IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

November 14, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9510-CC-00334**
Appellee,	)	
	)	**SULLIVAN COUNTY**
VS.	)	
	)	**HON. FRANK L. SLAUGHTER, JUDGE**
SABRINA CHRISTIAN,	)	
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted by presentment on two counts of selling cocaine, each a Class B felony, and one count of facilitating the sale of cocaine, a Class C felony. She pled guilty to all the offenses in exchange for the State's recommendation that she be sentenced as a Range I standard offender to eight years and a two thousand dollar ($2,000) fine for each of the selling offenses and to three years and a two thousand dollar ($2,000) fine for the facilitating offense. The three sentences were ordered to run concurrent for an effective sentence of eight years. The manner of service of the sentence was left to the court's discretion. After a hearing, the sentencing court ordered that the sentence be served in the Department of Correction. In this appeal as of right, the defendant contends that the court erred by denying her request for probation. After a review of the record, we find no error in the defendant's sentence and affirm the judgment below.

The defendant was arrested for her participation in three cocaine transactions in September and October of 1994. On September 26, 1994, the defendant sold 2.1 grams of cocaine, a Schedule II controlled substance, to a confidential informant with the Second Judicial Drug Task Force. The informant, equipped with a tape recorder, purchased the cocaine from the defendant at her home in Chadwick Apartments in Kingsport. On October 10, 1994, again from her apartment, the defendant sold 3.8 grams of cocaine to the same informant. On October 17, 1994, the informant returned to the defendant's apartment where he met David Lewis Mayes, as had been arranged by the defendant. Mr. Mayes subsequently sold 3.5 grams of cocaine to the informant.

When a defendant complains of his or 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
>
> (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.

The defendant complains that the court should not have denied her request for probation.[1] In determining whether the defendant should be granted probation, the court must consider the defendant's criminal record, social history, present physical and mental condition, the circumstances of the offenses, the deterrent effect upon the criminal activity of the accused as well as others, and the defendant's potential for rehabilitation or treatment. State v. Bonestel, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993). In this case, the sentencing court found as follows:

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[1]Upon her plea of guilty, the defendant was referred to the Probation Department for review. Because she pled guilty to two Class B felonies, she was not entitled to the statutory presumption for alternative sentencing under T.C.A. § 40-35-102. However, because her effective sentence was eight years, she is eligible for consideration of probation under T.C.A. § 40-35-303(a).

> The best thing the Defendant has going for her is her pronounced good intentions. Now, the record in this case shows that she has a previous history of criminal convictions, criminal behavior. The record in this case shows that she has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community.

The evidence supports these findings. The defendant has been convicted of several misdemeanor offenses including promoting prostitution, public intoxication, driving under the influence of an intoxicant, assault and battery, and numerous driving related offenses. She has been placed on probation before and has been in counseling, but these efforts at rehabilitation have been unsuccessful. Furthermore, the defendant has a long history of drug and alcohol abuse and admits to having used drugs since age twelve. These facts clearly support the sentencing court's conclusion that probation is not proper for this defendant. See, e.g. State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App. 1994)(finding denial of probation proper on grounds that defendant's history indicated clear disregard for law and morals of society and failure of past efforts to rehabilitate where defendant had lengthy history of criminal conduct, was unemployed at the time of sentencing hearing and had a sporadic work history, and had a history of drug and alcohol abuse).

Thus, we find the sentencing court properly denied the defendant's request for probation. The judgment is therefore affirmed.

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JOHN H. PEAY, Judge

CONCUR:

DAVID G. HAYES, Judge

WILLIAM M. BARKER, Judge