IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 15, 2002

STATE OF TENNESSEE v. JIMMY L. SLATTON

Appeal from the Criminal Court for Wilson County
No. 00-0690 J. O. Bond, Judge

No. M2001-01529-CCA-R3-CD - Filed June 3, 2002

The defendant, Jimmy L. Slatton, pleaded guilty to attempted aggravated sexual battery and agreed to a six-year sentence. The plea agreement provided that the trial court would determine the manner of service of the sentence. After a sentencing hearing, the trial court denied any form of alternative sentencing and imposed incarceration in the Department of Correction. From this determination, the defendant appeals. Finding no error, we affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, J., joined. JOE G. RILEY, J., not participating.

William Cather, Lebanon, Tennessee, and Merrilyn Feirman, Nashville, Tennessee, for the Appellant, Jimmy L. Slatton.

Paul G. Summers, Attorney General & Reporter; David H. Findley, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The record in this appeal consists of the technical record, a transcript of the sentencing hearing, and the presentence investigative report, which was exhibited to the sentencing hearing. We glean from the record that the defendant was originally charged with rape of a child, *see* Tenn. Code Ann. § 39-13-522 (1997), but entered into a plea agreement that provided for a guilty plea to attempted aggravated sexual battery, a Class C felony, *see id.* § 39-13-504 (1997) (proscribing aggravated sexual battery as a Class B felony); *id.* § 39-12-101 (proscribing criminal attempt); *id.* § 39-12-107 (grading criminal attempt at one classification lower than named substantive offense). We can discern nothing about the nature and circumstances of the offense other

than that it occurred in 1997 and the minor female victim's surname is Slatton.[1] Neither the presentence report nor the witnesses in the sentencing hearing discussed the nature or circumstances of the conviction offense.

The presentence report reflects that at the time of sentencing the defendant was 46 years of age. He has an eighth grade education and has worked as a licensed electrician for twenty years. His prior criminal record includes a 2000 misdemeanor conviction of failure to appear, two convictions (1992 and 1997) of public intoxication, and 1992 felony convictions on three counts of incest. In the incest cases, the defendant received concurrent, five-year sentences to be served on probation. After an unspecified probation violation, the defendant was transferred to "community corrections probation" on November 16, 1993. He was transferred back to regular probation on June 8, 1995, but after another violation he was again transferred to "community corrections" on December 12, 1997. Then, on December 17, 1999, the community corrections staff placed him on "absconder status for failure to report." He was arrested on January 24, 2000. His probation was revoked, and he was sent to the penitentiary on March 17, 2000. He was discharged on October 14, 2000. A "psychosexual evaluation" report appended to the presentence report in the present case indicates that the defendant poses a high risk for future exploitation of children.

The plea agreement specified a six-year sentence but deferred to the trial court to determine the manner of service. The trial judge announced that he was applying the sentencing factors and guidelines, finding no applicable mitigating factors, and applying four enhancement factors. The enhancement factors applied are that the defendant has a history of criminal convictions or behavior in addition to those necessary to establish the sentence range, *see* Tenn. Code Ann. § 40-35-114(1) (Supp. 2001); that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community, *see id.* § 40-35-114(8); that the offense was committed while the defendant was on probation status in 1997 from a prior felony, *see id.* § 40-35-114(13); and that the defendant abused a position of private trust, *see id.* § 40-35-114(15). The trial court ordered the six-year sentence to be served in incarceration.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a *de novo* review of the record with a presumption that the determinations made by the trial court are correct. *Id.* § 40-35-401(d) (1997). This presumption 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 burden of showing that the sentence is improper is upon the appellant." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

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[1] We decline to disclose the minor victim's full name.

In making its sentencing determination, the trial court, at the "conclusion of the sentencing hearing," determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§40-35-210(a), (b) (Supp. 2001), 40-35-103(5) (1997); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

As mentioned above, our task in reviewing the manner of service of the defendant's sentence is to conduct a *de novo* review of various factors, including the nature and circumstances of the offense. Also as mentioned above, the record before us is devoid of any explanation of the nature and circumstances of the offense. Especially conspicuous by its absence is a transcript of the plea submission hearing, which should have contained a factual basis for the court accepting the guilty plea. *See* Tenn. R. Crim. P. 11(f). We have commented previously that occasionally we can "reconstruct . . . an undisputed version of the factual events of the crime" from the "bits and pieces" of the record on appeal, s*ee State v. Jorge Obdulio Herrera*, No. E1999-00118-CCA-R3-CD, slip op. at 2-3, n.1 (Tenn. Crim. App., Knoxville, July 20, 2000), but we find no "bits and pieces" in the present record. Consequently, we cannot perform our appellate function. "We have repeatedly held that failure to include the transcript of the guilty plea hearing in the record prohibits this court from conducting a meaningful *de novo* review of the sentence." *Id.*, slip op. at 2. The defendant, as the appellant, is obliged to furnish this court with a fair, accurate, and complete record of what transpired in the trial court with respect to the issues that form the bases of the appeal. Tenn. R. App. P. 24(b); *State v. Banes*, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993); *State v. Miller*, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987). In the absence of such a record, the affected issues are waived. *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). We must presume that the lower court's determination was adequately supported by the record before that court. *See id. Jorge Obdulio Herrera*, slip op. at 3. Accordingly, we conclude that our review of the defendant's sentencing issue has been waived.

We cannot resist commenting, however, that the limited record before us supports the trial court's imposition of incarceration. The defendant was previously convicted of sexual offenses involving a family member. Moreover, the record demonstrates that he was repeatedly unable to conform his conduct to requirements of release in the community, having violated probation three times and having served the balance of his previous sentence in prison. As the trial judge noted, he committed the present offense while he was on probation for three convictions of incest. He came before the trial court with a presumption of suitability for alternative sentencing options, *see* Tenn. Code Ann. § 40-35-102(6) (1997), but the presumption was overcome – indeed, overwhelmed – by a showing in the record that "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant," *see id.* § 40-35-103(1)(C). Were we constrained to review the lower court's judgment on the record before us, we would conclude that the order of incarceration is justified.

For these reasons, we affirm the trial court.

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JAMES CURWOOD WITT, JR., JUDGE