

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

FILED
August 2, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

GREGORY RUSSELL)
CURTIS,)

Appellant.)

C.C.A. NO. 02C01-9509-CC-00266

CARROLL COUNTY

HON. JULIAN P. GUINN)
JUDGE)

(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF CARROLL COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant entered pleas of guilty to two counts of selling marijuana and one count of selling cocaine. The trial judge sentenced the Defendant as a Range I standard offender to the minimum sentence of one year for each of the marijuana offenses and to the minimum sentence of eight years for the cocaine offense. The sentences were ordered to be served concurrently. One year was ordered served in confinement with the balance to be served on supervised probation. On appeal, the Defendant argues that the trial court erred by not granting full probation or, in the alternative, a community corrections sentence without any period of confinement. We affirm the judgment of the trial court.

On January 3, 1995, the Carroll County Grand Jury returned a three count indictment against the Defendant. Count 1 charged the Defendant with selling 27.7 grams of marijuana to an undercover agent on June 25, 1993. Count 2 charged the Defendant with selling 33.2 grams of marijuana to an undercover agent on July 1, 1993. Count 3 charged the Defendant with selling in excess of .5 grams of cocaine to an undercover agent on August 18, 1993.

On March 28, 1995, the Defendant entered pleas of guilty as charged in each count of the indictment. Sentencing was left to the discretion of the trial court. A presentence report was filed and a sentencing hearing was conducted. The trial judge sentenced the Defendant to concurrent terms of one year each for

the Class E felonies and to a concurrent sentence of eight years for the Class B felony, all to be served as a Range I standard offender. The trial judge ordered that one year be served in confinement, with the balance on supervised probation. It is from the sentences ordered by the trial court that the Defendant appeals, arguing that he should be granted full probation or community corrections without any period of confinement.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that 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). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 and -210; 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 presentence report reflects that the Defendant was twenty-six years old and successfully completed the eleventh grade. He attended high school through the twelfth grade, but did not receive a diploma. He had twice taken the GED examination but failed to successfully complete it. He was unmarried but lived with his girlfriend, with whom he had a three-year-old son. He apparently had been regularly employed as a heavy equipment operator. He was convicted of misdemeanor theft in 1994 for which he received an eleven month and twenty-nine day suspended sentence and was ordered to pay restitution. He was also convicted of assault in 1994 and received an eleven month and twenty-nine day sentence with all time suspended except for four days.

At the time of the sentencing hearing, the Defendant was unemployed, although his girlfriend stated that she and their son were totally dependent upon the Defendant for support. On cross examination, the Defendant explained that his theft conviction grew out of a situation in which he took a camcorder from someone because that person owed him money for some marijuana.

In sentencing the Defendant, the trial judge stated that he had considered full probation, but found it inappropriate because of the circumstances of the offense, noting that there were three separate offenses and that full probation would "deprecate" the seriousness of the offense. The trial court also noted the

need for deterrence. The trial judge then ordered the sentencing alternative of continuous confinement in conjunction with the term of probation. Tenn. Code Ann. § 40-35-104(c)(4).

Tennessee Code Annotated section 40-35-103 sets out certain sentencing considerations which are guidelines for determining whether or not a Defendant should be incarcerated. These include the need “to avoid depreciating the seriousness of the offense” and the determination that “confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses.” Tenn. Code Ann. § 40-35-103(1)(B).

Because the Defendant herein was convicted of a Class B felony, he does not enjoy the presumption that he is a favorable candidate for alternative sentencing options. Furthermore, the burden of establishing suitability for probation rests with the Defendant. Tenn. Code Ann. § 40-35-303(b).

Included in the Defendant’s statement for the presentence report is the following: “I was contacted by the undercover agent and asked to supply him with the drugs. I have known the undercover agent all of my life and I thought I was doing a favor for him.” At the sentencing hearing, the Defendant testified: “I’d known the guy that done this to me all my life. He just called and he -- he called me the day that I got out of jail.” (emphasis added) We believe these statements indicate something less than the Defendant accepting full responsibility for his criminal conduct.

As previously set forth, the trial judge's sentence is clothed with a presumption of correctness. We have performed the required de novo review of the record. We are unable to conclude that the trial judge erred or abused his discretion when he did not grant the Defendant full probation or allow his sentence to be served in community corrections without any period of confinement.

The judgment of the trial court is accordingly affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

JERRY L. SMITH, JUDGE