IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE	)	NO. 02C01-9412-CR-00286
	)	
Appellee	)	SHELBY COUNTY
	)	
V.	)	HON. L. T. LAFFERTY, JUDGE
	)	
TIMOTHY LEE ALEXANDER,	)	(Driving Automobile While
	)	Habitual Offender - 2 Counts);
Appellant	)	
	)	(Driving a Motor Vehicle on a Revoked
	)	License)
	)	
	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

This is an appeal by Timothy Alexander from the sentence imposed by the Shelby County Criminal Court following his pleas of guilty to two (2) counts of driving an automobile in violation of the Motor Vehicle Habitual Offender Act, a Class E Felony.[1]

The appellant pled guilty to two (2) counts of driving while an habitual offender. As a part of the plea agreement, he received a sentence of two years as a Range I standard offender. The manner in which the sentence would be served was to be determined by the trial court. The appellant's sole contention in this appeal is that the trial court erred in sentencing him to confinement in the Shelby County Corrections Center, instead of sentencing him pursuant to the Community Corrections Act of 1985.

Following a de novo review of the record on appeal, the applicable law, and arguments of the parties, we affirm the trial court.

The record in this case indicates that the appellant, age 27, is married, but was separated from his wife at the time of the sentencing hearing. He is the father of two children, one by his wife and one by his girlfriend. He resides in Millington, Tennessee, and is employed by L. D. Martin Construction Company. He testified that he is paying child support pursuant to an order from the juvenile court.

He testified that his only prior violations of the law involved driving convictions. He further testified that he was no longer operating a motor vehicle, and that his immediate supervisor takes him to and from work each day.

The presentence report revealed that the appellant quit high school in the twelfth grade to obtain employment. He reported that he later received his G.E.D., but has not pursued any further formal education. The appellant has an extensive history

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[1]The appellant was also fined five hundred ($500.00) dollars for driving on a revoked license. He does not appeal the imposition of the fine for that offense; we will therefore concern ourselves with the felony convictions only.

of driving violations.[2] In addition, in response to a question from the trial court, the appellant indicated he had a prior conviction in Tipton County for receiving stolen property.

The trial court denied the appellant a community corrections sentence and imposed a full term of incarceration in the Shelby County Correctional Center as a Range I standard offender. As grounds for its determination regarding incarceration as the manner of service of the sentence, the trial court cited the appellant's extensive history of driving violations, his "callous disregard to continue to violate the law willfully and knowingly," and the appellant's continued driving in direct violation of the orders of Judge Weinman not to drive following a previous conviction as a motor vehicle habitual offender.

In sentencing the appellant to incarceration, the trial judge stated that he did not feel that the appellant, by law, was eligible for sentencing pursuant to the Community Corrections Act, but even if he were eligible, he would not receive such alternative sentencing based upon the record in this case.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review with the presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401 (d) (1990 Repl.). 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 the record reveals that the trial court failed to consider the sentencing principles, including statutory mitigating and enhancing factors, then the presumption of correctness is removed, and this Court simply conducts a de novo review upon the record to

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[2]The appellant's prior convictions are:
11-05-87 - Driving While License Revoked
11-18-89 - Driving While License Revoked
05-02-90 - Driving While License Revoked
05-02-90 - Driving Under the Influence
01-19-93 - Driving While Habitual Motor Vehicle Offender

determine an appropriate sentence. The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210 (1990 Repl.); State v. Smith, 735 S.W.2d 859, 563 (Tenn. Crim. App. 1987).

Tennessee Code Annotated section 40-35-102 (6) states, in relevant part to the case at bar, that a "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." Militating against alternative sentencing are the following considerations:

> [c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, [c]onfinement is necessary to avoid depreciating the seriousness of the offense, or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses, or [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103 (1) (A)-(C)(1990 Repl.). See also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The appellant was sentenced for two (2) Class E felonies as a Standard, Range I offender and has no history of any higher class felonies or of any violent crimes. He is therefore presumed to be a favorable candidate for alternative sentencing.

The appellant maintains that the trial judge erred in ruling that persons convicted of violating the Motor Vehicle Habitual Offender Act were not eligible for the community corrections program, notwithstanding the above referenced code provision regarding alternative sentencing. The appellant argues that based upon the record in

this case he should have been sentenced pursuant to the Community Corrections Act.

This Court has previously determined that alternative community-based sentencing is available to persons who have been convicted as habitual motor vehicle offenders. See State of Tennessee v. Penny Lewis, No. 03C01-9310-CR-00360 (Tenn. Crim. App. at Knoxville, July 7, 1994). Moreover, in the recent case of State of Tennessee v. Ricky Fife, No. 03C01-9401-CR-00036 (Tenn. Crim. App. at Knoxville, June 15, 1995), we said that the Tennessee Criminal Sentencing Reform Act of 1989 superseded Tennessee Code Annotated section 55-10-616 (c), and that trial courts may even suspend all or part of a motor vehicle offender's sentence. Therefore, the trial court erred when it concluded that the appellant was ineligible for sentencing pursuant to the Community Corrections Act of 1985.

Even though we conclude that the trial judge erred in his decision regarding the appellant's eligibility for the community sentencing program, we find that such error was harmless. In sentencing the appellant to confinement, the trial court indicated that even if community sentencing were available to the appellant, based upon the record in this case, incarceration was the appropriate sentence. We agree. The appellant has a long history of criminal driving convictions extending over many years. See Tenn. Code Ann. § 40-35-103 (1) (A) He had previously been found guilty of violation of the Motor Vehicle Habitual Offenders Act and had been specifically ordered by Judge Weinman not to drive, but nevertheless, he continued to operate his car. Under these circumstances the trial court was more than justified in requiring that the appellant serve his full term of incarceration in the Shelby County Correctional Center since less restrictive measures of rehabilitation have failed. Tenn. Code Ann. § 40-35-103 (1) (C) (1990 Repl.).

Accordingly, we affirm the sentence imposed by the trial court.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

PAUL G. SUMMERS, JUDGE

MARY BETH LEIBOWITZ, SPECIAL JUDGE