IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION



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| EMMA JEAN DUNLAP HILLIARD, | * | C.C.A. # 02C01-9507-CC-00182 |
| Appellant, | * | HENRY COUNTY |
| VS. | * | Hon. Julian P. Guinn, Judge |
| STATE OF TENNESSEE, | * | (Sale of a Controlled Substance) |
| Appellee. | * | |

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OPINION FILED: _____

JUDGMENT AFFIRMED; SENTENCE MODIFIED

GARY R. WADE, JUDGE

**OPINION**

The defendant, Emma Jean Dunlap Hilliard, was convicted of the sale of less than .5 grams of cocaine, a Class C felony. Tenn. Code Ann. § 39-17-417(a)(3). The trial court imposed a Range II sentence of six years to be served consecutively to prior sentences she was already serving.

The following issues are presented for our review:

(1) whether the trial court erred by using the defendant's prior record to enhance the sentence; and

(2) whether the trial court erred by denying probation or an alternative sentence under the Community Corrections Act.

For the reasons set forth in this opinion, we modify the sentence from Range II to Range I. Otherwise, the judgment is affirmed.

In 1993 and 1994 the defendant was charged with and found guilty of three different drug offenses. Only the third conviction is the subject of this appeal. Because the sentencing for the offenses is interrelated, the circumstances of each of the three convictions are pertinent.

In June of 1993, the defendant was arrested for possession of marijuana with the intent to sell or deliver and possession of cocaine with the intent to sell or deliver; she was later convicted of the lesser offense of simple possession and the Class B felony of possession of cocaine with intent to sell. The trial court imposed concurrent sentences of eleven months and twenty-nine days on the first conviction and eight years on the second. Because the indictment did not allege the amount of cocaine involved, a fact which is necessary to determine the grade of felony, this court was required on direct appeal to modify the 1994 conviction to a Class C felony and remand for resentencing. State v. Emma Jean Dunlap Hilliard,

906 S.W.2d 466, 470 (Tenn. Crim. App. 1995); see Tenn. Code Ann. § § 39-17-417(c)(1) & (2). The record on the appeal of the third offense does not reflect what sentence the defendant received after the remand.

On October 26, 1993, some four months after the initial charges, the defendant sold less than .5 grams of cocaine to an undercover agent. The incident occurred while the defendant was out on bail on the prior charges. After her convictions on the first two offenses, a jury convicted the defendant on the last charge. The trial court imposed a Range II sentence of six years, consecutive to her previous terms of imprisonment. The Range II classification was based on an even earlier, 1985 felony conviction and on the 1994 felony conviction, which was on appeal at the time of this sentence.

The defendant argues that the trial judge improperly relied on prior convictions to enhance the sentence and should have granted some form of alternative sentencing. 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. § 40-35-40l(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 l66, l69 (Tenn. l99l). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (l) 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-l02, -l03, and -2l0; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. l987).

I

The defendant's first issue is that the trial court erred by classifying her as a Range II offender. Because the defendant did not have the requisite number of convictions to support such a classification, we must agree.

A multiple, Range II offender is a defendant who has received the following:

> (1) A minimum of two (2) but not more than four (4) prior felony convictions within the conviction class, a higher class, or within the next two (2) lower felony classes, where applicable; or
>
> (2) One (1) Class A prior felony conviction if the defendant's conviction offense is a Class A or B felony.

Tenn. Code Ann. § 40-35-106(a)(1) & (2). Subpart (2) is inapplicable because the defendant was convicted of a Class C felony, not a Class A or B felony. Subpart (1) is also inapplicable because the defendant did not have the required number of "prior felony convictions." Tenn. Code Ann. § 40-35-106(b)(1).

In seeking the enhanced classification, the state relied on the 1985 felony conviction and the 1994 felony conviction. Our supreme court, however, has held that "prior convictions used to enhance a defendant's status beyond that of a standard offender must have been reduced to judgment before the commission of the ..." more recent offense for which sentence is being imposed. State v. Blouvett, 904 S.W.2d 111, 111-13 (Tenn. 1995). The 1994 felony conviction had not been

reduced to judgment before the defendant committed this offense in October of 1993. Because the defendant only had one "prior felony conviction" at the time of sentencing, we must classify the defendant as a Range I standard offender.

We will now attempt to determine the sentence required by law. The presumptive sentence, of course, is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

A Range I, Class C felony requires a three-year minimum sentence. Tenn. Code Ann. § 40-35-112(a)(3). The trial court applied the following enhancement factors:

> (1) The defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range, Tenn. Code Ann. § 40-35-114(1); and
>
> (2) The defendant committed the crime while on bail, Tenn. Code Ann. § 40-35-114(13)(A).

We agree that these enhancing factors are applicable. Moreover, the defendant filed no mitigating factors and the trial court found none. Thus the trial court acted within its authority in assessing significant weight to each factor and imposing a six-year sentence, consecutive to the prior term of imprisonment.

II

The defendant's second issue is whether the trial court erred by denying some form of alternative sentencing or Community Corrections. The trial court made the following observations:

> This Court has again considered alternative forms of sentencing, as it is required to do, and for those reasons stated in her prior sentence finds not only that they're not inappropriate but that they are impossible to be imposed in this particular case....
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> As in all others, I don't think that a suspended sentence or alternative forms of punishment would be in the best interest of the defendant, although I think it is unduly harsh. It certainly wouldn't be in the best interest of the public. Lastly, for deterrence sake, like the others, if you're going to deal in cocaine then you're going to have to take the penalties when the time comes.

Among the factors applicable to the defendant's application for probation are the circumstances of the offense, the defendant's criminal record, social history, and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978), cert. denied, 439 U.S. 1077 (1979).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a) and (b).

Alternative sentencing issues must be determined by the facts and circumstances of the individual case. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Here, the defendant has two daughters; they were 10 and 18 years old at the time the presentencing report was prepared. The defendant appears to have a supportive family; her mother is caring for her children while she is incarcerated. The defendant has a limited work history. Otherwise, very little appears in the presentence report about her "social history" or "present condition."

Weighing against the grant of probation is the fact that the defendant has a prior criminal record since 1985, which includes a felony drug conviction and several misdemeanor convictions for such offenses as shoplifting, disorderly conduct, and petit larceny. See Tenn. Code Ann. 40-35-103(1)(A). Also, weighing against probation is the fact that the defendant committed this crime while on bail for a similar crime. The nature and circumstances of this case warranted the denial of probation. The defendant has not overcome the presumption that the trial court's denial of probation was correct. See Tenn. Code Ann. § 40-35-401(d).

The defendant also contends that she should have been sentenced to Community Corrections. The defendant, however, is not statutorily eligible for this program. "Persons who are sentenced to incarceration ... at the time of consideration will not be eligible." Tenn. Code Ann. § 40-36-106(a)(7). This provision bars the defendant from being eligible for this program, as she was incarcerated at the time of sentencing.

Accordingly, the sentence is modified to a Range I term of six years, consecutive to the prior sentences.

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Gary R. Wade, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Jerry L. Smith, Judge