IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9601-CR-00004**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. THOMAS H. SHRIVER,**
WYLEY TODD LOGGINS	)	**JUDGE**
A/K/A TODD W. LOGGINS	)	
	)	
Appellant.	)	(Sentencing)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for knowingly selling not less than one-half ounce nor more than ten pounds of marijuana, a Schedule VI controlled substance in violation of T.C.A. § 39-17-417. He pled guilty to the offense and, as agreed, a one year sentence was imposed. After a hearing, all was suspended except for forty-five days to be served, followed by two years probation. In this appeal as of right, the defendant contends that the sentence of confinement is excessive. After a review of the record, we find that the court erred by not stating on the record its reasons for incarceration and by not applying the presumption of alternative sentencing to the defendant. However, after a de novo review, we find the sentence is appropriate, and we affirm the judgment below.

The defendant was arrested in April of 1994 after he and two other men sold ten pounds of marijuana to an undercover police officer. The defendant pled guilty and entered into a plea agreement with a sentence of one year and a two hundred fifty dollar ($250.00) fine.

Before discussing the sentencing issue, we briefly address the state's contention that because the defendant entered into a plea agreement he cannot now complain about his sentence.

A defendant has a right of appeal upon a plea of guilty or nolo contendere if:

> (i) Defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case; or
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> (ii) Defendant seeks review of the sentence set and there was no plea agreement under Rule 11(e); or

> (iii) The error(s) complained of were not waived as a matter of law by the plea of guilty or nolo contendere, or otherwise waived, and if such errors are apparent from the record of the proceedings already had; or
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> (iv) defendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case.

Tenn. R. Crim. P. 37(b)(2). Here, the defendant seeks a review of his sentence only. The state maintains that he cannot do so because he entered into a plea agreement.

"When a defendant pleads guilty pursuant to a plea agreement, he waives his right to challenge the sentencing ranges to which he agreed." Eric Williamson v. State, No. 02C01-9305-CR-00096, Shelby County (Tenn. Crim. App. filed May 11, 1994, at Jackson), citing State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987). Also, a defendant does not have a right to appeal from a sentence which complies exactly with his plea agreement. State v. Charles David Raines, No. 03C01-9407-CR-00254, Hamblen County (Tenn. Crim. App. filed March 21, 1995, at Knoxville)(finding no basis for appeal where defendant agreed to a particular sentence pursuant to a plea bargain).

In this case, the defendant is neither challenging the range of his sentence nor an agreed upon particular sentence. He is only challenging the manner in which the sentenced is to be served. While the defendant did agree to a one year sentence, he did not agree to incarceration. Thus, we see no reason to bar the defendant from pursuing this appeal.

We now turn to the appropriateness of the defendant's sentence. When a defendant complains of his/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 § 40-35-103 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. § 40-35-103(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.

At the sentencing hearing, the court heard evidence from the defendant and Thomas Seard, the probation officer who prepared the presentence report. After hearing this testimony, the court sentenced the defendant to the agreed sentence of one year. The trial court then ordered the defendant to serve forty-five days and placed him on two years supervised probation. In explaining the sentence, the court said only:

> I think when the legislature passed the law that said you serve a year -- uh -- one to two years for a first offense sale of -- of marijuana that -- uh -- under ten pounds that they meant that you served that. I don't think anybody conceived the idea that -- the idea that you just go on your way after you did that.

The presumption of correctness normally afforded sentencing determinations clearly cannot attach to this sentence. The record fails to show that the court considered "the sentencing principles and all relevant facts and circumstances" as is required by Ashby, 823 S.W.2d at 169.

The court further erred when it failed to apply the presumption in T.C.A. § 40-35-102(6). The sentencing process must necessarily commence with a determination of whether the accused is entitled to the benefit of the presumption of alternative

sentencing options in the absence of evidence to the contrary. Ashby, 823 S.W.2d at 169; State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993).

Because the trial court failed to follow the statutory guidelines for sentencing the defendant, the presumption of correctness does not apply and our review is completely de novo. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). We begin with the presumption that the defendant is a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6).

The defendant was arrested for his part in arranging a $12,000 sale of marijuana to an undercover police officer. At the sentencing hearing, the defendant testified that he had expected to make five hundred ($500) to one thousand dollars ($1000) from the sale. At the time of the hearing, the defendant was self-employed in the aluminum siding business. For the past five years of his self-employment, the defendant failed to pay any income taxes. He testified that he is now making arrangements to satisfy his debt. He further testified that he had not smoked marijuana in at least two months, but did admit to smoking it from the time he was arrested until then. He also admitted in the presentence report to having used marijuana for nearly ten years. At the time of the hearing, he was attending Narcotics Anonymous three nights a week and Alcoholics Anonymous two nights a week.

While never convicted of a felony, the defendant was convicted for an offense arising from a burglary charge. He was also convicted of desertion for being absent without leave from the United States Army. Upon his return to the Army, he was incarcerated a short time in Fort Knox and later received a general discharge. Four years later, the defendant was arrested for theft but the charges were dropped.

Considering the defendant's history of long-term drug use, including his

continued use of marijuana even after his arrest, and his prior offenses, we think that a short period of incarceration is appropriate. The judgment of the sentencing court is therefore affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID H. WELLES, Judge