IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

December 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9511-CC-00356**
Appellee,	)	
	)	**BLOUNT COUNTY**
VS.	)	
	)	**HON. D. KELLY THOMAS, JR., JUDGE**
BENITA COLLINS,	)	
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED AS MODIFIED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted on one count of embezzlement, one count of theft over sixty thousand dollars ($60,000), and one count of theft over ten thousand dollars ($10,000). She pled guilty to all three counts, leaving her sentence to the court's determination. After a sentencing hearing, the court below sentenced her as a Range I standard offender to four years on the embezzlement conviction, ten years on the conviction for theft over sixty thousand dollars ($60,000), and four years on the conviction for theft over ten thousand dollars ($10,000), all sentences to run concurrently. The defendant was ordered to serve these sentences in the Department of Correction, and was also ordered to pay restitution of three hundred thirty-three thousand three hundred three dollars and fifty-six cents ($333,303.56).

The defendant now appeals as of right, complaining that the sentencing court misapplied mitigating and enhancement factors, thereby imposing excessive sentences, and that it erred by refusing to grant her an alternative sentence. After a review of the record, we modify the defendant's sentence by reducing her sentence on the embezzlement conviction to three years. We otherwise affirm the judgment below.

During the period 1988 through August 1994, the defendant was employed by Smoky Mountain Secrets, Incorporated, and Special Programs, Incorporated, as a payroll clerk. As payroll clerk, she prepared checks and had signing authority on certain checking accounts for the corporations and had the responsibility of reconciling the bank statements on these accounts. Over the course of this period, she wrote and negotiated unauthorized checks to herself on these checking accounts and subsequently hid the misappropriated checks. The total sum so misappropriated was approximately three

hundred ninety thousand seven hundred sixteen dollars ($390,716).

The defendant testified that she took the funds to pay off her then-husband's gambling and drug debts. She testified that the first such debt was approximately one thousand five hundred dollars ($1,500) in 1987. She further testified that she started getting threats from her husband's creditors in late 1990 or early 1991 and that she and her husband divorced in 1993. She also testified that some of the money was spent on expensive tools and vacations. Her version of the offenses set forth in the presentence report included the statement, "I continued stealing to pay my bills and because of impaired judgment I thought I'd show him that me and his children would have a 'good' life." The defendant testified that she and her three children were currently living with her father, that she was gainfully employed, that her current employer had not and would not terminate her as a result of these offenses, and that she was willing to pay restitution in addition to the approximately fifty seven thousand dollars ($57,000) she had already paid. However, she also admitted during cross-examination that, after she was terminated from the victim corporations' employ, she had lied to her subsequent employers about her prior employment history.

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).

A portion of the Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, established a number of specific procedures to be followed in sentencing. This section mandates the court's consideration of the following:

> (1) The evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

T.C.A. § 40-35-210.

In addition, this section provides that the minimum sentence within the range is the presumptive sentence for B, C and D felonies. If there are enhancing and mitigating factors, the court must start at the minimum sentence in the range and enhance the sentence as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. If there are no mitigating factors, the court may set the sentence above the minimum in that range but still within the range. The weight to be given each factor is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

As enhancement factors, the sentencing court found that the amount of damage to the victims' property was particularly great, and that the defendant abused a position of private trust in the commission of the offenses. T.C.A. § 40-35-114(6) and (15). As mitigating factors, the court noted that the offenses neither caused nor threatened serious bodily injury; that the defendant had paid some restitution; and that she had no prior convictions. T.C.A. § 40-35-113(1) and (13). Accordingly, it imposed mid-range sentences on the theft convictions and a maximum sentence on the embezzlement conviction.[1]

The defendant contends that she should have received the minimum sentences on these convictions. In support of this contention, she argues that the sentencing court should have applied as additional mitigating factors that she committed these offenses because she was motivated by a desire to provide necessities for herself or her family and that she acted under the duress or domination of another person. T.C.A. § 40-35-113(7) and (12). She also contends that the sentencing court erred in applying as an enhancement factor on the embezzlement offense that she abused a position of private trust.

With respect to her argument that she committed these offenses because she wanted to provide necessities to herself or her family, the defendant testified that she spent the stolen money on gambling and drug debts, vacations and "expensive tools." These are not "necessities." The sentencing court did not err in failing to apply this

[1]The theft over sixty thousand dollars ($60,000) offense was a class B felony, T.C.A. § 39-14-105(5), carrying a Range I sentence of eight to twelve years. T.C.A. § 40-35-112(a)(2). The theft over ten thousand dollars ($10,000) offense was a class C felony, T.C.A. § 39-14-105(4), carrying a Range I sentence of three to six years. T.C.A. § 40-35-112(a)(3). The embezzlement offense was a class D felony, T.C.A. § 40-35-118, carrying a Range I sentence of two to four years. T.C.A. § 40-35-112(a)(4).

mitigating factor. Nor did it err by not applying the factor involving duress or domination. While the defendant testified that she had received threats from her husband's creditors, including threats against her children, she stated that these did not start until late 1990 or early 1991. The offenses began in 1988. Moreover, she admitted that she had stolen money not (just) because she felt threatened but because she wanted to get back at her ex-husband by providing herself and her children with the "good life." This issue is without merit.

With respect to enhancement factors, the defendant concedes that she "embezzled a particularly large amount of money by abusing a position of private trust." She contends, correctly, that the enhancement factor for abuse of a private trust could not be applied on her embezzlement conviction because the existence of a private trust was an element of that offense prior to November 1, 1989.[2] See T.C.A. § 39-3-1121 (1982); T.C.A. § 40-35-114. It is unclear whether the sentencing court applied this enhancement factor on the embezzlement conviction. The court noted "that in some of these counts, she abused positions of private trust for a long time" (emphasis added). In any event, one enhancement factor was properly applicable to the embezzlement conviction.[3] However, because three mitigating factors were found, we find that the court below erred in sentencing the defendant to the maximum on this conviction. Accordingly, we reduce the defendant's sentence on her embezzlement conviction to a midrange sentence of three years. The midrange sentences for the two theft convictions are appropriate and are affirmed.

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[2]The indictment against the defendant states that the embezzlement offenses occurred in "1988/1989."

[3]The proof demonstrated that the defendant misappropriated over sixty thousand dollars ($60,000) in 1988 and 1989. This supports application of the enhancement factor for a particularly great amount of damage to the victims' property.

Finally, the defendant contends that she should have received an alternative sentence, specifically probation or community corrections. We first note that the defendant is not eligible for probation because her sentence is more than eight years. T.C.A. § 40-35-303(a). And while she meets the minimum eligibility standards for community corrections, T.C.A. § 40-36-106(a), the sentencing court was not thereby required to so sentence her.

T.C.A. § 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.

In support of its decision to incarcerate the defendant, the court below stated that a theft of almost four hundred thousand dollars ($400,000) which did not result in a sentence involving confinement would depreciate the seriousness of the offense. It also noted that the crimes had occurred at a steady pace over a six year period, including the theft of approximately fifty six thousand dollars ($56,000) after the defendant's husband left, giving her a "lengthy history of criminal conduct, albeit all involved in these offenses." The sentencing court also expressed concern that the defendant's dishonesty with her employers continued after her termination from the victims' employ, stating that these factors showed "her willingness to be dishonest and to steal if it's in her best interest or if she feels like it's necessary, using her living expenses that she needs and the welfare

of her children as an excuse to do this for six years." Thus, it appears that the sentencing court found that the defendant lacked potential for rehabilitation. Finally, the court found the need for general deterrence, noting "a lot of embezzlement cases [which have] come through this court[.]" All of these factors are sentencing considerations which support a sentence involving confinement. T.C.A. § 40-35-103(1) (A) and (B), and (5). Thus, even if the court below erred in applying general deterrence as a consideration, such error was harmless. This issue is without merit.

For the reasons set forth above, the defendant's sentence is modified so as to reduce her sentence on the embezzlement conviction to three years. The defendant's sentence is otherwise affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge