

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY SESSION, 1996

FILED
October 18, 1996
Seal Crowder Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee,)

VS.)

THOMAS HARMON,)

Appellant.)

C.C.A. NO. 03C01-9542-CR-0038-1

SEVIER COUNTY

HON. WILLIAM R. HOLT, JR.
JUDGE

(Insurance Fraud; Aggravated Burglary;
Theft; Aggravated Assault)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF SEVIER COUNTY

FOR THE APPELLANT:

GLEN B. RUTHERFORD
Lockett, Slovis & Weaver
P.O. Box 1668
Knoxville, TN 37901-1668

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ELIZABETH T. RYAN
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

AL SCHMUTZER, JR.
District Attorney General

STEVEN R. HAWKINS
Assistant District Attorney General
Suite 301, Courthouse
Sevierville, TN 37862

OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Thomas Harmon pled guilty to insurance fraud, aggravated burglary, theft of less than \$500, aggravated assault, public intoxication, and carrying a weapon with the intent to go armed. As a Range I standard offender, he received an effective sentence of five years in the Sevier County jail. Following a sentencing hearing, the trial court ordered incarceration for a period of six months with the balance of the five-year sentence served on supervised probation. In this appeal, Appellant presents the following issue: whether the trial court erred in denying full probation.

After a review of the record, we affirm the judgment of the trial court.

I. FACTUAL BACKGROUND

On December 27, 1992, Appellant reported that a gun was stolen from his home during a burglary. He filed a claim with his insurance company and was paid \$607. Appellant later found the gun but failed to inform his insurance company of his finding. On May 27, 1994, authorities searched Appellant's vehicle in an unrelated incident and discovered the allegedly stolen gun. From these facts, Appellant was charged with insurance fraud.

On August 29, 1994, Ms. Nell Atchley, a widow who lived alone, received a telephone call from an unidentified individual. The caller stated that a family member was seriously ill in the hospital. While Ms. Atchley was at the hospital,

where she discovered that the telephone call was bogus, her home was burglarized and a gun was stolen. Following the burglary and theft, neighbors observed a truck, later identified as Appellant's, parked near Ms. Atchley's home. Upon the issuance of a search warrant, authorities found Ms. Atchley's stolen gun in the truck. From these facts, Appellant was charged with aggravated burglary and theft of less than \$500.

On September 11, 1994, authorities received a call that Appellant was outside his home armed and intoxicated. When authorities arrived, he threatened suicide. At various times during the stand-off, Appellant pointed his gun at one of the police officers. He was eventually apprehended without further incident. From these facts, Appellant was charged with aggravated assault, public intoxication, and carrying a weapon with the intent to go armed.

On May 17, 1995, Appellant pled guilty to the aforementioned offenses in the Sevier County Criminal Court. Pursuant to the plea agreement, he received an effective sentence of five years. On July 27, 1995, a sentencing hearing was conducted to determine the manner by which he would serve his sentence. Following the hearing, the trial court ordered Appellant to serve a six-month period of incarceration in the county jail with the remainder of the five-year sentence served on probation. The trial court also ordered him to pay restitution both to the insurance company in the amount of \$607 for the fraudulent claim and to Ms. Atchley in the amount of \$1,000 for damage to her home. According to the trial court's order, Appellant was eligible for work release and was subject to drug and alcohol screening.

II. SENTENCING

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ëate v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the event that the record fails to demonstrate such consideration, review of the sentence is purely de novo. Id. If appellate review reflects that the trial court properly considered all relevant sentencing principles and its findings of fact are adequately supported by the record, this Court must affirm the sentence, “even if we would have preferred a different result.” State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In conducting a review, this Court must consider the evidence, the presentence report, the sentencing principles, the arguments of counsel, the nature and character of the offense, mitigating and enhancement factors, any statements made by the defendant, and the potential for rehabilitation or treatment. State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993). The defendant bears the burden of showing the impropriety of the sentence imposed. State v. Gregory, 862 S.W.2d 574, 578 (Tenn. Crim. App. 1993).

We note initially that, because the record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, our review of Appellant's sentence will be de novo with a presumption of correctness.

The Tennessee Criminal Sentencing Reform Act of 1989 recognizes the limited capacity of state prisons and mandates that "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 of rehabilitation shall be given first priority regarding sentencing involving incarceration." Tenn. Code Ann. § 40-35-102(5). A defendant who does not qualify as such and who is an especially mitigated or standard offender of a Class C, D, or E felony is "presumed to be a favorable candidate for sentencing options in the absence of evidence to the contrary." Id. § 40-35-102(6). A sentencing court may then only deny alternative sentencing when presented with sufficient evidence to overcome the presumption. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). A denial of alternative sentencing in the face of the statutory presumption should be based on the following considerations: whether confinement is necessary to protect society from a defendant with a long history of criminal conduct, whether confinement is necessary to avoid depreciating the seriousness of the offense, whether confinement would provide an effective deterrent, and whether measures less restrictive than confinement have failed in the past. Tenn. Code Ann. § 40-35-103(1).

As a Range I standard offender convicted of two Class C felonies and a Class E felony, Appellant is entitled to the presumption of alternative sentencing.

However, the determination of whether a defendant is entitled to an alternative sentence and whether a defendant is entitled to full probation are different inquiries, requiring different burdens of proof. Even when presumed a favorable candidate for alternative sentencing, the defendant always bears the burden of establishing suitability for full probation. Tenn. Code Ann. § 40-35-303(b). In order to justify full probation, the defendant must demonstrate that such a sentence will “subserve the ends of justice and the best interest of both the public and the defendant.” State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990). When determining suitability for full probation, the sentencing court should consider the following factors: (1) the nature and circumstances of the criminal conduct involved; (2) the defendant’s potential or lack of potential for rehabilitation, including the risk that, during the period of probation, the defendant will commit another crime; (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (citations omitted).

The record reveals many factors weighing in favor of full probation. For example, Appellant is a high school graduate with two years of college, a year of embalming school, and two years of ambulance school. He has been employed by the same company for the past five or six years and provides for his family financially. Furthermore, he has taken steps to deal with his substance abuse problem. However, despite these favorable factors, the record reveals that the trial court was troubled by Appellant’s refusal to take full responsibility for his actions. With regard to his insurance fraud conviction, Appellant simply claimed

that he was unaware of his legal obligation to notify the insurance company that he had found his gun. With regard to his other convictions, Appellant maintained that he did not remember any of the events leading up to the commission of the offenses. On the matter of Appellant taking responsibility for his actions, the trial court made the following observation:

[T]here's been a request for leniency. . . . And ordinarily -- I mean, this a totally different procedure than we have had in quite a while. The defendant says, "Yes, I did this, Your Honor. I'm sorry. I want to make restitution and pay all these people back and start all over." But [Appellant] hasn't owned up to anything.

The trial court revisited this issue at the conclusion of the sentencing hearing, stating as follows:

[O]rdinarily the proof in a sentencing hearing goes a different direction than this in saying, "I don't remember what happened, I don't know if I did it, and if I did do it, I'm sorry." It just doesn't add up unless you were strung out on something . If you were, that doesn't excuse it.

The failure to accept responsibility for one's actions is a proper consideration for determining potential for rehabilitation. See State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994). Moreover, this Court has previously held that, upon viewing a defendant's demeanor while testifying, the trial court is in a better position to accurately assess potential for rehabilitation. See State v. Dodd, No. 03C01-9508-CC-00214, 1996 WL 393926, at *1 (Tenn. Crim. App. July 16, 1996). Here, the record reveals that, based upon Appellant's testimony and demeanor at the sentencing hearing, the trial court questioned his potential for rehabilitation. As a result, the trial court concluded that Appellant had failed to establish suitability for full probation. Because Appellant's potential

or lack of potential for rehabilitation is a proper consideration when determining suitability for full probation and because the record supports the trial court's finding that Appellant's potential for rehabilitation was questionable, we conclude that the imposition of a sentence of split confinement was warranted.

Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOHN K. BYERS, SPECIAL JUDGE