IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9601-CR-00033
Appellee	)	
	)	SHELBY COUNTY
vs.	)	
	)	Hon. Arthur T. Bennett, Judge
KENNETH D. ODIE,	)	
	)	(Possession of Cocaine in Excess of
	)	One-Half Gram)
Appellant	)	

For the Appellant:

Mark A. Saripkin
Attorney at Law
296 Washington Avenue
Memphis, TN 38103

Joseph S. Ozment
Attorney at Law
217 Exchange Avenue
Memphis, TN 38103

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Ellen H. Pollack
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

John W. Pierotti
District Attorney General

Jennifer Nichols
Asst. District Attorney General
201 Poplar Avenue, Third Floor
Memphis, TN 38103

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Kenneth D. Odie, appeals from the trial court's denial of an alternative sentence. The appellant pled guilty in the Criminal Court of Shelby County to possession of cocaine in excess of one-half gram with the intent to sell, a class B felony. Tenn. Code Ann. § 39-17-417(c)(1) (1992). The plea agreement provided for a sentence of eight years. According to the plea agreement, the trial court was to determine the manner of service of the sentence. The trial court ordered that the appellant serve his entire sentence in the Department of Correction. On appeal, the appellant contends that the trial court should have granted the appellant probation or community corrections.

After reviewing the record, we affirm the judgment of the trial court.

FACTUAL BACKGROUND

On June 17, 1994, the appellant and two co-defendants entered the parking lot of an apartment complex in Memphis and began to sell crack cocaine from the appellant's brown Cadillac. Their activities were observed by a Memphis Police Department Drug Saturation Team. When the police approached them, the appellant and the co-defendants attempted to leave in the Cadillac.

The police stopped the appellant's vehicle. A search of the vehicle revealed 38 rocks of crack cocaine on the back seat and a .45 caliber, semi-automatic handgun, loaded with six live rounds. The police also found six additional rocks of crack cocaine on the floorboard in the right front passenger area of the vehicle. The police seized from the appellant $100.00 and a beeper. Initially, all three defendants denied any knowledge of the cocaine or the

weapon.

On July 11, 1995, following the appellant's guilty plea, the trial court conducted a sentencing hearing in order to determine the manner of service of the appellant's sentence. The State relied upon the presentence report. The appellant testified on his own behalf. According to the appellant, he is twenty-two years old and lives with his mother. He is employed part-time as a cook with Fred Gang's Restaurant in Memphis, earning $5.00 per hour. The appellant's employment history is sporadic. At the time of the offense, he was unemployed. He had previously terminated three jobs, because they did not provide "enough money." The appellant has an eleventh grade education. He has one child, a daughter, whose whereabouts are unknown. The appellant has no adult criminal history. With respect to the instant drug conviction, the appellant admits possession of the 38 rocks of crack cocaine, weighing 8 grams. The appellant denies ownership or knowledge of the weapon found in his car.

When questioned by the court concerning his drug activities at the apartment complex, the appellant was somewhat evasive.[1] Indeed, although the appellant initially testified that he had only on one occasion purchased cocaine for the purpose of resale, he later admitted that he had been selling drugs "about

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[1]The court and the appellant engaged in the following exchange:
Court: What were ya'll getting ready to do with these drugs at the time? Where [sic] you waiting for the sale, or looking for a buyer? Ya'll were in the party together, I guess.
Appellant: Yes, sir. Looking for a buyer, sir.
Court: All ya'll going to sell drugs? Or were they just assisting you?
Appellant: I just had the drugs, sir.
Court: I know you had them. Ya'll was going, looking for somebody to buy them.
Appellant: Well, I wasn't just, you know, with him, sir. You know, I was by myself, you know. You know, he just was like there, and I was there, and he was there, you know.
...
Court: Where were these other people?
Appellant: Well, they was like -- well, its like apartments and I was like somewhere, and he was like somewhere --

a month."

At the conclusion of the hearing, the trial court found that confinement of the appellant in the Department of Correction is necessary to avoid depreciating the seriousness of the offense.

> You didn't have three or four rocks, you had thirty-eight rocks on you for sale at the time, out there in the apartment parking lot. . . . [you] knew at the time that you were violating the law, and its no secret that you get big time for selling big drugs, but you took the chance. Stopped working and decided that you were going to do it by - you were going to make a living by [selling] drugs.

In assessing the seriousness of the offense, the court also noted the presence and availability of the .45 caliber, semi-automatic handgun on the backseat of the appellant's vehicle. The court considered the need for deterrence. Finally, the trial court found that the appellant had been less than candid concerning the extent of his involvement in drug activity.

ANALYSIS

Again, the appellant contends that the trial court should have granted him probation or a sentence pursuant to the Community Corrections Act. Both probation and community corrections are non incarcerative alternative sentences. Tenn. Code Ann. § 40-35-104 (c)(2) and (8) (Supp. 1994). Therefore, we must initially ascertain whether the trial court properly excluded the appellant from any form of alternative sentencing.

Review by this court of the manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct.

Tenn. Code Ann. § 40-35-401(d) (1990). The presumption of correctness,

however, only applies if the record demonstrates that the trial court properly considered sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). For reasons subsequently discussed in this opinion, we conclude that the trial court applied an inappropriate sentencing consideration. Therefore, we do not defer to its sentencing determination. Nevertheless, the burden of showing that his sentence is improper remains upon the appellant. State v. Lee, No. 03C01-9308-CR-00275 (Tenn. Crim. App. at Knoxville, April 4, 1995).

In reviewing a trial court's denial of an alternative sentence, we must first determine whether the appellant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995)(citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). The appellant in this case was convicted of a class B felony and, therefore, is not entitled to the presumption. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). This determination alone does not end our inquiry. Again, the appellant bears the burden of demonstrating that he is a suitable candidate for alternative sentencing.

Tenn. Code Ann. § 40-35-103 (1990) provides:

> (1) Sentences involving confinement should be based on the following considerations:
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> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Bingham, 910 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 169). A court may

also apply the mitigating and enhancing factors set forth in Tenn. Code Ann. § 40-35-113 (1990) and -114 (Supp. 1994), as they are relevant to the § 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5) (1990). Finally, the potential or lack of potential for rehabilitation of a defendant should be considered in determining whether he should be granted an alternative sentence. Tenn. Code Ann. § 40-35-103(5).

Initially, we note that the trial court improperly considered deterrence in sentencing the appellant. Tenn. Code Ann. § 40-35-103(1)(B). Before a trial court can deny alternative sentencing on the basis of deterrence, evidence in the record must support a need within the jurisdiction to deter individuals other than the appellant from committing similar crimes. Bingham, 910 S.W.2d at 455 (citing Ashby, 823 S.W.2d at 170); Bonestel, 871 S.W.2d at 169; State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993); State v. Jones, No. 03C01-9302-CR-00057 (Tenn. Crim. App. at Knoxville, November 22, 1994), perm. to appeal denied, (Tenn. 1995). A finding that the appellant's sentence will have a deterrent effect cannot be merely conclusory. Id.

Nevertheless, we agree that the circumstances of the offense require the confinement of the appellant. The appellant and his companions were attempting to sell a substantial quantity of crack cocaine in an apartment complex and had access to a loaded, semi-automatic weapon. Moreover, the record supports the trial court's finding concerning the appellant's lack of candor. The appellant's truthfulness while testifying on his own behalf is probative of his attitudes toward society and prospects for rehabilitation. See, e.g., United States v. Grayson, 438 U.S. 41, 50-51, 98 S.Ct. 2610, 2616 (1978). Accordingly, the appellant's candor while testifying is a relevant factor that may be considered by the trial court in determining the manner of service of the appellant's sentence. State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994).

We cannot conclude that the trial court improperly denied the appellant a sentence of probation or community corrections. The appellant has failed to demonstrate that he is an appropriate candidate for alternative sentencing. The judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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PAUL R. SUMMERS, Special Judge