IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

February 13, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	**C.C.A. NO. 01C01-9602-CC-00065**
Appellee,	)	
	)	**COFFEE COUNTY**
VS.	)	
	)	**HON. GERALD L. EWELL, SR., JUDGE**
FREIDA DAWN DARNELL	)	
	)	
Appellant.	)	(Passing worthless checks)
	)	

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OPINION FILED: _____

AFFIRMED AS MODIFIED

JOE G. RILEY
JUDGE

O P I N I O N

The sole issue in this appeal is whether the defendant's misdemeanor sentences are excessive. Defendant pled guilty to nineteen (19) counts of passing worthless checks under $500 in value and was sentenced to eleven (11) months and twenty-nine (29) days on each count. The first three (3) counts were ordered to be served consecutively in confinement in the county jail; the next ten (10) counts were ordered to be served on probation consecutively to the first three (3) counts and consecutively to each other; and the final six (6) counts were ordered to be served on probation concurrent with the first count. Therefore, the total effective sentence was three (3) consecutive terms of eleven (11) months and twenty-nine (29) days to be served in confinement followed by almost ten (10) years probation.

We affirm the sentences of confinement but modify the length of probation.

I

Defendant opened the subject bank account in September 1994 and made deposits totaling approximately $700 over the next three months. During this same period she wrote fifty-five (55) checks totaling over $3,600. This led to the subject indictment to which defendant pled guilty to all nineteen (19) counts.

Unfortunately, this is not the defendant's first encounter with the criminal justice system. During the seven years preceding the commission of these offenses the defendant received conviction after conviction for passing worthless checks. Some are misdemeanors, and some are felonies. In addition, she was convicted of criminal attempt to commit a felony and making harassing phone calls. Her prior criminal record comprised three (3) full pages in the pre-sentence report. It is apparent that the defendant fraudulently secured thousands of dollars in property during recent years. She has been fined, received various forms of alternative sentencing and has served

time in confinement. Nothing has deterred her criminal involvement.

In sentencing the defendant the trial judge noted the defendant's extensive prior record and the need for her to be specifically deterred from committing future offenses. The trial judge further found that she was untruthful at her sentencing hearing and failed to acknowledge her personal responsibility for these offenses.

II

This Court conducts a *de novo* review of the sentences with a presumption of correctness. T.C.A. § 40-35-401(d). This presumption of correctness is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166 (Tenn. 1991). The burden is upon the appealing party to show that the sentence is improper. T.C. A. § 40-35-401(d) Sentencing Commission Comments.

This Court is required, pursuant to T. C. A. § 40-35-210, to consider the following factors in sentencing:

> (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 [her] own behalf about sentencing.

A misdemeanant, unlike a felon, is not entitled to any presumption of a minimum sentence. State v, Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994). Furthermore, there is no presumption of alternative sentencing for a misdemeanor offense. State v. Williams, 914 S.W.2d 940 (Tenn. Crim. App. 1995).

III

Where a defendant is convicted of more than one offense, the Court must decide whether to run the sentences concurrently or consecutively. Circumstances under which sentences can be run consecutively are set forth in T.C.A. § 40-35-115(b). Professional criminals who have knowingly devoted themselves to criminal acts as a major source of livelihood as well as those whose record of criminal activity is extensive are the proper subjects of consecutive sentencing. T.C.A. § 40-35-115(b)(1) and (2). In order to impose consecutive sentences the Court must also find that such sentences are necessary to protect the public against further criminal conduct of the defendant and that it reasonably relates to the severity of the offenses. State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995).

Any sentence imposed must be the "least severe measure necessary to achieve the purposes for which the sentence is imposed." T.C.A. § 40-35-103(4). The length of the term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence. T.C.A. § 40-35-103(5).

IV

The trial court had before it a defendant with a history of criminal conduct that spanned eight (8) years. She repeatedly returned to defrauding members of society after receiving various court sanctions. She was a professional criminal who knowingly devoted herself to criminal activity as a major source of livelihood for several years. Her criminal record was obviously extensive. Measures less restrictive than confinement had been applied unsuccessfully to the defendant.

We agree that the trial judge appropriately sentenced the defendant to three (3) consecutive terms of confinement of eleven (11) months and twenty-nine (29) days each. However, the presumption of correctness attached to the probationary term of nearly ten (10) years has been overcome by the evidence. The term of probation must be the least severe measure necessary to accomplish the purposes of sentencing.

T.C.A. § 40-35-103(4). We conclude a probationary term of five (5) years would be sufficient to accomplish the purposes of sentencing. Accordingly, the judgments shall be modified so that the eleven (11) months and twenty-nine (29) days probationary terms set forth in counts nine (9) through nineteen (19) shall run concurrently with count eight (8).

This matter is remanded to the trial court for modification of the judgments in accordance with this opinion.

JOE G. RILEY, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE