

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

**FILED**  
**October 11, 1995**  
**Cecil Crowson, Jr.**  
**Appellate Court Clerk**

STATE OF TENNESSEE, )  
 )  
 Appellee )  
 )  
 v. )  
 )  
 ANTONIO D. EWING, )  
 )  
 Appellant )

NO. 02C01-9503-CR-00057

SHELBY COUNTY

Hon. Arthur T. Bennett, Judge

(aggravated assault)

For the Appellant:

Walker Gwinn  
Assistant Public Defender  
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(ON APPEAL)

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(AT TRIAL)

For the Appellee:

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201 Poplar Ave.  
Memphis, TN 38103

OPINION FILED \_\_\_\_\_

AFFIRMED AS MODIFIED

John K. Byers  
Senior Judge

## OPINION

The defendant entered a plea of guilty to aggravated assault. He was sentenced to serve three years and his petition for probation was denied.

The defendant insists the trial judge erroneously denied him probation.

We affirm the conviction and modify the sentence.

The victim in this case was a used car dealer. The defendant purchased a car from him. Two days after the purchase the car developed engine problems. The defendant attempted on more than one occasion to get the victim to refund the money he had paid for the vehicle. These efforts were all in vain. On January 18, 1994, the defendant went to the dealership, pulled the victim from a vehicle and pistol-whipped him. The victim apparently was severely injured by this conduct. In the wake of the beating, a shot was fired from the gun.

The record shows the defendant is a first-time offender, that he was gainfully employed and not likely to again violate the law.

The trial judge denied probation because of the seriousness of the offense and the need to deter this type of behavior.

We review the sentence *de novo* upon the record with a presumption of the correctness of the judgment of the trial court. TENN. CODE ANN. § 40-35-401. In the review we must determine whether the trial judge considered all of the relevant facts and the principles and purposes of sentencing. *State v. Ashby*, 823 S.W.2d 166 (Tenn. 1991).

Especially mitigated or standard offenders who have committed class C, D or E felonies are presumed to be favorable candidates for alternative sentencing and unless there is evidence or circumstances indicating they are not suitable for alternative sentencing, alternative sentencing is proper.

Deterrence alone is rarely an issue for denying probation to a person otherwise suitable for such sentencing, *State v. Cummings*, 868 S.W.2d 661 (Tenn.

*Crim. App. 1992*), and when probation is denied, there must be a showing of some special need in addition to deterrence to justify denial of probation. TENN. CODE ANN. § 40-35-103 (1)(B).

We agree with the trial judge that this is a serious offense, which justifies incarceration and not probation. However, we are of the opinion the record does not support a finding that the defendant is not suitable for confinement of a lesser degree than fixed by the trial judge. We conclude the defendant should be sentenced to serve 90 days in the county jail and that he be placed upon probation for the remainder of the sentence. The service of the sentence shall be on week-ends or other days of the week if necessary to permit the defendant to be employed.

We affirm the conviction of the defendant and modify the sentence. We remand this case to the trial court for entry of a judgment in accordance with this opinion. The trial judge may impose such conditions as are reasonably necessary to carry out the judgment in this case.

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John K. Byers, Senior Judge

CONCUR:

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Joseph B. Jones, Judge

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Joseph M. Tipton, Judge