

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

FILED
February 13, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
)
v.)
)
)
JOHN ERIC LIPSCOMB,)
)
 APPELLANT.)

No. 01-C-01-9506-CR-00185

Davidson County

Ann Lacy Johns, Judge

(Sentencing)

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OPINION FILED: _____

REVERSED AND REMANDED FOR A SENTENCING HEARING

Joe B. Jones, Presiding Judge

OPINION

The appellant, John Eric Lipscomb, appeals as of right from a judgment of the trial court revoking his Community Corrections sentences and sentencing him to serve four (4) years in the Department of Correction in each count of a four-count indictment and ordering that three of the sentences be served consecutively. The effective sentence imposed was twelve (12) years. Two issues are presented for review. The appellant contends that the sentences imposed are excessive; and the trial court abused its discretion in ordering consecutive sentencing. The appellant does not challenge the revocation of his Community Corrections sentence.

The judgment of the trial court is reversed, the sentences imposed are set aside, and this case is remanded to the trial court for a new sentencing hearing for the reasons set forth in this opinion.

The appellant entered pleas of guilty to four counts of aggravated perjury. The trial court sentenced the appellant as a Range I standard offender to confinement for two (2) years in the Department of Correction pursuant to a plea bargain agreement. Subsequently, the trial court ordered that the appellant would be required to serve six months day for day, and the balance of the sentence would be served pursuant to the Community Corrections Act of 1985. The appellant served the six months in confinement. However, he violated several terms of the Community Corrections sentence.

Two revocation warrants were issued for the appellant's arrest based upon the violations of the agreement. An evidentiary hearing was conducted to determine the merits of the allegations of the two warrants. The trial court found that the appellant tested positive for marijuana, failed to pay the court costs as ordered, failed to pay the supervision fees as ordered, and absconded after testing positive for marijuana. The appellant in essence admitted all of these violations. His testimony at the revocation hearing established the violations. When the hearing was concluded, the trial court stated:

Obviously, he [the appellant] will be revoked from his alternative sentencing program. He specifically, through counsel, requested that no form of alternative sentencing be further considered. That is not necessarily his option. He could have been put back on the program without requesting it according to the case law, but I'm perfectly happy to accede to his wishes and no longer waste a slot in the privileged status

of Community Corrections on Mr. Lipscomb.

His sentences will be increased to four years on each count. The first three of those sentences will be ordered served consecutively to each other. The final one to be served concurrent, for a total effective sentence of 12 years. And this is based on 40-35-115(b)(2). This sentence now imposed correctly reflects both the seriousness of the original offenses and the seriousness of Mr. Lipscomb's bad attitude toward the criminal justice system. . . .

When a trial court revokes a community corrections sentence, the court has the authority to resentence the accused. Tenn. Code Ann. § 40-36-106(e)(3) provides:

The court shall also possess the power to revoke the sentence imposed at any time due to the conduct of the defendant. . . , and the court may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed, less any time actually served in any community-based alternative to incarceration.

The purpose of this statute is to permit a trial court to impose a new sentence if the nature, circumstances, and frequency of the accused's violations warrant a different type of alternative sentence or incarceration. However, the provisions of the statute do not permit a trial court to arbitrarily establish the length of the new sentences. The statute should not be used by trial courts for the sole and exclusive purpose of punishing an accused for violating the provisions of a Community Corrections sentence.

A sentence imposed pursuant to this statute may exceed the length of the sentence initially imposed by the trial court. This practice does not offend the Double Jeopardy Clause of either the United States Constitution or the Tennessee Constitution. State v. Griffith, 787 S.W.2d 340, 341-342 (Tenn. 1990); see also State v. Patty, ____ S.W.2d ____ (Tenn. 1995) (decided at Knoxville, April 3, 1995).

The Tennessee Criminal Sentencing Reform Act and the Community Corrections Act are in pari materia. See State v. Taylor, 744 S.W.2d 919, 920 (Tenn. Crim. App. 1987). Consequently, when a trial court opts to impose a sentence which exceeds the length of the initial sentence based on a breach of the terms of the sentence, the trial court must conduct a sentencing hearing pursuant to the Tennessee Criminal Sentencing Reform Act of 1989 and the sentence imposed must conform to the provisions of this Act.

See Tenn. Code Ann. §§ 40-35-209(a) and -210 (a) through (e).

If the trial court opts to enhance the sentence, the court must state its reasons for imposing a new sentence on the record. Tenn. Code Ann. § 40-35-209(c) and 210(f)-(g). Tenn. Code Ann. § 40-35-209(c) provides in part that the record of the sentencing hearing "shall include specific findings of fact upon which application of the sentencing principles was based." Tenn. Code Ann. § 40-35-210 provides in part:

(f) Whenever the court imposes a sentence, it shall place on the record either orally or in writing what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209.

(g) A sentence must be based on evidence in the record of the trial, the sentencing hearing, the presentence report, and, the record of prior felony convictions filed by the district attorney general with the court as required by § 40-35-202(a).

These provisions are mandatory. State v. Gauldin, 737 S.W.2d 795, 798 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). The fact that this Court reviews sentences de novo does not relieve the trial court from complying with these statutory mandates. Gauldin, 737 S.W.2d at 798. As this Court said in Gauldin:

We wish to make it clear . . . that the fact we are now required to make a de novo review of these sentencing issues does not in any way relieve the trial judges of their responsibility and duty to comply with the guidelines and mandates of the Sentencing Act including the making of a proper record.

737 S.W.2d at 798 (quoting State v. Anthony D. Davis, et. al, Hamilton County No. 954 (Tenn. Crim. App., Knoxville, November 25, 1986), per. app. denied (Tenn. 1987)); see State v. Dulsworth, 781 S.W.2d 277, 289-90 (Tenn. Crim. App.), per. app. denied (Tenn. 1989).

The purpose of these statutory requirements is to guarantee the preparation of a proper record for appellate review. An appellate court cannot review either the length or method of serving a sentence unless the findings of the trial court are contained in the record.

In this case, the trial court did not address the purposes outlined in the Tennessee Criminal Sentencing Reform Act of 1989, Tenn. Code Ann. § 40-35-102, the sentencing

considerations enumerated in the Act, Tenn. Code Ann. § 40-35-103, the mitigating factors that might have been present, Tenn. Code Ann. § 40-35-113, or the enhancement factors which were present, Tenn. Code Ann. § 40-35-114. Nor does the record reveal how the trial court applied the mitigating and enhancement factors, if any, that applied in this case. Furthermore, the trial court did not explain why consecutive sentencing was appropriate in this case. Before consecutive sentencing is warranted, there must be a finding that "an extended sentence is necessary to protect the public against further criminal conduct by the defendant," and "the consecutive sentences must reasonably relate to the severity of the offenses committed." State v. Wilkerson, 905 S.W.2d 933. 939 (Tenn. 1995).

Given the state of the record, this Court cannot conduct the statutorily mandated de novo review of the new sentences. Consequently, this Court must reverse the judgment of the trial court, set aside the sentences, and remand this case to the trial court for a sentencing hearing. See State v. Keith F. Batts, Davidson County No. 01-C-01-9210-CR-00326 (Tenn. Crim. App., Nashville, February 18, 1993).

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH H. WALKER, III, SPECIAL JUDGE