

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1994 SESSION

<p>FILED</p> <p>October 17, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 MICHAEL ALDERSON,)
)
 Appellant.)

No. 01C01-9404-CC-00120

Maury County

Hon. Jim T. Hamilton, Judge

(Sentencing)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
 Judge

OPINION

The defendant, Michael Alderson, appeals as of right from the sentences imposed by the Maury County Circuit Court after it revoked his placement in the South Central Tennessee Community Correction Program. The trial court sentenced the defendant, as a Range I, standard offender, to a four-year term in the custody of the Department of Correction for aggravated assault, a Class C felony, a consecutive one-year term for selling a counterfeit controlled substance, a Class E felony, and a concurrent eleven-month-twenty-nine-day term for evading arrest, a Class A misdemeanor. The defendant contends that the trial court erred by enhancing the aggravated assault sentence to one year above the minimum and by requiring the two felony sentences to be served consecutively. He does not contest the revocation.

The record on appeal reflects that pursuant to a plea agreement, on December 4, 1990, the defendant entered a guilty plea to aggravated assault and a judgment of conviction was entered. The judgment provides that a sentence of three years was imposed, "suspended upon time served" and that three years probation was granted.

On February 4, 1991, pursuant to a plea agreement, the defendant entered guilty pleas to sale of a counterfeit controlled substance and evading arrest. The judgments of conviction provide that for the sale, a sentence of one year was imposed consecutive to the aggravated assault sentence, and, for the evading arrest, a thirty-day sentence was imposed, concurrent to the one-year sentence. These sentences were to be served on probation. Thus, at this point, the defendant was serving an effective sentence of four years on probation.

The record indicates that a probation violation warrant was issued on October 7, 1991, and amended on January 6, 1992. On the latter date, the trial court entered an order revoking the felony probations for the defendant's failure to report to

his probation officer and failure to meet the schedule for payment of his fees and costs. The order recites that the defendant is to serve the felony sentences in the Department of Correction but also states that he is to be placed in the community corrections program. A transcript of the revocation hearing is not in the record.

Although no subsequent revocation warrant is in the record, a hearing was held on January 3, 1994, at which the defendant's community corrections supervisor testified that he filed a warrant on June 23, 1993, because the defendant had failed to report and could not be found for about three months. Apparently, the defendant was then allowed to stay on the program with further court review to be conducted on November 30, 1993. However, the defendant "absconded again," which resulted in another revocation warrant being filed on October 13, 1993. In late October, after the defendant turned himself in, a drug screen performed on the defendant showed the presence of cocaine. The record also indicates that this was the second positive drug screen obtained from the defendant, the first having resulted in the defendant being required to enter a drug rehabilitation program.

The defendant did not testify at the hearing, although he elicited testimony from his program supervisor that he had performed his community service and met his fees and costs payment requirements. His counsel requested that he be given another chance and offered for him to enter another rehabilitation program. The trial court refused and sentenced the defendant to an effective sentence of five years, a one-year sentence for his sale of a counterfeit controlled substance to be served consecutively to a four-year sentence for aggravated assault and concurrently to an eleven-month-twenty-nine-day sentence for evading arrest.

The defendant contends that the trial court improperly enhanced his sentence for aggravated assault. He asserts that a notice of enhancement factors was never filed, see T.C.A. § 40-35-202(b)(1), and that the trial court failed to make factual findings on the record supporting enhancement of the sentence. See T.C.A. § 40-35-210(f). The state counters that the requirements of the Sentencing Reform Act of 1989 do not apply to resentencing decisions made after revocation of a community corrections sentence and, thus, the trial court's imposition of a four-year sentence for aggravated assault was proper even though it did not make factual findings in support of its decision.

We disagree with the state's assertion that the 1989 act is inapplicable to sentencing decisions made after revocation of a defendant's community corrections sentence. By its terms, the act applies to the sentencing of all persons who commit crimes on or after November 1, 1989:

Applicability of chapter. -- (a) All persons who commit crimes on or after November 1, 1989, shall be tried and sentenced under the provisions of this chapter.

T.C.A. § 40-35-117. A sentence imposed under the Tennessee Community Corrections Act of 1985 must also comply with the sentencing considerations and purposes of the 1989 act. State v. Smith, 898 S.W.2d 742, 746 (Tenn. Crim. App. 1994); see also, State v. Patty, 922 S.W.2d 102, 103 (Tenn. 1995) (applying principles of the 1989 act to resentencing after revocation of community corrections sentence).

Under the 1989 act, appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d).¹ As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is

¹ An abuse of discretion standard of review applies to a trial court's decision to revoke a community corrections sentence. State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). However, in this case, the defendant does not challenge the revocation of his community correction sentences.

improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 sentencing act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

However, "the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§ 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

Although the record in this case does not reflect that the trial court properly considered all of the relevant sentencing principles, enhancement of the defendant's conviction for aggravated assault remains justified. The defendant's use of cocaine shows criminal behavior, see T.C.A. § 40-35-114(1), and he has also demonstrated his inability to abide by conditions of a sentence involving release into the community. See T.C.A. § 40-35-114 (8).

Initially, the defendant was to serve his sentence for aggravated assault on probation. However, he violated the conditions of his probation by failing to report and by failing to meet the scheduled fee payments. He was then granted a community

corrections sentence. In the two years that the defendant was serving his community corrections sentence, two revocation warrants were filed. The first resulted from his failure to report to his community corrections officer for a period of three months. He was allowed to stay on the program but was required to enter a drug rehabilitation program because he tested positive for cocaine. It was not until the defendant violated the court's trust again by failing to report and by testing positive for cocaine that the trial court revoked the defendant's community corrections sentence. The defendant's unwillingness to comply with conditions of release warrants enhancement of his aggravated assault conviction by a year.

II

Next, the defendant contends that the trial court erred by ordering that his sentence for sale of a counterfeit controlled substance be served consecutively to his sentence for aggravated assault. However, when the defendant entered his guilty plea for sale of a counterfeit controlled substance, he agreed that consecutive sentencing was proper. The consecutive nature of the defendant's sentence is no less appropriate after his misconduct while on probation and in the community corrections program.

In consideration of the foregoing and the record as a whole, the defendant's sentences for aggravated assault and sale of a counterfeit controlled substance are affirmed.

Joseph M. Tipton, Judge

CONCUR:

David H. Welles, Judge

Stephen M. Bevil, Special Judge