

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
January 5, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)	C.C.A. NO. 03C01-9905-CR-00179
)	
Appellee,)	
)	
)	SCOTT COUNTY
VS.)	
)	HON. LEE ASBURY
VERONICA PHILLIPS,)	JUDGE
)	
Appellant.)	(Direct Appeal - Class D Felony)

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OPINION FILED _____

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

OPINION

The appellant, Veronica L. Phillips, entered a plea of *nolo contendere* in the Scott County Criminal Court to one (1) count of reckless homicide, a Class D felony, and one (1) count of reckless aggravated assault, a Class D felony. The trial court sentenced the appellant as a Mitigated Offender to concurrent terms of four (4) years for each offense, to be served in the community corrections program. On appeal, the appellant claims that the trial court erred in denying judicial diversion and full probation. After a thorough review of the record before this Court, we conclude that the trial court imposed an illegal sentence. Therefore, the judgment of the trial court is reversed, and this case is remanded for resentencing.

I.

The record indicates that on May 10, 1996, at 6:30 p.m., the defendant, who was twenty years old at the time, and a friend were traveling east at a high rate of speed on State Highway 63. This stretch of highway was dry and flat. As the defendant drove east, she passed a vehicle in front of her, causing a driver traveling in the westbound lane to pull to his right in order to avoid colliding head-on with the defendant's vehicle. At a point approximately two miles further, the defendant again attempted to pass a vehicle in front of her. This vehicle was driven by Gaylon Gibson. As the defendant pulled across the double yellow line into the westbound lane of traffic to pass Mr. Gibson's car, she collided head-on with a vehicle driven by Timothy Bowling. The defendant's car came to rest on the roof of Mr. Gibson's car. Apparently, nothing obstructed the defendant's view of the Bowlings' car prior to impact. Nonetheless, no skid marks were found on the road, indicating that neither the defendant nor Mr. Bowling applied their brakes prior to impact, possibly because neither had time to do so.

None of the people involved in the accident were wearing their seat belts. Mr. Bowling, who was thirty-four years old at the time of the

accident, died as a result of the head-on collision, and his wife, who was traveling with him, sustained serious injuries. Mr. Gibson and his passenger were also injured, although not as gravely injured as the Bowlings. Both the defendant and her passenger were also seriously injured, and according to the accident report, neither remember the events leading up to the accident or the accident itself. Following the accident, the defendant was issued two citations, one for improper passing and one for reckless driving. Two months later, a grand jury indicted the defendant with the reckless homicide of Mr. Timothy Bowling and the reckless aggravated assault of Ms. Alice Bowling, his wife.

State v. Veronica L. Phillips, C.C.A. No. 03C01-9708-CR-00320, 1998 Tenn. Crim. App. LEXIS 679 at *1-2, Scott County (Tenn. Crim. App. filed June 26, 1998, at Knoxville).¹

In July 1998, the appellant entered a plea of *nolo contendere* to one (1) count of reckless homicide and one (1) count of reckless aggravated assault. At the sentencing hearing, the parties stipulated that the appellant would be sentenced as an Especially Mitigated Offender. No agreement was reached with respect to the length of the sentence. The trial court sentenced the appellant to concurrent terms of four (4) years for each offense. The court determined that the appellant should serve her sentence in the community corrections program. In addition, the trial court denied the appellant's application for post-trial diversion. From the trial court's ruling, the appellant now brings this appeal.

II.

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption

¹Prior to the appellant pleading *nolo contendere*, she applied for pretrial diversion, which was denied by the district attorney general. The appellant then applied a petition for writ of certiorari with the trial court, which was denied by the trial court and affirmed on appeal. To place this case in the proper perspective, we quote the relevant facts from this Court's opinion on the appellant's appeal of the denial of her application for pretrial diversion.

is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The appellant contends that the trial court erred in denying judicial diversion and in denying full probation. However, without addressing the merits of the appellant's issues, this Court notes that the trial court imposed illegal sentences for the appellant's convictions for reckless homicide and reckless aggravated assault.

First, the parties stipulated that the appellant would be sentenced as an Especially Mitigated Offender. A defendant may be sentenced as a mitigated offender if she has no prior felony convictions and "the court finds mitigating, but no enhancement factors." Tenn. Code Ann. § 40-35-109(a). Additionally,

[i]f the court finds the defendant an especially mitigated offender, the court shall reduce the defendant's statutory Range I minimum sentence by ten percent (10%), or reduce the release eligibility date to twenty percent (20%) of the sentence, or both reductions. If the court employs both reductions, the calculation for release eligibility shall be made by first reducing the sentence and then reducing the release eligibility to twenty percent (20%).

Tenn. Code Ann. § 40-35-109(b).

For both Class D felonies, the trial court sentenced the appellant to four (4) years, the maximum sentence within Range I.² A trial court may only impose the maximum sentence upon finding applicable enhancement factors. See Tenn. Code Ann. § 40-35-210(c), (e). However, by sentencing the appellant as a mitigated offender, the trial court implicitly found the absence of any applicable enhancement

² According to the judgments of conviction, the trial court reduced the appellant's release eligibility date to twenty percent (20%) of the sentence.

factors. Thus, to sentence a defendant to the maximum sentence as an Especially Mitigated Offender is simply incongruous.³

Secondly, the trial court ordered that the appellant serve her sentence in the community corrections program. Tennessee Code Annotated section 40-36-106 lists the criteria for eligibility in the community corrections program. A defendant is eligible for participation in community corrections if she is “convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5.” Tenn. Code Ann. § 40-36-106(a)(2) (emphasis added). However, the appellant was convicted of reckless homicide and reckless aggravated assault, both of which are “crimes against the person as provided in title 39, chapter 13, parts 1-5.” See Tenn. Code Ann. §§ 39-13-102, 39-13-215. The appellant is statutorily ineligible for community corrections; therefore, the trial court erred in ordering that the appellant serve her sentence in the community corrections program.

III.

Because the trial court imposed illegal sentences for the appellant’s convictions, this case must be remanded for resentencing. Upon remand, the trial court should impose a sentence in accord with the statutory guidelines and should consider all available sentencing alternatives.

Furthermore, although we do not reach the merits of the appellant’s judicial diversion issue, we invite the trial court to more fully explain its reasons for the denial

³ A defendant may accept an otherwise “illegal sentence” as part of a plea bargain agreement. See State v. Pettus, 986 S.W.2d 540, 542-43 (Tenn. 1999). However, in this case, the appellant merely agreed that she would be sentenced as an Especially Mitigated Offender. The determination of the length and manner of the appellant’s sentence was left to the trial court’s discretion.

of judicial diversion. Of course, the decision whether to grant or deny judicial diversion rests within the sound discretion of the trial court. State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993). However, the record must reflect that the court has weighed all of the relevant factors in reaching its determination, and the court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. Id.

IV.

The trial court imposed illegal sentences of four (4) years in community corrections for the appellant's convictions for reckless homicide and reckless aggravated assault. Accordingly, the judgment of the trial court is reversed, and this case is remanded for resentencing.

JERRY L. SMITH, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

THOMAS T. WOODALL, JUDGE