IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	)	
	)	No. 03C01-9501-CR-00014
Appellee	)	
	)	HAMILTON COUNTY
vs.	)	
	)	Hon. **STEPHEN M. BEVIL**, Judge
WILLIAM JERRY McCORD,	)	
	)	(Aggravated Child Abuse)
Appellant	)	

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OPINION FILED: _____

SENTENCE MODIFIED

David G. Hayes
Judge

OPINION

The appellant, William Jerry McCord, appeals as of right from a sentence of eight years confinement imposed by the Criminal Court of Hamilton County. The appellant contends that the trial court erred by not sentencing him under the Community Corrections Act.

After a review of the record, the appellant's sentence is modified.

I. Facts

On May 27, 1994, the appellant pled guilty to one count of aggravated child abuse, a class B felony.[1] Pursuant to the plea agreement, the appellant received the minimum sentence of eight years. A sentencing hearing was held on July 25, 1994, to determine the manner in which the sentence would be served.

The proof at the sentencing hearing revealed that on November 28, 1993, the appellant was left at home to baby-sit his ten week old son while his wife accompanied her father to the movies. After returning home, his wife found that their son cried when his left leg was moved. When questioned as to what had happened, the appellant replied, "I think his leg is broken." The child was then immediately taken to the emergency room by the appellant and his wife.

At the hospital, x-rays revealed multiple fractures in varying stages of healing. The examining physician concluded that the injuries resulted from

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[1]Effective July 1, 1994, aggravated child abuse of a child six years old or younger became a Class A felony. Tenn. Code Ann. § 39-15-402(b) (1994 Supp).

"shaken infant syndrome" or "battered child syndrome."[2] At this time, the police were notified of the suspected child abuse, and the parents were taken into custody for questioning. The appellant told the police that he had "jerked the baby's legs up" when he was changing his diaper and that he had shaken the child to stop his crying. The appellant never denied his role in his son's injuries, nor was he uncooperative with the authorities.

The pre-sentence report reflects that the appellant was twenty-five years old and married at the time of the incident. He is now divorced. He dropped out of high school in the twelfth grade, but prior to his conviction for this offense he had been attending a vocational school. On the date of this offense, the appellant was employed as a laborer with the Van Heusen Company. The appellant's previous work history indicates sporadic employment. He has no prior juvenile or adult criminal history and does not use alcohol or drugs.

At the sentencing hearing, the appellant testified as to his remorse and responsibility for his son's injuries, his lack of parenting skills, and his willingness to undergo counseling and obey any court order. Charles Pittman, the appellant's pastor, verified the appellant's participation at church and in church counseling. Diane Brown, the appellant's mother-in-law, denied any knowledge or suspicion of child abuse prior to this charge. Defense counsel introduced the child's medical reports to show the child was regularly taken to his pediatrician. The records also demonstrated that at no time prior to November 28 had any examination of the child revealed any abnormal findings. Finally, the appellant offered the testimony of Dr. Eric Engum, a clinical psychologist.

Dr. Engum testified that it was apparent from his initial observation that

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[2] See DEPOSITION OF DR. J. HICKS CORY at 13, 14, 43, Exhibit #3. "Shaken child syndrome" or "Battered child syndrome", simply put, is abuse in the form of shaking a child.

the appellant was "somewhat intellectually limited." The Wechsler Adult Intelligence Scale, a standardized I.Q. test, revealed the appellant had a full scale I.Q. of 80, which placed him in the borderline range of functioning. Dr. Engum testified that additional test results suggested very poor tolerance for stress and pressure, immaturity, and an inability to realize the impact of his behavior on others. He concluded that the appellant was ill-equipped to be a parent, and that while the appellant may act without thinking when confronted with stress, his actions will not be committed in a malicious fashion or in an attempt to purposely harm another.

After reviewing the evidence and argument offered at the sentencing hearing, the trial court sentenced the appellant to eight years confinement with the Department of Correction. The appellant now seeks review of the manner of service of the sentence imposed by the trial court.

II. Review of Sentence

The appellant contends that he should have been sentenced pursuant to the Community Corrections Act, which is one form of alternative sentencing. Whether the appellant should have been granted an alternative sentence begins with the determination of whether he is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993). The appellant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender of a class C, D, or E felony and he does not have a history evincing either a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). Because the appellant was convicted of a class B felony, he is not presumed to be a favorable candidate. Nevertheless, the appellant remains eligible for

probation under Tenn. Code Ann. § 40-35-303(a) (1994 Supp.) as his sentence is eight years or less.[3] [4] As the appellant is eligible for probation, he also has the burden of establishing his suitability for probation. State v. Radden, No. 03C01-9408-CR-00280 (Tenn. Crim. App. at Knoxville, Feb. 24, 1995).

Appellate review of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, the presumption applies only if the record demonstrates that the trial court considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court correctly applied such principles to the issue of probation. However, the court failed to consider any sentencing alternative other than probation. As such, we cannot apply the presumption of correctness to the trial court's sentence. See Tenn. Code Ann. § 40-35-210 (b)(3) (1990).

In conducting a *de novo* review on the record, we are required to consider the evidence received at the trial and the sentencing hearing, the presentence report, the principles of sentencing, the arguments of counsel, the nature and characteristics of the offense, existing mitigating and enhancing factors, statements made by the offender and the potential for rehabilitation. Tenn. Code Ann. § 40-35-102, -103(5), -210(b) (1990); see also Ashby, 823 S.W.2d at 168; State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The appellant must show that the sentence imposed was improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

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[3]Effective July 1, 1994 a defendant convicted of aggravated child abuse is no longer eligible for probation. Tenn. Code Ann. § 40-35-303(a)(1994 Supp.).

[4]Both appellant and appellee erroneously state that appellant is not eligible for probation under Tenn. Code Ann. § 40-35-303(a)(1994 Supp.). Appellant's offense and plea occurred before the effective date of this section, and as such, this section will not operate as an *ex post facto* law against the appellant. See State v. Pearson, 858 S.W.2d 879, 882 (Tenn. 1993).

The trial court's denial of probation was based on the "seriousness of the offense," the appellant's poor employment history, and the public concern regarding child abuse. In reaching this conclusion, the trial court considered the presence of four enhancement factors, even though the court noted that such factors do not need review in this case.[5] In order to deny an alternative sentence based on the seriousness of the offense, "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," and the nature of the offense must outweigh all factors favoring a sentence other than confinement. State v. Hartley, 818 S.W.2d 370, 374-375 (Tenn. Crim. App. 1991). Although we in no way condone the conduct of the appellant, we are unable to conclude that the nature and circumstances of this offense outweigh all factors favoring a sentence other than total confinement. However, we do note that, although outweighed by other factors, the nature of the offense is still accorded its due weight in determining an appropriate sentence.

While the trial court correctly considered the "seriousness of the offense" when denying total probation, Tenn. Code Ann. § 40-35-103(1)(B), the court was also required to consider the principles of sentencing as they relate to other sentencing alternatives. Tenn. Code Ann. § 40-35-210(b)(3). The manner of punishment is not solely a result of the seriousness of the offense. State v. Frank, No. 03C01-9209-CR-00303 (Tenn. Crim. App. at Knoxville, Dec. 22, 1993). Punishment is supposed to encourage effective rehabilitation with alternatives to incarceration designed to elicit the appellant's voluntary cooperation. Tenn. Code Ann. § 40-35-102(3)(c); -103(5), (6). Therefore, the sentence imposed should be the least severe measure necessary to achieve the

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[5]Enhancement and mitigating factors are the exclusive factors which may be considered in setting the length of a sentence within a given range. See State v. Dykes, 803 S.W.2d 250 (Tenn. Crim. App. 1990). The appellant's sentencing hearing was to determine the manner of service and not the length of sentence.

purpose provided by the legislature for which a sentence is imposed. Tenn. Code Ann. § 40-35-103(4). The proper consideration and application of these sentencing principles by a trial court on a case-by-case basis are in the best interest of both the public and the defendant. Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

We have already determined that the trial court erred by denying total probation based upon the seriousness of the offense. See Tenn. Code Ann. § 40-35-103(1)(B). Thus, we conclude that a sentence of total incarceration is not warranted under the particular facts of this case. The only question that remains is which sentencing alternative is appropriate. The following criteria provide guidance on this issue: (1) the nature and circumstances of the criminal conduct, Tenn. Code Ann. § 40-35-210(b)(4); (2) the defendant's potential for rehabilitation, Tenn. Code Ann. § 40-35-103(5); (3) whether full probation would depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and (4) whether a sentence other than full probation would provide an effective deterrent, Tenn. Code Ann. § 40-35-103(1)(B).

We have previously determined that the nature and circumstances of this offense do not outweigh other factors favoring an alternative sentence. Therefore, continuing our review, we are required to consider the appellant's potential for rehabilitation. The appellant presented proof relating to his potential for rehabilitation, including the appellant's mental health problems and lack of parenting skills, his full cooperation with authorities, his acceptance of responsibility for the offense, his lack of a prior criminal history, and his attempts at training and education to become a more productive member of society. These factors favor some form of alternative sentencing, although we conclude that a sentence of total probation is inappropriate, given the nature of the offense in this case.

The legislature has provided a myriad of sentencing options to permit individualized sentencing. Tenn. Code Ann. § 40-35-104(c) (1990). These include a term or period of confinement in a local jailhouse or workhouse coupled with a term of probation, Tenn. Code Ann. § 40-35-104(c)(3) and (4), and a sentence to a community corrections program pursuant to the requirements of Tenn. Code Ann. § 40-36-106 (1994 Supp.); Tenn. Code Ann. § 40-35-104(c)(8).

Eligibility for community corrections participation is governed by Tenn. Code Ann. § 40-36-106 (a), (b), and (c). The provisions of subsections (a) and (b) are not applicable in the present case.[6] In order to be eligible under subsection (c), an offender must be statutorily eligible for probation. A defendant is eligible for community corrections, under subsection (c), if he demonstrates a special need that is treatable and could best be served in the community, i.e. chronic alcohol and drug abuse or mental health problems. The appellant has demonstrated and proven a notable mental deficiency with accompanying emotional and behavioral problems. We conclude that his mental health problems would be better treated in the community. Thus, the appellant has shown a special need and is, therefore, entitled to community corrections under subsection (c).

Based upon our *de novo* review of the record, we conclude that the appellant is an eligible and appropriate offender for sentencing under the Tennessee Community Corrections Act. See Tenn. Code Ann. § 40-36-106. The record reflects the appellant's considerable potential for rehabilitation. See

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[6]We note that the appellant does not meet the minimum criteria necessary to be considered eligible for community corrections under Tenn. Code Ann. § 40-36-106(a). Only persons "who are convicted of non-violent felony offenses" are eligible for community corrections. Tenn. Code Ann. § 40-36-106(a)(3). Aggravated child abuse is a violent crime, therefore the appellant cannot meet the requirements of (a).

Tenn. Code Ann. § 40-35-103(5). However, the appellant's sentence should be combined with a period of confinement. Tenn. Code Ann. § 40-35-104(c)(5) and (8). Therefore, we conclude that a sentence of confinement coupled with a sentence to the community corrections program would both serve the ends of justice and fulfill the rehabilitative needs of the appellant.

The judgment of conviction is modified to reflect that the appellant is required to serve a period of one year continuous confinement in the county jail or workhouse.[7] After completion of this period of confinement, the appellant is sentenced to the local community corrections program for the remainder of his eight year sentence. The appellant will be required to perform 200 hours of community service work and to comply with all other reasonable conditions imposed by either the trial court or program guidelines which are deemed necessary to meet the goals of the Community Corrections Act. Additionally, the appellant is required to submit to a mental health examination at a facility utilized by the local community corrections program and complete any course of treatment or counseling as recommended.

The case is remanded to the trial court for entry of an order modifying the manner in which the appellant shall serve the sentence imposed consistent with this opinion.

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DAVID G. HAYES, Judge

[7]The record reflects that the appellant has been continuously confined in the Department of Correction since his sentencing hearing. We note that any time which has already been served by the appellant will be credited toward his one year period of confinement in the local jail or workhouse.

CONCUR:

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DAVID H. WELLES, Judge

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JOHN A. TURNBULL, Special Judge