IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1995

FILED

March 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9503-CR-00103**
	)	
Appellee,	)	
	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. DOUGLAS A. MEYER**
JASON WINDHAM,	)	**JUDGE**
	)	
Appellant.	)	**(Sentencing - Direct Appeal)**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

In August of 1994, Appellant Jason Windham pled guilty to one count of aggravated burglary, one count of burglary of a vehicle, two counts of attempted burglary of a business, two counts of theft of property over $1000, two counts of burglary of a business, one count of theft of property under $500, one count of possession of marijuana, and one count of possession of drug paraphernalia. Appellant received an effective sentence of ten years as a Range I standard offender. The plea agreement stipulated that Appellant could request alternative sentencing for either part or all of his sentence. In this appeal, Appellant alleges that the trial court erroneously denied his request for alternative sentencing. After reviewing Appellant's sentence under the applicable standard of review, we find no error and affirm the sentence.

When reviewing the denial of alternative sentencing, an appellate court must conduct a de novo review of the sentence, with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990). In conducting such a review, an appellate court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancing factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The presumption of correctness must be supported by an affirmative showing in the record that the trial court considered the applicable sentencing principles and all relevant facts and circumstances. State v. Edwards, 868 S.W.2d 682, 700 (Tenn. Crim. App. 1993). If the trial court fails to make this showing in the record, the presumption of correctness is inapplicable, State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992), and appellate review is de novo. State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). The defendant always bears the burden of showing the

impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

The Criminal Sentencing Reform Act of 1989, Tenn. Code Ann. § 40-35-101 to -605 (1990 & Supp. 1995), recognizes the limited capacity of state prisons and mandates that "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." Id. § 40-35-102(5). A defendant who does not qualify as such and who is an especially mitigated or standard offender 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." Id. § 40-35-102(6). For such a defendant, a rebuttable presumption exists that a sentence other than incarceration would result in successful rehabilitation. State v. Fletcher, 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991). However, when presented with sufficient evidence to overcome this presumption, a trial court may sentence the defendant to confinement. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The Criminal Sentencing Reform Act dictates that sentences involving confinement should be based on the following considerations:

> (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.

Tenn. Code Ann. § 40-35-103(1) (1990). In determining Appellant's sentence, the trial court made specific reference to each of these considerations and found that the facts and circumstances surrounding Appellant's offenses warranted confinement. Because the record reflects that the trial court properly considered the applicable sentencing

principles and all relevant facts and circumstances, the sentence of the trial court bears a presumption of correctness.

As previously noted, Appellant is entitled to the presumption that he is a favorable candidate for alternative sentencing only in the absence of evidence to the contrary. The record reflects Appellant has an extensive record of juvenile delinquency based on grand larceny, possession of drug paraphernalia, vandalism, and disorderly conduct. His juvenile record also shows various violations of probation and community placement. As an adult, Appellant was convicted of nine property-related offenses and two drug-related offenses occurring within an approximate eight-month period. Some of these offenses were committed while Appellant was released on bond for the others.

Appellant's record demonstrates a "long history of criminal conduct". See Tenn. Code Ann. § 40-35-103(1)(A) (1990). Given Appellant's failure to successfully respond to probation and community-based placement in the past, the trial judge was justified in concluding that a punishment less restrictive than confinement would only serve to give Appellant the opportunity to continue his pattern of unlawful behavior. See Id. § 40-35-103(1)(C). Therefore, sufficient evidence exists to overcome the presumption that Appellant is a favorable candidate for alternative sentencing and to warrant confinement.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. BARKER, JUDGE