IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	)
	) C.C.A. No. 02C01-9411-CR-00254
Appellee,	)
	) Shelby County
V.	)
	) Hon. W. Fred Axley, Judge
	)
VITO SUMMA,	) (Assault)
	)
Appellant.	)

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED IN PART

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Vito Summa, pled guilty to assault in the Shelby County Criminal Court. Judge Fred Axley presided. He was sentenced to eleven (11) months and twenty nine (29) days confinement with five (5) months plus one (1) week actual confinement. The trial judge also ordered two (2) years probation following appellant's release from confinement. Appellant's brief raises the sole issue of whether the trial court should have granted full probation. We affirm in part and reverse in part.

Both the appellant and the victim lack credibility. However, what can be gleaned from the record is that appellant's wife drafted the victim a check for two hundred ($ 200.00) dollars. The victim told appellant's wife that he had misplaced the check. Appellant's wife then drafted the victim another check which the victim promptly cashed. One month later, the victim cashed the original check he allegedly had lost. Appellant went to the victim's home to collect two hundred ($ 200.00) dollars. An ensuing scuffle resulted in injuries to the victim's face, neck, and scalp. Appellant was later arrested and charged with aggravated assault but pled guilty to Class A misdemeanor assault.

At the sentencing hearing, appellant put on proof that he was a college student, had a wife and child, and that two of his former employers considered him to have been a good employee. However, proof also established that appellant had previously been arrested at a nightclub for assault. The assault charges were ultimately dismissed and expunged. The record also indicates that appellant received a less than honorable discharge from the Marines. Appellant testified that he did not remember the details of his discharge but alleges he requested the discharge so that he could marry his pregnant girlfriend.

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 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). The defendant is presumed to be a favorable candidate for alternative sentencing unless sufficient evidence rebuts the presumption. Tenn. Code Ann. § 39-17-417(C)(2); Tenn. Code Ann. § 40-35-102(5) - (6) (1990) & Supp. 1994); State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993); see State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim App. 1992) (finding "because especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates for alternative sentencing, the same presumption would logically apply to misdemeanors"); see also State v. Marshall, No. 01-C-019203CC00073 (Tenn. Crim. App. Sept. 11, 1992) (stating presumption created by Tenn. Code Ann. § 40-35-102(6) would logically apply to misdemeanors).

The trial judge found appellant to be a proper candidate for alternative sentencing and ordered split confinement. In rejecting appellant's request for full probation, the trial judge: (1) emphasized the nature of the victim's injuries, (2) found that appellant had been less than candid with the court (presumably considered this factor as reducing his amenability toward treatment) see State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984) (holding defendant's untruthfulness is factor which may be considered in determining appropriateness of probation), and (3) considered both appellant's prior assault charge and his less than honorable discharge from the Marines.

We believe that appellant's lack of candor, the violent nature of the offense, and his background support the trial judge's conclusions. In light of legislative mandate, the issue is close. However, the trial judge had a much

greater vantage point with which to assess appellant, his attitude, and his potential for rehabilitation. We, therefore, affirm the denial of full probation.

II

Although appellant's brief fails to challenge the validity of the two (2) years probation, we may consider the issue under Rule 13(b) of the Tenn. R. App. P. In sentencing the appellant, the trial judge ordered as follows:

> . . . upon your plea of guilty to the offense of assault as included in the indictment -- And you got a deal, Mister. In this courtroom you got a deal. On the front end, pleading guilty to an assault. The Court finds you guilty of that offense, fixes your punishment at a fine of $ 500.00 and costs and eleven months and twenty-nine days at the Shelby County Correctional Center.
>
> And then I'm hearing, well, probation is best in the interest of me. But then I'm hearing from the victim, no this guy needs to serve time. . . .
>
> But I'm going to give you probation. Does that make you happy? You happy now? You want probation? You going back to your wife and children and sell furniture in New Jersey? Well, you got two years probation, buddy, after March 21, 1995. That's called split confinement.

The judgment sheet reflects that the trial judge suspended all but the first five (5) months and one (1) week of appellant's eleven (11) month twenty-nine (29) day sentence. However, at the end of the incarceration period, the judge ordered two (2) years probation.

Appellant was convicted of Class A misdemeanor assault. A person convicted of a Class A misdemeanor may be sentenced to not more than eleven (11) months and twenty-nine (29) days incarceration. Tenn Code Ann. § 40-35-111(e)(1) (1990). Tenn. Code Ann. § 40-35-303(c) (1990) states:

> If the court determines that a period of probation is appropriate, the court shall sentence the defendant to a specific sentence but shall suspend the execution of all or part thereof and place the defendant on supervised or unsupervised probation either immediately or after a period of confinement with the remainder of the sentence on probation supervision.

In State v. Mangrum, No. 01-C-019007CC0176 (Tenn. Crim. App. Feb. 21, 1991), the Court stated:

> We think the plain meaning of T.C.A. section 40-35-303(c) is the Judge imposes a specific sentence, suspends all or a part thereof, and places the defendant on probation for whatever part of the sentence is suspended. Probation is during the sentence actually imposed. There is no provision for probation to extend to the maximum term provided by law for the offense.

Slip op. at 2 (citations omitted). The Court further noted that a trial court could not fix a period of probation that exceeded the sentence actually imposed. Therefore, "in view of the clear statutory limitations of T.C.A. section 40-35-303(c), a probationary period beyond the sentence actually imposed would be illegal, not merely erroneous, and could be set aside at any time." Slip op. at 2. See also State v. McKinney, No. 03C01-9309-CR-00307 (Tenn. Crim. App. Oct. 26, 1994) (holding trial court should not have sentenced defendant to probationary period longer than confinement period provided by statute).

Accordingly, following appellant's actual incarceration, the trial judge should not have sentenced the appellant to a probationary period longer than six (6) months and twenty-two (22) days. We, therefore, hold that following appellant's five (5) month one (1) week incarceration, appellant will serve the remainder of his sentence on probation. The additional probationary period, such that it exceeds appellant's eleven (11) month twenty-nine (29) day sentence, is void.

AFFIRMED IN PART AND REVERSED IN PART

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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