

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

**STATE OF TENNESSEE v. NORA McFALL**

**Direct Appeal from the Criminal Court for Hardin County  
No. 7752 C. Creed McGinley, Judge**

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**No. W1999-01086 -CCA- R3-CD - Decided May 26, 2000**

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The appellant, Nora McFall, pled guilty in the Hardin County Criminal Court to possession with intent to deliver under 0.5 grams of cocaine, a class C felony, and to possession with intent to deliver dihydrocodeinone, a class D felony. Pursuant to a plea agreement, the trial court imposed a sentence of five years for the cocaine conviction and a four year sentence for the dihydrocodeinone conviction with the sentences to run concurrently. The parties agreed that the trial court would determine the manner of service of the sentences. The trial court ordered the appellant to serve nine months of the sentence in confinement in the county jail with the balance to be served on community corrections. The appellant contends that the trial court erred by denying her request for judicial diversion, and by ordering that she serve nine months incarceration prior to being placed in the Community Corrections program. Following a review of the record and the parties' briefs, we affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed.**

OGLE, J., delivered the opinion of the court, in which WADE, P. J. and WILLIAMS, J. joined.

Robert M. Brannon, Jr., Memphis, Tennessee, for the appellant, Nora McFall.

Paul G. Summers, Attorney General and Reporter; J. Ross Dyer, Assistant Attorney General; G. Robert Radford, District Attorney General; and John W. Overton, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On May 30, 1998, the appellant, a waitress at the Starlight Tavern in Hardin County, was arrested for the possession of approximately 26 grams of cocaine, more than 120 dihydrocodeinone pills, and over \$9,000 in cash. Pursuant to a plea agreement, the appellant plead guilty to possession with intent to deliver under 0.5 grams of cocaine, a Class C felony, and possession with intent to deliver dihydrocodeinone, a Class D felony. The parties agreed to a five year sentence for the cocaine conviction and to a four year sentence for the dihydrocodeinone

conviction, with the trial court to determine the manner of service. The appellant filed a petition for judicial diversion, probation, and/or community corrections. The trial court determined that the appellant was not eligible for judicial diversion, and ordered that the appellant serve nine months confinement in the county jail prior to being placed in the Community Corrections program. The appellant contends that the trial court erred by denying her petition for judicial diversion and by ordering a period of incarceration.

Initially, we note that the record before this court does not contain a transcript of the guilty plea hearing. For those defendants who plead guilty, the guilty plea hearing is the equivalent of a trial, in that it allows the State the opportunity to present the facts underlying the offense. See State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999). For this reason, a transcript of the guilty plea hearing is often needed in order to conduct a proper review of the sentence imposed. Keen, 966 S.W.2d at 844. Although we could consider all issues pertaining to sentencing waived, we will, nevertheless, consider the merits.

The appellant contends that the trial court erred in determining that based upon a prior conviction of a Class A misdemeanor, she was not eligible for judicial diversion. A person who has a prior conviction of a Class A misdemeanor is not statutorily eligible for judicial diversion. Tenn. Code Ann. § 40-35-313(a)(1)(A) (1997). The pre-sentence report indicates that the appellant had a prior conviction for “Simple Poss./Specific Sub. Or Sch. Unknown,” that she received a suspended sentence of eleven months and twenty-nine days, and that she was placed on probation. The appellant argues, however, that because the substance was never identified, the trial court improperly assumed that she plead guilty to a Class A misdemeanor.

Tenn. Code Ann. § 39-17-418 (1997) provides that it is unlawful for a person to “knowingly possess... a controlled substance.” Subject to two exceptions which are not applicable to the appellant, knowingly possessing a controlled substance is a Class A misdemeanor. Tenn. Code Ann. § 39-17-418(c). The appellant does not dispute that she pled guilty to possession of a controlled substance and received a suspended sentence of eleven months and twenty nine days. The mere fact that the substance was unidentified is immaterial. We conclude that the trial court properly concluded that the appellant was not eligible for judicial diversion.

The appellant also contends that the trial court erred by ordering that she serve nine months confinement prior to being placed on community corrections. 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) (1997). This presumption 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).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have

often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); see also Ashby, 823 S.W.2d at 169.

There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. § 40-35-103(2); State v Boggs, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996). Indeed, individualized punishment is the essence of alternative sentencing. State v Dowdy, 894 S.W.2d. 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

The trial court properly found that the appellant was presumed eligible for an alternative sentence since she was convicted of a Class C felony and a Class D felony. See Tenn. Code Ann. § 40-35-102(6). However, the trial court noted that a large quantity of drugs was found in her possession, that there were two different types of drugs involved, that the appellant possessed a large amount of cash, and that the appellant was on probation from a prior drug conviction at the time this offense was committed. Although the appellant contended that she simply intended to deliver the cocaine as a favor for someone else, she acknowledged that the search warrant resulting in the seizure of the cocaine was based upon her alleged sale of cocaine a few days prior to the seizure. Implicit in the trial judge's findings was that he did not consider the appellant's testimony to be forthright. The trial court further found that the appellant was not totally cooperative since she would not reveal the source of the cocaine.

We conclude that the trial court committed no error by requiring the appellant to serve nine months incarceration. The appellant possessed with intent to deliver approximately 26 grams of cocaine, over 50 times the amount necessary to classify the offense as a Class B felony. See Tenn. Code Ann. § 39-17-417(c)(1) (1997). Although she was indicted for a Class B felony, she was allowed to plead to a Class C felony. The court has a right to look behind the plea agreement to ascertain the true facts. State v. Hollingsworth, 647 S.W.2d 937, 939 (Tenn. 1983). Thus, the court properly considered the seriousness of the offense pursuant to Tenn. Code Ann. § 40-35-103(1)(B) (1997). Furthermore, the fact that the appellant was on probation for a drug offense when the instant offenses were committed indicates that measures less restrictive than confinement were recently applied unsuccessfully. See Tenn. Code Ann. § 40-35-103(1)(C) (1997).

The trial court, who was in a much better position than this court to ascertain the credibility of the appellant, found her to lack candor relating to her explanation for the possession of the cocaine. Lack of candor reflects upon one's potential for rehabilitation. See Tenn. Code Ann. § 40-35-103(5); Dowdy, 894 S.W.2d at 306. Although this court has cautioned that to deny alternative sentencing based solely upon an appellant's refusal to reveal the names of sources is improper, a trial court may consider such a refusal along with other factors in determining whether alternative sentencing is in the best interest of the appellant and society. See State v. Ricky Keele, No. 02C01-9865-CC-00139, 1999 WL 150871, at \* 2-4 (Tenn. Crim. App. at Jackson, March 22, 1999), perm. to app. denied (Tenn. September 13, 1999).

Considering the seriousness of the offense, the fact that the appellant was on probation for a drug offense at the time this drug offense was committed, and the appellant's lack of candor, we conclude that the trial court did not err in requiring the appellant to serve nine months of confinement.

Accordingly, the judgment of the trial court is affirmed.