IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED

September 5, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9511-CC-00374**
Appellee,	)	
	)	**COFFEE COUNTY**
VS.	)	
	)	**HON. GERALD L. EWELL, SR., JUDGE**
DONNA ARMS,	)	
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for aggravated burglary and theft of property in excess of one thousand dollars ($1,000), Class C and D felonies, respectively. She pled guilty to both offenses and after a hearing was sentenced to six years for the burglary charge, and to four years for the theft offense. Both sentences were to run concurrently. Probation was ordered after one year of incarceration with "release from custody and placement on probation . . . subject to the verification of the district attorney general in writing that the defendant has cooperated fully in the investigation and prosecution of other possible criminal offender(s) in this case." In this appeal as of right, the defendant challenges the length of her sentence and contends that the trial court erred by not considering her for alternative sentencing. She also contends that the trial court erred when it imposed, as a condition to her probation, that she cooperate in the prosecution of her accomplice(s). We find no error in the length of the sentence or in the requirement that she be incarcerated. We do find error in the condition of probation as imposed by the trial court.

On January 9, 1995, the defendant burglarized the residence of Mr. and Mrs. Mike Logan, her aunt and uncle by marriage. With one or two accomplices, the defendant stole thousands of dollars worth of personal property which was then sold, pawned or discarded. Approximately one month after the burglary and theft took place, the defendant confessed her involvement in the crime to authorities and expressed a willingness to make restitution for the victims' financial loss.

When a defendant complains of her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of

showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

Tennessee Code Annotated § 40-35-210 provides that the minimum sentence within the range is the presumptive sentence. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

Tennessee Code Annotated § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need "to avoid depreciating the seriousness of the offense," the determination that confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-1-3(1).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the

trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. § 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b). In addition, the legislature established certain sentencing principles which include the following:

> (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
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> (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.

T.C.A. § 40-35-102.

After reviewing the statutes set out above, it is obvious that the intent of the legislature is to encourage alternatives to incarceration in cases where defendants are sentenced as standard or mitigated offenders convicted of C, D, or E felonies. However, it is also clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate.

The defendant contends first that the length of her sentence is excessive. She was sentenced as a Range I standard offender. The minimum sentence for a Range I standard offender on a Class C felony is three years, with a maximum of six. T.C.A.

§ 40-35-112 (a)(3) (1990 Repl.). The minimum sentence for a Range I standard offender on a Class D felony is two years, with a maximum of four. T.C.A. § 40-35-112 (a)(4) (1990 Repl.). The record reveals that the defendant has a prior criminal record of numerous misdemeanor offenses including two previous convictions relating to theft of property. Charges of driving with a revoked license in two different counties were also pending at the time of the sentencing hearing. In addition, the defendant had twice violated her probation on earlier sentences. In consideration of these facts, the trial court properly applied two enhancing factors: a previous history of criminal convictions or behavior in addition to those necessary to establish the range, and a previous history of unwillingness to comply with the conditions of a sentence involving release in the community. T.C.A. § 40-35-114(1), (8) (1990 Repl.). The trial court found no mitigating factors. The record supports the trial court's findings, and it did not abuse its discretion in setting the defendant's sentences at the maximum. This issue is without merit.

The defendant next contends that the trial court erred by failing to consider the defendant for alternative sentencing. However, the trial court not only considered alternative sentencing, but imposed one: probation, albeit following a year of incarceration. The trial court's actions satisfy the 1989 Sentencing Reform Act's requirements that probation be automatically considered for those defendants convicted of these offenses and who receive an actual sentence of eight years or less, T.C.A. § 40-35-303(a), and that qualifying defendants such as Ms. Arms be presumed a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). Moreover, given the defendant's "extensive criminal history" and her repeated violations of past probation, the trial court did not abuse its discretion in requiring a year of the defendant's sentence to be served. The defendant has not carried her burden of demonstrating that the evidence preponderates against the trial court's findings. This issue is without merit.

In her third issue, the defendant contends that the trial judge erred when he imposed as a condition to her release on probation that she cooperate in the investigation and prosecution of her accomplice(s) in the offenses. We agree with the defendant on this issue. The Criminal Sentencing Reform Act of 1989 provides that "[w]henever a court sentences an offender to supervised probation, the court shall specify the terms of the supervision and may require the offender to comply with certain conditions." T.C.A. § 40-35-303 (d). Various specific conditions are then enumerated followed by a "catch-all" provision permitting "any other conditions reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience, or otherwise prohibited by this chapter." T.C.A. § 40-35-303 (d)(9) (1995 Supp.). In other words, the Sentencing Reform Act permits the sentencing court to impose conditions of probation, but not conditions precedent to probation. In this case, the sentencing court required that the defendant satisfy the condition prior to being released on probation. In addition, it gives to the prosecutor the authority and power to determine if the condition has been met. The Sentencing Reform Act does not provide for this scenario.

We are also concerned about the substance of the condition imposed. While we recognize that plea bargains often involve favorable sentencing terms in exchange for cooperation in the prosecution of others, this is not a plea bargained case. Moreover, requiring the defendant to choose between incarceration and becoming an informant strikes us as incompatible with the defendant's freedom of conscience in contravention of the statute. See also State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994) ("requiring the appellant to participate in undercover activities under the facts as presented was outside the scope of the Sentencing Act as it was clearly not voluntary, was not reasonably related to any form of rehabilitation and was unduly restrictive of

appellant's liberty.")

For the reasons set forth above, we find that the trial court erred when it imposed on the defendant a condition precedent to probation, and in creating a condition that does not comport with the requirements of T.C.A. § 40-35-303(d). Therefore, we reverse that portion of the defendant's sentence and remand this matter for the trial court to reconsider the conditions of probation in accordance with this opinion. The remainder of the defendant's sentence is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge