referred hereinafter as the "defendant," appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. As a result of a Wilson County jury finding the defendant guilty of voluntary manslaughter, the trial court imposed a sentence of four and one-half (4 1/2) years in the Department of Correction, denying the defendant's application for full probation.

The defendant presents three issues for appellate review:

1. Whether the trial court erred in applying enhancement factor (1), [Tenn. Code Ann. § 40-35-114](#), to enhance the defendant's sentence for his two arrests of driving under the influence of intoxicant subsequent to his conviction for voluntary manslaughter?

2. Whether the trial court erred in applying enhancement factor (6), [Tenn. Code Ann. § 40-35-114](#), to enhance the defendant's sentence based upon the amount of damage to the personal property belonging to the victim being particularly great?

3. Whether the trial court erred in denying probation to the defendant?

After a review of the entire record, the briefs of the parties, and applicable law, we AFFIRM the trial court's judgment.

### **FACTUAL BACKGROUND**

The defendant was indicted by the Wilson County Grand Jury for the offense of murder second degree, involving the death of his roommate, Wally F. Haynes, on November 3, 1996. On November 12, 1997, a jury found the defendant guilty of voluntary manslaughter. The record does not contain a transcript of the actual facts surrounding the death of Wally Haynes. The sentencing hearing occurred on January 21, 1998. The pre-sentence report filed in this record, sets out the defendant's version of the offense, from which we quote in pertinent parts:

Me and Wally had gone out to the Chute and Wynona's bar. We had a mostly normal night. On the way home he was angry about something. I never really knew why he was angry to start out with. Then I told him that he was either going to love life or love cocaine and he slammed on the brakes and slammed the car into park and got out. Then I drove home. On the rest of the way home he was pulling on his hair and making animal noises, ripped the rearview mirror off the windshield. I tried to remain calm and finally got home. When we got home, Wally was still in this state of mind and we got into an argument. I tried to leave and he grabbed me and threw me on the couch and cut my air off. I fought him off by pulling on his hair, pushing, kicking. He flew into a rage and started crashing furniture. I tried to leave again and he grabbed me again and was holding my face down in the cushions of the couch. He told me "your [sic] not leaving here under your own power." "[Y]ou'll be carried out first." I pushed him off a second time and went to the bedroom. I had only seconds to grab my gun. When I turned around he was standing just inside the doorway. I managed to get around him and tried to leave. He prevented me from doing so by coming up behind me and threw me down. We got into another physical struggle and he told me a second time he was going to kill me. When I broke free of him I fired. The first shot didn't [sic] stop him and I fired another shot. That's the one that killed him. It was not my intention to kill him. I didn't [sic] want any of this to happen at all. I didn't [sic] call 911 right then because there was no time. After he was shot I panicked and didn't [sic] know what to do so I went to my mothers [sic] where 911 was called.

On a recorded statement given to the police, the defendant can be heard giggling.

## SENTENCING HEARING

Ms. Betsy Jakalski, a probation officer for Wilson County, identified a pre-sentencing report she compiled for the defendant's sentencing hearing. The pre-sentence report includes the victim's family impact statements and the defendant's version of the criminal offense. Ms. Jakalski testified in a records check on the defendant that she did not find any felony convictions but did find some misdemeanor arrests. On May 4, 1993, the defendant entered a plea of guilty to no driver's license, reduced from an arrest for driving on a suspended license, receiving a fine of \$50.00. On May 10 and May 24, 1993, the defendant had two arrests for driving on a suspended license dismissed. On November 6, 1996, the defendant made restitution for a worthless check, which charge was nol proded. At the time of the sentencing hearing, Ms. Jakalski testified that the defendant had two driving under the influence of intoxicants pending action of the Davidson County Grand Jury. These arrests occurred while the defendant was released on bond on April 30, 1997, and June 8, 1997, from his present conviction. Ms. Jakalski testified that the defendant advised her he was HIV positive with a suppressed immune system. Ms. Jakalski verified this diagnosis with a local medical hospital.

Brook Charlton, niece of the victim, testified regarding her feelings about her uncle, Wally Haynes. Ms. Charlton testified as to her and her brother's loving relationship with their uncle from their childhood and the devastating affect his death had on them. Ms. Charlton testified that she had no malice for the defendant and observed the sadness the defendant had caused his family. However, Ms. Charlton is very angry with the defendant, since she will no longer be able to talk and see her uncle at Christmas. Ms. Charlton

advised the trial court that the defendant should pay for killing her uncle, and he should receive the maximum sentence of six (6) years.

Mrs. Vaynell Charlton, sister of the victim, testified that she believed her daughter, Brook, did a very good job in summing up the witness's feelings. Mrs. Charlton stated that she loved her brother very much and approached the trial with compassion for the defendant and his family. However, after listening to the evidence at trial, Mrs. Charlton was at a loss to explain the actions of the defendant in shooting her brother. Mrs. Charlton testified that the family did not receive any of her brother's belongings or know what happened to them. Mrs. Charlton believed that the defendant should be held accountable for what he had done.

Mrs. Jessie Haynes, mother of the victim, testified that she filed a victim impact statement, and her loss was so devastating that it could not be put into words. Mrs. Haynes expressed some doubts about how the defendant killed her son. However, Mrs. Haynes testified that she was sorry for the defendant, but that the defendant is still alive with his family. Mrs. Haynes described her son as sweet, gentle, caring, loving and generous. Mrs. Haynes advised the trial court that the defendant should take responsibility for what he had done and not be patted on the back. As to her son's personal effects, Mrs. Haynes testified she had only received her son's.

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