

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 1995 SESSION

FILED
January 17, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
) No. 01-C-01-9505-CC-00131
)
 v.) Putnam County
)
) John W. Rollins, Judge
)
) (Sentencing)
 CHARLIE VAUGHN,)
)
 APPELLANT.)

FOR THE APPELLANT:

Michael D. Galligan
Attorney at Law
308 West Main Street
McMinnville, TN 37110

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Michelle L. Lehmann
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37343-0493

William E. Gibson
District Attorney General
145 Jefferson Avenue, South
Cookeville, TN 38501-3424

Lillie Ann Sells
Assistant District Attorney General
145 Jefferson Avenue, South
Cookeville, TN 38501-3424

OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Charlie Vaughn, entered a plea of guilty to the offense of theft in excess of \$10,000, a Class C felony. The trial court found that the appellant was a standard offender and imposed a Range I sentence of confinement for four (4) years in the Department of Correction. The appellant's request for an alternative sentence was denied.

The appellant presents one issue for review. He contends that:

[T]he [trial] court violated the spirit and letter of the Tennessee Sentencing Reform Act of 1989 as codified in T.C.A. [§] 40-35-101 et. seq., in sentencing the Defendant, Charlie Vaughn, to the penitentiary for four (4) years upon his plea of guilty to a Class C felony theft charge, in light of the Defendant's excellent rehabilitation potential.

Based upon the argument advanced in the appellant's brief and oral argument, the specific issue to be addressed is: Did the State of Tennessee present sufficient evidence to overcome the presumption created by Tenn. Code Ann. § 40-35-102(6) that he was a favorable candidate for an alternative sentence?

It is the opinion of this Court that the State of Tennessee presented sufficient evidence to overcome the presumption in favor of alternative sentencing. Therefore, the judgment of the trial court is affirmed.

The appellant was sixty-two years of age when he was sentenced. He is the father of two grown children. His marriage of almost twenty-five years ended in divorce several years ago. The appellant presently works for a construction company that builds Wal-Mart stores. He went from a common laborer to foreman in a very short period of time. His duties included overseeing the work of several employees and keeping track of the supplies delivered to the construction sites. His employer described the appellant as "dependable." His description of the appellant indicated that the appellant was an excellent employee.

The appellant served in the armed forces. He received an honorable discharge. When he was discharged from the service, he attended Tennessee Technical University. He earned a degree in agriculture. Later, he attended the YMCA Law School in Nashville

and obtained a law degree. He apparently was not eligible to take the bar examination. Thus, the appellant was never licensed to practice law.

The appellant served as the Circuit Court Clerk for Putnam County from September 9, 1964, to August of 1974. He did not seek reelection. An audit of his office revealed a deficiency of \$4,500 in the cash drawer receipts. Before the appellant left office, he placed his check for \$4,500 in the cash drawer. He was not prosecuted for the shortage. He explained that he satisfied the deficiency because as Clerk he felt he was responsible for the missing funds. He denied misappropriating the funds.

The First National Bank employed the appellant as a loan officer from September 1, 1974 through March 1, 1977. While a loan officer, he loaned \$50,000 to a customer; and the customer gave him the money to invest in the stock market. His investments resulted in the loss of the entire \$50,000. Since this transaction violated federal banking regulations, the appellant was prosecuted in federal court for receiving profits from a bank transaction. He was placed on diversion. He made restitution of the entire \$50,000 and successfully completed the probationary period.

The appellant served as Clerk and Master of the Chancery Court of Putnam County from March 5, 1977 until he resigned his office on September 30, 1992. In November of 1990, the appellant, as Clerk and Master, received a child support check in the amount of \$15,750. The Clerk's fee of \$750 was deducted and \$15,000 was forwarded to the appropriate party. However, the fee was never recorded as having been received by the Clerk. The appellant was subsequently indicted for theft over \$500. The prosecution was dismissed after the appellant paid \$750 in restitution. He denied that he took the money. Again, he stated that he felt obligated to pay the amount because the transaction occurred while he was Clerk and Master.

The appellant served as the Treasurer of the Tennessee Clerk's Association from 1985 to 1992. During this period, the appellant embezzled \$18,583 from the association. Most of this money came from membership dues. Additional funds were obtained by submitting false travel vouchers for approval by the president of the association. The appellant embezzled the money over a period of time.

When the appellant was asked to account for the association's funds, he furnished

the association a page from a savings account passbook which showed a \$15,000 deposit. This page had been taken from a passbook that he maintained while he was Clerk. The account had been closed for years. An investigation revealed that no such account existed. When the appellant was asked to surrender the funds, he placed approximately \$17,000 in the association's account.

The appellant admitted that he knew the taking of the money was wrong. He also admitted that presenting the page from the closed account was wrong.

Initially, the appellant sought pretrial diversion. The appellant failed to reveal in the application form that he had been arrested and prosecuted for the possession of untaxed whiskey, a misdemeanor, and for receiving profits from a bank transaction. These crimes were found by the person preparing the presentence report.

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). This presumption 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). 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. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); 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). However, this Court is required to give great weight to the trial court's determination of controverted facts. The trial court's determination in this instance was made after viewing the witnesses' demeanor and listening to the testimony.

When the accused is the appellant, the accused has the burden of establishing that the sentence imposed by the trial court was erroneous. Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

Since the appellant was convicted of a Class C felony, there was a presumption, rebuttable in nature, that he was a favorable candidate for alternative sentencing. Tenn.

Code Ann. § 40-35-102(6). However, the State of Tennessee successfully rebutted this presumption. Thus, the trial court did not abuse its discretion in refusing to impose an alternative sentence to incarceration.

The appellant was less than candid when he prepared and submitted the application for pretrial diversion. Lack of candor or an attempt to conceal a prior record of arrests and convictions is probative of the appellant's prospects for rehabilitation. United States v. Grayson, 438 U.S. 41, 50-52, 98 S.Ct. 2610, 2616, 57 L. Ed. 2d 582 (1978); State v. Dykes, 803 S.W.2d 250, 259-60 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

The appellant has had several opportunities to rehabilitate himself. He was placed on pretrial diversion for the violation of the federal banking laws. The indictment for theft over \$500 was dismissed when the appellant made restitution. Nevertheless, the appellant continued to engage in criminal conduct. Most of the crimes he committed involved a breach of a fiduciary duty while he was serving in a position of public trust. He also attempted to mitigate or explain away his conduct rather than take responsibility for it.

There is no question that the appellant knew he was engaging in criminal conduct. He is not the average person that finds his or her way into the criminal justice system. He has a college degree and a law degree, and it is obvious that the appellant is intelligent. He candidly admitted that he knew he was engaging in criminal conduct by taking the association's money. He also admitted that he knew it was wrong to try and make the officials of the association believe that there was \$15,000 on deposit. In short, he made an effort to prevent the association from discovering that funds were missing.

Based upon a de novo review of the record, this Court is of the opinion that the trial court did not abuse its discretion by refusing to impose an alternative sentence rather than incarceration. The State of Tennessee successfully rebutted the statutory presumption of fitness for an alternative sentence.

JOE B. JONES, PRESIDING JUDGE

JOHN H. PEAY, JUDGE

JOSEPH H. WALKER, III, SPECIAL JUDGE