IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9608-CC-00284**
	)	
Appellee,	)	
	)	
	)	**SEVIER COUNTY**
VS.	)	
	)	**HON. REX HENRY OGLE**
JAMES A. HOWARD,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

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

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OPINION FILED _____

SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Upon his pleas of guilty, the Defendant was convicted of aggravated burglary and theft of property valued at more than five hundred dollars but less than one thousand dollars. Pursuant to his plea agreement, the Defendant received minimum sentences of three years for the aggravated burglary and one year for the theft, to be served concurrently. The manner of service of the sentence was left to the discretion of the trial court. The trial judge denied any alternative sentencing option and ordered the sentences served in the Department of Correction. We modify the judgment of the trial court.

The facts surrounding the commission of these crimes are fairly simple. The victim was an elderly woman who collected and traded Dolly Parton memorabilia and souvenirs. The Defendant and his cohort lured the victim away from her house by calling her and advising her that they wanted to meet her to purchase some of her memorabilia. Not knowing of the scheme, she agreed to meet them at a given location. After thus tricking the victim into leaving her home, the Defendant and his cohort then went to her home and stole some of her Dolly Parton memorabilia and some other personal items. The Defendant maintained that his companion was the leader regarding this criminal episode, although the Defendant admitted that he knew his companion was up to no good.[1] The Defendant stated that at the time he took his cohort to the victim's house, he did not know that his companion was going to break into the house.

[1]The Defendant's companion apparently fled the jurisdiction and, at the time of the Defendant's sentencing, had not been apprehended.

The trial judge found the Defendant to be untruthful on this point. The trial judge denied the Defendant any alternative sentencing option, apparently basing his decision on the seriousness of the offense and the need for deterrence. It is from this order that the Defendant appeals.

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).

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(3) - (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

When imposing a sentence of total confinement, our Criminal Sentencing Reform Act mandates the trial court to base its decision on the considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations which militate against alternative sentencing include: the need to protect society by restraining a defendant having a long history of criminal conduct, whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense, the need to avoid depreciating the seriousness of the offense, and the need to order confinement in cases in which less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1).

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the Defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The presentence report reflects that the Defendant was twenty-four years old and unmarried. He had no children. He completed the tenth grade and subsequently obtained his GED. He was employed at a supermarket. He had no prior record as an adult or as a juvenile.

The victim of the offense testified about the circumstances of the break-in and items which were taken. The Dolly Parton memorabilia and other items which were taken from her were very important to her. Although she had received some of the items back, some of the returned items were damaged. Some of the personal items taken were photographs of a deceased grandson which had not been recovered. Obviously these items were especially valuable to her.

The Defendant had no explanation for his conduct other than "bad judgment." He stated that his cohort was the leader in the commission of the offense and that he did not really know that his cohort was going to break into the house.

In ordering the Defendant's sentence served in the Department of Correction, the trial judge expressed in no uncertain terms his sympathy for the victim and his disdain for the Defendant's crime. The trial judge compared the victim to his own grandmother. He stated, "You know, what more can you do to elderly people except to kill them?" Concerning the Defendant, he said, "Now if he doesn't deserve to go to jail, nobody does." It is clear from this record that the trial judge strongly believed that this Defendant should receive nothing less than a sentence of confinement in the Department of Correction.

However, as we have previously noted, it is also clear that this Defendant was presumed to be a favorable candidate for an alternative sentencing option in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). In

an effort to give us guidance on what must be presented to overcome the presumption, our Supreme Court in Ashby stated as follows:

> Guidance as to what will constitute "evidence to the contrary" under subsection (6) is found in T.C.A. § 40-35-103(1). Sentences involving confinement should be based on considerations that "(c)onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct," "(c)onfinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or "(m)easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." (Citations omitted)

823 S.W.2d at 169.

From our review of this entire record, we must conclude that the trial court was not presented with evidence sufficient to overcome the statutory presumption that the Defendant is entitled to an alternative sentencing option. The record reflects no history of criminal conduct. The record reflects that the Defendant was steadily employed. The record contains no evidence reflecting adversely on the Defendant's background or social history. Although the Defendant clearly believed that his companion was the leader in the commission of this crime, he did not deny his own culpability. The record contains no evidence which adversly reflects on the Defendant's potential for rehabilitation. We acknowledge that an element of deterrence is present for consideration in every case. We do not believe that the evidence in this case supports a finding that deterrence dictates a sentence of straight confinement.

We conclude that the Defendant is entitled to an alternative sentencing option. We believe that a sentence of split confinement is appropriate. We modify the sentence imposed by the trial judge to reflect that the Defendant serve

one hundred and twenty days in confinement in the local jail or workhouse. The balance of his sentence shall be served on probation, with the terms and conditions of probation to be set by the trial judge. We remand this case solely for the entry of an order consistent herewith.

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DAVID H. WELLES, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

_____
THOMAS T. WOODALL, JUDGE