

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1996 SESSION

FILED

March 4, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 03C01-9604-CC-00159

Appellee,

*

BRADLEY COUNTY

VS.

*

Hon. Mayo Mashburn, Judge

MICHELLE WESTFIELD,

*

(Theft Over \$10,000)

Appellant.

*

For Appellant:

For Appellee:

Richard A. Fisher
Attorney
Logan, Thompson, Miller, Bilbo,
Thompson & Fisher, P.C.
Thirty-Second Street
P.O. Box 191
Cleveland, TN 37364-0191

Charles W. Burson
Attorney General & Reporter

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

Rebble Johnson
Assistant District Attorney General
Tenth Judicial District
P.O. Box 1351
Cleveland, TN 37364-1351

OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Michelle Westfield, was convicted of theft over \$10,000.00, a Class C felony. Tenn. Code Ann. § 34-14-103, -105. The trial court imposed a three-year sentence and suspended all but thirty days, which were to be served in the county jail. Probation thereafter is to extend for a period of four years and eleven months. The defendant was ordered to pay \$13,374.50 in restitution.

In this appeal of right, the defendant claims that the trial court erred by imposing any of the sentence to be served in jail. We find no error and affirm the judgment of the trial court.

The official version of the offense is as follows:

Between March 1994 through March 1995 Michelle Westfield and Genna Dunn conspired together to embezzle over \$25,000.00 from Coppingers on Old Tasso Road. Ms. Dunn would issue the checks to Michelle Green (the maiden name of Michelle Westfield) and Ms. Westfield would cash the checks. The money was then divided two ways between them. Both defendants confessed to the crime and appear to be very cooperative. There are records from the company's account office that also prove the theft.

The defendant, who acknowledged receiving over \$12,000.00 of stolen proceeds, applied for and was denied judicial diversion. She claimed that she used the stolen money to pay hospital bills not covered by insurance and medication for her daughter. She acknowledged having purchased Christmas presents and personal items with the proceeds and having paid other bills.

Initially, the defendant claimed that she had paid as much as \$7,000.00 of the total stolen proceeds for medical expenses. The court delayed the proceeding to give the defendant an opportunity to substantiate that claim. Several

weeks later, the defendant was unable to provide documentation for her contentions that most of the stolen proceeds had been used for medical expenses.

From this, the trial court found that the defendant had been untruthful in an effort to elicit sympathy and gain a lenient sentence. While acknowledging that the defendant was presumptively entitled to probation, the trial court denied immediate probation and imposed the thirty-day sentence "for perjury, is what it amounts to."

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). There are, however, exceptions to the presumption of correctness. First, the record must demonstrate 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing. And third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in her own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210. Among the factors determinative on the issue of probation are the circumstances of

the offense, the defendant's criminal record, social history, present condition, his potential for rehabilitation or treatment, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978); Stiller v. State, 516 S.W.2d 617, 619-20 (Tenn. 1974). Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a). The ultimate burden of establishing suitability for probation, however, is still upon the defendant. Tenn. Code Ann. § 40-35-303(b).

The defendant, twenty-five years of age at the time of the sentencing hearing, is married and the mother of two small children. She was employed at the time of the sentence and had expressed a willingness to make restitution for one-half of the stolen funds. Additionally, her church had taken a collection for the purpose of making a partial payment towards the restitution. The defendant claims that there were several other factors favorable to the grant of probation; that is, she initiated contact with the police and cooperated in the investigation. She clarified her original position by estimating that twenty-five percent of the stolen money was used for the necessities of her family. She insisted that she was not the leader in the offense, assessing that responsibility to her codefendant, and contended that the theft had not threatened or caused bodily injury. The trial court, however, ruled that she had been a leader in the offense and had also taken advantage of a position of trust.

In our view, the trial court properly considered the principles of

sentencing and all of the relevant facts and circumstances. It began with the presumption that the defendant was entitled to probation.

Certainly, she was eligible for an alternative sentence. The complaint, of course, is that she received only partial probation. Lack of candor, however, has traditionally been a valid reason for the denial of probation. State v. Poe, 614 S.W.2d 403 (Tenn. Crim. App. 1981). In our view, any untruthfulness when under oath suggests a lack of amenability towards rehabilitation. State v. Bunch, 646 S.W.2d 158 (Tenn. 1983). The opportunity for probation is always enhanced by the acceptance of responsibility in the honest recitation of both the facts underlying the offense and the circumstances under which the crime was committed. Conceding for a moment that the term "perjury," as used by the trial court, may have been a bit too strong, it is nonetheless apparent that the defendant exaggerated the amount of stolen proceeds used for medical expenses; her effort in doing so was, from all appearances, to acquire the most lenient sentence possible. That deception, even if minimal, indicates a lesser degree of amenability to rehabilitation and, in our assessment, warranted the trial court's denial of immediate probation.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

Jerry L. Smith, Judge