

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

FILED
May 21, 1996
~~Geoff Crowson Jr.~~
Appellate Court Clerk

STATE OF TENNESSEE,) C.C.A. NO. 03C01-9501-CR-00220
)
Appellee,)
)
) **BLOUNT COUNTY**
VS.)
) **HON. D. KELLY THOMAS, JR.**
CHARLES JERRY TALLEY,) **JUDGE**
)
Appellant.) (Denial of Probation - Misdemeanor)

**ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF BLOUNT COUNTY**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Charles Jerry Talley, brings this appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted upon his guilty plea to three misdemeanor theft charges. For these convictions, the trial court sentenced him to three concurrent sentences of eleven months and twenty-nine days in jail, with a release eligibility date of thirty percent, and with immediate eligibility for work release. The Defendant's sole issue on appeal is that the trial court erred by not suspending his sentence and granting him probation. We affirm the judgment of the trial court.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of

potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The Defendant was indicted on six felony charges of extortion and theft in violation of Tennessee Code Annotated sections 39-14-103 and 39-14-112. The charges stemmed from three different instances in which the Defendant, a former bail bondsman, accepted money from people who were involved in criminal proceedings by making representations that he might be able to assist them in getting more favorable treatment in court.

At the time of the incidents, the Defendant worked as a used car salesman at a Blount County car dealership. He first agreed to help a co-worker get a pending DUI charge dismissed or reduced in return for money. The Defendant did not help the co-worker in this matter. Several months later, in November 1989, another co-worker gave the Defendant money in exchange for the Defendant's help in taking care of a charge. The Defendant accompanied the co-worker to court, but the co-worker subsequently pleaded guilty to his DUI charge. The Defendant apparently reimbursed the co-worker for the money.

A third co-worker, Al Lewis, Sr., requested the Defendant's assistance in getting sexual assault charges against his son dismissed. After two or three meetings, the Defendant told Lewis that he could do nothing to help him. The Defendant later agreed to help after Lewis offered to pay him twenty-five thousand dollars in cash. The Defendant again met with Lewis and accepted an envelope that was purported to contain the money. Lewis, however, was working for the law enforcement authorities. While acting under their supervision, he taped the conversation and gave the Defendant an envelope containing only paper. When the Defendant left with the envelope, FBI officers apprehended him. The FBI released the Defendant after questioning him. He was later indicted on the six charges of theft and extortion.

The Defendant said that he took the money as loans which he intended to repay. He said that his son suffered from cancer and that he needed the money to defray medical expenses and other costs. The Defendant subsequently agreed to plead guilty, and the charges were reduced to misdemeanor theft. The trial court sentenced the Defendant to three concurrent sentences of eleven months and twenty-nine days, with a release eligibility date of thirty percent, to be followed by supervised probation, and with immediate eligibility for work release. The Defendant argues that the trial court erred in denying his request for immediate probation.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. In determining the correct sentence, the trial court

should examine the case in the light of the nature and character of the offense. State v. Gilboy, 857 S.W.2d 884, 889 (Tenn. Crim. App. 1993). Among the factors applicable to the Defendant's application for probation are the circumstances of the offense, his criminal record, social history and present condition, and the deterrent effect upon and best interest of the Defendant and the public. State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1992).

Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. The trial court retains the authority to place the Defendant on probation either immediately or after a time of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). 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. Gennoe, 851 S.W.2d at 837; see Tenn. Code Ann. § 40-35-102(6). However, the misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy 885 S.W.2d 829, 832 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994). Additionally, the burden of establishing suitability for probation rests with the Defendant. Tenn. Code Ann. § 40-35-303(b).

The Defendant is married and has two children. The presentence report indicates that he has no prior criminal history other than a traffic offense and three arrests for passing worthless checks, two of which were dismissed and the third was nolle on payment of restitution. The report reflects that the Defendant

was in good health and did not have any drug or alcohol problems.

The Defendant contends that the following mitigating factors should have been applied to his case: (1) That his criminal conduct neither caused nor threatened bodily injury; (7) that he was motivated by a desire to provide necessities for his family; (11) that he committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated his conduct; (13) that he made restitution in these case prior to the entry of his guilty pleas or sentencing, and (13) that he has no previous history of criminal convictions. Tenn. Code Ann. § 40-35-113.

In denying probation, the court considered the testimony at the sentencing hearing, the circumstances of the crimes, the presentence report, and character letters submitted by various people on the Defendant's behalf. The trial court noted that although the crimes were not violent, they were conducted over the period of a year, not on the spur of the moment. The trial court denied probation primarily because the Defendant intentionally convinced others to think that the criminal justice system could be subverted if they paid large sums of money. The court said that from listening to the taped conversation of the Defendant and Lewis, the Defendant was very convincing in his representations that he could get the case "fixed." The court also found as an enhancement factor that the Defendant abused a position of trust among his co-workers. Tenn. Code Ann. § 40-35-114(15) The trial court noted that the Defendant was originally charged with Class D and E felonies carrying a much harsher sentencing range, and in light of the nature of the offenses, he could not grant immediate probation.

As previously set forth, the trial judge's denial of probation is clothed with a presumption of correctness. We have performed the required de novo review of the record and find that the evidence does not preponderate against the findings of the trial court. We conclude that the factors considered by the trial judge in denying probation were proper and that the judge did not err in declining to apply any mitigating factors. This court should not place trial judges in a judicial straight-jacket in the area of sentencing, and we should exercise restraint in interfering with their traditional discretionary powers. State v. Ashby, 823 S.W.2d 166, 171 (Tenn. 1991). We cannot conclude that the trial judge erred or abused his discretion in denying immediate probation.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

WILLIAM M. BARKER, JUDGE