IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1996 SESSION

**FILED**
**Jan. 28, 1997**
**Cecil Crowson, Jr.**
**Appellate Court Clerk**

| | | |
|---|---|---|
| STATE OF TENNESSEE, APPELLEE, | ) | No. 02-C-01-9601-CC-00010 |
| v. | ) | Lake County |
| | ) | Joe G. Riley, Judge |
| ELBERT PURDY, APPELLANT. | ) | (Sentencing) |

FOR THE APPELLANT:

G. Stephen Davis
District Public Defender
208 Mill Avenue, North
Dyersburg, TN 38025-0742
(Appeal Only)

Timothy C. Naifeh
Attorney at Law
102 Court Street, South
Tiptonville, TN 38079
(Trial Only)

FOR THE APPELLEE:

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

Sarah M. Branch
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Phillip Bivens
District Attorney General
P.O. Drawer E
Dyersburg, TN 38025

OPINION FILED:_____

AFFIRMED

Joe B. Jones, Presiding Judge

# O P I N I O N

The sole issue presented for review is whether the sentences imposed by the trial court are excessive. The appellant, Elbert Purdy, asks this Court to modify his sentences and impose some form of alternative sentencing. The State of Tennessee argues the sentences imposed by the trial court are not excessive, and the trial court properly refused to impose alternative sentencing. After a thorough review of the record, the briefs submitted by the parties, and the authorities which govern the issue presented for review, this Court is of the opinion the judgment of the trial court should be affirmed.

The Lake County grand jury returned a five count indictment charging the appellant with selling cocaine under .5 grams and selling cocaine over .5 grams. The appellant pled guilty to two counts of selling less than .5 grams of cocaine, a Class C felony, and two counts of selling more than .5 grams of cocaine, a Class B felony. The parties agreed the sentences in all four cases should be served concurrently. There was no agreement as to the sentences.

The trial court conducted a sentencing hearing to determine the appropriate sentences which should be imposed. The court concluded the minimum sentences should be imposed. The court found the appellant was a standard offender and imposed the following Range I sentences: (a) a fine of $2,000 and confinement for three (3) years in the Department of Correction for each count of selling cocaine under .5 grams, and (b) a fine of $2,000 and confinement for eight (8) years in the Department of Correction for each count of selling cocaine in excess of .5 grams. All of the sentences are to be served concurrently. The effective sentence imposed was fines totaling $8,000 and confinement for eight (8) years in the Department of Correction.

An employee of the Tennessee Highway Patrol, Criminal Investigation Division, served as an undercover officer in Lake County from May of 1994 to April of 1995. During this period of time, the officer made three purchases of cocaine from the appellant in what is known as "crack alley." The officer also made purchases of illicit drugs from other individuals in the "alley." On these occasions, the officer witnessed the appellant selling illicit drugs to other individuals. The Lake County sheriff related the only way trafficking in illicit drugs can be deterred is to impose lengthy sentences and require the accused in

these cases to serve the sentences.

The appellant was forty-one years of age when he was sentenced. He is separated from his wife. He is the father of six children. The appellant states he supports one of the children.

The appellant graduated from high school. He also served in the armed forces and received an honorable discharge. He has a relatively clean criminal record, and he has a stable work record. However, the appellant's employment with Dyersburg Fabrics was terminated in May of 1994 due to excessive absenteeism. He was unemployed until the time of his arrest and being taken into custody. The undercover officer made the first purchase from the appellant in May of 1994. The appellant candidly admitted he was addicted to alcohol. He testified he drank beer to excess.

While the trial court did not make an explicit finding regarding the appellant's credibility as a witness, it is obvious the trial court did not believe the testimony given by the appellant. The appellant profusely denied being a drug dealer. The trial court found the appellant was a drug dealer, and he had been a drug dealer since May of 1994. Furthermore, there are several inconsistencies contained in the appellant's testimony. He testified he did not remember making the sales to the undercover officer because he was drunk. When asked about the testimony of the undercover officer concerning his sale of drugs on dates the officer was making purchases from others in the "alley," he said the officer was mistaken. If the appellant was always drunk, how could he remember what occurred on those dates or whether he in fact sold drugs to others? The appellant testified he did not use drugs. However, he told the person preparing the presentence report he had ingested marijuana.

When an accused challenges the length and manner of service of sentences, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken 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). Furthermore, the presumption does not apply to the legal conclusions reached by the trial court in

sentencing the accused or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination is based upon the witnesses' demeanor, appearance, and vocal inflection.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received into evidence at the trial or at sentencing, (b) the presentence report, (c) the principles of sentencing, (d) the argument of counsel relative to sentencing alternatives, (e) the nature and character of the offenses, (f) any mitigating or enhancing factors, (g) any statement made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation. Tenn Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. per. denied (Tenn. 1987). However, the party challenging the sentences imposed by the trial court has the burden of establishing that the sentences imposed by the trial court were erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

In this case, the appellant failed to establish the sentences imposed by the trial court were erroneous. The length of time the appellant sold drugs, the serious nature of the offenses, the addiction to alcohol which the appellant has never addressed, and the lack of candor of the appellant at the sentencing hearing support the refusal of the trial court to impose alternative sentences. Contrary to the argument asserted in the appellant's brief, the appellant was not entitled to the presumption of fitness for an alternative sentence as to the Class B felonies.

Confinement is necessary in this case to deter others as well as the appellant and to avoid depreciating the seriousness of the offenses. According to the trial court, the appellant's potential for rehabilitation is "fair." This Court agrees. The appellant lost his job due to absenteeism -- failure to go to work. He has an alcohol problem, but he has never addressed this problem. His lack of candor, standing alone, is sufficient to support the denial of an alternative sentence.

The judgment of the trial court is affirmed.

_____
JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
JOSEPH M. TIPTON, JUDGE

_____
JERRY L. SMITH, JUDGE