IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1996 SESSION



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| STATE OF TENNESSEE, | ) | |
| | ) | |
| APPELLEE, | ) | |
| | ) | No. 03-C-01-9511-CC-00361 |
| | ) | |
| | ) | Sullivan County |
| v. | ) | |
| | ) | Frank L. Slaughter, Judge |
| | ) | |
| | ) | (Sentencing) |
| MARK A. HAROLD, | ) | |
| | ) | |
| APPELLANT. | ) | |

FOR THE APPELLANT:

Nat H. Thomas
Attorney at Law
317 Shelby Street
Kingsport, TN 37660

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Timothy F. Behan
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

H. Greeley Wells, Jr.
District Attorney General
P.O. Box 526
Blountville, TN 37617-0526

Edward W. Wilson
Assistant District Attorney General
P.O. Box 526
Blountville, TN 37617-0526

OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

# O P I N I O N

The appellant, Mark A. Harold, was convicted of possessing less than .5 grams of cocaine with the intent to sell, a Class C felony, and possessing drug paraphernalia, a Class A misdemeanor, by a jury of his peers. The trial court, finding the appellant to be a standard offender, imposed a Range I sentence consisting of a $100,000 fine and confinement for three (3) years in the Department of Correction for possessing cocaine with intent to sell; and the court imposed a sentence consisting of a $2,500 fine and confinement for eleven months and twenty-nine days in the Sullivan County Jail for possessing drug paraphernalia. The sentences are to be served concurrently.[1] One issue is presented for review. The appellant contends the trial court abused its discretion by refusing to grant him an alternative sentence to incarceration. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issue presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

On December 10, 1994, Kingsport police officers executed a search warrant at an apartment in a subsidized housing complex in Kingsport.[2] The apartment had been the center of drug transactions prior to the execution of the search warrant. When the officers entered the apartment, the appellant came face to face with one of the officers. The appellant was tackled and taken to the floor by the officer. A search of the appellant's person revealed .2 grams of cocaine and five or six plastic baggies used to package illicit drugs for resale.

The appellant was twenty years of age. He left high school after completing the tenth grade. He stated he left school because he had "problems" with the teachers and the principal. The appellant began ingesting marijuana when he was eighteen years of age. He laced the marijuana with cocaine once or twice a week. He admitted he was a drug user.

The record establishes the appellant has been convicted of two counts of criminal trespass, theft under $500, and two counts of driving without a license. Of course, each

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[1]The effective sentence imposed was fines totaling $102,500 and confinement for three (3) years in the Department of Correction.

[2]The appellant did not reside in the apartment nor was his name on the lease. However, he was present inside the apartment when the search warrant was executed.

possession of marijuana and cocaine in the past constituted a separate and distinct crime. The appellant was granted the largesse of probation for two of the offenses he committed. In fact, he was on probation when he committed the crimes in question.

The appellant has a prior probation violation, and he was violating the terms of probation when he was arrested on December 10, 1994. He was using illicit drugs, and he had failed to pay the fine, court costs, and restitution, which were made conditions of his probation.

Based upon a de novo review of the record, the appellant has failed to overcome the presumption of correctness afforded the determinations made by the trial court. Tenn. Code Ann. § 40-35-401(d). Moreover, the record clearly establishes the presumption of fitness for alternative sentencing granted by Tenn. Code Ann. § 40-35-102 was successfully rebutted. In other words, the trial court did not abuse its discretion by refusing to grant the appellant an alternative sentence. The record supports the determination of the trial court. In addition, the appellant has been afforded an alternative sentence in the past, and he failed to abide by the terms of this largesse. There is no indication the grant of probation would have assisted the appellant in rehabilitating his admitted criminal lifestyle.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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DAVID G. HAYES, JUDGE