IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

FILED

January 5, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	Nos. 03C01-9901-CC-00041 and
	)	03C01-9901-CC-00042
	)	
	)	Grainger County
v.	)	
	)	Honorable Richard R. Vance, Judge
	)	
LINDA SUE KAYWOOD and	)	(Child abuse)
RICKY HARBIN,	)	
	)	
Appellants.	)	

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OPINION FILED:_____

AFFIRMED AS MODIFIED

Joseph M. Tipton

Judge

O P I N I O N

The defendants, Linda Sue Kaywood and Ricky Harbin,[1] appeal as of right the sentences they received in the Grainger County Circuit Court. Both defendants pled guilty to abuse of a child under six, a Class D felony, and to misdemeanor child abuse. The trial court sentenced them each as Range I, standard offenders to four years in the Department of Correction for the felony and to a concurrent eleven months and twenty-nine days for the misdemeanor, requiring seventy-five percent of the sentence to be served. The defendants challenge both the length and manner of service of their sentences. We affirm the judgments of the trial court as to the manner of service but modify the sentences to three years for each defendant.

At the sentencing hearing, Mr. Harbin testified that he had lived with Ms. Kaywood for fifteen years. He said that they had two children, a ten-year-old son and a five-year-old daughter, and that Ms. Kaywood was currently pregnant with their third child. He said that he pled guilty to punishing his children by making them hold hot peppers in their rectums for three to four minutes. He stated that his son cried during this episode but that his daughter did not. He said that he did this because the children were staying out until 10:00 or 11:00 p.m. and riding their bicycles in the road. He said that he used this punishment because the "Devil put it in [him]" and because his father did it to him. He said that at the time, he thought that this punishment was appropriate, but he now felt awful and would never use this punishment again. He admitted that he saw Ms. Kaywood place hot peppers in the children's mouths on that same day to punish them for cursing.

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[1]Although Mr. Harbin's name appears as James Ricky Harbin on the briefs and throughout the record, it is the policy of this court to use the name that appears on the charging instrument, absent an appropriate amendment in the record.

Mr. Harbin testified that he visited his children every two weeks through the Department of Children's Services (DCS). He said that while he was in jail on these charges, other inmates beat him because of the nature of the charges against him. He said that he had a fifth grade education, that he could not read, and that he could not write well. He stated that he did not drink or use illegal drugs and that he had started attending church after the offenses in this case. He said that he was willing to attend parenting classes.

Ms. Kaywood testified that she graduated from high school and married Sammy Kaywood when she was nineteen. She said that Mr. Kaywood would not give her a divorce and that she had lived with Mr. Harbin for fifteen years. She said that she was never disciplined with hot peppers as a child, but she stated that she had seen Mr. Harbin punish their children with hot peppers. She said that she put hot peppers in the mouths of both children to stop them from going to the neighbors' houses. She stated that other forms of discipline had not worked and that she did not know what else to do. She said that she visits her children when allowed and that she attends church every Sunday morning, Sunday evening and Wednesday. She said that she no longer thinks that hot peppers are an appropriate form of discipline. She stated that she is sorry that she did this and has prayed for forgiveness. She agreed that she was willing to go to parenting classes if the court recommended it.

Ms. Kaywood testified that she was on pretrial diversion for theft at the time of her arrest in this case. She said that she subsequently pled guilty to the charges in the diverted case and was sentenced to two years probation, which she was serving on house arrest. She said that her mother and brothers were also charged in the theft case. She testified that she did not remember telling a Department of Human Services (DHS) worker that she put hot peppers in her children's mouths two or three times. She admitted that she signed a statement that contained this information. She

said that she used peppers just once on each child for running away and for cursing. She admitted telling the DHS worker that Mr. Harbin told her not to tell anyone about the peppers or DHS would take their children.

Patricia Dykes testified that she is a child advocate and that she volunteered for three years in the Hawkins County Juvenile Court in the area of probation. She said that she encountered one abuse case during this time. She stated that she allowed the defendants to live with her for two weeks after they made bail in this case. She described the defendants as nice, polite and helpful. She said that Mr. Harbin had agreed to get his G.E.D. She said that the defendants made an effort to go to all DCS appointments. She said that she had heard of other people making their children hold hot peppers in their mouths as punishment.

Dana Benton testified that he works for the State Forestry Division and that Ms. Dykes' husband is his boss. He said that he learned about the defendants from his boss and that he allowed them to stay rent-free in a house that he owns. He said that the defendants go to church and that his tenants in a nearby trailer have not had any problems with them. He stated that the defendants have helped him pull tobacco. He said that he had no qualms about the defendants being around his four grandchildren, who were between two and four years old.

The presentence report for Mr. Harbin reveals that he has no previous convictions and that he has been unemployed for the previous nine years due to a disability. The report states that Mr. Harbin reported having a bad lung and a hole in his heart. He also stated that his mental health was poor and that he felt frustrated because he was homeless and could not get any help. Ms. Kaywood's presentence report reveals that she reported no employment information and that she has been disabled since childhood. Ms. Kaywood described her physical and mental health as

poor. She stated that she was not able to take medication for her nerves due to her pregnancy. Her report reveals that she was granted pretrial diversion in October 1997 for two counts of aggravated burglary and three counts of theft under one thousand dollars. Her diversion was revoked on August 24, 1998, and she pled guilty. On July 3, 1986, she was fined for violating the helmet law. Neither defendant reported any problems with drugs or alcohol. Both reports state that the defendants' children are in foster care and have received psychological evaluations. The reports state that the psychologist recommended the termination of parental rights.

The trial court applied the following enhancement factors from Tenn. Code Ann. § 40-35-114 to both defendants:

> (4) A victim of the offense was particularly vulnerable because of age . . . ;
>
> (5) The defendant treated or allowed a victim to be treated with exceptional cruelty during the commission of the offense; [and]
>
> (15) The defendant abused a position of public or private trust . . . .

The trial court applied the following additional enhancement factors to Ms. Kaywood:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;
>
> (8) The defendant has a previous unwillingness to comply with the conditions of a sentence involving release into the community; [and]
>
> (13) The felony was committed while on any of the following forms of release status if such release is from a prior felony conviction:
>
> > (A) Bail, if the defendant is ultimately convicted of such prior felony;
> > (B) Parole;
> > (C) Probation;
> > (D) Work release; or
> > (E) Any other type of release into the community under the direct or indirect supervision of the department of correction or local governmental authority.

Tenn. Code Ann. § 40-35-114.

In mitigation, the trial court considered Mr. Harbin's lack of a criminal record, his limited education, his remorse for the offenses, his ignorance of proper forms of discipline, and that he had been disciplined with hot peppers as a child. The court considered Ms. Kaywood's poor family background and upbringing. With regard to both defendants, the trial court found that the enhancement factors substantially outweighed the mitigating factors, placing great weight on the abuse of private trust and the egregious nature of the offenses. The trial court also placed great weight on Ms. Kaywood's previous criminal history. It sentenced the defendants to four years for the felony and eleven months, twenty-nine days at seventy-five percent for the misdemeanor. The trial court denied probation to both defendants.

I. LENGTH OF SENTENCE

The defendants challenge the length of their sentence, contending that the trial court erred in applying enhancement factor (4) in Tenn. Code Ann. § 40-35-114. Ms. Kaywood contends that the trial court erred in enhancing her sentence with factor (13). The defendants also ask this court to consider in mitigation their remorse over the offenses, their improved lifestyle, their willingness to attend parenting classes, and their willingness to comply with the conditions of probation. The state concedes that factor (4) is not applicable but contends that the maximum sentence is justified for both defendants. The state fails to address Ms. Kaywood's argument concerning factor (13).

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to

the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action 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 this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). When setting the percentage of a misdemeanor sentence to be served in incarceration, the trial court must consider the sentencing principles along with the enhancement and mitigating factors and is encouraged to make findings of fact on the record. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and 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, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

The sentence to be imposed by the trial court for abuse of a child under six, a Class D felony, is presumptively the minimum in the range when no enhancement or mitigating factors are present. See Tenn. Code Ann. § 40-35-210(c). With regard to count two, misdemeanor child abuse, the law provides no presumptive minimum for misdemeanor sentencing. See, e.g., State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. Tenn. Code Ann. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

The trial court applied enhancement factor (4) because it found that the defendants' five-year-old daughter was particularly vulnerable due to her age. The defendants contend and the state concedes that this factor does not apply because no evidence exists that the defendants' daughter was particularly vulnerable. See State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993) (holding that factor (4) "relates more to the natural physical and mental limitations of the victim than merely to the victim's age"). The defendant also points out that the legislature has already enhanced the crime of child abuse based upon the victim's age. Tenn. Code Ann. § 39-15-401(a) provides:

> Any person who knowingly, other than by accidental means, treats a child under eighteen (18) years of age in such a manner as to inflict injury or neglects such a child so as to adversely affect the child's health and welfare commits a Class A misdemeanor; provided, that if the abused child is six (6) years of age or less, the penalty is a Class D felony.

Thus, the trial court erred in applying this factor to both defendants.

The state contends that the trial court should have applied factor (5), the "defendant treated . . . the victim with exceptional cruelty during the commission of the

offense," to both defendants. The state argues that forcing a child to hold a hot pepper in his or her mouth, and particularly in his or her rectum, is exceptionally cruel beyond what is inherent in child abuse. We note that the trial court did enhance the sentences of both defendants with this factor when it stated that the circumstances of the offenses were shocking, outrageous and amounted to torture. The trial court's finding that the defendants' offenses essentially amounted to torture relates to exceptional cruelty. We affirm the trial court's application of this factor, but we encourage trial courts to state specifically which factors they are applying.

Ms. Kaywood contends that the trial court should not have enhanced her sentence with factor (13) because pretrial diversion does not involve release from a prior felony conviction. Factor (13) permits a trial court to enhance the sentence when the defendant commits a felony while on a form of "release status if such release is from a prior felony conviction . . . ." Tenn. Code Ann. § 40-35-114(13). The defendant contends that the convictions for the felonies underlying her pretrial diversion were not entered until after she had been charged for the present offenses. This court has recognized that pretrial diversion spares the defendant the burden of trial and conviction. State v. Poplar, 612 S.W.2d 498, 501 (Tenn. Crim. App. 1980). Furthermore, Tenn. Code Ann. § 40-35-104 does not include diversion as a sentencing alternative, and the presumption in favor of alternative sentencing in Tenn. Code Ann. § 40-35-102(6) does not apply to diversion. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992) (discussing judicial diversion). Pretrial diversion is not specifically listed in factor (13) nor does it fall under the general category in (13)(E) because it does not involve a conviction. The trial court erred in applying this factor to Ms. Kaywood.

Although not raised by either party, in our de novo review we have concluded that the trial court improperly enhanced Ms. Kaywood's sentence with factor

(8). At the sentencing hearing, the trial court found that Ms. Kaywood violated the terms of her previous release in the community under pretrial diversion by committing the present offenses. However, factor (8) contemplates a previous history of unwillingness to abide by the conditions of release status and, therefore, cannot be triggered solely by the commission of the offense for which the defendant is being sentenced. State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995). The trial court improperly applied factor (8) to Ms. Kaywood.

Without asserting that the trial court erred regarding the mitigating factors, the defendants encourage us to consider in mitigation their remorse over the offenses, their improved lifestyle, their willingness to attend parenting classes, and their willingness to comply with the conditions of probation. This court has held remorse to be a mitigating factor under the catchall provision in Tenn. Code Ann. § 40-35-113(13). State v. Butler, 900 S.W.2d 305, 314 (Tenn. Crim. App. 1994). The trial court applied this factor with regard to Mr. Harbin. The trial court did not apply this factor to decrease Ms. Kaywood's sentence, although it did specifically find her to be remorseful during its discussion of her eligibility for probation. On the other hand, her presentence report stated that she expressed no remorse for her actions or concern for her children during her interview. In light of her testimony at the sentencing hearing, we agree with the trial court's finding that Ms. Kaywood was remorseful and believe that this mitigating factor should have been applied to her.

This court has held dramatic improvement in lifestyle, including involvement in church, to be a mitigating factor under subsection (13). Id. In Butler, the defendant, convicted of second degree murder, had overcome his drug addiction, became a better husband and parent, joined and became involved in church, and performed volunteer work with the homeless and disaster victims. In the present case, both defendants began attending church, and their testimony indicates that this has

made a big impression on their lives. We also note that the defendants have made every effort to visit their children as permitted by DCS, despite the complications resulting from Ms. Kaywood's house arrest status. Both have expressed a willingness to attend parenting classes. Mr. Benton testified that the defendants have helped with his tobacco crop. We believe that the defendants have exhibited an improvement in lifestyle that should be considered as a mitigating factor under subsection (13).

Finally, we do not view the defendants' willingness to abide by the conditions of probation to be a mitigating factor under subsection (13). Every defendant seeking a sentence alternative to incarceration must be willing and indeed is expected to abide by the conditions of that alternative sentence. State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995).

The sentencing range for a standard offender convicted of a Class D felony is two to four years. Tenn. Code Ann. § 40-35-112(a)(4). A Class A misdemeanant may be incarcerated for up to eleven months and twenty-nine days. Tenn. Code Ann. § 40-35-111(e)(1). Because the trial court has erred in its application of factor (4) to both defendants and factors (8) and (13) to Ms. Kaywood, we will determine the appropriate sentence de novo without the presumption that the trial court is correct. With regard to Ms. Kaywood, enhancement factors (1), (5), and (15) apply. In addition to the trial court's application of her negative upbringing, we apply her remorse for the offenses and her improved lifestyle as mitigating circumstances under factor (13). In light of the loss of factors (4), (8), and (13) and the additional mitigation, we conclude that the appropriate sentence is three years for the felony but that the misdemeanor sentence should remain unchanged.

With regard to Mr. Harbin, enhancement factors (5) and (15) apply. We agree with the trial court's application of his lack of a criminal record, his limited

education, his remorse for the offenses, his ignorance of proper forms of discipline, and his abuse with hot peppers as a child under mitigating factor (13). We believe that his improved lifestyle should also be considered under factor (13). In light of the loss of factor (4) and the additional mitigating factor, we conclude that the appropriate sentence for Mr. Harbin is three years for the felony but that the misdemeanor sentence should remain unchanged. Although Mr. Harbin has one less enhancement factor and more mitigating factors than Ms. Kaywood, the three-year sentence is justified by the more egregious nature of his offenses.

II. MANNER OF SERVICE

The defendants contend that the trial court should have allowed them to serve their sentences on probation. The trial court denied probation for Mr. Harbin because it found that the circumstances of the offenses were shocking and outrageous. The trial court denied probation for Ms. Kaywood because it found that the circumstances of the offenses justified the denial and that less restrictive forms of punishment had been previously applied unsuccessfully. The court also deemed that Ms. Kaywood was untruthful about the number of times she punished her children with hot peppers.

The defendants are eligible for probation because both received sentences of less than eight years. See Tenn. Code Ann. § 40-35-303(a). Furthermore, as standard offenders, each convicted of a Class D felony, the defendants are presumed to be favorable candidates for probation absent any evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6). Tenn. Code Ann. § 40-35-103(1) provides that confinement should be based on the following considerations:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited

> to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

In finding that the outrageousness of the offenses justified the denial of probation, the trial court focused on the seriousness of the offenses. See Tenn. Code Ann. § 40-35-103(1)(B). The defendants contend that no evidence exists that probation would depreciate the seriousness of their offenses within the Grainger County community. Denial of probation cannot be based solely upon the nature of the offense unless it is clear that the offense, as committed, is "especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree" so as to outweigh all other factors in favor of probation. State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); State v. Butler, 880 S.W.2d 395, 400 (Tenn. Crim. App. 1994). Mr. Harbin testified that he forced both victims to hold hot peppers in their rectums for three or four minutes. He said that his son cried. Ms. Kaywood testified that she made both victims hold hot peppers in their mouths. The trial court found that the defendants' use of hot peppers to punish the victims was shocking, outrageous and amounted to torture. The evidence does not preponderate against this determination.

Ms. Kaywood contends that the trial court erred in denying her probation based upon its finding that measures less restrictive than confinement were ineffective. See Tenn. Code Ann. § 40-35-103(1)(C). She argues that while she was on pretrial diversion for burglary and theft, she committed no other burglaries or thefts. Thus, she contends that the pretrial diversion program was successfully applied to her. The defendant's pretrial diversion was revoked because of the offenses in this case. Obviously, the defendant did not successfully complete the less restrictive sentence of pretrial diversion.

In consideration of the foregoing and the record as a whole, we modify Mr. Harbin's and Ms. Kaywood's sentences to three years for the felony child abuse. We note that the judgments for both defendants fail to indicate the sentencing range for the felony and the percentage to be served for the misdemeanor. The transcript of the sentencing hearing reflects that the trial court sentenced both defendants as Range I, standard offenders and ordered them both to serve seventy-five percent of their misdemeanor sentence. We further modify the judgments to correct these omissions. See, e.g., State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991) (holding that the transcript controlled when in conflict with the judgment or the court minutes); State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985) (holding that the transcript controlled when in conflict with the judgment). We affirm the misdemeanor sentences and the manner of service imposed by the trial court.

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Joseph M. Tipton, Judge

CONCUR:

_____
Jerry L. Smith, Judge

_____
Thomas T. Woodall, Judge