IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED

January 26, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	**C.C.A. NO. 03C01-9901-CC-00015**
	)	
Appellee,	)	
	)	**GRAINGER COUNTY**
V.	)	
	)	
	)	**HON. RICHARD R. VANCE, JUDGE**
HENRY CALLOWAY,	)	
	)	
Appellant.	)	**(THEFT OVER $1000.00 IN VALUE)**

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Henry Calloway pled guilty to one count of theft, more than $1,000 in value, in Grainger County Circuit Court. Following a sentencing hearing the trial court sentenced him to four (4) years incarceration in the custody of the Tennessee Department of Correction. Defendant now appeals as of right, and challenges the length and manner of service of his sentence, arguing that the appropriate sentence is two years probation. After a thorough review of the record we affirm the judgment of the trial court.

I. Facts

On March 24, 1998, Defendant and co-defendant Shannon Taylor were in the vicinity of Linda's Lakeside Marine in Bean Station, Tennessee. They backed-up Defendant's pick-up truck to a "16 foot" boat that belonged to Linda's Lakeside Marine, hooked-up the boat trailer to the truck, and took the boat, trailer, and attached motor. Linda Owens, the boat's owner, observed Defendant taking an active part in the theft, assisting Taylor in cutting the chains and locks that secured the boat, and helping attach the trailer to Defendant's truck. Another eyewitness noted Defendant's license plate, and the trailer, boat and motor were recovered at Defendant's residence. Defendant later pled guilty to one count of theft, more than $1,000 in value.

Defendant is 49 years old and suffers from cerebral palsy and rheumatoid arthritis. He has difficulty with ambulation, and uses crutches for support. He is under the care of three physicians, and he receives physical therapy in his home. His home is equipped with a wheelchair and a hospital bed. He cannot bathe himself, and is cared for by his son and home health personnel.

II. Analysis

Defendant was convicted of a class D felony, and sentenced as a Range I standard offender. The trial court sentenced Defendant to four (4) years incarceration in the Department of Correction. Defendant contends that the length of the sentence is excessive and that incarceration is inappropriate. He argues that he should have received two years probation. After a careful review of the record, we conclude that Defendant's sentence is appropriate.

When an accused challenges the length, range, or the manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 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). If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In conducting a de novo review of a sentence, this court must consider (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (1997 & Supp. 1999). See State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). Moreover, we are mindful that the principles of sentencing require that the sentence be no greater than that

deserved for the offense committed, and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2), (4) (1997).

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Id. 102(6). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." Id. § 102(5). When determining if incarceration is appropriate, a court must consider if confinement is (1) necessary "to protect society by restraining a defendant who has a long history of criminal conduct"; (2) necessary "to avoid depreciating the seriousness of the offense"; (3) "particularly suited to provide an effective deterrence to others likely to commit similar offenses"; or (4) needed because "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Id. § 103(1). The court should also consider the defendant's potential for rehabilitation or treatment, or lack thereof, when determining the appropriate sentence. Id. § 103(5). Thus, a defendant sentenced to eight (8) years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. See id. § 303(a), (b).

An alternative sentence may involve the immediate suspension of the entire sentence. Id. § 212(b)(1). However, a defendant seeking full probation bears the burden on appeal of showing that the sentence actually imposed is improper, and that full probation is in the best interest of the defendant and the public. State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (citation omitted). In deciding if probation is appropriate, the following factors should be considered: (1) the nature

and characteristics of the crime; (2) the defendant's potential for rehabilitation; (3) whether full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence of full probation would provide an effective deterrent. State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997) (citing Tenn. Code Ann. §§ 40-35-103, 210).

A Range I sentence for a class D felony is a term of two (2) to four (4) years. Tenn. Code Ann. § 40-35-112 (1997). The sentence within the range is determined by the application of any applicable enhancement or mitigating factors. See id. §§ 113, 114. When there are enhancement and mitigating factors for a class D felony the court must start at the minimum sentence in the range, enhance the sentence within the range as appropriate for the enhancement factors, then reduce the sentence within the range as appropriate for the mitigating factors. Id. § 210 (Supp. 1999). Here, the trial court enhanced Defendant's sentence based on three enhancement factors: (1) Defendant's prior criminal history; (2) Defendant's leadership role in the offense; and (3) Defendant's prior history of non-compliance with the conditions of release. See id. § 114(1), (2), (8) (1997). The trial court also found Defendant's disability to constitute a mitigating factor. See id. § 113(13). The trial court denied probation based on these same factors.

We first note that the trial court erred when it found that Defendant had a history of noncompliance with conditions of release. The fact that Defendant was on unsupervised probation from Carter County Criminal Court at the time that the instant offense occurred does not trigger enhancement factor (8)–there must be a history of non-compliance prior to the instant infringement. See State v. Hayes, 899 S.W.2d 175, 186 (Tenn. Crim. App. 1995) (citing Tenn. Code Ann. § 114(8) (1997)). The legislature created a separate enhancement factor which applies when the Defendant commits the instant offense while on probation from a prior felony conviction. See Tenn. Code Ann. §114(13) (1997). Thus while factor (8) is inapplicable, we note that Defendant's probation status triggers enhancement factor

(13). We also note that the trial court correctly applied the other two enhancement factors.

Notwithstanding the trial court's erroneous application of one enhancement factor, we find that trial court's sentence is supported by the record, and affirm Defendant's sentence and manner of service. Defendant's prior criminal history, which is substantiated by the record, reflects a 1989 conviction for 17 counts of obtaining property by false pretenses, for which Defendant received a 10 year sentence. We think that Defendant's prior convictions and the instant offense evince a clear disregard for the law–a conclusion which is further supported by the fact that Defendant committed this crime while on probation.

While Defendant's disability is an appropriate mitigating factor in determining the length of Defendant's sentence, we think that it is not to be accorded great weight under these facts and circumstances. Defendant has provided no evidence that alleges or substantiates a correlation between the length of a criminal sentence and any potential deterioration in his medical condition. Given the above, we think that Defendant's sentence of 4 years is appropriate. The enhancement factors clearly outweigh the marginal consideration attributable to Defendant's disability.

As to probation, Defendant has failed to carry his burden and show that the sentence imposed by the trial court is improper and full probation is in the best interest of Defendant and the public. Defendant brazenly stole a boat that was secured, and cut the chains and locks while the owner watched from her home. The fact that Defendant committed this crime while on probation suggests (1) that rehabilitation through probation for the instant offense will not be successful, and (2) probation is not a sufficiently restrictive measure to constrain Defendant's criminal activity. Finally, although Defendant's disability is also an appropriate consideration when determining Defendant's manner of service, Defendant has provided no

evidence that alleges or proves that incarceration will have a detrimental effect on Defendant's medical condition.

III. Conclusion

For the above reasons we affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

_____
JERRY L. SMITH, Judge