

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

January 30, 1997

Cecil W. Crowson

Appellate Court Clerk

FILED

STATE OF TENNESSEE,

C.C.A. NO. 01001-96-0043

Appellee,

VS.

RUTHERFORD COUNTY

CONNIE A. PARSONS,

HON. J. S. DANIEL
JUDGE

Appellant.

(Sentencing)

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

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Upon her pleas of guilty, the Defendant was convicted of two counts of facilitating the rape of a child.¹ For these Class B felony convictions, the Defendant was ordered to serve two consecutive ten-year terms in the Department of Correction as a Range I standard offender. It is from the sentences imposed by the trial court that the Defendant appeals. We affirm the judgment of the trial court.

The Defendant and her husband were jointly indicted by the Rutherford County Grand Jury for four counts of the Class A felony of rape of a child. The Defendant's guilt was predicated on her being criminally responsible for the conduct of her codefendant-husband.² The victim of the offense was the Defendant's ten-year-old daughter, who at the time resided with the Defendant and her codefendant-husband.

The Defendant entered into a plea agreement which allowed her to plead guilty to two counts of the reduced charge of facilitating the rape of her child, with sentencing left to the discretion of the trial court. The Defendant also agreed to testify against her codefendant-husband at his trial. As part of the agreement, the State dismissed two of the counts of raping her child.

¹Tenn. Code Ann. §§ 39-11-403 and 39-13-522.

²Tenn. Code Ann. § 39-11-402.

We will briefly summarize the facts surrounding the Defendant's two convictions.³ In the first instance, the victim was asleep in her bed. The Defendant went and woke her and led her to the living room, where the codefendant was waiting. The victim was forced to perform oral sex on the codefendant. The codefendant began rectal intercourse. He then attempted vaginal intercourse but was apparently unable to penetrate the victim. The codefendant then vaginally penetrated the victim with his finger. The facts which led to the second conviction occurred about three weeks after the first occurrence. The victim was brought into the bedroom of the Defendant and her codefendant-husband where various acts of oral and anal intercourse took place between the Defendant, the codefendant, and the victim. The victim was forced to perform oral sex on the codefendant. The Defendant and the codefendant then had intercourse. The Defendant maintained that her codefendant-husband was physically and mentally abusive to her and that she was forced by him to participate in the actions involving the rape of her ten-year-old daughter.

After conducting a sentencing hearing, the trial judge sentenced the Defendant to the mid-range sentence of ten years for each offense. The sentences were ordered to be served consecutively in the Department of Correction as a Range I standard offender. On this appeal the Defendant argues that her sentences are excessive and that we should order the sentences served concurrently rather than consecutively.

³The victim did not testify. These facts are gleaned from a bill of particulars and from the Defendant's testimony at the sentencing hearing.

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).

The presentence report reflects that the Defendant was twenty-eight years old and was married to her codefendant. She had two children by a previous

marriage. She married her codefendant-husband some three or four months after the attacks on her ten-year-old daughter.⁴ The Defendant's formal education ended with the eleventh grade although she reported that she had obtained her GED. No record of prior convictions was set forth in the presentence report, although the Defendant reported she had been arrested for possession of marijuana and that she had two prior shoplifting convictions. The Defendant also reported a long history of marijuana use. She did not report steady employment but she had worked as a factory worker at several locations.

At the sentencing hearing the Defendant testified concerning the assaults upon her daughter. She admitted that she had assisted her husband in raping the child during the first assault, although she said she acted only out of fear of her husband. She said she didn't report the assaults to anyone because she was afraid of her husband. She also admitted her involvement in the second rape although she again stated she participated only because her husband physically abused her and she was afraid of him. It appears from the record that the victim was penetrated both vaginally and anally and was required to perform oral sex on the codefendant-husband. The Defendant expressed her remorse for her crimes. We have already noted that the Defendant actually married her codefendant-husband some three or four months after the rapes occurred. At the sentencing hearing, a psychologist testified generally concerning the characteristics of an abused spouse, although the psychologist had never examined the Defendant.

⁴The record indicates that the Defendant's codefendant-husband was convicted on a jury verdict of two counts of rape of a child and received an effective sentence of forty-four years in the Department of Correction.

Prior to the Defendant's sentencing, she had testified at the trial of her codefendant-husband. During her sentencing hearing, references were made by counsel for the Defendant and counsel for the State regarding testimony given by the Defendant at the trial of her codefendant. Statements were made to and by the trial judge concerning testimony presented at the codefendant's trial, particularly statements against interest made by the Defendant. The trial judge herein presided over the codefendant-husband's trial. While we believe that the record on appeal is sufficient to allow us to adequately review the Defendant's sentencing issues, we do point out that the record on appeal does not contain a transcript of the Defendant's testimony at her codefendant's trial. A party seeking review in this court is required to prepare a record which conveys a fair, accurate, and complete account of what transpired in the trial court with respect to the issues that will be presented to the appellate court for determination. T.R.A.P. 24(b); State v. Ballard, 855 S.W.2d, 557, 560-61 (Tenn. 1993).

When we consider the nature and characteristics of the Defendant's criminal conduct, we can only conclude that it was most reprehensible. The crimes that the Defendant not only allowed to be perpetrated against her own child, but also participated in, were terrible. That the Defendant married her codefendant after these acts were committed is almost beyond comprehension.

In sentencing the Defendant, the trial court found as an enhancement factor that the victim was particularly vulnerable because of her age. Tenn. Code Ann. § 40-35-114(4). The victim was ten years old. The trial judge noted that the child was located in a county where no other family members existed other than her mother and her younger sister. Because no one was readily available to

which the child could turn for help, we believe that the record supports the application of this enhancement factor, even though the age of the victim is an element of the offense. See State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993).

The court also found as an enhancement factor that the Defendant abused a position of private trust in a manner that significantly facilitated the commission or the fulfillment of the offense. Tenn. Code Ann. § 40-35-114(15). We believe this enhancement factor clearly applies, and obviously the trial court gave it great weight. A more serious violation of private trust is hard to imagine. In addition, although not specifically found by the trial court, this record does support as an enhancement factor that the Defendant has a previous history of criminal behavior in addition to that necessary to establish her sentencing range. Tenn. Code Ann. § 40-35-114(1). The Defendant admitted to shoplifting convictions and long standing marijuana use.

As a mitigating factor, the trial judge found that the Defendant did act under some duress and under some domination of her codefendant-husband, even though the duress and domination was not sufficient to constitute a defense. Tenn. Code Ann. § 40-35-113(12). The court found no further mitigating factors and we agree that none are supported by the record.

The Defendant's sentencing range for these Class B felonies was between eight and twelve years. Based upon our review of this record, we cannot conclude that the trial judge erred or abused his discretion in setting the Defendant's sentence at the mid-range of ten years.

The trial court found that consecutive sentences were warranted because the Defendant had been convicted of two statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the Defendant and her victim, the time span of the Defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim. Tenn. Code Ann. § 40-35-115(5). The Defendant first argues that this section of the law does not apply because she was convicted of facilitating the rape of the child rather than the rape itself. We find this argument to be without merit. We believe that it is clear that the Defendant's crimes qualify as "statutory offenses involving sexual abuse of a minor."

We also believe that the crime is aggravated because of the relationship of the Defendant and the victim, same being a mother-daughter relationship. Although the time span of the Defendant's undetected sexual activity is not clear, it is apparent from the record that the abuse of the victim took place over at least a four-month period of time and possibly longer. We also agree that consecutive sentencing is warranted based on the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim, which factors are supported by evidence in this record. In summary, we believe that the Defendant met the criteria for consecutive sentences and we cannot conclude that the trial judge erred or abused his discretion in ordering the sentences served consecutively.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JERRY L. SMITH, JUDGE