IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
OCTOBER SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9607-CC-00214
Appellee	)	
	)	BENTON COUNTY
vs.	)	
	)	Hon. Julian P. Guinn, Judge
JOHN STEPHEN LEE,	)	
	)	(Sexual Battery)
Appellant	)	

FILED
Jan. 17, 1997
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Appellate Court Clerk

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, John Stephen Lee, appeals from a sentence imposed by the Benton County Circuit Court upon his plea of guilty to the offense of sexual battery, a class E felony. Pursuant to a negotiated plea, the appellant received a sentence of one year as a range I offender. The manner of service of the sentence was submitted to the trial court for determination. Following a sentencing hearing, the trial court denied any form of alternative sentence and imposed a sentence of incarceration in the Department of Correction. The appellant now appeals this decision.

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

I. Background

On June 17, 1995, the appellant confessed to Benton County deputies that he had made sexual contact with his fifteen year old stepdaughter's intimate parts "fairly constant[ly]" since she was twelve years old. Although he admitted a continuing sexual attraction to his stepdaughter, he denied having sexual intercourse with her. The appellant indicated that, at one point during this abuse, his stepdaughter threatened to "tell on" the appellant or run away if the touching continued. Responding to this threat, the appellant replied "that if she told anyone, he would kill her and her family. . . ." He further implored the deputies for help, explaining that he was sick, that he loved his stepdaughter and his family, and that he "[did not] want to do it anymore."

Following the appellant's guilty plea, the trial court conducted a sentencing hearing on February 12, 1996, to determine the appellant's eligibility for alternative sentencing. The appellant chose not to testify and relied on the presentence report and argument of counsel to the court. At the time of the sentencing hearing, the appellant was thirty-six years old and was employed by the City of Camden. Although the appellant dropped out of high school in the tenth grade, purportedly to join the Army, he currently was working toward his GED.[1] Besides the current offense, the appellant has no other criminal history with the exception of a conviction for driving on a suspended licenses in 1992. The appellant maintains that he does not use alcohol or drugs. Additionally, since the revelation of his unlawful behavior toward his stepdaughter, he and his wife have separated. His wife and her children left the area and their whereabouts are unknown to the appellant.

The appellant's counsel stated that the appellant has begun counseling for his problems and that he is remorseful for his behavior. Trial counsel then requested that the appellant be placed in community corrections or receive a sentence of split confinement in order for the appellant to continue financially supporting his family. The State responded by asking the court to impose a sentence of incarceration. In denying an alternative sentence, the court considered the ongoing nature of the appellant's unlawful conduct, the appellant's custodial control over the child, and the appellant's lack of remorse for his actions. In doing so, the court concluded that "anything less than service would not be in the best interest of the public, it wouldn't be in the best interest of you and it certainly would not be in the best interest of justice. . . .I specifically consider confinement necessary to avoid depreciating the seriousness of this offense."

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[1]The appellant was unable to provide verification for his military service, although he asserted that he received a medical discharge in November 1976.

II. Alternative Sentence

When a defendant challenges the manner of his sentence, this court must conduct a *de novo* review with the 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 shows that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the present case, the record makes no such showing. Accordingly, we do not apply the presumption.

In determining the appellant's suitability for an alternative sentence, we first decide 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)). To be eligible for the statutory presumption, a defendant must meet three requirements. The defendant must be convicted of a class C, D, or E felony. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). He must be sentenced as a mitigated or standard offender. Id. And, the defendant cannot have a criminal history evincing either a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5). The appellant satisfies these criteria. Accordingly, he is entitled to the presumption favoring alternative sentencing.

This presumption may be rebutted by "evidence to the contrary." Guidance as to what constitutes "evidence to the contrary" may be found in the sentencing considerations codified in Tenn. Code Ann. § 40-35-103 (1990).

Such evidence may be found in the presentence report, the evidence presented by the State, the testimony of the accused, or any other source provided that it is part of the record. Bonestel, 871 S.W.2d at 167; see also Tenn. Code Ann. § 40-35-102(6).

In the present case, the trial court denied alternative sentencing based upon the seriousness of the offense. A trial court's denial of an alternative sentence on this ground can only be upheld if there is evidence in the record that indicates that the circumstances of the offense, as committed, were especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense outweighs all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 454 (citations omitted). We conclude that the proof in the record establishes that the appellant's conduct was both reprehensible and offensive. The proof also establishes that the victim of the offense was particularly vulnerable because of her age, the offense was committed to gratify the defendant's desire for pleasure or excitement; and the appellant abused a position of private trust. Tenn. Code Ann. §40-35-114(4), -114(7), -114(15). The mitigating and enhancing factors set forth in Tenn. Code Ann. § §40-35-113 (1990) and -114 (1994 Supp.) may be considered in determining the appropriateness of alternative sentencing. See State v. Zeolia, No. 03C01-9503-CR-00080 (Tenn. Crim. App. at Knoxville, Mar. 21, 1996) (citing Tenn. Code Ann. § 40-35-210 (b)(5)). Additionally, the offense is excessive and exaggerated based upon the period of its occurrence and the manner in which it was perpetrated. Moreover, despite the assertions of the appellant, the trial court found a lack of remorse on behalf of the appellant for his conduct. Lack of remorse is relevant when considering a defendant's potential for rehabilitation and sentencing alternatives. Tenn. Code Ann. § 40-35-103(5). We conclude that the State has presented sufficient evidence to the contrary to rebut the presumption favoring an alternative sentencing option. See, e.g.,

Schmidt v. State, No. 03C01-9501-CR-00016 (Tenn. Crim. App. at Knoxville, Aug. 3, 1995) (citing State v. Gennoe, 861 S.W.2d 833 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1992); State v. Gross, No. 03C01-9110-CR-00324 (Tenn. Crim. App. at Knoxville, 1992)). A sentence of incarceration is proper under the facts of this case.

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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PAUL G. SUMMERS, Judge