IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

FILED
Dec. 30, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9509-CR-00287**
Appellee,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. WILLIAM H. WILLIAMS,**
DANNY B. THOMAS,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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(On Appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for multiple counts of selling cocaine, possessing cocaine with the intent to deliver, and possessing cocaine with the intent to sell. He pled guilty to four counts of selling over .5 grams of cocaine and accepted an agreed sentence of eight years on each count, to run concurrently, with a $2,000 fine on each count. He was designated a Range I standard offender. The only issue left to the sentencing court was whether to grant probation or some other form of alternative sentence. The court below denied any form of alternative sentence. In this appeal as of right, the defendant challenges that denial. After a review of the record, we affirm the judgment below.

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).

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
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> (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 this case, the defendant was convicted of four class B felonies, T.C.A. § 39-17-417(c)(1), each having occurred on a different day. While he is therefore eligible for probation, T.C.A. § 40-35-303(a), and community corrections, T.C.A. § 40-36-106(a), he is not presumed to be a favorable candidate for alternative sentencing. T.C.A. § 40-35-102(6). Rather, the defendant has the burden of proving that he is suitable for probation. T.C.A. § 40-35-303(b); State v. Davis, 750 S.W.2d 167, 168 (Tenn. Crim. App. 1988).

The defendant admitted that he had made drug sales other than those for which he was arrested. He also admitted that he had smoked marijuana while this matter was pending before the court below. His record of past criminal activity or behavior included a contempt of juvenile court conviction for nonsupport and a juvenile offense of aggravated rape. He admitted that he had sold the drugs in order to make money to pay his bills, that his current job payed only $5.00 per hour, and that he could pay only $300 toward his $8,000 fine at the time of the sentencing hearing. He professed regret for his actions and asserted that he had learned his lesson and that he was going to start over.

In denying probation, the court below considered that the defendant had sold the drugs for money rather than because of an addiction; that each sale constituted "a deliberate willful intentional act of selling a high-risk drug that can kill you"; his criminal history; and his social history including six children by several women and being engaged to another, all by the age of twenty-six.[1] In light of these factors, the court below found as

[1]In considering these facts, the court noted that this might involve a "moral issue . . . that the Court shouldn't consider these days, but to some degree it affects his character, and I'm looking at a person who the question is -- one of the factors and one of the questions that I look at is his ability and willingness to observe the laws and

applicable the sentencing considerations set forth at T.C.A. § 40-35-103(1)(A) and (B), to wit, that confinement was necessary to protect society by restraining a defendant who has a long history of criminal conduct, and that it was necessary to avoid depreciating the seriousness of the offense, or that it was particularly suited to provide an effective deterrence to others likely to commit similar offenses. T.C.A. § 40-35-103(1)(A) and (B). It also relied on specific deterrence in denying an alternative sentence.

In making its decision, the court below considered the sentencing principles and relevant facts and circumstances. This sentence is therefore clothed with the presumption of correctness, and it is the defendant's burden to demonstrate that it is improper. This, the defendant has not done. The sales of cocaine were neither unique nor extraordinary for this defendant, and combined with his past criminal conduct, his behavior indicates a continuing disregard for our laws. His profession that he had learned his lesson was apparently less than convincing to the court below. Accordingly, we think the denial of alternative sentencing was proper in this case.

The defendant also complains about the sentencing court's misapplication of an enhancement factor. However, enhancement factors are used in calculating the length of a defendant's sentence. T.C.A. § 40-35-210(d), (e). Here, the defendant agreed to the length of his sentence, and the court's only decision was the manner of service. Any misapplication of an enhancing factor was therefore harmless error as to the consideration of alternative sentencing.

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morals of society."

For the reasons set forth above, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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DAVID G. HAYES, Judge