IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1999

FILED

January 25, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9903-CC-00097**
	)	No.M-1999-02370-CCA-R3-CD
Appellee,	)	
	)	**DICKSON COUNTY**
V.	)	
	)	
	)	**HON. ROBERT E. BURCH, JUDGE**
CAROL L. HUGHES,	)	
	)	
Appellant.	)	**(AGGRAVATED ASSAULT)**

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OPINION FILED _____

AFFIRMED AS MODIFIED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Carol L. Hughes pled guilty to one count aggravated assault, one count reckless endangerment, and one count evading arrest in Dickson County

Circuit Court. Following a sentencing hearing, the trial court sentenced her to concurrent sentences of four (4) years, one (1) year, and 11 months, 29 days, respectively. The trial court ordered that each sentence was to be suspended after an eighteen (18) month period of incarceration. Defendant now appeals as of right, and asks us to modify her sentence, arguing first that she should have received full probation, and, in the alternative, that the trial court erred in ordering split confinement with a confinement term in excess of one (1) year. The State concedes that the trial court's structuring of the split confinement was error, but argues that this Court should remand this matter to the trial court for re-sentencing. After a thorough review of the record, we decline to remand for re-sentencing, and we modify Defendant's sentence such that her manner of service will be one (1) year of incarceration in the Dickson County jail, with the remainder of the effective sentence of four years suspended.

I. Facts.

On January 22, 1998, Officer Jimmy Mann of the Dickson Police Department was on patrol with trainee patrolman Keith Bell. Because Mann wanted Bell to perform a radio exercise, Bell called the police dispatcher and had Defendant's automobile tags checked through the department computer system. When the computer indicated that the tags were registered to a different type of vehicle than that which Defendant was driving, the officers turned around and returned to the location where they spotted Defendant. On arrival, Officer Mann exited the patrol car and instructed Defendant to keep her car stationary while trainee Bell turned the patrol car around. Instead, Defendant immediately drove-off and fled the scene. Mann testified at the sentencing hearing that at this time he viewed a distraught two- to three year-old child standing on the front passenger seat, and another child in a car seat in the back.

Mann and Bell pursued Defendant with emergency lights and siren operating, but Defendant did not stop. Instead, Defendant made every effort to lose the patrol car by driving her vehicle through the city of Dickson at high speed in the middle of the Friday afternoon rush hour. In so doing she ran several stop signs and red lights, and came very close to being killed when she ran a light in front of a semi-tractor-trailer, who locked-up his brakes to avoid Defendant's car. At one point Officer Mann thought the chase was over, because Defendant's car came to a stop, but as soon as Mann exited the patrol car, Defendant took flight once again.

After circling through Dickson, Defendant led officers onto Highway 70 west-bound, where Defendant traveled at speeds up to 120 miles per hour in her attempt to get away. Because the west-bound lane was clogged with commuter traffic, Defendant stayed in the east-bound lane of Highway 70 for a significant portion of the chase, while driving in a westerly direction, so she could pass slower west-bound traffic.

The dangerous nature of Defendant's driving was compounded by the fact that the chase occurred in the dusk and dark, in the rain, and over an extended stretch of roadway–through McEwen and all the way to Waverly. Defendant evaded a moving roadblock, and in the process almost rammed a patrol car. Defendant also ran through a stationary road block, and came to a stop only after running-over spikes that were placed in the road by law enforcement officers. After the chase ended Defendant removed her children from her vehicle, and placed them in a nearby vehicle that belonged to another person. Although law enforcement officers subsequently apprehended her, they placed her in an unsecured patrol car, and Defendant opened the back door and tried to run away before she was handcuffed and confined in a patrol car that was locked. Finally, during the chase, she threw a bag out the window that was later retrieved and identified as containing crack cocaine smoking paraphernalia.

Defendant testified at the sentencing hearing that she was going through a hard period in her life when she committed the crimes at issue. The father of her children had left her, and refused to give her money for the children or herself. She moved into a "bad neighborhood," and began to associate with persons who introduced her to crack cocaine. She became addicted, and was an addict at the time of the incident at issue. Defendant testified that her children had been taken away from her after she committed these crimes, but that she had worked hard to cooperate with the Department of Human Services, and had regained physical custody (but not legal) of the children two months before the hearing. She also testified that she was no longer using illegal drugs, and that she had since passed five (5) random drug screens, the most recent being the day before the sentencing hearing.

II. Analysis

Defendant challenges only the manner of service of her sentence, arguing first that she should have received full probation in lieu of any confinement time. In the alternative, she argues that the trial court erred in imposing split confinement with a confinement term of eighteen (18) months, and that the period of incarceration should be reduced. While the state concedes that the eighteen (18) month period does not comply with the 1989 Sentencing Reform Act, the State argues that we should remand this case to the trial court for re-sentencing.

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).

With regards to alternative sentencing, 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." Tenn. Code Ann. § 40-35-102(6) (1997). 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). 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. § 40-35-303(a), (b).

An alternative sentence may involve the immediate suspension of the sentence following sentencing. Tenn. Code Ann. § 40-35-212(b)(1) (1997). However, the defendant bears the burden of proving that she is eligible for full probation. Id. § 303(b); State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). An alternative sentence may also involve confinement for a portion of the sentence, with the remainder of the sentence to be suspended. See Tenn. Code Ann. § 40-35-212(b)(2) (1997). For this type of sentence, the length of confinement is limited by statute; the initial period of confinement may not exceed one year. Id. § 306(a).

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).

Here, we modify Defendant's manner of service such that Defendant's period of confinement is one (1) year, to be served in the Dickson County jail, with the remainder of the sentence suspended. To begin, we think that the trial court properly determined that Defendant is eligible for a suspended sentence, but that full probation is not appropriate. The facts and circumstances of the crime do not warrant full probation. Defendant's driving threatened numerous persons with the risk of serious harm. As noted by the trial court, Defendant's actions are "almost incomprehensible to a civilized person," and that "it just boggles the mind that somebody would be going 120 miles an hour in the rain on that kind of road." Although Defendant had a chance to end the chase when her car came to a stop in Dickson, she chose to flee again, and stopped only when her car was disabled by law enforcement. We think these facts are sufficiently egregious so as to require confinement. For these same reasons we also think that awarding Defendant full probation would unduly depreciate the seriousness of the offense.

Although we think the above sufficient in and of itself to support a denial of full probation, see Bingham, 910 S.W.2d at 456, we also note that full probation would not be a sufficient deterrent to Defendant. Defendant does have potential for rehabilitation, but we note that Defendant has stopped seeing a drug counselor, and stopped attending group meetings. Moreover, the trial court was not impressed by

Defendant's veracity, and noted that Defendant expressed little remorse for her crimes. This lack of candor is disturbing, constitutes evidence that Defendant has yet to be fully rehabilitated, and is an additional ground for denying full probation. See State v. Dowdy, 894 S.W.2d 301, 305-06 (Tenn. Crim. App. 1995).

The trial court did err, however, when it imposed split confinement with the initial term of confinement to be set at eighteen (18) months. The court also erred when it ordered confinement in the Tennessee Department of Corrections. When split confinement is ordered, incarceration, is in the county jail or workhouse. Tenn. Code Ann. § 40-35-306(a) (1997). After a review of the record, and the factors discussed previously, we are of the opinion that the Defendant should serve one (1) year confinement, with the balance on probation.

III. Conclusion

For the above reasons we affirm the trial court's denial of full probation. We modify Defendant's manner of service. Defendant will serve one (1) year of confinement, to be served in the Dickson County jail, with the remainder of the sentence suspended.

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THOMAS T. WOODALL, Judge

CONCUR:

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JOE G. RILEY, JR., Judge

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JAMES CURWOOD WITT, JR., Judge