IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE, APPELLEE,	)	No. 02-C-01-9502-CR-00049
v.	)	Shelby County
	)	Arthur T. Bennett, Judge
	)	(Sentencing)
JOHN I. RODGERS, APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Judge

O P I N I O N

The Shelby County Grand Jury sitting at Memphis returned a two count indictment against the appellant, John I. Rodgers. Both counts charged the appellant with the aggravated rape of his stepdaughter. These cases were subsequently tried. The jury could not agree upon a verdict. Nine jurors voted to convict the appellant and three jurors voted to acquit him.

The state and the appellant subsequently entered into a plea bargain agreement. The appellant entered an Alford plea to one count of sexual battery, a Class E felony. The trial court sentenced the appellant to a Range I sentence consisting of a $500 fine and confinement for one (1) year in the Shelby County Correction Center pursuant to the agreement. The plea bargain agreement did not address the question of an alternative sentence.

The trial court conducted a sentencing hearing to determine whether the appellant's sentence should be suspended and the appellant placed on probation. The court refused to suspend the appellant's sentence.

One issue is presented for review: "Whether the trial judge erred in refusing to grant the defendant probation and therefore abused his discretion."

The judgment of the trial court is affirmed.

When an accused challenges the manner of serving a sentence, it is the duty of this Court to conduct a de novo review on the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d)(1990).[1] This presumption is "conditioned upon the affirmative

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[1]The appellant states in his brief: "In reviewing the issue of an alleged excessive sentence, this Court conducts a de novo review on the record, without presuming that the Trial Court's determinations are correct. Tenn. Code Ann. § 40-35-402(d)." This is not a correct statement of current law. Moreover, the statute cited governs the state's, not the accused's, right to appellate review, and the standard of review applicable to sentencing issues raised by the state.

Tenn. Code Ann. § 40-35-401(d), which was amended several years ago, governs the standard of review when the accused raises a sentencing issue. This statute states in part: "When reviewing sentencing issues raised pursuant to subsection (a), including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." (Emphasis added).

showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances."[2] The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or the determinations made by the trial court which are predicated upon uncontroverted facts.[3]

There are several factors that this Court must consider in conducting a de novo review of a sentencing issue. The Tennessee Criminal Sentencing Reform Act of 1989 requires the appellate court to consider (a) the evidence received at the trial and sentencing hearing, if any, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel concerning sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating and enhancement factors, (g) any statement made by the accused, and (h) the accused's potential for rehabilitation or treatment.[4]

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous.[5]

If an accused has been convicted of a Class C, D, or E felony and sentenced as an especially mitigated or standard offender, there is a presumption, rebuttable in nature, that the accused is a favorable candidate for alternative sentencing unless disqualified by some provision of the Tennessee Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-102 (1990) provides in part:

> (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving

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[2]State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

[3]State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993).

[4]Tenn. Code Ann. §§ 40-35-102, -103 and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

[5]Commission Comments to Tenn. Code Ann. § 40-35-401 (1990); Ashby, 823 S.W.2d at 169; State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991).

incarceration; and

> (6) A defendant who does not fall within the parameters of subdivision (5) and is an especially mitigated or standard offender convicted of a Class C, D[,] or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.

The sentencing process must necessarily commence with a determination of whether the accused is entitled to the benefit of the presumption.[6] As the Supreme Court said in Ashby: "If [the] determination is favorable to the defendant, the trial court must presume that he is subject to alternative sentencing. If the court is presented with evidence sufficient to overcome the presumption, then it may sentence the defendant to confinement according to the statutory provision[s]." [7]

This Court's ability to review the issue presented for review is hampered by the incompleteness of the record. While the trial court made numerous references to the evidence adduced during the trial, the evidence introduced at the trial has not been memorialized and included in the record. Also, the record does not contain a transcript of the submission hearing.

When an accused seeks appellate review of an issue in this Court, it is the duty of the accused to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues which form the basis of the appeal.[8] When the record is incomplete and does not contain the proceedings relevant to an issue, this Court is precluded from considering the issue.[9] Furthermore, this Court must conclusively

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[6]Ashby, 823 S.W.2d at 169; Bonestel, 871 S.W.2d at 167.

[7]823 S.W.2d at 169 (emphasis added).

[8]State v. Richardson, 875 S.W.2d 671, 674 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993), per. app. denied (Tenn. 1994); State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); State v. Keller, 813 S.W.2d 146, 150 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Rhoden, 739 S.W.2d 6, 14 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987).

[9]State v. Groseclose, 615 S.W.2d 142, 147 (Tenn. 1981), cert. denied, 454 U.S. 882, 102 S.Ct. 366, 70 L.Ed.2d 193 (1981); Banes, 874 S.W.2d at 82; State v. Locke, 771 S.W.2d 132, 138 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989); Roberts, 755 S.W.2d at 836; Rhoden, 739 S.W.2d at 14-15; Miller, 737 S.W.2d at 558.

presume that the ruling of the trial court was correct.[10]

This rule applies with equal force to sentencing issues.[11] In State v. Bunch,[12] the accused, as in this case, sought probation at a sentencing hearing. The trial court relied upon the evidence adduced at the trial in denying the application for probation. However, the accused, as in this case, did not have the trial proceedings memorialized and included in the record. In holding that the record was insufficient for appellate review of the issue, the Supreme Court said:

> The trial judge stated that "the Defendant lied under oath in the trial of this case and is therefore not entitled to probation." An appellate court is not authorized to substitute its judgment for that of the trial court when it is supported by evidence. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). Here we have a conclusion drawn by the trial court on the Defendant's credibility and truthfulness and we have no evidentiary record of the trial proceedings from which he drew his conclusion. The trial judge had the opportunity to evaluate the Defendant's testimony in the light of the other evidence presented in order to determine the issue of truthfulness. We have no way of knowing whether or not the record would support the trial judge's conclusion that "the Defendant lied under oath." It is the duty of the party seeking review of the action of the trial court to prepare a record sufficient to enable the reviewing court to determine if the discretion has been abused. In a case such as this, where the trial judge has predicated denial of probation upon Defendant's untruthfulness at trial, a reviewing court cannot determine if his discretion has been abused without a transcript of the evidence at trial.
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> As this Court succinctly stated in Stiller v. State, 516 S.W.2d 617, 622 (Tenn. 1974), "A review of any discretionary action, at any stage of the proceedings, wholly depends upon full knowledge of all the attendant facts and circumstances." This Court concluded that in the absence of a substantial and significant portion of the record, which no doubt was persuasive upon the trial judge, we are not in a position to

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[10] Richardson, 875 S.W.2d at 674; Oody, 823 S.W.2d at 559; Locke, 771 S.W.2d at 138; Miller, 737 S.W.2d at 558; State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

[11] State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Hayes, 894 S.W.2d 298, 300 (Tenn. Crim. App. 1994), per. app. denied (Tenn. 1995); State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993); State v. Brown, 756 S.W.2d 700, 705 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Beech, 744 S.W.2d 585, 588 (Tenn. Crim. App.), per. app. denied (Tenn. 1987); State v. Ollie G. Garrett, Shelby County No. 02-C-01-9404-CR-00057 (Tenn. Crim. App., Jackson, October 19, 1994); State v. Melvin Kivett, Blount County No. 03-C-01-9306-CR-00201 (Tenn. Crim. App., Knoxville, July 7, 1994); State v. Wayne Eugene Boring, Knox County No. 03-C-01-9307-CR-00244 (Tenn. Crim. App. Knoxville, February 9, 1994).

[12] 646 S.W.2d 158 (Tenn. 1983).

evaluate his actions.[13]

A similar result was reached in State v. Hayes,[14] where the accused failed to include a transcript of the trial proceedings in the record transmitted to this Court. In ruling, this Court said:

> Initially, we note that neither party included a transcript of the trial in the record on appeal. . . .
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> On appeal, it is our obligation to conduct a de novo review, but with a presumption that the trial court's determinations are correct. See T.C.A. §§ 40-35-401(d) and -402(d). Under such a standard, a party complaining about a sentence has the burden of establishing that the trial court imposed an improper one. In this respect, failure to include a transcript of the trial makes it impossible for us to conduct an appropriate de novo consideration of the case or to determine whether the trial court erred relative to its determinations which were based in any part on that evidence.[15]

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Another concern of this Court is the report of Dr. Howard Jacobson, a psychologist. No effort was made to have the report marked as an exhibit. It is simply included in what was formerly referred to as the "technical record." Before this Court may consider an exhibit, it must have been (a) received into evidence, (b) marked by the trial court, the clerk, or the court reporter as having been received into evidence as an exhibit, (c) authenticated by the trial court, and (d) included in the transcript of the evidence transmitted to this Court.[16]

In the interest of justice, this Court has conducted a de novo review based on the record submitted by the appellant. Due to the incompleteness of the record, this Court finds that the appellant has failed to establish that the ruling of the trial court was

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[13]646 S.W.2d at 160.

[14]894 S.W.2d at 300.

[15]Hayes, 894 S.W.2d at 300.

[16]Tenn. R. App. P. 24(f); Roberts, 755 S.W.2d at 838; Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987); State v. Melson, 638 S.W.2d 342, 351 (Tenn. 1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983); Krause v. Taylor, 583 S.W.2d 603, 605-06 (Tenn. 1979).

erroneous. In other words, the appellant has failed to overcome the statutory presumption of correctness afforded the determinations made by the trial court.

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JOE B. JONES, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOHN K. BYERS, SENIOR JUDGE