IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

FILED

March 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9502-CR-00038
	)	
	)	Blount County
v.	)	
	)	Hon. D. Kelly Thomas, Judge
	)	
DOUGLAS A. MERRICK,	)	(Denial of Probation)
	)	
Appellant.	)	

For the Appellant:

Mack Garner
District Public Defender
318 Court Street
Maryville, Tennessee 37801

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Michelle L. Lehmann
Assistant Attorney General of Tennessee
450 James Robertson Parkway
Nashville, TN 37243-0493

Michael L. Flynn
District Attorney General
and
Assistant District Attorney General
Blount County Courthouse
Maryville, TN 37804-5906

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Douglas A. Merrick, was convicted upon pleas of guilty in the Blount County Circuit Court of two counts of forgery and two counts of uttering a forged instrument, Class E felonies. He was sentenced as a Range I, standard offender to concurrent one-year sentences for each count and ordered to pay a total of $878.72 in restitution. His sentences are to be suspended and supervised probation imposed after he serves sixty days in the county jail. The trial court also ordered that the defendant is eligible for work release but conditioned his eligibility on payment of $30.00 per week in restitution. In this appeal as of right, the defendant claims that the trial court erred by denying him full probation. We disagree.

At the sentencing hearing, the defendant admitted signing and cashing ten stolen checks ranging in amounts from $200.00 to more than $300. The defendant admitted that his prior record included a felony conviction for possession with the intent to sell or deliver marijuana and five misdemeanor convictions. He said that he was on probation from the felony conviction when he committed the present offenses and also admitted that he had violated probation one other time by failing to perform community service work. He said that he served eighteen months when his probation for the felony was revoked and that serving time changed his attitude towards the law. However, he admitted using marijuana after his release and said that he last used the drug about a month before the sentencing hearing in this case.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court follows the statutory sentencing procedure, makes findings

of fact that are adequately supported in the record, and gives due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action 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).

In conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103 and -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

A defendant who is eligible for probation has the burden of establishing suitability for probation. As the Sentencing Commission Comments to T.C.A. § 40-35-303(b) state, although "probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." See State v. Fletcher, 805 S.W.2d at 787. However, as the defendant does not meet the description of one who should be given first priority regarding a sentence involving incarceration under T.C.A. § 40-30-102(5), and has been convicted of Class E felonies as a standard offender, he is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6).

The presumption of suitability may be rebutted if any of the following actors outweigh the defendant's rehabilitative capabilities: (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) 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 (3) measures less restrictive than confinement have been frequently or recently applied unsuccessfully to the defendant. See T.C.A. § 40-30-103(1); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Fletcher, 805 S.W.2d at 787-788. The trial court relied upon the first and third sentencing considerations in denying full probation, noting the defendant's criminal history and his previous probation violations. In reaching its decision, the trial court considered the defendant's alleged change in attitude and his obtaining employment, but it also factored in his recent use of marijuana. Its conclusion that the circumstances warranted the defendant being confined for sixty additional days with work release capacity was entirely reasonable.

The defendant has failed to overcome the presumption that the trial court was correct in its denial of full probation. The judgment of the trial court is affirmed.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
John H. Peay, Judge

_____
David G. Hayes, Judge