IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, l994

FILED

September 26, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 03C0l-9403-CR-00093
	)	
	)	UNICOI COUNTY
V.	)	
	)	HON. LYNN W. BROWN, JUDGE
	)	
ED PETERSON	)	(Rape; Statutory Rape)
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant was indicted for two counts of sexual battery committed on T.N.[1] He was also charged with one count of aggravated rape of T.N. In addition, he was charged with two counts of sexual battery of C.C. and one count of aggravated rape of C.C. He entered a plea of guilty of one count of rape of T.N. and one count of statutory rape of C.C. For the rape, he received a sentence of eight years in the state penitentiary. For the statutory rape, he received a sentence of two years in the state penitentiary. He was designated a Range I standard offender. The sentences were ordered to be served concurrently. Probation and community corrections were denied.

On appeal he has presented one issue, contending in two subissues that (l) the trial judge erred by denying him probation for the sole reason that confinement was necessary to avoid deprecating the seriousness of the offenses and (2) by denying his admission to the community corrections program because he had no special needs that were treatable as a result of a mental health problem.

Since a sentencing issue has been raised in this appeal, we have conducted a de novo review on the record, with a presumption that the determinations of the trial judge are correct. Tenn. Code Ann. § 40-35-40l(d).

The appellant was, at the time of sentencing, sixty-five years of age. For twenty-one years he was the driver of the church bus, with the responsibility of picking up children to take them from their homes to the church for services at the Ninth Street Baptist Church in Erwin and then to return them to their homes.

The appellant let T.N. sit near him on a step stool on the bus or in the

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[1]It is the policy of this Court to refer to the victims of child sexual abuse by initials or other designators, never by name.

driver's seat with him. After a time, he began putting his arm around her while driving and then began "feeling" of her. This led to his penetrating her vagina with his fingers "when she asked (him) to make her feel good." This continued to happen five to six times a month over a period of about two years. A similar pattern occurred with C.C., who was seventeen years of age. One day the appellant took T.N. to her home, where he fondled her breasts, rubbed her buttocks, digitally penetrated her and finally penetrated her with his penis.

Although the appellant admitted the other acts, he denied the penile penetration, contending that he was impotent. However, he conceded that he routinely masturbated twice a week without any difficulty.

The appellant placed the blame for these encounters on the girls. He told a psychological examiner that his behavior with T.N. was "an acceptable part of an intimate relationship which was the results of intense feelings of love," while his relationship with C.C. "occurred rapidly" and without the seduction he practiced on T.N.

In addition to his own testimony, the appellant presented an array of witnesses, including his son and other members of the church, as well as a marriage counsellor, who opined that the appellant could best be treated on an out-patient basis with no requirement that he serve any jail time at all. However, the marriage counselor also testified that there was no assurance that the appellant would not reoffend and he conceded that even up to the time of the hearing the appellant continued to minimize the criminality of his conduct.

Another counsellor from the same counselling service recommended that the appellant serve some time in jail and receive his treatment there, because

being jailed is extremely effective in breaking down the denial that the appellant currently is exhibiting.

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including, where appropriate, his mental and physical condition, the deterrent effect upon other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 5l6 S.W.2d 6l7, 620 (Tenn. l974). A negative finding as to any one factor is sufficient to support a denial of probation. State v. Baron, 659 S.W.2d 8ll, 8l5 (Tenn.Crim.App. l983). The burden is upon the defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d l66, l69 (Tenn. l99l). Defendants are sentenced on a case-by-case basis based on the nature of the offense and the circumstances under which it was committed. State v. Moss, 727 S.W.2d 229, 235 (Tenn. l986).

Contrary to the appellant's assertion, the denial of probation was not based only on the desire to avoid deprecating the seriousness of the offense. The trial judge carefully enumerated all the considerations required by law. The appellant's offense was particularly aggravated, the judge found, because it was a betrayal of trust by the appellant. The children's parents trusted the appellant to "take (their children) to church and to bring (them) back safely" home and he abused what should have been a Christian ministry as an opportunity to molest the children.

As to the appellant's criminal history, he noted that apart from these offenses, his prior record was quite good. However, the repeated commission of

these crimes five or six times a month for about two years certainly outweighed his lack of a record of prior criminal convictions.

As to his social history, the trial judge noted that it was a "mixed situation." While the appellant was active in his church and its ministry, "holding himself out" to be a law-abiding Christian, his participating in the bus ministry was a vehicle for him to molest the children who rode the bus.

As to his potential for rehabilitation, the trial judge noted that while he has at least some potential, he has continued "minimizing and rationalizing." Thus, he found this factor weighed neither for nor against probation. As to deterrence, the trial judge noted that that was not a significant consideration because his conviction would be of limited significance to another child abuser in the community.

Finally, the trial judge found that, as the appellant noted, the denial of probation was necessary to avoid deprecating the seriousness of the offense. However, as noted above, that was not the only consideration. It is clear that the denial of probation to this appellant for these offenses was entirely proper.

As to community corrections, the trial judge specifically considered the appellant's eligibility and found that he is not eligible. While those who commit crimes against the person are normally ineligible, Tenn. Code Ann. § 40-36-l06(a)(2), those who commit such crimes, but have special needs that are treatable as a result of chronic alcohol abuse, drug abuse or mental health problems may be admitted to the community corrections program. Tenn. Code Ann. § 40-36-l06(c). There was no proof that the appellant had such special needs. To the contrary, the proof revealed that his needs could best be met by

confinement in the penitentiary. There was no error in denying the appellant probation and community corrections.

The judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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PENNY J. WHITE, JUDGE

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DAVID G. HAYES, JUDGE