IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

FILED

October 14, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 03C01-9506-CC-00178
Appellee,	)
	) Blount County
V.	)
	) Honorable D. Kelly Thomas, Jr., Judge
	)
HAROLD BLEVINS,	) (Forgery (2 counts); Uttering (2 counts);
	) Theft Under $500; Passing a Worthless
Appellant.	) Check (10 counts); Obtaining a Controlled
	) Substance by Misrepresentation (2 counts);
	) Attempt to Obtain a Controlled Substance
	) by Fraud)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: ____________________

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Harold Blevins, pled guilty to two counts of forgery, two counts of uttering, theft under $ 500.00, ten counts of passing a worthless check, two counts of obtaining a controlled substance by misrepresentation, and attempt to obtain a controlled substance by fraud. He received an effective sentence of four years. He was ordered to serve his sentence at the Department of Correction's Special Needs Facility. He raises two issues on appeal:

> 1. Whether the trial court erred in sentencing him to a three year sentence out of a possible range of two to four years for the offense of obtaining a controlled substance by fraud.
>
> 2. Whether the trial court erred by refusing to place him on community corrections.

We affirm.

In April of 1993, the appellant forged and presented two stolen checks. In May of 1993, he stole jewelry valued at less than $ 500.00. In July of 1993, he was arrested for forgery and released on bond. Following his release on bond, he passed ten worthless checks. He then fled to Virginia and failed to appear at his forgery hearing. In March of 1994, the appellant returned to Tennessee. While on bond for the above offenses, he obtained two prescriptions for Lorcet and one prescription for Hydrocodone by means of misrepresentation. Appellant then jumped bail for a second time because he "was afraid of going to jail."

Appellant testified that he drafted bad checks and pawned stolen property to support his drug addiction. He had previously, but unsuccessfully, attended long term treatment, AA, and NA. He had twice been on methadone. He is HIV positive and has hepatitis B. He also has a pending DUI charge.

LENGTH OF SENTENCE

The appellant argues that the trial judge erred in sentencing him to a mid-range sentence for obtaining a controlled substance by misrepresentation. He contends that he should have received the minimum sentence of two years.[1] In response, the state enigmatically concedes to application of two mitigating factors.[2] The state, however, argues that the enhancement factors outweigh the mitigating factors and justify the appellant's sentence.

A court "shall place on the record either orally or in writing, what enhancement or mitigating factors it found." Tenn. Code Ann. § 40-35-210(f) (1990 Repl.). The significant nature of both enhancement and mitigating factors necessitate that even their absence must be recorded. Tenn. Code Ann. § 40-35-210 Sentencing Commission Comments. The findings are recorded to afford adequate appellate review. State v. Franklin, 919 S.W.2d 362, 365 (Tenn. 1996); State v. Smith, 910 S.W.2d 457 (Tenn. Crim. App. 1995); (State v. Manning, 883 S.W.2d 635, 638 (Tenn. Crim. App. 1994).

The trial judge issued a mid-range sentence without explanation. Although neither party proffered specific sentencing factors for application, it was incumbent upon the trial judge to express which factors, if any, were found to apply. Accordingly, our review is de novo.

The record supports application of enhancement factors sufficient to warrant a mid-range sentence. The appellant has a previous history of criminal behavior, and the felony was committed while on bail for another felony of which he was ultimately convicted. Tenn. Code Ann. § 40-35-114(2) & (13) (1995

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[1] In support of this contention, he argues that the trial judge erred in applying the following enhancement factors: (1) that appellant had a prior criminal history, and (2) that the offenses were committed while on release status. Furthermore, he argues that the trial judge erred in refusing to apply the following mitigating factors: (1) the appellant's conduct neither caused harm nor threatened serious bodily injury, (2) substantial grounds exist to justify his conduct, (3) he was motivated by desire to provide necessities for his family or himself, and (4) he was suffering from mental or physical conditions that reduced his culpability.

[2] (1) the appellant's conduct neither caused nor threatened serious bodily injury, and (2) substantial grounds existed excusing or justifying the appellant's conduct.

Supp.). In mitigation, we find that the appellant's conduct neither caused nor threatened serious bodily injury. Tenn. Code Ann. § 40-35-113(1) (1990 Repl.) We are unpersuaded, however, that his conduct was mitigated by his own voluntary use of drugs.[3] Tenn. Code Ann. § 40-35-113(3) (1990 Repl.). Provided that his addiction was a mitigating circumstance, the weight afforded, if any, would have been minimal. Accordingly, we find imposition of a three year mid-range sentence appropriate.

MANNER OF SERVICE

The appellant argues that the trial court erred in refusing to place him in community corrections. His argument is premised on his assertion that he has no prior record and that due to his failing health, community corrections is a humane and just sentence.

In conducting a de novo review of a defendant's sentence, including the manner in which he or she is to serve the sentence, this Court must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating and enhancement factors, (6) any statements made by the defendant in his or her own behalf, and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210, -103, and -210 (1990). Under the 1989 Act, sentences involving confinement are to be based on the following considerations contained in Tenn. Code Ann. § 40-35-103(1) (1990):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (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

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[3] Although a nexus did exist between his offenses and his addiction, the appellant was afforded numerous opportunities to rehabilitate himself. The counseling he received, however, has not aided him in conquering his problem since he committed the offenses immediately following his discharge from long term outpatient treatment in Virginia.

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .

The defendant's potential for rehabilitation is another key consideration in determining the manner in which one is to serve his or her sentence. Tenn. Code Ann. § 40-35-103(5) (1990 Repl.).

The trial judge found that the appellant was not "a proper candidate for release" into the community. In support of his findings, the trial judge cited: (1) the appellant's violent propensity, (2) his history of fleeing prosecution, (3) the fact that he committed offenses while on bail, (4) the fact that he committed his crimes over a period of approximately one and one half years, (5) his history of having twice jumped bail, (6) his history of extensive criminal activities,[4] and (7) his lack of amenability to successful rehabilitation in the community.[5]

The trial judge considered the applicable principles in determining the manner in which the appellant was to serve his sentence. Upon viewing the appellant's demeanor and listening to his testimony, the trial judge found that the appellant was a poor candidate for rehabilitation. Because the trial judge can view a witness' demeanor while testifying, he is in a better position to assess one's potential for rehabilitation. Accordingly, we are unable to conclude that the trial judge erred in finding that the appellant was not "treatable in the community" and that confinement was necessary to protect society's interests.

AFFIRMED

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PAUL G. SUMMERS, Judge

CONCUR:

[4] Although the trial judge acknowledged that the appellant did not have a criminal record when he committed his forgeries, he found that by the time the appellant "attempted to obtain a controlled substance by fraud, he had an extensive record of criminal activity."

[5] The trial judge found that the appellant was not "treatable in the community."

JOE B. JONES, Presiding Judge

GARY R. WADE, Judge