IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. #03C01-9503-CR-00081
APPELLEE,	*	BLOUNT COUNTY
VS.	*	Hon. D. Kelly Thomas, Judge
MARY McNABB,	*	(Worthless Check)
APPELLANT.	*	

For the Appellant:

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For the Appellee:

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OPINION FILED:_____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Mary McNabb, entered a nolo contendere plea to the offense of writing a worthless check, a class A misdemeanor. She was sentenced to eleven months and twenty-nine days in the Blount County Jail; she is eligible for work release, furlough, trusty status, or related rehabilitative programs after serving 70% of her sentence. On appeal, she argues that the trial court erred in failing to impose full probation or alterative sentencing. We find no error and affirm.

On November 18, 1992, the appellant wrote a check in the amount of $70.30 to the Gift Galleria in Blount County, Tennessee. The check was drawn on an account at First City Bank in Rutherford County, Tennessee. The check was returned and marked "Account Closed." On May 26, 1993, the appellant entered a plea of nolo contendere to the offense. She testified during the sentencing hearing that she was 38 years of age at the time of the offense, and a resident of Kingsport, Tennessee. She suffered from lupus and was unable to work. She received social security disability payments in the amount of $380.00 per month. She also received $190.00 per month for her son.

The appellant said that she had opened the account at First City Bank in 1986 or 1987, while she was a student at Middle Tennessee State University. She claimed that the problem with the check to the Gift Galleria was caused by First City Bank's failure to record social security payments that were to be deposited to her account via direct deposit. The appellant "assumed" the payments had been properly deposited but First City Bank had mistakenly "wiped out" her account and returned her payments to the government. The appellant claimed that she pointed out the error to the bank and was informed that the problem would be fixed. Nonetheless, for several months she did not know whether she had funds in the account. She believed that she

received statements from the bank until the account was closed officially in January or February of 1993. She did not have the statements at the hearing, nor did she have any other documentation to support her arguments.

The appellant acknowledged that in December of 1988, she pled guilty to twenty charges for writing worthless checks in Sullivan County. Nearly half of the convictions were felonies. She claimed that these convictions resulted when someone stole her checkbook and wrote the checks on the account. She plead guilty to the charges at the advice of her lawyer, a decision she called a "mistake." Nonetheless, she was incarcerated for the crimes for twenty months before being released on parole, and she was on parole when she committed the crime in Blount County. The appellant conceded that she also had been convicted of writing worthless checks in Rutherford County and Davidson County, and of fraudulent appropriation of property, a felony, in Sullivan County.[1]

The trial court elected to defer sentencing until more information could be obtained, specifically, the records of the Social Security Administration and First City Bank. The next hearing was held in November of 1994.[2] There was evidence that the appellant's account at First City Bank had been closed in December of 1986. The appellant, however, wrote approximately 228 checks on the account from June of 1991 to December of 1992. Of these, approximately 215 were written from August of 1992

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[1] The presentence report, although somewhat incomplete as to the particulars, corroborates the appellant's extensive criminal record. Similarly, the records of this court are indicative of the appellant's prior criminal history. State v. Mary McNabb, No. 03C01-9404-CR-00135 (Tenn. Crim. App., Feb. 8, 1995, Knoxville), perm. to appeal denied, (Tenn. 1995); State v. Mary McNabb, alias Ima Lewis, No. 880 (Tenn. Crim. App., Sept. 5, 1990, Knoxville), perm. to appeal denied, (Tenn. 1991).

[2] Prior thereto, the appellant failed to attend a scheduled hearing and was served with a capias for failure to appear. Her original bond was forfeited, and a new bond was set in the amount of $5,000.

to December of 1992--the same period during which she wrote the check to the Gift Galleria. All of the checks were marked "Account Closed." The amount of the checks totaled over $18,000.

The appellant conceded that she had written all of the checks but said that "most," including the one to Gift Galleria, had since been paid.[3] She maintained that First City Bank was at fault for failing to deposit her social security payments. She also claimed that in 1992 and 1993, she received student loan checks totaling some $10,000 that the bank failed to deposit. She conceded that the bank returned the loan checks directly to her and that she used some of the money to make restitution on the checks she had written. The appellant had no explanation for writing over 200 checks totaling approximately $18,000 in a four month period, other than she believed they would be covered by her social security payments and student loans. Finally, she conceded that, at the time of the hearing, she had two worthless check charges pending in Carter County and one worthless check conviction from Sullivan County pending on appeal.[4]

In sentencing the appellant, the trial court made the following findings:

> The way I read the presentence report, she has...eleven prior felony convictions on checks. And on her questionnaire, she reported three out of eleven. And I've not counted the misdemeanor check convictions. These have been going on since 1985 or '86.
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> After hearing all the evidence in the several sentencing hearings that we've had and her testimony about problems

[3] The record supports her claim that she made full restitution to the Gift Galleria.

[4] That case involved a worthless check written in February of 1993. The appellant pled nolo contendere and was sentenced to eleven months and twenty-nine days in the Sullivan County Jail. The sentence was affirmed on appeal. State v. Mary McNabb, No. 03C01-9404-CR-00135 (Tenn. Crim. App., Feb. 8, 1995, Knoxville).

> with her lawyer, and all the other things, and then getting the hard evidence in, she's one of the most incredible defendants that I've ever had to listen to in a sentencing hearing. There's absolutely nothing that she's ever been convicted of that...she did, to hear her tell it. Or that it was her fault. And...when her last sentencing hearing came up in May of this year, she failed to appear....

On appeal, the appellant maintains that the trial court erred in failing to impose full probation or, at least, a period of split confinement and probation. She concedes that she has an extensive criminal history but maintains that it was outweighed by other factors in her favor. First, she claims that the majority of her criminal conduct occurred from 1985 to 1989 and that she no longer writes bad checks. Second, she claims that the trial court did not consider mitigating factors such as her payment of restitution and the fact that her conduct did not cause or threaten bodily injury. Finally, she claims that her potential for rehabilitation without incarceration is favorable.

When a defendant challenges the length, range or manner of service of a sentence, the reviewing court must conduct a de novo review on the record with a presumption that the determinations made by the trial court were correct. Tenn. Code Ann. §40-35-401(d). The presumption of correctness 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). In conducting our review we must consider (a) the evidence received at the trial and sentencing, (b) the presentence report, (c) the principles of sentencing and arguments as to confinement or sentencing alternatives, (d) the nature and characteristics of the criminal conduct, (e) any mitigating or statutory enhancing factors, (f) any statement made by the defendant, and (g) the defendant's potential for treatment and rehabilitation. Tenn. Code Ann. §40-35-102, -103, & -210; see also

State v. Ashby, 823 S.W.2d at 168.

"[P]robation must be automatically considered as a sentencing option for eligible defendants, [but] the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. §40-35-303(b)(Sentencing Commission Comments); see State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). Instead, a defendant has the burden of establishing his or her suitability for probation. See State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990). In determining whether probation is appropriate, the court must consider the accused's criminal record, social history, mental and physical condition, and potential for rehabilitation and treatment. The court must also consider the circumstances of the offense and the deterrent effect incarceration would have on the accused and others. See Stiller v. State, 516 S.W.2d 617, 619-20 (Tenn. 1974); State v. Dykes, 803 S.W.2d at 260; see also Tenn. Code Ann. §40-35-102 & -103. A negative finding as to any one factor may be sufficient to deny probation. State v. Baron, 659 S.W.2d 811, 815 (Tenn. Crim. App. 1983).

Here the trial court denied probation based on the appellant's lengthy criminal history, failure to accept responsibility for her conduct, and lack of credibility. These factors were all amply supported by the record. The appellant's lengthy criminal record was self-evident, and it included at least twenty prior convictions for writing worthless checks. Moreover, her failure to accept responsibility for her actions by continually blaming the bank and others, as well as her lack of candor with the trial court, were indications that her potential for rehabilitation remained dubious at best. See State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); State v. Jenkins, 733 S.W.2d 528, 534 (Tenn. Crim. App. 1987). In sum, the appellant has failed to show that the trial court erred in denying probation and ordering that the full sentence be served.

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William M. Barker, Judge

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David G. Hayes, Judge

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Jerry L. Smith, Judge