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

FILED

March 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9505-CR-00143
Appellee	)	
	)	SULLIVAN COUNTY
vs.	)	
	)	Hon. **R. JERRY BECK**, Judge
M. STEVEN LILLY,	)	
	)	(Selling over 1/2 oz. marijuana)
Appellant	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, M. Steven Lilly, pled guilty in the Criminal Court of Sullivan County to two counts of sale of marijuana, class E felonies.[1] He now appeals from the consequent imposition of two concurrent eighteen month sentences. The sole issue presented for our review is the trial court's denial of alternative sentencing. Specifically, the appellant argues that the trial court should have ordered a sentence of probation, intensive probation, or community corrections.

After a review of the record, the judgment of the trial court is affirmed.

I. Facts

On January 19, 1995, the appellant filed a motion for alternative sentencing. A sentencing hearing was held that same day. Teresa Lilly, the appellant's wife, was the first witness to testify at the sentencing hearing. Mrs. Lilly testified that she and the appellant had been happily married for five years. When questioned about her health, Mrs. Lilly replied:

> I am not doing too good. I have reflex synthetic dystrophy which is a blood disorder, and I have epidural fibrosis which is fibrous tissues wrapped around my spine . . . . Degenerative disc disease . . . and I had a bone scan in the last month, and now, they say, I have degenerative osteoarthritis in both hips and both legs.

Because of her physical condition, Mrs. Lilly is totally disabled and receives social security benefits. She stated that she is not able to care for herself, and that she is physically dependant upon her husband. She added that she has no other family in the area to care for her. In addition to this testimony, Mrs. Lilly stated that, if the appellant received an alternative sentence, she was willing to

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[1]The sales involved approximately twenty-eight grams of marijuana and eight hundred and ninety-seven grams of marijuana respectively.

provide all the "moral, family, and social support" necessary for the appellant to meet the terms of probation.

The only other witness to testify was the appellant. He corroborated his wife's testimony regarding her physical disabilities and her dependance upon him for care and support. He stated that, at the time of the hearing, he was employed by Hutton Masonry Contractors and had been so employed since October, 1993. He added that, until the "first part of 1994," he worked at both the Piccadilly Cafeteria and at Hutton Contractors "until problems with his wrist" developed.[2] The appellant testified that he had received his GED, and that, if given a sentence of probation, he would continue working in order to support his wife.

With respect to his drug and alcohol abuse, the appellant claimed that he had taken steps necessary to rid himself of these addictions. To verify this allegation, the appellant introduced a certificate of achievement for completion of intensive phase one and two of Bristol Regional Counseling Center's outpatient program for chemical dependency. The appellant added:

> So, far as my record goes, my father was an alcoholic, I've been subjected to it, and had alcoholic and drug problems since I was fairly young. Those problems with alcohol and drugs have been the sole mitigating factor in any arrest that I have had. I had not admitted to myself until about a year ago that I had alcoholic problems, and was addicted. I sought help with Bristol Regional Counseling on that. . . . I've had complete sobriety since that time, the date of January the 25th of 1994.

The appellant conceded that he has prior convictions for driving on a revoked license and driving under the influence but asserted that he had completed the required programs and his license had been reinstated. He added that he also has a 1979 conviction for robbery in the State of California.

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[2]The appellant's testimony revealed that he had surgery for carpal tunnel syndrome and, at the time of the hearing, was under the care of a doctor.

With respect to the instant offenses, the appellant testified that he only became involved in selling drugs because of financial hardship. He stated, "Heavy medical bills, it came to the point, do you pay the rent, or do you get her prescriptions, or electric bill?" Moreover, the appellant added that, once he was charged, he fully cooperated with the police, leading to the arrest of the appellant's supplier. Furthermore, the record indicates that Detective Fisher, a participating officer in the appellant's arrest who usually does not recommend probation for drug offenders, was not opposed to probation in the appellant's case. In addition to this testimony, the appellant introduced letters from both his past and present employers stating that the appellant "is a very good worker and is my top man;" "[he has done an excellent job;" "he has an excellent attendance record and is a very dedicated employee;" and "Steve always displays a good attitude and is dependable."

The presentence report reveals that the appellant is thirty-five years old. He began drinking at an early age and began using marijuana at the age of fourteen. This use progressed to the abuse of speed, Valium, cocaine, Dilaudid, and, on one occasion, hashish and PCP.

The trial court denied any form of alternative sentencing due to the appellant's "continuing pattern of crimes" and because "[p]rior rehabilitation has failed." On February 1, 1995, the court entered these additional findings:

> (1) . . .that the unfavorable factors heavily outweigh favorable factors;
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> (2) [p]rior efforts at rehabilitation by use of probation methods have been unsuccessful;
>
> (3) . . .that rehabilitation in any program of alternative sentencing would be unsuccessful considering the defendant's past record and past performance;
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> (4) [a] person with a current outstanding warrant for violation of probation would not . . .be a favorable candidate for

probation;[3]

(5) [t]he defendant's social history and prior record of criminal conviction[s] [are] not favorable;

(6) . . .considering the special needs provision of the Community Corrections Act; and upon a review of all the facts of the case, . . .it would not be in the interest of the public to sentence the defendant to community corrections; and

(7) [t]he record does not support the defendant's contention that he is a proper person to receive alternative sentencing.

II. Review of the Sentence

In his only issue, the appellant argues that the trial court erroneously imposed a sentence of total confinement. Specifically, the appellant argues that he should have received a sentence of probation, intensive probation, or community corrections. We disagree.

When a defendant challenges the manner of his sentence, this court must conduct a *de novo* review with the presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the present case, because the trial court properly considered such principles, the presumption of correctness applies.

In determining the appellant's suitability for an alternative sentence, we first determine whether the appellant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bingham, 910

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[3]The proof establishes that a violation of probation warrant, stemming from the appellant's 1979 robbery conviction, remains outstanding in California. A notation in the record indicates that the State of California does not seek extradition.

S.W.2d 448, 453 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995) (citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). To be eligible for the statutory presumption, three requirements must be met. The appellant must be convicted of a class C, D, or E felony. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). He must be sentenced as a mitigated or standard offender. Id. And, the defendant must not fall within the parameters of Tenn. Code Ann. § 40-35-102(5) (1994 Supp.). This means that the defendant cannot have a criminal history evincing either a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Id. Although the appellant is a range I standard offender of two class E felonies, he does not fall within the parameters of Tenn. Code Ann. § 40-35-102(5). Therefore, he is not afforded the presumption favoring alternative sentencing.

Moreover, we conclude that, even if the appellant was entitled to the presumption, the presumption is rebutted by "evidence to the contrary." Such evidence may be found in the presentence report, the evidence presented by the State, the testimony of the accused, or any other source provided that it is part of the record. Bonestel, 871 S.W.2d at 167; see also Tenn. Code Ann. § 40-35-102(6). Guidance as to what constitutes "evidence to the contrary" may be found in the sentencing considerations codified in Tenn. Code Ann. § 40-35-103 (1990):

> (1) Sentencing involving confinement should be based on the following considerations:
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> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement 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
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the

defendant.

Bingham, 910 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 169).

The appellant's prior criminal history includes seven convictions as an adult. The presentence report also reflects that, as a juvenile, the appellant was adjudicated delinquent for the act of breaking and entering and was committed to a youth correctional facility.

Regarding the failure of past efforts at rehabilitation, the trial court found that the appellant has been afforded probation on numerous occasions and all such attempts at rehabilitation have failed. Specifically, the trial court noted:

> [T]he defendant received a four year sentence to general probation on February 27, 1980, for [his] robbery conviction. The report indicates that this probation was unsuccessful in that a bench warrant is outstanding at this time in California, charging violation of probation. At about age 17, the defendant, as a juvenile, was placed on probation for breaking and entering . . . . [And] [m]ore recent offenses indicate a probation sentence for D.U.I. on August 16,1989. A probated sentence for D.U.I. on April 11, 1990. [And] [a] probated sentence for [d]riving on a revoked license on December 8, 1993.

The trial court found that the presumption of alternative sentencing was rebutted by the appellant's "long history of involvement with the law, beginning when he was a juvenile, and [the fact that] various rehabilitation programs, including probation, have previously been attempted." See Tenn. Code Ann. §§ 40-35-103(1)(A), -103(1)(C). Moreover, the court noted, with disapproval, that the appellant is seeking probation while a warrant remains outstanding for violation of a previous probationary status. We agree with these findings.

Upon *de novo* review, we conclude that, because he does not fall within the parameters of Tenn. Code Ann. § 40-35-102(5), the appellant is not entitled to the presumption favoring alternative sentencing. Moreover, even if the

presumption applied, we conclude that confinement is necessary due to the appellant's "long history of criminal conduct" and because "measures less restrictive than confinement have failed." Tenn. Code Ann. §§ 40-35-103(1)(A), -103(1)(C). Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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WILLIAM M. BARKER, Judge

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JERRY L. SMITH, Judge