

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
February 3, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

<p>STATE OF TENNESSEE,</p> <p style="padding-left: 100px;">Appellee,</p> <p>V.</p> <p>LISA KEY,</p> <p style="padding-left: 100px;">Appellant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>C.C.A. NO. 03C01-9902-CR-00083</p> <p>GREENE COUNTY</p> <p>HON. JAMES E. BECKNER, JUDGE</p> <p>(POSSESSION OF CONTROLLED SUBSTANCE AND POSSESSION OF DRUG PARAPHERNALIA)</p>
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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Lisa Key was indicted by the Greene County Grand jury for possession of a controlled substance with intent to sell or deliver and for possession of drug paraphernalia. Following a jury trial, Defendant was convicted of simple possession of a controlled substance and possession of drug paraphernalia. The trial court subsequently imposed concurrent sentences of eleven months and twenty-nine days at 75% release eligibility. Defendant challenges her sentences, raising the following issues:

- 1) whether her sentences are excessive; and
- 2) whether her sentences are unjustly harsh in comparison with the sentences of a codefendant.

After a review of the record, we affirm the judgment of the trial court.

I. FACTS

On October 30, 1997, law enforcement officers from the Third Judicial District Drug Task Force and the Greeneville and Greene County SWAT team executed a search warrant for the residence of Defendant and Libby Fillers. After knocking and identifying themselves, the officers attempted to gain entry to the residence. Although Defendant briefly attempted to prevent the officers from gaining entry, the officers were able to enter the residence.

When the officers entered the residence, they observed Defendant, Jason Gross, and Defendant's two-year-old child. During the subsequent search, the officers discovered plastic baggies, scales, rolling paper, hemostats, and 68.4 grams of marijuana.

II. LENGTH OF SENTENCES

Defendant contends that the trial court erroneously imposed longer sentences than she deserves.

This Court's review of the sentences imposed by the trial court is de novo with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is conditioned upon an 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). The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) (1997) (Sentencing Commission Comments). Ordinarily, a trial court is required to make specific findings on the record with regard to sentencing determinations. See Tenn. Code Ann. §§ 40-35-209(c), -210(f) (1997 & Supp. 1999). However, the Tennessee Supreme Court has stated that review of misdemeanor sentencing is de novo with a presumption of correctness even if the trial court did not make specific findings of fact on the record because "a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. See State v. Palmer, 902 S.W.2d 391, 392 (Tenn. 1995). A defendant convicted of a misdemeanor, unlike a defendant convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Misdemeanor sentences do not contain ranges of punishments, and a misdemeanor defendant may be sentenced to the maximum term provided for the offense as long as the sentence imposed is consistent with the purposes of the sentencing act. Palmer, 902 S.W.2d at 393.

In this case, Defendant was convicted of simple possession of a controlled substance and possession of drug paraphernalia, which are both Class A misdemeanors. See Tenn. Code Ann. §§ 39-17-418(c), -425(a)(2) (1997). The authorized sentence for a Class A misdemeanor is a period equal to or less than eleven months and twenty-nine days. Tenn. Code Ann. § 40-35-111(e)(1) (1997). In addition, the trial court is authorized to set release eligibility at anywhere up to 75%. Tenn. Code Ann. § 40-35-302(d) (1997).

A.

The record indicates that in determining the length of Defendant's sentences, the trial court found that two enhancement factors applied: (1) Defendant has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate sentencing range, and (2) Defendant was the leader in an offense involving two criminal actors. See Tenn. Code Ann. § 40-35-114(1), (2) (1997). In addition, the trial court found that one mitigating factor applied: (1) Defendant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997).

Initially, we agree with the State that the trial court correctly applied enhancement factor (1). Indeed, the record indicates that before she was sentenced in this case, Defendant had been convicted of driving under the influence, driving while impaired, and possession of marijuana. While these three offenses were not committed until after the offenses in this case were committed, this Court has previously stated that criminal convictions or criminal behavior occurring prior to the sentencing hearing may be considered under enhancement factor (1), regardless of whether the criminal conduct occurred before or after the commission of the offense under consideration. State v. John Allen Chapman, No 01C01-9604-CC-00137, 1997 WL 602944, at *20 (Tenn. Crim. App., Nashville, Sept. 30, 1997), perm. to

appeal denied, (Tenn. 1998). In addition, the presentence report indicates that Defendant has admitted to frequent use of marijuana.

We agree with Defendant that the trial court erred when it applied enhancement factor (2). Although the record indicates that Gross apparently participated with Defendant in the commission of these crimes in some manner, the record does not contain any evidence about Defendant's actions in the preparation for or during the commission of the offenses that demonstrates that she was a leader in any way. In fact, the trial court did not identify any basis for applying this factor.

We agree with Defendant that the trial court properly applied mitigating factor (1). However, we note that in cases involving drugs, mitigating factor (1) is generally entitled to little weight. See State v. Hoyt Edward Carroll, No. 03C01-9607-CC-00254, 1997 WL 457490, at *4 (Tenn. Crim. App., Knoxville, Aug. 12, 1997), perm. to appeal denied, (Tenn. 1998). We also conclude that no other mitigating factors were applicable in this case.

We conclude that, upon de novo review in observance of the less stringent standards attached to misdemeanor sentencing and in light of Defendant's previous convictions and criminal behavior, sentences of eleven months and twenty-nine days are entirely appropriate in this case. Defendant is not entitled to relief on this issue.

B.

The record indicates that in setting release eligibility at 75%, the trial court found that confinement was necessary because a two-year-old child was present when the offenses were committed, there was a need for deterrence, and Defendant has poor potential for rehabilitation.

Initially, we agree with Defendant that the trial court improperly relied on the need for deterrence. The general rule is that before a trial court can order a sentence to be served in confinement based on the need for deterrence, there should be some affirmative proof of the need for deterrence. See Ashby, 823 S.W.2d 169–70. In this case, the State failed to introduce any proof on the issue of deterrence.

We need not decide whether the trial court properly relied on the presence of the two year old child when it set release eligibility for Defendant's sentences because we conclude that the trial court properly set release eligibility at 75% based on Defendant's poor potential for rehabilitation. See Tenn. Code Ann. § 40-35-103(5) (1997) (stating that potential for rehabilitation should be considered when determining whether sentence should be served in confinement). The record indicates that while she was on bond for the offenses in this case, Defendant committed the offense of driving while impaired. Then, while Defendant was on bond for the offenses in this case and the offense of driving while impaired, she committed the offenses of driving under the influence and possession of marijuana. This conduct of committing offenses while on bond for other offenses demonstrates a sustained intent to violate the law. In addition, Defendant has admitted to frequent use of marijuana. This continuing disrespect for the law indicates that Defendant has an extremely poor potential for rehabilitation.

We conclude that, upon de novo review in observance of the less stringent standards attached to misdemeanor sentencing and in light of Defendant's poor potential for rehabilitation, a release eligibility of 75% is entirely appropriate in this case. Defendant is not entitled to relief on this issue.

III. DISPARITY IN SENTENCING

Defendant contends that her sentences are unjustly harsh in comparison with the sentences imposed on Gross for his involvement in the case.

The record indicates that Gross pled guilty to simple possession of a controlled substance and possession of drug paraphernalia and he received concurrent sentences of eleven months and twenty-nine days, with ten days to be served in confinement and the remainder on probation. However, the record in this case does not contain any indication of whether Gross' sentences were negotiated, what proof was presented at Gross' sentencing hearing, and what findings were made by the trial judge who sentenced Gross. Thus, while Defendant is correct that one of the purposes of the Sentencing Reform Act of 1989 is to eliminate "unjustified disparity in sentencing," Tenn. Code Ann. § 40-35-102(2) (1997), Defendant's failure to include the relevant information in the record prevents us from reviewing this issue to determine whether the disparity in sentencing is justified or not. While the Sentencing Reform Act of 1989 seeks to eliminate disparities in sentencing that are unrelated to its purpose, there is no requirement that codefendants receive equal sentences. State v. Michael Leon Chambers, No. 01C01-9505-CC-00143, 1996 WL 337340, at *3 (Tenn. Crim. App., Nashville, June 20, 1996), perm. to app. denied (Tenn. 1996). Defendant is not entitled to relief on this issue.

Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JERRY L. SMITH, Judge
