IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1995 SESSION

FILED

July 11, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 01-C-01-9503-CC-00095
	)	
	)	Fentress County
v.	)	
	)	Lee Asbury, Judge
	)	
	)	(Sentencing)
MILTON FRANKLIN, JR.,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Milton Franklin, Jr., entered a plea of guilty to selling dihydrocodeinone, a Class D felony. The trial court found that the appellant was a standard offender and imposed a Range I sentence consisting of confinement for two (2) years in the Department of Correction. In this Court, the appellant contends that the trial court should have suspended his sentence and placed him on probation, or, in the alternative, sentenced him pursuant to the Tennessee Community Corrections Act of 1985. After a thorough review of the record, the briefs of the parties, and the law governing the issue presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

The appellant was thirty-seven years of age when he was sentenced. He is married. Five children were born to this union. He finished the tenth grade of formal schooling. According to the appellant, he left to join the United States Army. He obtained his diploma while in the military. Later, he supposedly attended Indiana University, Big Ben Community College in Germany, and Rose State College in Oklahoma. He advised the presentence officer that he attended Livingston Area State Vocational Technical School, where he obtained a license in cosmetology.

The Presentence Report indicates that the appellant worked for a period between June, 1989 and April, 1991. He testified at the sentencing hearing that he had been working for two weeks at a company that sold and installed satellite dishes and cable systems. The appellant's wife is disabled and receives monthly benefits of $446. She is also entitled to aid to dependent children, which totals $305, food stamps, and medical care.

The appellant has a prior record. He has been convicted of involuntary manslaughter, driving while license suspended, and driving while license revoked, two counts. He was convicted of speeding and required to attend safety school. He was also charged with larceny from a retailer, shoplifting, in Oklahoma. He was granted a "deferred disposition," a form of diversion.

In 1986, the Fentress County Sheriff served a search warrant at the residence

where the appellant and his family resided. The officers found a large patch of marijuana growing behind the residence. The appellant's wife took responsibility for the marijuana. The appellant was not charged in the incident.

On July 16, 1993, a confidential informant was sent to the appellant's home to purchase dihydrocodeinone. The appellant sold the drug to the informant. Based upon this sale, the sheriff's department obtained a search warrant for the appellant's residence. The officers found a large patch of marijuana growing behind the appellant's residence. They also found books on how to grow marijuana and marijuana seed catalogs. The appellant had $3,690 on his person. The officers found a list of drugs and prices in the appellant's wallet. Seventeen vehicles came to the appellant's residence while the officers were present. When the drivers saw the police cruisers, they turned around and left.

The sheriff testified that two of the drugs found on the appellant's list, Tylox and Percoset, had "just destroyed some of the younger generation in Fentress County and surrounding counties." He also testified that ninety percent or more of the people arrested for forgery and uttering forged paper had either been arrested for a drug offense or were addicted to drugs. Ninety-eight percent of the people who committed the offenses of burglary and larceny had either been arrested for a drug offense or were addicted to drugs.

The appellant admitted that he had $3,690 in his possession when the search warrant was executed. He stated that his sister had obtained a loan for $3,000 and gave it to the appellant and his wife to purchase a van. They had borrowed the other $600 from friends to go towards the purchase price of the van. Later, the owner of the van was murdered. He died inside the van.

While the appellant admitted that he was addicted to Tylox and marijuana, he denied having any interest in the marijuana growing behind his residence. He did not admit or deny selling any other drugs.

The trial court did not believe the appellant's testimony. The court noted that the appellant had been engaged in the drug business for an extended period of time. He had no other means of support. The trial court also noted the appellant's prior record. The court denied an alternative sentence based upon these two factors.

This Court has conducted a de novo review of the record pursuant to Tenn. Code

Ann. § 40-35-401(d). The findings of the trial court have been given the requisite presumption of correctness. This Court notes that an accused's lack of candor is a matter which can be considered when determining whether the accused can be rehabilitated. Also, the appellant's convictions may be considered in making this determination. Here, the appellant was convicted for offenses occurring in 1979, 1985, 1989, 1990, and 1993, approximately two and one-half months before he was arrested for selling the drugs to the informant. In other words, these offenses did not occur during a short period of time.

It is a well-established rule that the appellant has the burden of establishing how or why the sentence imposed by the trial court is erroneous. In this case, the appellant has failed to overcome the presumption of correctness afforded the trial court's findings. This Court agrees that the appellant was not entitled to leniency -- an alternative sentence. Based upon his background and testimony, his ability to be rehabilitated is questionable at best. Furthermore, the appellant has been granted an alternative sentence in the past. He did not learn from this experience.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
PAUL G. SUMMERS, JUDGE

_____
JOSEPH M. TIPTON, JUDGE