IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
JUNE SESSION, 1996

FILED

October 24, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9509-CC-00293
Appellee	)	
	)	WILLIAMSON COUNTY
vs.	)	
	)	Hon. Cornelia A. Clark, Judge
CARL M. HAYES,	)	
	)	(Sentencing - Two Counts
Appellant	)	Sale of Cocaine)
	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Carl M. Hayes, was indicted by a Williamson County Grand Jury in a six count indictment charging him with four counts of sale or delivery of cocaine in excess of .5 grams and two counts of sale or delivery of cocaine less than .5 grams. He pled guilty to one count of sale of cocaine in excess of .5 grams, a class B felony, and one count of sale of cocaine, a class C felony.[1] Following a sentencing hearing, the trial court imposed a nine year sentence for the class B felony conviction and ordered that the appellant be confined for a period of 220 days followed by placement in the local community corrections program for the balance of his sentence. For the class C felony conviction, the trial court imposed a four year sentence and ordered that the appellant serve 220 days in confinement again followed by placement in the community corrections program for the remainder of the sentence. The court ordered the sentences to run concurrently. On appeal, the appellant challenges the length of each sentence and the manner of service imposed by the trial court.

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

I. Factual Background

At the sentencing hearing, the State relied upon the presentence report and the nature and circumstances of the offenses which resulted in the appellant's convictions. The presentence report revealed that, at the time of the hearing, the appellant was a twenty-seven year old high school graduate. The

[1]The indictment alleges that, on three separate occasions, June 1, 1994, July 13, 1994, and June 14, 1994, the appellant sold and delivered a controlled substance, later identified to be cocaine. On May 17, 1995, the appellant pled guilty to a class B and a class C felony. In exchange for his guilty pleas, the remaining counts were dismissed.

appellant has four prior convictions, three of which are drug-related offenses.[2] The report indicates that the court placed the appellant on probation for each of these convictions.[3] In fact, the appellant was on probation for the July 15, 1993, conviction for marijuana possession when he committed the offense of sale of cocaine over .5 grams on June 1, 1994. Additionally, he was on probation for the marijuana possession, as well as being on probation for the June 8, 1994, conviction for drug paraphernalia, when he committed the offense of sale of cocaine on July 13, 1994.

The presentence investigation also indicates that the appellant was "shot during an altercation on [October 30, 1990]." As a result of this incident, the appellant's gall bladder, part of his liver, and a kidney were removed and that, currently, he "suffers from numbness in the right shoulder and arm." Regarding chemical dependencies, the report indicates that the appellant began drinking alcohol at age fifteen and reports his average consumption as "two beers a day." He also uses cocaine and marijuana. Although he admits to smoking marijuana, he contends that he only used cocaine from 1987 to early 1995. Additionally, the appellant's entire family, except for two brothers, resides in Franklin, Tennessee. The appellant reports that "he is closest to this [sic] mother." The appellant is a cook at a Hardee's restaurant in Franklin. Finally, in an addendum to the presentence report, the appellant's mother verified that the appellant was raised in a stable two parent home until the death of her husband, when the appellant was sixteen years old.[4] She informed the presentence officer that "[the appellant] resided with her until the Franklin Housing Authority made [the

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[2]Specifically, the appellant was convicted on June 8, 1994, for unlawful possession of drug paraphernalia; on July 15, 1993, for marijuana possession; on August 20, 1990, for marijuana possession; and on August 20, 1990, for evading arrest.

[3]The record also indicates that, in the fall of 1991, probation violations were alleged and warrants were issued. However, the warrants were later dismissed.

[4]The appellant's father was a Franklin police officer prior to his death.

appellant] leave due to his felony drug convictions."[5] Additionally, the appellant's mother reported that she is legally blind and that the appellant "comes over to her home to help when he is not working at Hardee's."

The appellant's proof consisted of his testimony, along with that of his supervisor and his mother. The appellant's supervisor, George Harrison, was the first to testify. Mr. Harrison stated that he had been a manager with the Hardee's restaurant chain for five years, but, had been the manager of the Hardee's on Columbia Road in Franklin for three years. He testified that he has known the appellant for two or three years and that the appellant has a reputation for being a truthful person. Mr. Harrison added that the appellant is a good worker and that he has never known the appellant to use drugs while on the job. He confirmed that the appellant helps support his mother and that he was evicted from his mother's home following his guilty pleas. Mr. Harrison testified that, in his opinion, the appellant would comply with the requirements of an alternative sentence, and that, if given assistance, the appellant could stop abusing marijuana.

The appellant does not dispute the information contained in the presentence report. Moreover, the appellant acknowledged his guilt for the present offenses and his regret for committing these crimes. Further, he blamed his involvement with drugs on his association with the "wrong crowd." Regarding his problems with drugs and alcohol, the appellant stated that he quit using cocaine "cold turkey" after seven years of recreational use, because he derived "no benefit" from its use.[6] However, he indicated that he continues to smoke

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[5]Ms. Doughman of the Franklin Housing Authority confirmed that the appellant was evicted from his mother's home, because federal housing regulations prohibit such habitation by a convicted felon.

[6]The appellant testified that he only used cocaine recreationally, on Fridays and Saturdays. However, he conceded that this recreational use amounted to a $40 to $50 per week habit.

marijuana and continues to drink at least two beers per day. He testified that he drinks "beer" to relax, and that his drug and/or alcohol use has not interfered with his work. The appellant explained that he "didn't really need [drugs], [it was] just something that happened" and that his cocaine use "turned into a habit . . . about 1991." Furthermore, he indicated that his use of marijuana and alcohol is not a problem. Despite extensive encounters with the judicial system involving drug related offenses, the appellant adamantly insists that the only times that he has ever sold cocaine were on the two occasions for which he pled guilty. Moreover, he refused to provide the court with the name of his suppliers stating, "That's where we have a stopping block -- the police asked me the same question and I value my mother's safety . . . I'm not giving any names. . . ." When questioned whether these "suppliers" were still on the streets selling controlled substances, the appellant replied, "I'm just concerned about myself."

Finally, the appellant's mother, Mary Hayes, testified that the appellant had a good home life until his father's death. Since then, the appellant has shared the burden of supporting her financially, since she is legally blind and only subsists on her monthly disability check. Additionally, she reported that the appellant gave her "her [insulin] shots," however, she conceded that she now has a nurse to provide the necessary medical treatment. Mrs. Hayes testified that she believes that her son "can overcome any drug problem with support."

In pronouncing sentence, the trial court first looked to mitigating factors. The court applied Tenn. Code Ann. § 40-35-113(1)(1990), finding that the appellant's criminal conduct neither caused nor threatened serious bodily injury. However, the court rejected defense counsel's other statutory and non-statutory mitigators, stating that these miscellaneous factors "may go to the appellant's rehabilitation, but they are not mitigators." Specifically, the court found Tenn. Code Ann. § 40-35-113(7) inapplicable because the record did not establish that

the appellant's actions were designed to provide necessities for him or his family. Next, the court analyzed applicable enhancement factors and concluded that Tenn. Code Ann. § 40-35-114(1) and 114(8) were applicable to the appellant's case, because the appellant had four previous convictions, three dismissed offenses, and admitted to the unlawful use of controlled substances for many years, and because the appellant has a history of unwillingness to comply with conditions of a sentence involving release into the community. In so finding, the court applied one mitigating factor and two enhancement factors.

The trial court, noting the serious drug problem in the community, concluded that the appellant was not a favorable candidate for probation nor was he a favorable candidate for any alternative sentence. However, the court noted that, although the appellant was not candid with the court about naming his suppliers and that the court had a hard time believing that these two offenses were the sole instances involving the sale a controlled substance, the appellant "does have a high school education, he does have a good employment record, and he does have a particular problem with the care of his mother." Moreover, the court found that the appellant "may have a slight possibility for continued rehabilitation." Accordingly, the court sentenced the appellant to nine years for the class B felony and four years for the class C felony, to run concurrently, with 220 days to serve followed by community corrections for the remainder of the sentences.

II. Sentencing

Review, by this court, of the length, range, or manner of service of a sentence is *de novo* with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption only

applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the case before us, the trial court correctly applied sentencing principles, thus, the presumption applies. Moreover, this court may modify a sentence only if, in the court's opinion, the sentence is excessive or the manner of service is inappropriate. State v. Russell, 773 S.W.2d 913, 915 (Tenn. 1989).

In making our review, this court must consider the evidence heard at the sentencing hearing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating or enhancement factors. and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-102, -103(5), -210(b) (1990); see also State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993) (citing Ashby, 823 S.W.2d at 168). The burden is on the appellant to show that the sentence imposed was improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

A. Length of Sentence

Initially, the appellant argues that his "sentences . . . are too severe and should be modified downward." Specifically, although he concedes that the record supports the application of enhancement factors (1), history of criminal convictions or behavior, and (8), history of unwillingness to comply with terms of sentence involving release in the community, and mitigating factor (1), conduct neither caused nor threatened serious bodily injury, he asserts that the trial court erred by not finding the presence of five other mitigating factors, namely: "(1) that the appellant has expressed remorse for his actions in the crime; (2) that the appellant has expressed willingness to take responsibility for this actions in the crime; (3) the appellant has a good employment record; (4) the appellant has a

good record of care and concern for his disabled mother; and (5) the appellant has unilaterally taken steps to dissociate himself from the use and abuse of cocaine."[7]

Upon *de novo* review, we conclude that the trial court did not err by failing to apply these requested mitigating factors.[8] First, the appellant argues that the trial court should have considered his remorse as a mitigating factor. Similar to the issue of credibility, remorse is best left to the determination of the trial court. A defendant's bare assertion of remorse or hollow apologies at the sentencing hearing do not automatically grant entitlement to mitigation in the sentencing process. In determining whether actual remorse is present, the reviewing court may consider the defendant's conduct and statements immediately following the unlawful act as well as the defendant's demeanor at the sentencing hearing. Although genuine remorse is a proper mitigating factor, the trial court did not make an affirmative ruling accepting the appellant's remorse as sincere. See State v. Buttrey, 756 S.W.2d 718, 722 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); State v. Williamson, No. 01C01-9308-CR-00249 (Tenn. Crim. App. at Nashville, Dec. 19, 1995). Second, although a person's willingness to take responsibility for his actions may be considered a mitigating factor, in the present case, the appellant's motive was self-serving, since four counts of the indictment were dismissed in exchange for guilty pleas. See State v. Cagle, No. 01C01-9301-CC-00006 (Tenn. Crim. App. at Nashville, Nov. 18, 1993), perm. to appeal denied, (Tenn. Mar. 28, 1994). Finally, this court has held that "the fact that the individual works, has finished his education and meets his financial obligations is not ordinarily a mitigating factor." State v. Crumsey, No. 03C01-9210-CR-00356 (Tenn. Crim. App. at Knoxville, Nov. 3, 1993), perm. to appeal

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[7]Tenn. Code Ann. § 40-35-113(13) permits the trial court to consider other factors "consistent with the purposes of this chapter."

[8] The trial court did not totally disregard the rejected non-statutory mitigators. Rather, the court considered these factors for rehabilitative potential in granting an alternative sentence.

denied, (Tenn. Feb. 28, 1994). Accordingly, the trial court considered the applicable enhancement and mitigating factors.

In determining the appropriate length of a sentence for a felony conviction, Tenn. Code Ann. §40-35-210(e) (1995 Supp.) instructs the sentencing court that, if there are enhancement and mitigating factors, the court must start at the minimum sentence in the range, then enhance the sentence in accordance with the enhancement factors, then reduce the sentence in accordance with the mitigating factors. There is no scientifically determined or controlling value applied to the enhancement and mitigating factors. Rather, the weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the purposes and principles of the Sentencing Act and its findings are adequately supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995) (citing Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see State v. Ashby, 823 S.W.2d at 169.).

In the present case, the appellant pled guilty to a class B felony and a class C felony. Additionally, the court found the appellant to be a range I offender. Consequently, the sentence range for a range I offender of a class B felony is "not less than eight nor more than twelve years." Tenn. Code Ann. § 40-35-112(a)(2) (1990). The court sentenced the appellant to nine years. The sentence range for a range I offender of a class C felony is "not less than three nor more than six years." Tenn. Code Ann. § 40-35-112(a)(3). The court sentenced the appellant to four years. Given the presence of two enhancement factors and one mitigating factor, the sentences imposed by the trial court are not excessive. This issue is without merit.

B. Alternative Sentence

In his remaining issue, the appellant challenges the manner of service of the sentence imposed by the trial court. In order to review this contention, we must first determine whether the appellant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995) (citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). A defendant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender, he is convicted of a class C,D, or E felony, and he does not have a criminal history evincing either "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5), -102(6) (1995 Supp.). The appellant was convicted of a class B and a class C felony. Moreover, the appellant has a history evincing a continuing pattern of illegal drug use and failed attempts at rehabilitation. Tenn. Code Ann. § 40-35-102(5). Accordingly, the appellant is not afforded the presumption favoring alternative sentencing. Thus, the appellant bears the burden of showing his entitlement to alternative sentencing. Tenn. Code Ann. § 40-35-401(d).

Additionally, because "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant" and because the appellant "has a long history of criminal conduct," we conclude that the length of the period of partial confinement imposed is appropriate and justified in the present case. Tenn. Code Ann. § 40-35-103(1)(A), (C) (1990). The appellant has failed to carry his burden of demonstrating that his sentences were improper.

After a review of the record, we conclude that the sentences imposed by

the trial court are reasonable and appropriate under the Sentencing Act.

Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge