IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED

September 25, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	No. 03-C-01-9508-CR-00244
	)	
	)	Hamilton County
v.	)	
	)	Stephen M. Bevil, Judge
	)	
	)	(Sentencing)
AMY RENEE MARCUM,	)	
	)	
APPELLANT.	)	

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OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Amy Renee Marcum, was convicted of solicitation to commit murder in the first degree, a Class B felony, after her plea of guilty to the offense. The trial court found that the appellant was a standard offender and imposed a Range I sentence consisting of confinement for ten (10) years in the Department of Correction. In this Court, the appellant challenges the length and manner of service of the sentence imposed by the trial court. After a thorough review of the record, the briefs submitted by the parties, and the law that controls the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

The appellant, seventeen years of age, went to work at a Chattanooga restaurant in June of 1992, shortly after she graduated from high school. During the course of her employment, she met Dr. Jorge Ariel Sanjines. Dr. Sanjines owned the restaurant. His brother managed the restaurant.

Sanjines expressed an interest in the appellant. They discussed the appellant's desire to major in pre-medicine. He indicated that he could help her when she graduated. After the appellant's eighteenth birthday, Sanjines charmed the appellant. They began dating. Their relationship commenced in August of 1992 and continued until March 5, 1994.

Initially, Sanjines was a gentleman. The appellant fell in love with him. In December of 1992, Sanjines became abusive and possessive. The appellant thought that Sanjines would change. His abuse escalated as the relationship progressed.

Sanjines and his wife, Gina Sanjines, were divorced. He was attempting to get custody of the children. Like most divorced parents, the custody of the children was a bone of contention. By court order, the appellant could not spend the night at Sanjines's house when the children were there. Mrs. Sanjines and her investigators watched Sanjines's residence. They apparently followed the appellant. Sanjines became angry with his former wife's conduct and the fact he was paying her a large amount of alimony each month.

In May of 1993, Sanjines told the appellant that he was going to have his wife

murdered after his May 30th birthday party. He told the appellant someone at the party had Mafia connections in New York. This person could have Mrs. Sanjines killed. He then asked the appellant to kill Mrs. Sanjines.

The appellant was approached by Jeremy M. Ingram in August of 1993 while she was in the parking lot of the restaurant. Ingram related that he understood from conversation in the restaurant Dr. Sanjines might be interested in having someone killed. He asked the appellant if she remembered when Jeff Wolfe was killed. She stated that she remembered the incident. Ingram told her someone had been hired to kill Wolfe. According to Ingram, he knew who killed Wolfe, and he could get the same individuals to kill again for remuneration. The appellant related her conversation with Ingram to Sanjines. Sanjines instructed the appellant to talk to Ingram about murdering Gina Sanjines.

The appellant admitted she solicited Ingram to murder Mrs. Sanjines. She also admitted to talking with Jeremy Gore, who was helping Ingram find someone to kill Mrs. Sanjines.

Ingram gave the appellant a list of questions regarding Mrs. Sanjines and where she worked. The appellant told Ingram he would have to get the information from Sanjines. In November of 1993, Ingram told the appellant Sanjines had paid him $10,000. When the appellant asked him why he was given the money, he told the appellant it was payment for killing her, not Mrs. Sanjines. Ingram shot Mrs. Sanjines three times in her head. While Mrs. Sanjines survived, she sustained permanent injuries. Ingram killed Virgil Schrag, Mrs. Sanjines's boyfriend.

The appellant went to court and sought relief from being followed by Mrs. Sanjines and others. She admitted she committed perjury during the court hearing. She stated that she testified as Sanjines had instructed her. When the police interviewed her about the shootings, she gave a statement in excess of forty pages. She accused an innocent person of committing the acts in question. Later, she went to the District Attorney General's Office and gave an accurate statement.

The appellant testified she told Sanjines in November of 1993 she did not want anything to do with his desire to have Mrs. Sanjines murdered. According to the appellant, Sanjines told her that if she went to the police or told anyone, he would kill her. She

continued her relationship with Sanjines, frequented his residence, and spent the night with him after this conversation. Furthermore, she admitted being with Sanjines after Ingram had murdered Schrag and wounded Mrs. Sanjines.

I.

When an accused challenges the length of a sentence and the manner in which the appellant is required to serve the sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct."[1] However, the application of 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."[2] The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts.[3] Nevertheless, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and inflection in their voices.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment.[4]

The party challenging the sentences imposed by the trial court has the burden of

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[1]Tenn. Code Ann. § 40-35-401(d).

[2]State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

[3]State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993).

[4]See Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

establishing that the sentences imposed by the trial court were erroneous.[5] In this case, the pivotal question is whether the length of the sentence was excessive.

II.

The trial court found that the evidence supported three enhancement factors. The factors used by the trial court to enhance the appellant's sentence within the appropriate range were: (a) the offense involved more than one victim,[6] (b) the personal injuries inflicted to the victim were particularly great,[7] and (c) she had no hesitation about committing a crime when the risk to human was high.[8] Although the appellant contended that the evidence supported several mitigating factors, the trial court found no such factors were supported by the evidence.

The appellant did not include a transcript of the submission hearing in the record. Consequently, this Court has no way of knowing the facts stipulated at that hearing or the nature and extent of her plea of guilty. This makes this Court's review extremely difficult.

The parties agree that enhancement factors (3) and (10) should not have been used to enhance the appellant's sentence within the appropriate range. Based upon the information contained in the briefs, the appellant entered a plea of guilty to soliciting Jeremy Ingram to kill Gina Sanjines. She was the only victim. The state agrees that enhancement (10) is an element of solicitation to commit murder in the first degree.

The appellant argues enhancement factor (6) is an element of solicitation to commit murder in the first degree. The state argues this enhancement is not an element of the offense. This Court is of the opinion that this enhancement factor is not an element of the offense. The appellant's reliance on the cases cited in her brief is misplaced. Those cases involved an accused who committed an act of homicide. In this case, enhancement factor (6) was not an element of the offense of solicitation. Therefore, the trial court properly

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[5]Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

[6]Tenn. Code Ann. § 40-35-114(3).

[7]Tenn. Code Ann. § 40-35-114(6).

[8]Tenn. Code Ann. § 40-35-114(10).

applied this enhancement factor.

The state argues the trial court should have applied enhancement factor (12) to enhance the appellant's sentence.[9] This factor provides: "During the commission of the felony, the defendant willfully inflicted bodily injury upon another person, or the actions of the defendant resulted in the death or serious bodily injury to a victim or a person other than the intended victim." The record establishes that the appellant's solicitation of Ingram to kill Gina Sanjines resulted in the death of Virgil Schrag. Mrs. Sanjines was dating Schrag. Sanjines and Schrag happened to be together when Ingram attempted to kill Mrs. Sanjines. Schrag was in fact killed by Ingram. The trial court should have applied this factor to enhance the appellant's sentence within the appropriate range.

III.

The appellant contends that "there were numerous mitigating factors present in the instant case." She argues that the evidence in this case supports the following mitigating factors: remorse, excellent work history, being a model student, no prior arrest history, acceptance of responsibility for her criminal conduct, and adherence to the terms of the Pre-Trial House Arrest Program.[10] She also argues that her role was the least culpable and she was under duress and dominion of Dr. Sanjines,[11] she lacked substantial judgment due to her age,[12] she lacked a sustained intent to violate the law,[13] she acted under a strong provocation when she introduced Ingram to Sanjines and failed to report the crime because she feared for her life,[14] and she assisted the authorities.[15]

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[9]Tenn. Code Ann. § 40-35-114(12).

[10]Tenn. Code Ann. § 40-35-113(13).

[11]Tenn. Code Ann. § 40-35-113(12).

[12]Tenn. Code Ann. § 40-35-113(6).

[13]Tenn. Code Ann. § 40-35-113(11).

[14]Tenn. Code Ann. §§ 40-35-113(2) and (8).

[15]Tenn. Code Ann. § 40-35-113(9).

This Court has held that genuine, sincere remorse is a proper mitigating factor.[16] The trial court saw the appellant, listened to her testimony, and observed her demeanor. The court obviously did not believe the appellant was truly remorseful that Mrs. Sanjines had been shot and Schrag had been killed. As this Court said in State v. Williamson: "[T]he mere speaking of remorseful words or a genuflection in the direction of remorse will not earn an accused a sentence reduction."[17]

The appellant's assertion that her excellent work history, being a model student, and having no prior arrest history qualify her for mitigation is misplaced. These attributes are expected of every citizen in this state.[18] As this Court said in State v. Keel: "Every citizen in this state is expected to have a stable work history if the economy permits the citizens to work, the citizen is not disabled, or the citizen is not independently wealthy."[19] Also, most of the appellant's educational pursuits occurred after she was arrested in this case. The trial court believed the appellant's efforts to pursue her college education were self-serving.

The appellant was not entitled to a reduction in her sentence because she complied with the conditions of the Pre-Trial House Arrest Program. Again, citizens who are afforded this right are expected to comply with the conditions. Besides, the appellant had reason to abide by these conditions. If she had violated the conditions, the trial court would have raised the appellant's bond and placed her in jail. In short, compliance with these conditions was the appellant's key in obtaining her release from custody and avoiding being returned to pre-trial confinement.

Contrary to the appellant's assertion, she did not accept responsibility for her criminal conduct or cooperate with law enforcement officials until she realized cooperating with the authorities may result in a lenient sentence. After the shooting and before her arrest, the appellant was interviewed by a police officer. She gave him a statement in

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[16]State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App.), per. app. denied (Tenn. 1988); see State v. Williamson, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995).

[17]919 S.W.2d at 83.

[18]See State v. Keel, 882 S.W.2d 410, 422-23 (Tenn. Crim. App.), per. app. denied (Tenn. 1994).

[19]882 S.W.2d at 423.

excess of forty pages. She unequivocally denied she had any part in the murder of Schrag and the attempt to murder Gina Sanjines. She told the police the Sanjines brothers told her that "Anthony Catapano was going to have Virgil killed." The appellant subsequently went to the District Attorney General's Office to tell the truth.

Equally specious are the assertions that the appellant played a minor role in the commission of the offense, lacked substantial judgment in committing the offense due to her age, acted under duress or the dominion of Dr. Sanjines, lacked a sustained intent to violate the law given the unusual circumstances, and acted under a strong provocation when she introduced Ingram to Sanjines. The role of soliciting someone to kill a person that she admitted she hated made the appellant a major player in the conduct that led to the death of Schrag and the wounding of Gina Sanjines. The trial court found that the appellant assisted in procuring a "hit man" because she loved Sanjines. She was with him the day before Ingram took the actions in question, and she was with Sanjines after Ingram had killed Schrag and wounded Gina Sanjines. Based upon the findings made by the trial court, the appellant had a sustained intent to commit the crime in question.

Although the transactions in question were committed while the appellant was between eighteen and nineteen years of age, the trial court rejected her youth as a mitigating factor. The court found the appellant was mature beyond her age. The audio tape of her one hour and fourteen minute statement to the police supports this finding. She was exceptionally convincing in her false statements, and her voice never wavered. Very few people could have withstood such a lengthy questioning. This is particularly true given the fact the police had first talked to several of the appellant's close friends. The police told her what her friends had said. The appellant continued to deny her involvement, casted suspicion on Catapano, and maintained her composure throughout the statement.

This Court is of the opinion the sentence imposed by the trial court was proper. There were two enhancing factors which are entitled to serious consideration. There are no mitigating factors present in the record.

IV.

The appellant contends the trial court should have granted her an alternative sentence to incarceration. She argues the state failed to overcome the presumption that she was qualified for alternative sentencing. This reasoning is flawed because she is not entitled to the presumption created by statute.[20]

Due to the length of the sentence, the appellant is not eligible for probation.[21] Also, the appellant is not entitled to a community corrections sentence due to the nature of the offense.[22] In State v. James Kenneth Spry,[23] a panel of this Court said:

> The Defendant also argues that the trial judge erred by not sentencing him to community corrections. While the trial judge did not specifically address this issue, we conclude that the Defendant was not eligible to be considered for community corrections. . . . [The] solicitation to commit murder in the first degree is a crime against the person and must be considered a violent felony offense. Furthermore, this felony offense involved the use or possession of a weapon. . . .[24]

This Court concludes the trial court properly denied the appellant's request for an alternative sentence.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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[20]See Tenn. Code Ann. § 40-35-102(6). The only presumption created by this statute is limited to Class C, D and E felonies. No presumption attaches to a Class B felony. If the appellant contends that subsection (5) creates a presumption, her contention is flawed. Subsection (5) does not create a presumption.

[21]See Tenn. Code Ann. § 40-35-303(a). This statute provides that a sentence must be eight years or less to be eligible for probation.

[22]Tenn. Code Ann. §§ 40-36-106(a)(3) and (a)(4).

[23]Coffee County No. 01-C-01-9409-CC-00309 (Tenn. Crim. App., Nashville, June 15, 1995), per. app. denied (Tenn. 1995).

[24]Spry, slip op. at 7.

JOHN H. PEAY, JUDGE

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DAVID H. WELLES, JUDGE