IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 2000 SESSION

STATE OF TENNESSEE,	*	No. E1999-01465-CCA-R3CD
Appellee,	*	BLOUNT COUNTY
V.	*	Hon. D. Kelly Thomas, Judge
GREGORY DAVIDSON,	*	(Possession of a Controlled Substance in a Penal Institution)
Appellant.	*	

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OPINION FILED:

AFFIRMED

NORMA MCGEE OGLE, JUDGE

OPINION

On January 20, 1999, the appellant, Gregory Davidson, pled guilty in the Blount County Circuit Court to possession of contraband in a penal institution, a class C felony. The appellant agreed to a sentence of four years as a Range I offender but submitted the manner of service of the sentence to the trial court for determination. Specifically, the appellant requested placement in a community corrections program. Following a sentencing hearing on July 20, 1999, the trial court denied the appellant any form of alternative sentence. On appeal, the appellant asserts that the trial court erred in denying a community corrections sentence. Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

I.

The record of the sentencing hearing and the pre-sentence report in this case reflect that, on September 19, 1997, the appellant's community corrections sentences in four different cases, including an aggravated burglary case, a theft of property case, a case of reckless endangerment involving a deadly weapon, and a first degree burglary case, were revoked due to the appellant's refusal to submit to a drug screen. At the sentencing hearing in this case, the appellant explained, "I told them I did not want to take a drug screen because I had went through a divorce at the time and had fell off the wagon, so to speak." In any event, due to the revocation of his alternative sentences, the appellant was an inmate at the Blount County Jail on October 9,1997, the date of the instant offense. On that day, the appellant was returning to the jail following an inmate picnic when another inmate asked him to retrieve a bag from a bathroom wall "in the old workhouse." Upon locating a zip-lock bag in a hole in the specified wall, the appellant placed it in his sock. Shortly thereafter, an officer at the Blount County Jail stopped and searched the appellant,

quickly locating the hidden bag. The bag contained marijuana. At the sentencing hearing in this case, the appellant denied any knowledge of the contents of the bag, insisting that he thought the bag contained tobacco. According to the appellant, he did disclose to the officers at the jail the name of the inmate who had requested that he retrieve the bag.

According to the pre-sentence report, the appellant's criminal record includes, in addition to those convictions already mentioned, misdemeanor convictions of assault, theft, and driving with a suspended license. The report further indicates that, in 1992, the appellant committed a theft offense on the day following his conviction of another theft offense for which he had received a suspended sentence. Similarly, in 1991, the appellant committed the offense of driving with a suspended license while on probation pursuant to his conviction one month earlier of another offense of driving with a suspended license.

Since his commission of the offense in this case, the appellant has participated in several bible correspondence and anger management courses. The appellant has also attended Alcoholics Anonymous and has been studying to obtain a general equivalency diploma. However, the appellant conceded at the sentencing hearing that, while the instant case was pending, he attempted on several occasions to smuggle tobacco into the Blount County Jail in violation of the rules at the jail. He testified at the sentencing hearing that he did not believe that the rules in the jail should apply to him. The pre-sentence report similarly reflects and the appellant conceded at the sentencing hearing that since his commission of this offense and, while incarcerated in the Southeastern Correctional Facility in Bledsoe County, he has been disciplined on several occasions for rule infractions.

Finally, the appellant testified at the sentencing hearing that he was currently incarcerated at Southeastern Correctional Facility pursuant to the aggravated burglary and first degree burglary convictions. The appellant asserted, however, that he was due to be released from the correctional facility on the day of the sentencing hearing. He conceded that he was unsure if he would, in fact, be released and presented no documentation concerning his release. Moreover, notwithstanding the appellant's testimony, the pre-sentence report reflects that the appellant's sentences were to expire in September, 1999, approximately two months after the sentencing hearing.

II.

When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption of correctness 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). In any event, the burden is upon the appellant to demonstrate the impropriety of his sentence. State v. Grigsby, 957 S.W.2d 541, 544 (Tenn. Crim. App. 1997).

A de novo review of the trial court's sentencing determination entails an analysis of (1) the evidence, if any, received at trial and at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offenses; (5) any mitigating or enhancement factors; (6) any statements made by the appellant on his own behalf; and (7) the appellant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103 (1997), and -210 (1998 Supp.).

Additionally, since the appellant contends that he should have been sentenced pursuant to the Tennessee Community Corrections Act of 1985, this court must also consider the eligibility standards set forth in Tenn. Code Ann. § 40-36-106 (1998 Supp.) and the report of the agency which administers the community corrections program. Grigsby, 957 S.W.2d at 544. Of course, "though an offender might meet the minimum eligibility requirements of the Act, an offender is not automatically entitled to such relief." Id. at 547.

III.

In light of the above guidelines, we preliminarily note that the appellant in this case has failed to include in the record before this court the transcript of the guilty plea hearing. With respect to those appellants who have pled guilty, "the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense." State v. Keen, 996 S.W.2d 842, 843 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1999); State v. Rhodes, No. 03C01-9405-CR-00174, 1995 WL 424956, at *2 (Tenn. Crim. App. at Knoxville, July 20, 1995). "For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed." Keen, 996 S.W.2d at 844. See also Tenn. Code Ann. § 40-35-210.

Moreover, just as the burden is upon the appellant to demonstrate the impropriety of his sentences, Tenn. Code. Ann. § 40-35-401, Sentencing Commission Comments, the burden is upon the appellant to ensure that the record before this court conveys a fair, accurate and complete account of what transpired in the court below with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the trial court's sentencing determinations are correct. State v.

Oody, 823 S.W.2d. 554, 559 (Tenn.Crim.App. 1991).

In this case, while the basic facts underlying the appellant's offense appear in the indictments, the transcript of the sentencing hearing, and the pre-sentence report, we are hesitant to disturb the trial court's sentencing determination in the absence of a complete record. Keen, 996 S.W.2d at 844. Moreover, the record that is before this court supports the trial court's determination. "A felon's rehabilitation potential and the risk of repeating criminal conduct are fundamental in determining whether he or she is suited for alternative sentencing." Keen, 996 S.W.2d at 844; Tenn. Code Ann. § 40-35-103(5). According to the record, the appellant's rehabilitation potential is extremely poor and amply justifies a term of incarceration.

IV.

Finally, the record reflects that, at the time of his sentencing hearing, the appellant was incarcerated in a correctional facility pursuant to his convictions of burglary. The Community Corrections Act denies eligibility to persons who are sentenced to incarceration at the time of consideration. Tenn. Code Ann. 40-36-106(a)(7).[1]

V.

For the foregoing reasons, we affirm the judgment of the trial court.

Norma McGee Ogle, Judge

[1]We note that the appellant's "Request for Acceptance of Plea of Guilty" suggests that the appellant pled guilty on the condition that his sentencing hearing would be held following his release from the correctional facility. Of course, as previously mentioned, this court does not have before it a record of the guilty plea hearing. Moreover, the record indicates that the appellant requested the earlier date for his sentencing hearing notwithstanding his uncertainty concerning his release.

CONCUR:

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Gary R. Wade, Presiding Judge

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Joseph M. Tipton, Judge