

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1995

FILED

September 19, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

LISA B. COOPER,)

Appellant.)

C.C.A. NO. 03C01-9501-CR-00006

ANDERSON COUNTY

HON. JAMES B. SCOTT, JR.
JUDGE

(Sentencing)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ANDERSON COUNTY

FOR THE APPELLANT:

J. THOMAS MARSHALL, JR.
Office of the Public Defender
101 South Main Street
Clinton, TN 37716

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

GEORGE LINEBAUGH
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JAMES N. RAMSEY
District Attorney General

JAN HICKS
Assistant District Attorney General
127 Courthouse
Clinton, TN 37716

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Upon her pleas of guilty, the Defendant was convicted of eleven counts of Class E felony forgeries and one count of a Class C felony forgery.¹ The trial court sentenced her to eleven concurrent one-year sentences for the Class E felonies and a concurrent three-year sentence for the Class C felony. The trial court denied her request for probation or other alternative sentences to incarceration. It is from the sentence imposed for the trial court that the Defendant appeals. We affirm the judgment of the trial court.

This is the second time this court has been called upon to review the sentences imposed by the trial court in this case. At the Defendant's first sentencing, the trial court did not allow the Defendant to present evidence or to be heard on the issue of probation or other alternatives. The trial court admonished defense counsel to "just save your breath." This court reversed and remanded this case to the trial court to conduct a proper sentencing hearing. This court directed the trial judge to include in the record his findings of fact and conclusions of law as required by the sentencing provisions of our code.²

The primary victim in this case was a disabled woman who employed the Defendant to provide twenty-four hour care for her. While so employed, the Defendant defrauded the victim out of a considerable amount of cash. The eleven Class E felony forgeries were for checks payable to the Defendant drawn on the victim's account totaling over three thousand, four hundred dollars. The Class C felony forgery was for

¹Tenn. Code Ann. § 39-14-114.

²State v. Lisa B. Cooper, No. 03C01-9305-CR-00160, Anderson County (Tenn. Crim. App., Knoxville, filed Feb. 3, 1994).

co-signing the victim's name on a promissory note for the purchase of an automobile in the amount of almost sixteen thousand dollars.³ The victim of the forged automobile note was either the automobile dealer or a lender, and the amount of actual loss was five thousand, four hundred and eighty-seven dollars. The disabled victim testified that the total amount of her loss caused by the actions of the Defendant was some twelve thousand dollars, which obviously included items for which the Defendant was not indicted or charged. The forgeries occurred during a period of time of approximately six months. The Defendant was employed by the victim for about a year and a half.

At the conclusion of the sentencing hearing conducted after remand by this court, the trial court imposed the identical sentences which it imposed at the Defendant's first sentencing. The Defendant appeals from the trial court's denial of her request to serve her sentence on probation or in some other alternative to incarceration.

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 the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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).

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

³The automobile was repossessed and sold and the proceeds of the sale were applied to the note.

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, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

At the time of sentencing, the Defendant was twenty-two years old. She dropped out of high school after the eleventh grade. She had some training in home health care as a nurse's assistant. She was married but separated. She has two children, one born during her prior marriage and one born during the pendency of this action. She admitted to having a drug problem. Her employment record was not good.

The Defendant's prior record consisted of a charge of driving on a suspended license which apparently was still pending at the time of her sentencing in the case sub judice. In October of 1991 and again in November of 1992, the Defendant was charged in Knox County, Tennessee with possession of marijuana with intent to sell or deliver. In February of 1994, the Defendant entered pleas of guilty in those cases to simple possession and in each case was fined two hundred and fifty dollars. In addition to the fines, she was sentenced to eleven months and twenty-nine days in the county jail, said sentences were ordered to be served consecutively. A hearing on her motion for a suspended sentence in those cases was pending at the time she was sentenced in the case sub judice, which was in August of 1994.

At the conclusion of the sentencing hearing, the trial court stated that the Defendant was going to have to spend some time in jail. The court stated "she is not a proper subject for probation. She doesn't have enough stability for us to feel confident that she would report" The court then ordered the Defendant confined in jail but set a hearing date for about a month thereafter to "determine whether or not

even a split confinement is available to her." Apparently, no further hearing was held due to the fact that the Defendant appealed the denial of probation.

After sentencing, the trial court set an appeal bond and the Defendant was released on a twenty thousand dollar bond. On November 28, 1994, a hearing was held on the bail bondsman's request to be relieved from further responsibility. At the conclusion of that hearing, the trial court did allow the bail bondsman to be relieved from further responsibility and revoked the Defendant's bond. This action was taken on the basis that the Defendant had failed to cooperate with her bail bondsman and violated conditions of her bail contract with the bonding company. During the course of these proceedings, some sort of an altercation between the Defendant and a deputy sheriff took place in the hallway of the court house which led to a warrant being issued for the Defendant's arrest on a charge of evading arrest. The Defendant denied that she had tried to escape, and the disposition of that charge is not reflected in the record.⁴

As this court noted in its prior opinion concerning this matter, the record of the sentencing hearing should include specific findings of fact upon which application of the sentencing principles was based. Tenn. Code Ann. § 40-35-209(c). While we must conclude that the trial court did not articulate its findings of fact or its consideration of the sentencing principles, we also conclude that the trial court did not err or abuse its discretion in refusing to allow this Defendant to serve her sentence on probation or in community corrections or other sentencing alternatives to incarceration.

In her statement in the presentence report, which was originally prepared in December of 1992, the Defendant stated that she wanted probation because she could

⁴Apparently the Defendant has been in jail serving the sentences ordered herein since November 28, 1994.

work and thus repay the money that she owed the victim. During a hearing held on her request for probation on July 8, 1994, the Defendant made her first payment of restitution to the victim in the amount of two hundred dollars. It is obvious from the trial court judge's comments that he did not deem her prospects for rehabilitation to be good.

The record reflects that the indictments against the Defendant were filed on November 12, 1991. In October of 1991 and again in November of 1992, the Defendant was charged with the felony possession of marijuana and entered guilty pleas on both charges to the misdemeanor possession of marijuana on February 10, 1994.

The Defendant stole a large sum of money from a disabled person for whom she had been employed to provide care. The seriousness of this offense should not be depreciated. Our law provides that the burden of establishing suitability for probation remains on the Defendant. Tenn. Code Ann. § 40-35-303(b). We recognize that this provision of our sentencing law must be considered in conjunction with the statutory presumption in favor of alternative sentencing options. Tenn. Code Ann. § 40-35-102(6). The Defendant's conviction of a drug offense committed subsequent to the charges herein does not reflect well on her prospects for rehabilitation.

Based on our review of the entire record herein, we are unable to conclude that the trial judge erred or abused its discretion in sentencing the Defendant. The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

DAVID G. HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE