IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED

October 17, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	No. 01C01-9509-CC-00292
	)	
Appellee	)	WILLIAMSON COUNTY
	)	
v.	)	HON. CORNELIA A. CLARK,
	)	JUDGE
JACK PROTZMAN,	)	
	)	(Possession of Marijuana)
Appellant.	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Jack Protzman, appeals as of right the sentence he received after pleading guilty in the Williamson County Circuit Court to possession with intent to sell not less than ten (10) pounds nor more than seventy (70) pounds of marijuana. He was sentenced to the maximum eight (8) years as a Range II offender and a $50,000 fine was imposed. Appellant raises three issues on appeal: (1) the trial court violated sentencing principles when it sentenced him to the maximum term and imposed the maximum fine; (2) the trial court erred in ordering that the current sentence be served consecutively to any outstanding sentences in North Carolina or Texas; and (3) the trial court erred in not allowing proof of a mitigating factor.

Finding no reversible error in the record, we affirm the appellant's sentence in all respects.

On April 8, 1993 appellant was arrested at the Red Lobster in Franklin for possession of marijuana, which was discovered hidden in a pickup truck he was driving. The amount was later determined to be fifty-three (53) pounds. The case went to trial on March 22, 1995 and after the State's opening statement, appellant changed his plea to guilty.

Although he pled guilty, appellant maintained his innocence at the sentencing hearing and testified that he was not aware that there was any marijuana in the truck. Appellant lived in Florida at the time of the offense and had driven to Nashville for a business meeting. He said that he met with David Lentz, who asked him to drive a pickup truck to a certain location. After stopping at appellant's hotel room to get the keys to the truck, Lentz and a companion drove appellant to the Red Lobster in Franklin. Appellant went inside the restaurant, made several phone calls and then made his way to the truck in the parking lot. He stated that he looked in the cab of the truck and in the bed of the truck, but saw nothing. He then got into the truck, started

the engine and was immediately surrounded by undercover police officers. After a search of the truck, marijuana was found hidden in the roof of the truck's camper top.

At the guilty plea hearing, the State offered a slightly different version of the facts. The District Attorney asserted that the entire deal had been organized by the appellant and that he routinely performed operations in this manner. Before appellant arrived in Nashville, the police arrested David Lentz on drug charges. Lentz agreed to provide them with information and ultimately led them to appellant.

Appellant's criminal record reflected convictions for: (1) possession of ten (10) pounds of marijuana with the intent to sell in Shelby County in May of 1991; (2) eleven (11) counts of embezzlement of state property in North Carolina in October of 1991; (3) violation of the Employment Security Law of North Carolina for failure to file required wage reports in 1989; and (4) passing a worthless check in the amount of $2,861.75 in North Carolina in 1989. The record reflects that appellant pled guilty to each of the above offenses. In addition, the appellant admitted at sentencing that he was free on an appeal bond from a Texas court when he committed the present offense. The Texas conviction was for transporting over fifty (50) pounds of marijuana, for which he received a sentence of twelve (12) years. When the present offense was committed, appellant was on probation in Shelby County and North Carolina.

In mitigation, the appellant offered proof that he was not armed when this offense was committed; that he played a minor role in the commission of the crime; that he had assisted law enforcement officials in the apprehension of other offenders; that he had accepted responsibility for all his prior crimes; that his previous convictions were primarily "white collar crimes" that did not involve violence or bodily injury; and that incarceration would be of no benefit. Appellant also introduced proof of charitable acts done in his home community of Tavares, Florida.

The trial court found only one mitigating circumstance: appellant's conduct did not cause or threaten serious bodily injury. It refused to find his assistance to law

enforcement officials to be a mitigating factor. He had provided no help to State officials and he had no independent proof of assistance provided to federal officials. For enhancement purposes, the trial court found three factors. First, the appellant has a previous history of criminal convictions. Specifically, he has ten (10) felony convictions in addition to those necessary to make him a multiple offender as well as the Texas conviction which was being appealed. In addition, the appellant had been subject to several forfeitures of personal property, including the seizure of $533,000 in cash by Louisiana authorities. Secondly, the court found an unwillingness to comply with the terms of a sentence for release into the community demonstrated by appellant's failure to comply with the terms of his probation in Shelby County and in North Carolina. Finally, the present offense was committed while on probation and while out on an appeal bond from Texas.

The trial court noted that appellant's testimony was unbelievable and ludicrous. Appellant was sentenced to eight (8) years as a Range II offender and fined $50,000. The trial court found him unsuitable for alternative sentencing. The court also ordered that appellant's sentence be served consecutively to any outstanding sentences in North Carolina or Texas.

Appellant contends that the trial court violated sentencing principles when it sentenced him to the maximum term and imposed the maximum fine. Although raising other points, the crux of appellant's argument is that he was an appropriate candidate for alternative sentencing. Because the trial court's findings are amply supported by the record, appellant's issue is without merit.

It is our duty to conduct a de novo review of appellant's sentence with a presumption of correctness. Tenn. Code Ann. §40-35-401(d) (1990). This presumption, however, is conditioned upon an 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). In conducting

this review, we must follow certain procedures as set forth in the statute and consider 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.

Tenn. Code Ann. §40-35-210 (Supp. 1995).

Appellant asserts that he was an appropriate candidate for community corrections. While we are inclined to agree that appellant meets the statutory eligibility requirements for community corrections, the statute does not provide that all offenders who meet the standards are entitled to such relief. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). See also State v. Grandberry, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990). Statutory considerations militating against alternative sentencing are the following:

> Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; [c]onfinement is necessary to avoid depreciating the serousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. §40-35-103(1)(A)-(C) (1990). See also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The record supports these factors which militate against community corrections. Appellant has a long history of criminal conduct; it is apparent that he is a professional drug courier. While none of the offenses committed were violent ones, their numerosity is significant and the light punishment thus far imposed has proven to be no deterrent. The offense here was a serious offense in that appellant was transporting fifty-three (53) pounds of marijuana, no small quantity. Furthermore, the less restrictive measures previously imposed upon the appellant have been unsuccessful. When he committed this offense, he was on probation from Shelby

County and also North Carolina. Each time he has received a suspended sentence or non-confinement, the appellant has subsequently committed another crime. These facts support the trial court's denial of alternative sentencing for the appellant.

We dispose of appellant's argument as to probation in a similar manner. We are aware that it was the intent of the legislature to encourage alternatives to incarceration. Tenn. Code Ann. §40-35-102 (Supp. 1995). We are also aware of the eligibility for probation of all defendants sentenced to eight years or less. Tenn. Code Ann. §40-35-303 (Supp. 1995). However, mere eligibility does not automatically entitle a defendant to this alternative. Tenn. Code Ann. §40-35-303 Sentencing Commission Comments (Supp. 1995) and State v. Fletcher, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). 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. See Tenn. Code Ann. §40-35-102 (Supp. 1995). The trial court here denied appellant probation because he had no ties to the community and his disregard for authority. We agree with these reasons.

Additionally, the trial court's consideration of the appellant's veracity was proper in evaluating his eligibility for alternative sentencing. An offender's truthfulness at trial or sentencing is a factor that may be considered and probation may be denied on this ground. State v. Dykes, 803 S.W.2d 250, 259-60 (Tenn. Crim. App. 1990) (citations omitted). Along this same vein, truthfulness is probative on the issue of amenability to rehabilitation, the very goal of alternative sentencing. State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Crim. App. 1993) (citations omitted). In this case, the trial judge said she had "never seen a witness sit on a stand and tell as many falsehoods or make as many technical or evasive answers as [appellant] has." The record is replete with evidence to support the trial court's denial of alternative sentencing.

Appellant attacks the characterization of his prior convictions used to classify him as a Range II offender. He argues that the eleven (11) count embezzlement conviction should be considered one conviction under the twenty-four (24) hour

merger rule. See Tenn. Code Ann. §40-35-106(a)(4) (1990). However, the record reflects that each count represents the failure to pay sales tax that occurred each month for several months. The violations were not part of a single course of conduct that occurred within twenty-four (24) hours. Tenn. Code Ann. §40-35-106(a)(4) (1990). As such, they are not subject to the twenty-four (24) hour merger rule. Appellant's criminal record is overwhelmingly sufficient to satisfy the requirements of a Range II multiple offender. See Tenn. Code Ann. §40-35-106 (1990). The sentence is not excessive.

Next, appellant contends that the trial court erred when it ordered that his sentence be served consecutively to outstanding sentences in North Carolina or Texas. He incredibly contends that the only basis present for consecutive sentencing is that the offense was committed while on probation and this was considered in error. Finding that the trial court did not abuse its discretion, we affirm the order of consecutive sentencing.

While consecutive sentences are not to be routinely given, the decision rests within the discretion of the trial court. Tenn. Code Ann. §40-35-115 Sentencing Commission Comments (1990). However, the legislature has given trial courts direction by setting forth criteria to be considered in ordering that sentences be served consecutively. Tenn. Code Ann. §40-35-115 (1990). In ordering consecutive sentences, the trial court specifically relied upon appellant's status as a professional criminal, his extensive criminal history, and the fact that he was on probation at the time of this offense. These findings are supported by the record.

Had the trial proceeded, the State was prepared to prove, through testimony of David Lentz and others, that appellant routinely organized drug runs from Texas to Tennessee, using the same pickup truck and the same associates each time. He even used equipment at the same woodworking shop each time to cut into the false roof in the camper top to retrieve the marijuana and to replace the false roof. The record supports a finding that appellant relied upon drug trafficking for his livelihood.

Appellant's testimony about previous employment with his brother was questionable. His ability to pay hefty fines imposed by other courts and his lifestyle indicated a lucrative profession that was not legitimately corroborated at sentencing. His previous convictions indicate a lengthy criminal history.

Furthermore, the appellant clearly was on probation at the time this offense was committed. The 1991 Shelby County conviction carried a three (3) year probation term, which is apparent on the face of the judgment. Additionally, the appellant received probation for his 1991 embezzlement convictions in North Carolina. He was given a ten (10) year suspended sentence, ordered to pay restitution and placed on probation for five (5) years as a result. Neither of these probationary periods had expired at the time of this offense. Appellant's North Carolina probation had not terminated upon his payment of restitution, as he asserts. The presentence report indicates that appellant's North Carolina probation officer intended to seek a probation violation warrant based upon the current offense. We see no abuse of discretion in the order of consecutive sentencing.

Furthermore, the trial court's order of consecutive sentencing was mandated by Rule 32(c)(2) of the Tennessee Rules of Criminal Procedure. This rule requires a trial court to order consecutive sentences if the defendant has outstanding convictions in other states, unless the court determines in its discretion to order otherwise. It is apparent that appellant had outstanding sentences in Texas and, as a result of his probation violation, in North Carolina. The trial court's reliance on this Rule was proper.

Appellant's last argument is that the trial court erred in not admitting evidence of a mitigating factor. He sought to rely upon his assistance to "authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed the offenses." Tenn. Code Ann. §40-35-113(9) (1990). Appellant offered his own testimony regarding his assistance to federal DEA agents in South Carolina and it was ruled inadmissible by the trial court. Because we, like the

trial court, find there was no indicia of reliability in appellant's testimony, this issue is without merit.

Reliable hearsay may be admitted at a sentencing hearing provided that the opposing party is permitted an opportunity to rebut the evidence. Tenn. Code Ann. §40-35-209(b) (Supp. 1995). That the evidence have some indicia of reliability is explicitly required. Id. For exemplary purposes, the statute refers to certified copies of convictions or other documents. Id. See also State v. Taylor, 744 S.W.2d 919, 921 (Tenn. Crim. App. 1987). However, the only corroboration offered by appellant was phone records purportedly reflecting phone calls to a DEA agent in South Carolina. The appellant merely submitted the records as evidence, without any proof to whom the number belonged. Although he named two agents with whom he dealt, appellant did not attempt to demonstrate that the phone calls were to either of those agents. Neither did appellant offer certified copies of arrests or convictions in which he had assisted authorities. Appellant's own self-serving testimony, without more, has no indicia of reliability.

The sentence given the appellant by the trial court was well-documented and comported fully with the sentencing guidelines. We find no error and therefore affirm the maximum eight (8) year sentence and $50,000 fine imposed upon the appellant.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge