IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

February 13, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
APPELLEE,	)	
	)	01-C-01-9511-CC-00388
	)	
	)	Warren County
v.	)	
	)	Charles D. Haston, Judge
	)	
	)	(Sentencing)
JEANNE GAIL WHITEAKER,	)	
	)	
APPELLANT.	)	

FOR THE APPELLANT:

Lionel R. Barrett, Jr.
Attorney at Law
222 Second Avenue, North
Nashville, TN 37201
(Appeal Only)

Charles S. Ramsey, Jr.
Attorney at Law
113 West Court Square
McMinnville, TN 37110
(Trial Only)

FOR THE APPELLEE:

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

Caroline R. Krivacka
Assistant Attorney General
404 James Robertson Parkway
Nashville, TN 37243-0488

William M. Locke
District Attorney General
P.O. Box 410
McMinnville, TN 37110-0410

Larry G. Ross
Assistant District Attorney General
P.O. Box 410
McMinnville, TN 37110-0410

OPINION FILED:_____

CONVICTION AFFIRMED; SENTENCE MODIFIED

Joe B. Jones, Presiding Judge

O P I N I O N

The appellant, Jeanne Gail Whiteaker, was convicted of theft in excess of $10,000, a Class C felony, after pleading guilty to the offense. The trial court found that the appellant was a standard offender and imposed a Range I sentence of confinement for five (5) years and three (3) months in the Department of Correction. The trial court denied the appellant's request for an alternative sentence. In this Court, the appellant contends the trial court imposed an excessive sentence, erroneously applied certain enhancement factors, and abused its discretion by denying her request for an alternative sentence. After a thorough review of the record, the briefs submitted by the parties, and the authorities which control the issues, it is the opinion of this Court that the judgment of conviction should be affirmed, and the sentence imposed be modified.

The appellant was employed by Dr. Jose A. Vivo from October 28, 1991 until September 14, 1992, as a secretary and insurance billing clerk. Dr. Vivo testified he terminated the appellant's employment because she was frequently late, absented herself when she pleased, and was rude to patients. Subsequently, the appellant reported that Dr. Vivo had filed fraudulent claims with Medicaid. The Tennessee Bureau of Investigation (TBI) initiated an investigation. She also reported the doctor to OSHA.

When Dr. Vivo employed another billing clerk, he directed the clerk to send statements to the patients and insurance companies. Patients and insurance companies advised the clerk the amount due had been paid. Dr. Vivo asked for verification. Patients brought receipts to verify the statement had been paid. Insurance companies sent canceled checks to establish the claims had been satisfied. It was discovered that approximately $17,500 had been stolen from Dr. Vivo. The loss was reported to law enforcement authorities. An investigation ensued. A TBI agent interviewed the appellant. She admitted taking cash and insurance company checks. The checks were endorsed "For Deposit Only" and deposited in the appellant's checking account.

The appellant is married. She has four teenaged children. Although she was employed by the Warren County School System as a substitute teacher, she does not have a degree. The appellant testified she "didn't especially enjoy working for the Vivos."

Although the appellant entered a plea of guilty, she testified she "wasn't able to

function normally" while employed by Dr. Vivo. She went to a psychiatrist on July 14, 1993, six days after she was approached by the TBI agent. The psychiatrist testified the appellant suffers from a major depression disorder, a panic disorder, a phobia, and an impulsive control problem the doctor diagnosed as kleptomania. The appellant told the psychiatrist about multiple episodes of shoplifting. However, she did not tell him about the thefts from Dr. Vivo. This did not surface until six to twelve months after the initial visit to the psychiatrist. The psychiatrist related the appellant had an impulse to steal things and this was the reason for the diagnosis of kleptomania.

When an accused challenges the length and manner of service of a sentence, 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." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). 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). 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 at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

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.

If an accused has been convicted of a Class C, D, or E felony and sentenced as an especially mitigated offender or a standard offender, there is a presumption, rebuttable in

nature, that the accused is a favorable candidate for alternative sentencing unless disqualified by a provision of the Tennessee Criminal Sentencing Reform Act of 1989.

The sentencing process must necessarily commence with a determination of whether the accused is entitled to the benefit of the presumption. Ashby, 823 S.W.2d at 169. As the Supreme Court said in Ashby:

> If [the] determination is favorable to the defendant, the trial court must presume that he is subject to alternative sentencing. If the court is presented with evidence sufficient to overcome the presumption, then it may sentence the defendant to confinement according to the statutory provision[s]. (Emphasis added)

The presumption can be successfully rebutted by facts contained in the presentence report, evidence presented by the state, the testimony of the accused or a defense witness, or any other source provided it is made a part of the record. State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993).

While the appellant is entitled to the presumption in this case, the state successfully rebutted the presumption. Thus, the trial court did not abuse its discretion in refusing to impose an alternative sentence. State v. Williamson, 919 S.W.2d 69, 84-85 (Tenn. Crim. App. 1995). The trial court found the appellant to be "totally without credibility." The appellant's lack of candor is probative of her prospect for rehabilitation. United States v. Grayson, 438 U.S. 41, 50-52, 98 S.Ct. 2610, 2616, 57 L.Ed.2d 582 (1978); State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984); Williamson, 919 S.W.2d at 84; State v. Dykes, 803 S.W.2d 250, 259-60 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). In retaliation for being fired, the appellant had Dr. Vivo investigated for Medicaid fraud and reported him to OSHA. The appellant stated her reason for taking this action: "I guess I thought by stopping him I could stop myself."

The appellant has been convicted of one count of shoplifting. However, Dr. Turner, the psychiatrist, testified the appellant related she had been involved in multiple episodes of shoplifting. The appellant was charged with two counts of passing worthless checks. The two counts were dismissed after she made restitution. She was charged with speeding. This offense is significant because the appellant failed to appear in court on the date she was to appear.

The appellant attempted to give all of her transgressions an innocent spin. For instance, she testified the worthless checks were the result of the bank using the funds she deposited to satisfy two house notes. She shoplifted because her child needed clothing. She also attempted to explain why she was really innocent of the failure to appear. When asked how she spent the $17,500, the appellant said she needed the money to take care of her sister-in-law and her brother's children. Apparently, her brother left town. However, the amount she claimed she spent was negligible.

The trial court used several enhancement factors when sentencing the accused. The trial court found (a) the appellant had a previous history of criminal convictions and criminal behavior, Tenn. Code Ann. § 40-35-114(1), (b) the offense involved more than one victim, Tenn. Code Ann. § 4035-114(3), (c) the loss sustained by the victim was particularly great, Tenn. Code Ann. § 40-35-114(6), and (d) the appellant abused a position of private trust, Tenn. Code Ann. § 40-35-114(15). The appellant contends the trial court erred when applying enhancement factors (3) and (6) to enhance her sentence. This Court agrees the trial court should not have used these two factors to enhance the appellant's sentence.

There was only one victim in this case, Dr. Jose A. Vivo. The money taken by the appellant was payable to Dr. Vivo. Mrs. Vivo was not a medical doctor. While Mrs. Vivo worked in the office, she was not entitled to share the income of the business. This would violate the ethics of the medical profession. Therefore, Mrs. Vivo was not a victim within the meaning of this enhancement factor. See State v. Raines, 882 S.W.2d 376, 384 (Tenn. Code Ann.), per. app. denied (Tenn. 1994).

The amount taken by the appellant was an element of the offense. State v. Michael Wayne Tate, Bradley County No. 03-C-01-9110-CR-00327 (Tenn. Crim. App., Knoxville, October 15, 1992), per. app. denied (Tenn., March 8, 1993). Before an accused can be sentenced as a Class C felon, the amount taken must exceed $10, 000. In this case, the amount taken was approximately $17,500, which is a Class C felony. Tenn. Code Ann. § 40-35-114.

CONCLUSION

Appellant's conviction for theft over $10,000 is affirmed. The trial court did not abuse its discretion by refusing to grant the appellant an alternative sentence. Since the trial court erroneously used two enhancement factors in determining the length of the appellant's sentence, the length of the sentence is reduced from five years and three months to four years. The sentence will be served in the Department of Correction as ordered by the trial court.

_____
JOE B. JONES, PRESIDING JUDGE

CONCUR:

_____
WILLIAM M. BARKER, JUDGE

_____
J. STEVEN STAFFORD, SPECIAL JUDGE