IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER 1995 SESSION

STATE OF TENNESSEE, APPELLEE,	)	No. 02-C-01-9505-CR-00145
v.	)	Shelby County
	)	Arthur T. Bennett, Judge
	)	(Sentencing)
MARK A. WILSON, APPELLANT.	)	

FOR THE APPELLANT:

Paula Skahan
Attorney at Law
140 Third Street, North
Memphis, TN 38103
(Appeal Only)

William C. Cole
Attorney at law
8582 Highway 51 North
Millington, TN 38053
(Trial Only)

FOR THE APPELLEE:

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

Elizabeth T. Ryan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

John W. Pierotti
District Attorney General
201 Poplar Avenue, Third Floor
Memphis, TN 38103

Jennifer Nichols
Assistant District Attorney General
201 Poplar Avenue, Third Floor
Memphis, TN 38103

Charles Bell
Assistant District Attorney General
201 Poplar Avenue, Third Floor
Memphis, TN 38103

OPINION FILED:_____

AFFIRMED AS MODIFIED AND REMANDED

Joe B. Jones, Judge

O P I N I O N

The appellant, Mark A. Wilson, was convicted of sexual battery, a Class E felony, following his plea of guilty to the offense. The trial court imposed a Range I sentence consisting of a $500 fine and confinement for 120 days in the Shelby County Correction Center pursuant to the parties' plea bargain agreement. A sentencing hearing was conducted pursuant to the appellant's request for an alternative sentence. The trial court denied the request at the conclusion of the hearing.

Three issues are presented for review. However, two of the issues can be consolidated. The appellant contends the trial court committed error of prejudicial dimensions in refusing to hear and consider evidence concerning his wife's medical needs following the transplant of a kidney and pancreas. He further contends that the trial court committed error in refusing to suspend his sentence and place him on probation.

The judgment of the trial court is affirmed as modified, and this case is remanded to the trial court for the entry of an order consistent with this opinion.

The appellant was thirty-six years of age when he was sentenced. He is married. His wife's two children, ages sixteen and ten, reside in the appellant's household. He also has a child by a prior marriage. The appellant is employed as a quality control technician.

On July 9, 1991, the appellant's wife underwent transplant surgery. She received a kidney and a pancreas. She is greatly disabled. Her medical expenses are approximately $1,000 per month. She must see a doctor at least once a month. The appellant has assisted his wife in many respects. He has paid for the medical expenses and is her sole source of support. If he is required to serve his sentence, he will lose his job.

On October 30, 1993, the Parks and Recreation Department of the City of Millington sponsored a Halloween Festival at a community center. A feature of the festival was a haunted house. The appellant, who was employed by the Parks and Recreation Department, was assigned to work in the haunted house. He, like other employees, was dressed in a costume. One employee squirted people with water. It was the appellant's job to scare those who entered the haunted house. He yelled, screamed, and grabbed the

people. He had been working in the haunted house for approximately twelve hours before the crime in question was committed.

The victim, J.B., a young lady who was fifteen years of age, went through the haunted house at approximately 10:00 p.m. on the evening of October 30th. As she passed the area where the appellant was positioned, the appellant reached out, grabbed her from the rear, and fondled her breasts. The victim and her father reported the matter to the Millington Police Department.

Initially, the appellant was charged with another count of sexual battery. The other victim was a friend of J.B. The state entered a nolle prosequi in this case. Neither J.B. nor her friend testified at the sentencing hearing. The state and the appellant stipulated to the following facts at the submission hearing:

> [O]n October the 31st, 1993, approximately 3:00 o'clock in the afternoon, a Mr. James Boyd and his fifteen year old daughter . . . came to the Millington Police Department filing a complaint. They stated that on October the 30th, 1993, approximately 10:00 o'clock in the evening she was at a Halloween party at the Baker Community Center. She said that a character in the Haunted House, dressed as Freddy Kruger, that person being identified later as Mark Wilson, had fondled her as she went through that Haunted House.

The appellant readily admitted that he committed the offense against J.B. He explained that he had been working all day and he "got carried away" with the situation. He acknowledged that what he did was wrong. When he was confronted by Millington officials shortly after the incident occurred, the appellant denied that he had committed the crime. He made an effort to obtain counseling at The University of Memphis through his wife's connection to the University. However, the University had closed for winter break. He obtained the necessary information so that he could obtain counselling once the University was back in session.

The assistant district attorney general questioned the appellant about the incidents involving J.B. and her friend. He was asked if he placed his hand between the legs of J.B. in addition to fondling her breasts. The appellant stated that he did not remember placing his hands between J.B.'s legs, but he stated "it's possible" that he did. He denied having any sexual contact with J.B.'s friend. As previously stated, neither J.B. nor her friend

testified at the sentencing hearing.

The trial court refused to grant an alternative sentence because (a) the appellant was untruthful -- he denied placing his hand between J.B.'s legs and fondling her friend; (b) the need for deterrence; and (c) the need to avoid depreciating the seriousness of the offense. The court also refused to grant split confinement for the same reasons.

I.

The appellant sought to introduce evidence concerning his wife's physical condition, her medical needs, her disability, and the cost of the medical treatment following a double transplant. The following colloquy occurred when the appellant was asked about his wife's medical condition:

> Q. Okay. Tell the Court about your wife.
>
> A. Sharon has had a kidney pancreas transplant. She received this in '91. When we first got married, she went into renal shutdown, which at that point she had to go on dialysis. We had to raise $30,000 to get her on the kidney pancreas national list for donors.
>
> THE COURT: Now, what does this have to do with what he did out there? Does that have some effect on it?
>
> MR. COLE: Your Honor, what we're asking Your Honor to do is to suspend his sentence.
>
> THE COURT: I understand that. But I mean what does a medical problem, which I'm sorry about and hope she's doing okay or better now, but what does that have to do with what he's --
>
> MR. COLE: Your Honor, I was hoping to show through the presentation of this evidence something of the sense of this man's responsibility to his family. She has gone through a traumatic medical procedure. She still has problems. He has obligations to her on a daily basis. I mean, he is -- She's under medication that's very expensive on a monthly basis. I was trying to show Your Honor that --
>
> THE COURT: Well, usually a lot of folks that come through here have obligations and some have sick relatives, sick husbands, sick wives. But --
>
> MR. COLE: Well, if Your Honor deems it, I will not go into that.
>
> THE COURT: I'm sorry about that, but I need to hear about this situation and any bearing on what happened.

Since the enactment of the 1982 Criminal Sentencing Reform Act, the rules of evidence apply to sentencing hearings. Tenn. Code Ann. § 40-35-209(b); State v. Taylor, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987). However, an exception is made for "reliable hearsay." Tenn. Code Ann. § 40-35-209(b); Taylor, 744 S.W.2d at 921. Before "reliable hearsay" may be admitted as evidence at a sentencing hearing, (a) an indicia of reliability must be shown to satisfy the due process requirement and (b) the opposing party must be afforded a fair opportunity to rebut the hearsay evidence. Tenn. Code Ann. § 40-35-209(b); Taylor, 744 S.W.2d at 921.

The Tennessee Rules of Evidence provide for the introduction of relevant evidence. Tenn. R. Evid. 402. Evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. The determination of whether evidence is relevant rests within the sound discretion of the trial court. State v. Hill, 885 S.W.2d 357, 361 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). This Court will not interfere with the exercise of this discretion unless it appears on the face of the record that the trial court clearly abused its discretion. State v. Hayes, 899 S.W.2d 175, 183 (Tenn. Crim. App.), per. app. denied (Tenn. 1995).

In this case, the trial court stated that the only evidence it wanted to hear was the circumstances of the offense. While evidence regarding the circumstances of the offense is clearly relevant when determining whether an accused's sentence should be suspended, there are other inquiries that are just as relevant. Since the landmark case of Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974), the following have also been deemed relevant in such inquiries: the accused's social history, present condition, physical condition, mental condition, potential for rehabilitation, and the need for deterrence. See State v. Meeks, 779 S.W.2d 394, 396 (Tenn. Crim. App. 1988), per. app. denied (Tenn. 1989); State v. Huff, 760 S.W.2d 633, 635-36 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); State v. Brooks, 741 S.W.2d 920, 925 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

The physical condition of the appellant's wife, her need for medical treatment, her disability, and the costs of the medical treatment were relevant. This evidence was

relevant as part of the appellant's social history and present condition. The trial court should have permitted the appellant and his wife to testify about these matters. Consequently, the refusal of the trial court to permit the introduction of this evidence constituted an abuse of discretion. Furthermore, the exclusion of this evidence prevented the trial court from making an informed decision based upon all of the relevant evidence.

II.

The appellant contends that the trial court abused its discretion in refusing to impose an alternative sentence. He argues that the trial court should have suspended his sentence and placed him on probation.

A.

When the 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). However, there are exceptions to this requirement. First, the requirement that this Court presume the determinations made by the trial court are correct 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused. State v. Keel, 882 S.W.2d 410, 418 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts or a document, such as the presentence report. Keel, 882 S.W.2d at 418; Bonestel, 871 S.W.2d at 166.

In conducting a de novo review of the sentence in this case, this Court must consider: (a) any evidence received at the trial and/or sentencing hearing, (b) the

presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) the statements made by the accused in his own behalf, and (f) the accused's potential or lack of potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5) and -210(b). These factors are applicable when the accused seeks the suspension of a sentence and the grant of probation. Meeks, 779 S.W.2d at 396; Huff, 760 S.W.2d at 635; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In probation cases, this Court must consider the circumstances of the offense, the accused's criminal record, social history, physical condition, mental condition, and the deterrent effect upon other criminal activity. Meeks, 779 S.W.2d at 396; Huff, 760 S.W.2d at 635-36; Brooks, 741 S.W.2d at 925. Most, if not all, of these factors are to be considered when conducting a de novo review of the record. Meeks, 779 S.W.2d at 396; Huff, 760 S.W.2d at 636; Brooks, 741 S.W.2d at 925.

When the accused raises a sentencing issue in this Court, the accused has the burden of establishing that the sentence imposed by the trial court is erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169; State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991).

B.

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 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. Ashby, 823 S.W.2d at 169; Bonestel, 871 S.W.2d at 167. 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]." 823 S.W.2d at 169 (emphasis added).

The appellant is entitled to the presumption in this case. He was convicted of a Class E felony, and he was sentenced as a standard offender. Furthermore, the state failed to overcome the presumption that the appellant is a favorable candidate for an alternative sentence.

C.

(1)

Probation is a privilege or act of grace which may be granted to an accused who is eligible and worthy of this largesse. Stiller, 516 S.W.2d at 620; State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). However, an accused does not have a demandable right to probation or the right to "insist on terms or strike a bargain." Hooper v. State, 201 Tenn. 156, 161, 297 S.W.2d 78, 81 (1956). To the contrary, the accused has the burden of establishing that he is entitled to the privilege and grace of probation. Dykes, 803 S.W.2d at 259; Brooks, 741 S.W.2d at 925-26. This requires a showing that probation will "subserve the ends of justice and the best interests of both the public and the defendant." Hooper, 201 Tenn. at 162, 297 S.W.2d at 81.

(2)

The truthfulness of the accused at a sentencing hearing is a factor that may be considered in determining whether an accused's sentence should be suspended and probation granted. The lack of candor is probative of his 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. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); Dykes, 803 S.W.2d at 259; Smith, 735 S.W.2d at 863; State v. Jenkins, 733 S.W.2d 528, 535 (Tenn. Crim. App. 1987). A trial court may deny probation on this ground. Bunch, 646 S.W.2d at 160; Jenkins, 733 S.W.2d at 535.

In this case, the evidence does not establish that the appellant was untruthful. First, the state did not present any evidence that contradicted the appellant's testimony. The state should have called the two victims. However, either the state neglected to have the witnesses present, the witnesses refused to attend the hearing, or the state decided it did not need the victims. The mere questions posed by the assistant district attorney general did not constitute a contradiction of the appellant's testimony. Second, the appellant did not deny that it may have happened. He frankly stated that while it may have occurred he had no memory of it occurring. Third, the state asked the appellant to stipulate at the submission hearing only that he had fondled the breasts of J.B. The statement of facts related by the assistant district attorney did not mention or allude to a touching of the victim's genitals.

The statement contained in the presentence report is hearsay. Since the victim did not respond to the presentence officer's inquiry, the victim's statement was taken from the "agency report." This is at least two times removed from the victim. In other words, the hearsay does not have the indicia of reliability required by Tenn. Code Ann. § 40-35-209(b). In this case, the mere fact that the information is contained in the presentence report does not, standing alone, establish the indicia of reliability that the appellant was less than candid when he testified at the sentencing hearing.

The trial court should not have refused to suspend the appellant's sentence and grant him probation based on untruthfulness. This is not established by the record.

(3)

The trial court also refused to grant the appellant an alternative sentence on the ground of deterrence. No evidence was introduced regarding the need for deterrence.

Before a trial court may deny probation on the ground of deterrence, there must be some evidence in the record "that the sentence imposed will have a deterrent effect within the jurisdiction." State v. Horne, 612 S.W.2d 186, 187 (Tenn. Crim. App. 1980), per. app. denied (Tenn. 1981); see Jenkins, 733 S.W.2d at 535; State v. Vance, 626 S.W.2d 287, 290 (Tenn. Crim. App. 1981). In addition, the Tennessee Criminal Sentencing Reform Act of 1989 requires that any sentence imposed by a court must be based on evidence contained in the record of the trial court and sentencing hearing or the presentence report. Tenn. Code Ann. § 40-35-210(g). This rule is reasonable. If a particular crime constitutes a particular problem in the county, the state has the opportunity to establish this fact through the testimony of a law enforcement officer or other witness. See State v. White, 649 S.W.2d 598, 602 (Tenn. Crim. App. 1982), per. app. denied (Tenn. 1982) (local sheriff testified that "the defendant's incarceration would deter like crimes and made reference to the numerous worthless check violations in Lincoln County"); State v. McColgan, 631 S.W.2d 151, 156 (Tenn. Crim. App. 1981), per. app. denied (Tenn. 1982) (local sheriff testified "his county had a real problem with drug traffic and traffic in stolen property and that requiring the appellant to serve his sentence would deter others from criminal activity.") If trial judges were permitted to assume facts not in the record or base a sentence imposed on extraneous facts, it would be impossible for this Court to review sentencing issues.

The state failed to establish the need for deterrence. See Smith, 735 S.W.2d at 864; Jenkins, 733 S.W.2d at 535. Furthermore, the denial of the request to suspend the appellant's sentence and place him on probation was not required to deter the appellant. He had one prior criminal conviction for driving while under the influence that occurred twelve years prior to the offense in question. He told the presentence officer about the offense. It is possible the presentence officer may not have discovered this prior conviction without the appellant's honesty about his past. Furthermore, the appellant has maintained constant employment and otherwise lived an honest life.

(4)

The trial court also denied probation based on the circumstances of the offense. As previously stated, the stipulation at the submission hearing consisted of the appellant briefly fondling the breasts of the victim.

Before a trial court may deny a request for the suspension of a sentence and probation on the circumstances of the offense, the circumstances surrounding the crime must be shown to have been especially violent, horrifying, shocking, and reprehensible. State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); State v. Hartley, 818 S.W.2d 370, 374-375 (Tenn. Crim. App.), per. app. denied (Tenn. 1991); Huff, 760 S.W.2d at 637; Brooks, 741 S.W.2d at 926. In Hartley, this Court said that this standard has "essentially been codified in the first part of T.C.A. § 40-35-103(1)(B) which provides for confinement if it 'is necessary to avoid depreciating the seriousness of the offense.'" 818 S.W.2d at 375 (citing State v. Fletcher, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991)).

Although the nature of the offense in question is despicable, the fondling of the victim lasted for a very short period of time. It was the only time it occurred to this particular victim. The offense may not be described as violent, horrifying, shocking, or reprehensible based upon the facts contained in the record. This fact is evidenced by the relatively lenient offer of settlement made by the state. Therefore, the trial court should not have denied an alternative sentence based on the circumstances of the offense.

(5)

This Court is of the opinion that the appellant should actually serve thirty (30) days of the sentence imposed by the trial court. The time to be spent in confinement shall be split confinement. The appellant shall serve the thirty (30) days on consecutive weekends. If the appellant is required to work weekends, the trial court shall require the appellant to serve this time on his days off. The balance of the sentence is to be suspended and the appellant placed on probation for a period of one (1) year.

One condition of probation will be counselling. The appellant must take appropriate

steps to obtain counselling. On remand, the trial court may set such further conditions of probation as the court deems necessary that conform with the statutes of this state.

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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