

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

FILED
June 10, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 CHARLES RANDALL BROWN)
)
 Appellant)

NO. 03C01-9603-CC-00099
SULLIVAN COUNTY
HON. R. JERRY BECK, JUDGE
(Sentencing)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

Opinion

_____The Appellant, Charles Randall Brown, appeals as of right the Sullivan County Criminal Court's denial of probation or alternative sentencing for his misdemeanor convictions of criminal trespass, theft of property under \$500.00 in value, and two counts of writing worthless checks. We have reviewed the record on appeal and for the reasons contained herein, we affirm the trial court's judgment denying probation or alternative sentencing.

On June 9, 1994, the Appellant wrote a worthless check in the amount of twenty-five dollars to Sam's Package Store. On June 17, 1994, the Appellant wrote a worthless check to Discount Package Store in the amount of thirteen dollars and sixty-one cents. On June 24, 1994, at 2:00 a.m., Sullivan County police officers observed the Appellant carrying a VCR and stopped him to investigate. Shortly thereafter, an employee of Bill McConnell Auto Painting identified the VCR as one that had been stolen during a burglary of his employer's premises.

_____On July 24, 1995, the Appellant pled guilty to an amended charge of criminal trespass, theft of property under \$500.00 in value, and two counts of writing worthless checks. The trial court sentenced him to thirty days for criminal trespass and eleven months and twenty-nine days for theft, to be served concurrently. The trial court then sentenced the Appellant to eleven months and twenty-nine days for each worthless check charge to be served concurrent to each another, but consecutive to the theft sentence, for a total sentence of twenty-three months and twenty-eight days. The trial court also scheduled a probation hearing for October 12, 1995.

At the October probation hearing, the Appellant testified that he had recently gotten married and that his wife was pregnant and needed constant attention. He also testified that he had a substantial criminal record and that he attributed his criminal conduct to his alcoholism. He stated that he had stopped drinking when he got married and that he has been attending alcohol abuse counseling with Behavioral Health Services for two years. The probation report, however, indicated that

Behavioral Health Services has no record of the Appellant attending any counseling. The Appellant also filed a statement of mitigating factors, offering that his criminal conduct did not cause or threaten serious bodily injury and that he had assisted the authorities in locating stolen property. See Tenn. Code Ann. § 40-35-113 (1), (10) (1990).

The trial court found that both statutory mitigating factors applied to the Appellant and noted other mitigating circumstances such as the Appellant's successful completion of high school, his recent ability to control his alcoholism, and his wife's pregnancy. But the trial court also found that the Appellant had a significant criminal record with more than thirty worthless check convictions, several traffic offenses, one petit larceny conviction, one criminal trespass conviction, one theft conviction, and a pending DUI charge in the Sullivan County Criminal Court. In summary, the trial court recognized that even though some mitigating circumstances applied to the Appellant, those mitigating circumstances were outweighed by his extensive criminal record. It then concluded that the Appellant's criminal history reflected negatively on his willingness to follow the law and denied his request for probation or alternative sentencing.

The Appellant now argues that the trial court erred when it denied his request for probation or alternative sentencing. This issue is without merit.

When an appellant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d)(1990). The burden of showing that the sentence is improper is upon the appealing party. Id (sentencing commission comments). This presumption, however, is conditioned upon an 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).

Tennessee Code Annotated, section 40-35-103(1) (1990), sets out the sentencing considerations which are guidelines for determining whether or not a

defendant should be incarcerated. These include the need “to protect society by restraining a defendant who has a long history of criminal conduct,” the need “to avoid depreciating the seriousness of the offense or [that] confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses,” or the determination that “measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the appellant.” Tenn. Code Ann. § 40-35-103(1)(A)-(C) (1990).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in Tennessee Code Annotated, sections 40-35-113 and 40-35-114, and (6) the defendant’s statements in his or her own behalf concerning sentencing. Tenn. Code Ann. § 40-35-210(b) (Supp. 1996). Reviewing the Sentencing Act’s principles, it is clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate. See State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App. 1994); State v. Russell, 866 S.W.2d 578, 581 (Tenn. Crim. App. 1992).

The Appellant claims that the trial court failed to consider all principles of sentencing before it denied the Appellant’s request for probation or alternative sentencing. We disagree with the Appellant and find that there is ample evidence in the record supporting the trial court’s judgment.

The record shows that several mitigating circumstances were applicable to the Appellant. The Appellant, who has a high-school diploma, suffers from both mental and physical health problems and has a newly born child who is depending on him for financial and emotional support. The Appellant has also come to terms with his

alcoholism and stayed sober for approximately one year. Two statutory mitigating factors, that the Appellant's criminal conduct has never caused or threatened to cause any person serious bodily injury and that he has aided the police in recovering stolen property, also applied to the Appellant. See Tenn. Code Ann. § 40-35-210(b).

The same record also shows us that the Appellant has an extensive criminal record with more than thirty worthless check convictions, numerous traffic convictions, one petit larceny conviction, one criminal trespass conviction, one theft conviction, and one DUI conviction. As a result of these convictions, the Appellant has been incarcerated for a total of three years without being deterred from further criminal activity. The Appellant has admitted that he used cocaine on one occasion within the year preceding these convictions, and it appears that the Appellant wrongfully stated that he has attended alcohol counseling when there is no record of him attending such counseling.

Based on this record, we are of the opinion that the trial court correctly denied the Appellant's request for probation or alternative sentencing. We recognize that several mitigating circumstances were present, but we nevertheless find that the Appellant's extensive criminal record outweighed those mitigating circumstances. We also find that there is a need to protect society from further criminal conduct by the Appellant. Finally, we find that incarceration is necessary to avoid depreciating the seriousness of the Appellant's offenses and that shorter periods of incarceration have been unsuccessfully imposed on the Appellant.

The judgments of the trial court are affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

CURWOOD WITT, JUDGE