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

STATE OF TENNESSEE,	)	
	)	No. 02C01-9512-CC-00368
Appellee	)	
	)	HARDIN COUNTY
vs.	)	
	)	Hon. C. Creed McGinley, Judge
TIMOTHY S. MYRICK,	)	
	)	(Poss. of Schedule II drug
Appellant	)	(Hydromorphone) with
	)	intent to deliver or sell; Poss. of Paraphernalia; Failure to Report an accident; Public Intoxication)

For the Appellant:

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For the Appellee:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Timothy S. Myrick, appeals from a sentence imposed by the Hardin County Circuit Court upon his plea of guilty to one count of possession of a schedule II drug (hydromorphone) with intent to deliver or sell, a class C felony; and to one count of unlawful possession of drug paraphernalia, one count of failure to report an accident, and one count of public intoxication, all misdemeanors. Pursuant to a negotiated plea, the appellant received an effective sentence of three years as a range I offender.[1] 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. In this appeal, the appellant challenges the trial court's denial of alternative sentencing.

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

I. Background

On December 28, 1994, the appellant was involved in an automobile accident in Hardin County. The appellant, barely able to walk and disoriented, was discovered standing in the road. He was arrested on charges arising from the accident. Pursuant to a search incident to the arrest, officers discovered 127 and ½ dilaudid (hydromorphone) pills in a non-prescription bottle on the appellant's person. Also found was a "pipe . . . of the type used for smoking controlled substances." Following his arrest, the appellant advised the officers

[1]Specifically, the court imposed a sentence of three years for possession of hydromorphone with intent to sell, ninety days for possession of drug paraphernalia, thirty days for failure to report an accident, and thirty days for public intoxication. The sentences were ordered to run concurrently.

that the 127 pills were not his but that they belonged to an acquaintance. He explained that his wife was returning them to this acquaintance when she was involved in a wreck and that his possession of the pills was simply for safekeeping purposes.

The trial court held a sentencing hearing on July 31, 1995. The appellant chose not to testify and relied upon the information in the presentence report, the testimony of his wife, Cindy, and on the argument of his counsel. On the date of the sentencing hearing, the appellant was forty-one years old, married with three children. The appellant "dropped out" of high school during the eleventh grade, however, he has earned his GED and completed some electrical courses at a vocational school in Crump, Tennessee. He admits using alcohol and illegal drugs.[2] Apparently, it was this dependency that led to the appellant's four prior criminal convictions for the sale of controlled substances.[3] Moreover, the appellant has congestive heart failure and seizures, which enables him to receive social security disability. His family's income is limited to this social security income, his children's social security income, and food stamps. Prior to the onset of the appellant's health problems, in 1988, the appellant was employed as an electrician. Cindy Myrick, the appellant's wife, described the appellant's health as "terrible." She added that the appellant was scheduled to have his pacemaker replaced in the near future. Mrs. Myrick also confirmed that, if the appellant was granted a sentence other than incarceration, he would obey all rules and regulations.

The appellant's counsel urged the court to classify the appellant as a "special needs-type person" requiring an alternative sentence. The State

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[2]The record indicates that the appellant twice attempted rehabilitation through counseling.

[3]The presentence report indicates that the appellant was convicted in 1991 and 1981 for drug offenses. The 1991 convictions resulted in two concurrent three year sentences for the sale of Schedule II drugs. The 1981 convictions resulted in two concurrent four year sentences for the sale of drugs. Both sentences involved supervised probation.

responded that dilaudid was a serious drug and that the appellant possessed a large quantity of the substance. The trial court denied alternative sentencing emphasizing the appellant's prior drug-related convictions, the highly addictive quality of dilaudid, and the large quantity of pills possessed by the appellant. Additionally, he noted that, although the offense does not involve violence, drug related offenses present "a potential for great danger to the community." In imposing a sentence of confinement, the court found that past efforts of rehabilitation had failed and that there is a need for deterrence.

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 convinces us that the presumption is applicable.

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 has a past history of drug and alcohol abuse, two prior criminal convictions, and failed efforts at rehabilitation. Accordingly, the presumption does not apply.

Moreover, we conclude that, even if the appellant was entitled to the presumption, the presumption is 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 imposed incarceration because measures less restrictive than incarceration have been applied unsuccessfully to the appellant and to provide a deterrent to others likely to commit the offenses. Tenn. Code Ann. §40-35-103(1)(B), (C). The record supports the trial court's finding that prior efforts at rehabilitation have been unsuccessful. The appellant was placed on probation for two previous convictions involving four counts of selling controlled substances. Despite these prior convictions, the appellant has continued to violate the law as evidenced by these additional charges. Additionally, the trial court denied alternative sentencing because there is a need to deter individuals from engaging in drug trafficking. Tenn. Code Ann. §40-35-103(1)(B). When deterrence is used to deny alternative sentencing, there must be evidence in the record illustrating the need to deter others from committing the offense. See State v. Bonestel, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993). In the present case, the State failed to present any evidence to illustrate

the need for a deterrence to drug related offenses. However, in State v. Dykes, 803 S.W.2d 250, 260 (Tenn. Crim. App. 1990), this court held that the sale or use of narcotics is "deterrable *per se,*" even absent a record demonstrating a need for deterrence.

Upon *de novo* review, with the presumption that the findings of the trial court are correct, we conclude that the State presented sufficient "evidence to the contrary" to rebut the presumption for alternative sentencing. Thus, the trial court properly denied alternative sentencing based upon the appellant's lack of rehabilitative potential and the need to deter drug related offenses. We affirm the judgment of the trial court.

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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