IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9512-CC-00407**
	)	
Appellee,	)	
	)	
	)	**MONTGOMERY COUNTY**
VS.	)	
	)	**HON. ROBERT W. WEDEMEYER**
CHARLES HENRY GEORGE,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF MONTGOMERY COUNTY

FOR THE APPELLANT:

MARK R. OLSON
114 Franklin Street
Clarksville, TN 37040

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

JANIS L. TURNER
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JOHN CARNEY
District Attorney General

ARTHUR BIEBER
Assistant District Attorney General
204 Franklin Street
Suite 200
Clarksville, TN 37040

OPINION FILED _____

SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Pursuant to a plea agreement, the Defendant entered pleas of guilty to five counts of telephone harassment[1] and one count of misdemeanor vandalism[2], and a plea of nolo contendere to one count of misdemeanor stalking.[3] Sentencing was left to the discretion of the trial judge. In addition to ordering restitution and public service work, the trial judge sentenced the Defendant to incarceration for five consecutive terms of eleven months and twenty-nine days each, followed by probation for two consecutive terms of eleven months and twenty-nine days each. It is from the sentences imposed by the trial judge that the Defendant appeals. We modify the judgment of the trial court.

The Defendant was indicted by the Montgomery County Grand Jury for seven counts of telephone harassment, one count of felony vandalism, and one count of stalking. The telephone harassment charges involved more than fifty telephone calls placed to six separate female victims. At least two of the victims were minors. The telephone calls were made anonymously and involved sexually suggestive remarks and/or threats. The vandalism charge grew out of the Defendant's actions in "keying" one victim's automobile, and the stalking charge grew out of the Defendant's actions in following and generally harassing one of the victims.

---

[1]Tenn. Code Ann. § 39-17-308(2).

[2]Tenn. Code Ann. § 39-14-408.

[3]Tenn. Code Ann. § 39-17-315.

Pursuant to the plea agreement, the Defendant entered pleas of guilty to five counts of telephone harassment and one count of vandalism, reduced from a felony to a misdemeanor. The Defendant entered a plea of nolo contendere to the count charging stalking. Two counts of telephone harassment were dismissed. While the record does not contain a transcript from the guilty plea proceedings, the record does contain a transcript of the sentencing hearing during which the victims and the Defendant testified.

The Defendant made numerous telephone calls to the victims from several different public telephone booths. His remarks were sexually suggestive and expressed in explicit “street language.” Suffice it to say that the Defendant’s conduct, in addition to being illegal, was disgusting and demeaning. All of the victims were annoyed and upset. Some were clearly and understandably frightened.

Although the Defendant raises several separate issues in this appeal, the issues raised all relate to the length and manner of service of the sentences. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the court is required to provide the Defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). The trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). Misdemeanor sentencing is designed to provide the trial court with continuing

jurisdiction and a great deal of flexibility. One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

The presentence report reflects that the Defendant was sixty-years-old, married and had a high school education with some college work. He and his wife had two children, both of whom were apparently adults.

The Defendant served in the United States Army for over thirty years, having retired in 1982 with the rank of Master Sergeant (E-8). Subsequent to his retirement he worked as a private security guard at banks and possibly other businesses. At the time of sentencing, the Defendant was unemployed, but he received his military pension and his wife received social security benefits. The presentence report reflects no prior convictions, although it does reflect that the Defendant successfully completed pretrial diversion for a charge of making harassing phone calls in 1982, the year he retired from the military.

The Defendant testified that he met his wife in Germany and that, although his wife speaks fluent English, he must conduct the family's personal and household business himself. He testified that his wife was sixty-nine years old and in fair health. He stated that he was trying to face up to his problems and that he was sorry for his actions. He testified that he was embarrassed by the publicity he had received and that he had been undergoing psychiatric counseling for his problems. He described his military service and the numerous awards

which he received while serving in the Army. He testified that he was attempting to start up a "handyman" business.

The Defendant had been receiving counseling in the sex abuse treatment program at the Rivendell Counseling Center in Clarksville for several months. His counselor testified that she was a "licensed psychological examiner" and a "national certified counselor." She described the Defendant's condition as one of "paraphilia" and "impulse control disorder," and more specifically, "telephone scatologia." She explained that these terms meant that the Defendant "has some unusual sexual responses to certain stimuli and in this case, it was the phone calls, obscene calls." She testified that the Defendant needed to continue counseling and treatment and that in her opinion, if the Defendant continued to receive counseling, he would not reoffend.

At the conclusion of the sentencing hearing, the trial judge stated that he was considering as mitigating factors, the Defendant's exemplary military record and that the Defendant was suffering from a mental condition that significantly reduced his culpability for the offense. The court found as an enhancement factor that the number of crimes and the length of time during which they were committed established that the Defendant had a previous history of criminal behavior in addition to that necessary to establish his range. The court also found that the offenses were committed to gratify the Defendant's desire for pleasure or excitement and that at least two of the victims were particularly vulnerable because of their age.

Although it is clear that two of the victims in this case were minors,[4] we must conclude that the trial court erred in applying the "particularly vulnerable because of age" enhancement factor. That factor, as it has been construed by our supreme court, "relates more to the natural physical and mental limitations of the victim than merely to the victim's age." State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993). Moreover, the State bears the burden of proving the victim's limitations rendering him or her particularly vulnerable. Id. In the case at bar, however, the record fails to demonstrate how, other than age alone, the minor victims were particularly vulnerable. While the youth of the victims may have been entitled to some consideration as a characteristic of the offense,[5] the State failed to establish particular vulnerability to qualify as a statutory enhancement factor.

Other than the "particular vulnerability" factor, we believe that the record supports the application of the remaining enhancement and mitigating factors applied by the trial court, and find no error regarding same. Although we do believe that it was error to apply the "particular vulnerability" enhancement factor, we conclude that the record supports the eleven month and twenty-nine day sentence imposed for each count.

In deciding that some of the Defendant's sentences should be served consecutively to others, the trial judge stated that he had "the right and actually the obligation to sentence the Defendant on some of the sentences

---

[4] It appears from the record that one of the victims was fifteen at the time of the offenses and another victim was sixteen or seventeen.

[5] See Tenn. Code Ann. § 40-35-210(b)(4).

consecutively." The judge stated that because the Defendant made numerous offensive telephone calls to several victims over the course of approximately eleven months, this established that the Defendant was an offender whose record of criminal activity is extensive and thus qualified for consecutive sentencing. Tenn. Code Ann. § 40-35-115(b)(2). As we have noted, the Defendant had no prior convictions on his record, although he had been charged with making harassing telephone calls some ten plus years prior to the charges discussed herein.

Even if we agree with the trial court's finding that the number of harassing telephone calls qualifies the Defendant as "an offender whose record of criminal activity is extensive," we do not believe that our sentencing laws allow for consecutive sentences based on this record. Our supreme court has held that consecutive sentences cannot be imposed unless the proof in the record establishes that "the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). Here, we have a sixty-year-old Defendant who had never been convicted of or incarcerated for a crime prior to the misdemeanor convictions discussed herein. Even if we conclude that the Defendant's effective five-year sentence reasonably relates to the severity of his crimes, we do not believe that this record establishes that consecutive sentences are "necessary in order to protect the public from further serious criminal conduct by the defendant." Id. We emphasize that these are the Defendant's first convictions. Therefore, we believe we must modify the Defendant's sentences to reflect that all sentences will be served concurrently.

Although the Defendant argues that it was error to allow any reference to or consideration of his prior charge of making harassing phone calls which was the subject of successful pretrial diversion, we note from the transcript that the Defendant was quick to stipulate to that matter at the time the State first alluded to it at the sentencing hearing. The record does not reflect what consideration, if any, was given to this matter by the trial court in arriving at its sentences. Under the circumstances of this case, we find no error concerning any consideration given the previous charge and further conclude that if there was error, it was harmless.

We are also unable to conclude that the trial court erred in denying the Defendant full probation or some other form of alternative sentence. The Defendant argues that he has met the general statutory eligibility requirements for probation or community corrections. See Tenn. Code Ann. §§ 40-35-303(a) and 40-36-106(a). Mere eligibility, however, does not resolve the issue. Instead, the Defendant still bears the burden of establishing that he is a suitable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-303(b); State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Factors which may militate against alternative sentencing are circumstances indicating that measures less restrictive than confinement have recently been applied unsuccessfully to a defendant or that confinement is necessary either to protect society from a defendant with a long history of criminal conduct or to avoid depreciating the seriousness of the offense. See Tenn. Code Ann. § 40-35-103(1); Ashby, 823 S.W.2d at 169.

At the conclusion of the sentencing hearing, the trial court found that a period of incarceration was an appropriate punishment in the present case. The trial judge did not find the testimony that the Defendant was unlikely to reoffend to be credible. Furthermore, the trial judge specifically stated that "the general public is going to be better off while he [the Defendant] is incarcerated." From the record before us, we cannot conclude that the trial judge abused his discretion in denying full probation or another form of alternative sentencing.

Likewise, we are unable to conclude that the trial judge abused his discretion in denying the Defendant's request for judicial diversion. To find an abuse of discretion in cases involving judicial diversion, we must determine that no substantial evidence exists to support the ruling of the trial court. See State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993); State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion. For instance, in determining whether to grant pretrial diversion, a district attorney general should consider the defendant's criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that pretrial diversion will serve the ends of justice and best interests of both the public and the defendant. See State v.

Washington, 866 S.W.2d 950, 951 (Tenn. 1993); State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). A trial court should consider the same factors when deciding whether to grant judicial diversion. See Bonestel, 871 S.W.2d at 167; Anderson, 857 S.W.2d at 572-73. Moreover, a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration. See Bonestel, 871 S.W.2d at 168.

In the case sub judice, the trial court did not state its reasons for denying judicial diversion. This cursory denial is obviously inadequate in light of the requirements set forth in Bonestel and Anderson. Nevertheless, in considering the entire record, we can only conclude that there is substantial evidence to support the ruling of the trial court. The Defendant placed numerous harassing telephone calls to multiple women over the course of a year. The calls were both upsetting and frightening to the victims. Several of the victims testified regarding threats made during the telephone calls. Moreover, the Defendant vandalized the car of one of the victims, apparently in response to her hanging up on him. We also note that the Defendant had previously been granted pretrial diversion on a similar charge. We noted the positive aspects of the Defendant's personal history earlier in this opinion. From the record before us, however, we cannot conclude that the trial judge abused his discretion in denying judicial diversion.

For the reasons stated herein, the judgment of the trial court is affirmed, except that the Defendant's sentences are ordered to be served concurrently rather than consecutively. This case is remanded to the trial judge solely for the purpose of entering an order consistent herewith.

_____
DAVID H. WELLES, JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

_____
JERRY L. SMITH, JUDGE