IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

FILED

December 28, 1995

Cecil Crowson, Jr.

Appellate Court Clerk

MICHELLE STARNES,	)
	) C.C.A. No. 02C01-9504-CC-00103
Appellant,	)
	) Henry County
V.	)
	) Hon. Julian P. Guinn, Judge
	)
STATE OF TENNESSEE,	) (Denial of Probation: Simple Possession
	) (2) counts; Violation of Registration)
Appellee.	)

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OPINION FILED: _____

AFFIRMED AS MODIFIED

PAUL G. SUMMERS,
Judge

O P I N I O N

A jury found appellant, Michelle Starnes, guilty of two (2) counts of simple possession of a controlled substance and violation of registration. The trial judge denied appellant's request for alternative sentencing and ordered confinement for eleven (11) months, twenty-nine (29) days for each count of possession and ten (10) days for violation of registration to be served concurrently. Appellant now appeals the trial court's denial of probation. We modify in part and affirm.

Following a Crime Stopper's tip, appellant was stopped for violation of registration. Officers conducted a consensual search of appellant's vehicle and recovered 10.1 grams of cocaine, 25.6 grams of marijuana, benzocaine (a cutting agent), and drug paraphernalia. Appellant was charged with two (2) counts of possession of a controlled substance with intent to deliver or sell and violation of registration. A jury trial resulted in misdemeanor convictions for two (2) counts of simple possession and violation of registration.

Following the jury convictions, appellant submitted an Alternative Sentencing Memorandum. In this memorandum, appellant contends that she is an appropriate candidate for probation because she is: (1) a first time offender with no previous record, (2) a mother of a very young child, (3) convicted of a crime that is non-violent in nature, (4) employed, and (5) actively pursuing her GED. However, the record indicates that the contentions in this memorandum were neither stipulated to nor proven at the sentencing hearing.

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness, however, is conditioned upon an 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).

Upon review of the record, we find that the appellant was not sentenced according to the Sentencing Reform Act's principles. Tenn. Code Ann. § 40-35-102(6) (1990) states that especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates for alternative sentencing unless sufficient evidence rebuts the presumption. Although the statute fails to delineate whether the presumption attaches to sentencing for misdemeanors, courts have held that "the same presumption would logically apply to misdemeanors." State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. 1992); State v. Marshall, No. 02C01-9206-CR-00128 (Tenn. Crim. App. filed Sept. 11, 1992).

There is no indication in the record that the trial judge began with the presumption that appellant was a candidate for alternative sentencing. Furthermore, the record fails to affirmatively show whether any of the statutory guidelines or factors were taken into consideration when sentencing the appellant. It appears the trial judge initially imposed incarceration and then explained why a sentence less restrictive than confinement would not be appropriate.[1] Ashby, 823 S.W.2d at 169. Accordingly, we review de novo.

In conducting a de novo review of a defendant's sentence, including the manner in which he or she is to serve the sentence, this Court must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the pre-sentence report, (3) the principles of sentencing and arguments to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any

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[1] The trial judge did not deny probation due to doubts of appellant's rehabilitative capabilities. The trial judge's denial of probation stemmed from his view that any sentence less than confinement would "reward [appellant]." See State v. Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991).

mitigating and enhancement factors, (6) any statements made by the defendant in his or her own behalf, and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210, -103, and -210 (1990). Among the factors applicable to the probation determination are the circumstances of the offense, the defendant's criminal record, social history, present condition, the deterrent effect upon the defendant, and the best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978).

Under the 1989 Act, sentences involving confinement are to be based on the following considerations contained in Tenn. Code Ann. § 40-35-103(1) (1990):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
> (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. . . .

As can be gleaned from the record, (A) and (C) are not implicated. Therefore, whether or not appellant should be denied probation will be decided under Tenn. Code Ann. § 40-35-103(1)(B).

Tennessee courts have held that probation may be properly denied based upon the circumstances surrounding the offense. State v. Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991); State v. Travis, 622 S.W.2d 529 (Tenn. 1981). However, for such a denial of relief to occur, 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 probation." State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985). The standard enunciated in Cleavor has essentially been codified in the first part of Tenn. Code Ann. § 40-

35-103(B) which provides for confinement if it "is necessary to avoid depreciating the seriousness of the offense." Hartley, 818 S.W.2d at 374.

Upon review of the entire record, we find that appellant is a candidate for alternative sentencing. Although appellant's Alternative Sentencing Memorandum is not proof, it appears from the record that appellant is a first time offender with no previous record. Appellant was convicted of misdemeanors which were non-violent in nature. Her potential for rehabilitation appears to be good. Appellant is only twenty (20) years old. Since her arrest, she has found employment and begun classes to obtain her GED. Furthermore, according to the record, measures less restrictive than incarceration have never been applied to her.

As to rebutting the presumption for alternative sentencing, we find that the state did not present evidence that incarceration was necessary to deter others from committing similar offenses. See Hartley, 818 S.W.2d at 375 (stating that statutory denial of probation because of deterrence, alone, must be supported by evidence indicating special need or consideration relative to jurisdiction which would not be addressed by normal deterrence inherent in any criminal penalty); see also State v. Ashby, 823 S.W.2d 166, 169-170 (Tenn. 1991) (holding that deterrence should be qualified or reliance upon deterrence would defeat the whole concept of alternative sentencing); State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim App. 1993) (indicating that the general proposition that similar crimes needed to be deterred in area may be insufficient). However, the record indicates that appellant may have been less than candid with the court. See State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984) (holding defendant's untruthfulness is a factor which may be considered in determining appropriateness of probation). We may also take into account the nature of the offense. See Stiller v. State, 516 S.W.2d 617, 621 (Tenn. 1974) (stating the nature of offense is but one of a number of considerations).

We acknowledge that the issue is very close. We respectfully submit that had the trial judge's decision conformed with the sentencing guidelines and principles, the evidence in the record would not overcome a presumption of correctness. However, reviewing the record de novo, and given the legislative mandate, we must modify the sentence. We affirm the trial judge's finding of concurrent sentences of eleven (11) months twenty-nine (29) days for each count of simple possession, and ten (10) days for the violation of registration. However, we modify the sentences by suspending all but the first 180 days of appellant's confinement which appellant will serve concurrently in the county jail. Upon release from jail, appellant will serve the remainder of her sentences on supervised probation, as directed by the trial court.

AFFIRMED AS MODIFIED

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PAUL G. SUMMERS, JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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WILLIAM M. BARKER, JUDGE