

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1996

FILED
September 30, 1996
C.C.A. #02C01-9508-CC-00248
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,]
Appellee,]
VS.]
KATHERINE H. GALLAHER]
Appellant.]

C.C.A. #02C01-9508-CC-00248
HARDIN COUNTY
HON. C. CREED MCGINLEY
JUDGE
(Second Offense DUI)

FOR THE APPELLANT:

MR. J. DANIEL FREEMON
Attorney at Law
Freemon and Hillhouse
P.O. Box 787
Lawrenceburg, TN 38426

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

CHARLOTTE H. RAPPUHN
Attorney General's Office
450 James Robertson Parkway
Nashville, TN 37243

JOHN W. OVERTON
Asst. District Attorney General
Main Street
Savannah, TN 38372

OPINION FILED _____

AFFIRMED AS MODIFIED

LYNN W. BROWN, SPECIAL JUDGE

OPINION

The appellant, Katherine H. Gallaher, pleaded guilty in the Criminal Court for Hardin County, Tennessee, to the offense of driving under the influence of an intoxicant, second offense. The trial court imposed a sentence of 11 months and 29 days of which the appellant was required to serve 180 days in jail followed by 5 months and 29 days of supervised probation. Her driver's license was revoked for three years and a fine of six hundred dollars was imposed. The only issue presented in this appeal is whether the sentence imposed by the trial court is appropriate. We affirm the judgment of the trial court.

The proof in the case showed that on November 13, 1994, the appellant was driving so erratically on a public road in Hardin County that a good citizen attempted to stop her. Her automobile traveled into the oncoming lane of traffic as well as off the roadway. She hit one automobile and then stopped in a parking lot where the citizen took the keys from her car to prevent her driving any further. A sheriff's deputy arrived, found the appellant to be intoxicated, and placed her under arrest. She was transported to a hospital where a sample of blood was obtained,

but the results of the laboratory analysis of her blood were suppressed by the trial court. She was charged with driving under the influence of an intoxicant, fourth offense which she waived to the grand jury. The grand jury, however, indicted the appellant for the offense of second offense driving under the influence of an intoxicant. Ms. Gallaher entered a plea of guilty as charged without a plea agreement, and the court at request of her counsel set a later date for sentencing hearing.

At sentencing hearing the state introduced certified copies of three prior convictions for DUI as follows: a conviction on March 10, 1989, in the General Sessions Court for Wayne County for which she served two days in jail; a conviction on April 10, 1992, in the General Sessions Court for Hardin County showing a blood alcohol content of .25% for which she served 45 days in jail; a conviction in the Criminal Court for Wayne County on May 12, 1992 for which she received a 45-day jail sentence concurrent with Hardin County. The April 10, 1992, Hardin County conviction had been alleged for the purpose of enhancement in the indictment and was the basis for appellant's plea to a second offense DUI.

The appellant has the burden of establishing that the sentence imposed by the trial court was erroneous. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991). Appellate review of a sentence is de novo, with a presumption that the determinations made by the trial court are correct. Tennessee Code Annotated §40-35-401(d).

This presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." Ashby, 823 S.W.2d at 169. Specifically, with respect to misdemeanor offenders, the trial court must consider the principles, purposes, and goals of the Sentencing Act. State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995); see also Tennessee Code Annotated §40-35-302. Moreover, the court can grant probation immediately or after a period of split or continuous confinement. Id.

The trial court's statements at the sentencing hearing indicate that the court did consider principles, purposes, and goals of the Act; the appellant's prior criminal history; and the appellant's rehabilitative potential. See Tennessee Code Annotated §40-35-103(1)(A), -103(1)(C), and -103(5). Our review is, therefore, de novo with a presumption of correctness. Also, one convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App.), permission to appeal denied, id. (Tenn. 1994).

The trial court properly found that the range of punishment for the offense to which the appellant pleaded was a not less than forty-five days nor more than eleven months and twenty-nine days in jail. Tennessee Code Annotated §55-10-403(a)(1). The court noted that the appellant's prior conviction on April 10, 1992, in

Hardin County was used to establish the range of punishment for DUI second offense, so that it could not be used to enhance the punishment within the range. However, the trial court did consider the appellant's two additional convictions for DUI for the purpose of enhancing punishment within the range. The trial court also found that the petitioner had failed at previous attempts of rehabilitation. The evidence supports this finding; the petitioner has continued to consume alcoholic beverages, even though such consumption worsens her chronic liver disease and may reduce her life span. We note that Ms. Gallaher testified that she had completely refrained from the use of alcohol since the commission of this offense. However, the record indicates that she has persistently abused alcohol. The proof supports the findings of the trial court on her potential for rehabilitation.

Having examined the record in this case, we conclude that the trial court enhanced the sentence appropriately within the range of punishment for this offense, upon consideration of the sentencing principles and all relevant facts and circumstances. Accordingly, we affirm the judgment of trial court in imposing a sentence of 180 days confinement.

There is, however, one matter regarding the judgment of the trial court which should be corrected upon remand. The trial court revoked the appellant's drivers license for three years. Tennessee Code Annotated §55-10-403(a) (1) provides that the court shall prohibit a person convicted of DUI second offense from

driving a vehicle in the State of Tennessee for a period of time of two years. The statute does not allow a suspension of the driving privilege for three years upon this conviction.

The judgment of the trial court is in all other respects affirmed.

Lynn W. Brown, Special Judge

CONCUR:

David G. Hayes, Judge

Jerry L. Smith, Judge