

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1997

FILED
May 7, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

TIMOTHY ALAN
LOCKRIDGE,

Appellant.

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C.C.A. NO. 01C01-9003-CR-0009

SUMNER COUNTY

HON. JANE WHEATCRAFT
JUDGE

(Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SUMNER COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED AS MODIFIED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Pursuant to a plea agreement, the Defendant entered pleas of guilty to one count of theft of property over the value of five hundred dollars (\$500.00) and one count of passing a forged check. For these Class E felonies, the plea agreement provided for concurrent sentences of two years for each offense, but the two concurrent sentences were to be served consecutively to a prior sentence of six years. The plea agreement provided that the manner of service of the two-year sentences was left to the discretion of the trial judge.

After conducting a sentencing hearing, the trial judge ordered that the Defendant's two concurrent two-year sentences be served in the Department of Correction and ordered that the Defendant make restitution on the forgery conviction in the amount of two hundred and ninety dollars (\$290.00). On appeal, the Defendant argues that the trial judge erred by ordering him to serve his sentence in the Department of Correction and further erred by ordering restitution in conjunction with a sentence of incarceration. We affirm the sentence of incarceration ordered by the trial court but we must modify the sentence to delete the order of restitution.

On this appeal, the Defendant primarily argues that the trial judge erred or abused her discretion in denying him probation, community corrections or a sentence of split confinement.

A defendant who “is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that “convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration.” Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(3) - (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

The Community Corrections Act allows certain eligible offenders to participate in community-based alternatives to incarceration. Tenn. Code Ann. § 40-36-103. A defendant must first be a suitable candidate for alternative

sentencing. If so, a defendant is then eligible for participation in a community corrections program if he also satisfies several minimum eligibility criteria set forth at Tennessee Code Annotated section 40-36-106(a).

However, even though an offender meets the requirements of eligibility, the Act does not provide that the offender is automatically entitled to such relief. State v. Grandberry, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990); State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Rather, the statute provides that the criteria shall be interpreted as minimum standards to guide a trial court's determination of whether that offender is eligible for community corrections. Tenn. Code Ann. § 40-36-106(d).

When imposing a sentence of total confinement, our Criminal Sentencing Reform Act mandates that the trial court base its decision on the considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations which militate against alternative sentencing include: the need to protect society by restraining a defendant having a long history of criminal conduct, whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense, the need to avoid depreciating the seriousness of the offense, and the need to order confinement in cases in which less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1).

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and

mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the Defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

We first note that as provided by the plea agreement, the Defendant was sentenced as a multiple offender. Therefore, he did not enjoy the presumption that he was a favorable candidate for an alternative sentencing option. From this record, we are able to ascertain very little about the facts underlying the Defendant's convictions for theft and passing forged paper. The theft charge involved a "high pressure washer" and tools. The passing forged paper charge involved the cashing of certain checks. The presentence report reflects that the Defendant was unmarried and thirty-one years old. He dropped out of high school before completing the twelfth grade. His employment history included work as a brick mason and as a mechanic. He apparently has been steadily employed.

The Defendant does have a rather extensive history of criminal conduct. In addition to several traffic offenses, he has convictions for possessing stolen property, at least one felony drug conviction, and one felony conviction for bringing contraband into the county jail. The Defendant was serving a community corrections sentence at the time he committed the offenses which led to his convictions in the case sub judice. The Defendant admitted to a long history of marijuana use. The presentence report reflects that the Defendant tested positive for marijuana while serving his community corrections sentence. The

trial judge noted that the Defendant failed a drug screen on the day of the sentencing hearing in the case sub judice.

Based on our review of this record, we cannot conclude that the trial judge erred or abused her discretion in denying the Defendant an alternative sentence to incarceration. We believe the record supports the trial judge's determination that the Defendant's sentence be served with the Department of Correction.

The Defendant also argues that the trial judge erred when she ordered him to pay restitution in conjunction with a sentence of incarceration. Although the State argues that the Defendant agreed to pay restitution to the victims as a part of the plea agreement, we do not believe that the record supports the State's position. While it is clear that the Defendant was receptive to restitution if the trial court allowed his sentence to be served on probation, we do not believe the Defendant expressly agreed to the restitution as part of the plea agreement.

We note that our Supreme Court recently addressed this issue and concluded that, prior to the 1996 amendment to the sentencing law¹, there was no authority under which courts could impose restitution as part of a sentence of incarceration and that restitution could therefore be imposed only as a condition of a sentence of probation. State v. Davis, ___ S.W.2d ___ (Tenn. 1997). We therefore conclude that the trial court did not have the statutory authority to order the payment of restitution as part of the Defendant's sentence of confinement.

¹Effective July 1, 1996, Tennessee Code Annotated section 40-35-104(c)(2) was amended to include the following sentencing alternative: "payment of restitution to the victim or victims either alone or in addition to any other sentence authorized by this subsection." The Defendant in the case sub judice was convicted and sentenced prior to the enactment of this amendment.

For the reasons stated herein, we modify the Defendant's sentence by deleting the order that he pay restitution. In all other respects, the judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JERRY L. SMITH, JUDGE

JOE G. RILEY, JUDGE