

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1997 SESSION

FILED
September 24, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
 v.)
)
 ARMONDO HERNANDEZ OLIVERIA,)
)
 APPELLANT.)

No. 03-C-01-9611-CR-00417
Sullivan County
Frank L. Slaughter, Judge
(Statutory Rape)

FOR THE APPELLANT:

Richard A. Spivey
Attorney at Law
142 Cherokee Street
Kingsport, TN 37660-4308
(On Brief)

Timothy R. Wilkerson
Attorney at Law
1370 Dewey Avenue
Kingsport, TN 37664-3655
(Oral Argument)

FOR THE APPELLEE:

John Knox Walkup
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Marvin E. Clements, Jr.
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

H. Greeley Wells, Jr.
District Attorney General
P. O. Box 526
Blountville, TN 37617-0526

Edward E. Wilson
Assistant District Attorney General
P. O. Box 526
Blountville, TN 37617-0526

OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Armondo Hernandez Oliveria (defendant), entered pleas of guilty to fifteen (15) counts of statutory rape, a Class E felony. Pursuant to a plea agreement, the trial court imposed Range I sentences consisting of confinement for two (2) years in the Department of Correction on all fifteen counts. The sentences are to be served concurrently. In this Court, the defendant contends the trial court abused its discretion by (a) failing to impose an alternative sentence and (b) using enhancement factor four, which permits enhancement due to the vulnerability of the victim, as a basis for denying an alternative sentence. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

Initially, this Court notes the record transmitted to this Court does not contain a transcript of the submission hearing. It is unknown whether the parties stipulated to the facts in each case or witnesses were presented to establish the factual basis for the pleas of guilty. This transcript is important because it provides this Court with the same factual basis the trial court considered when ruling upon the sentencing issues. In this case, the trial court referred to prior hearings which are not included in the record. Nevertheless, the record appears to contain sufficient information to permit a review of the issues presented.

The defendant, a Mexican citizen, was twenty-five when the sentencing hearing was conducted. He had resided in the United States for three years. He was married and the father of one child. The defendant had a fifth grade education. While living in the United States, the defendant worked at restaurants specializing in Mexican food.

The defendant met the two victims, C.C. and K.B., when they were sixteen years of age. He met the two victims separately. He had sexual intercourse with C.C. on three occasions. He had sexual intercourse with K.B. on twelve occasions. He told both victims he would marry them after they graduated from high school.

The defendant was dating his wife while he was having sexual intercourse with the victims. In fact, he had intercourse with one of the victims the day after he married his wife. One of the victims read in the local newspaper a marriage license had been issued to the defendant and his present wife. When confronted with this fact, the defendant told the

victim his “green card” was about to expire and he had to get married to remain in the United States.

One evening the parents of C.C. called her at her place of employment. C.C. had already left. When she returned home, C.C.’s parents wanted to know where she had gone. She revealed her sexual relations with the defendant. The police were notified and the defendant was arrested.

When an accused challenges the manner of service of a sentence, it is the duty of this Court to conduct a de novo review of 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) (1990). 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). 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 uncontradicted 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 a witness’s demeanor and appearance.

When 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) any statements made by the accused in his own behalf, and (h) the accused’s potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 (1990) and -210 (1995). State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

In this case, the defendant was entitled to the statutory presumption that he was a favorable candidate for alternative sentencing. Tenn. Code Ann. § 40-35-102(5) and (6) (1994). However, this presumption is rebuttable in nature. Tenn. Code Ann. § 40-35-102(6).

When the accused is the appellant, the accused has the burden of establishing the

sentence imposed by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169.

When denying the defendant's request for an alternative sentence, the trial court concluded confinement was necessary to avoid depreciating the seriousness of the offense because the victims were particularly vulnerable due to their age and there was more than one victim. This Court agrees with the defendant the vulnerability of the victims was not established by the state. State v. Adams, 864 S.W.2d 31, 35 (Tenn. 1993); State v. Clabo, 905 S.W.2d 197, 206 (Tenn. Crim. App.), per. app. denied (Tenn. 1995). Moreover, age should not have been considered because age was an element of the offense. This Court also agrees with the defendant that the trial court erred in considering the fact there was more than one victim. The defendant was convicted of the crimes against each victim. State v. McKnight, 900 S.W.2d 36, 54 (Tenn. Crim. App. 1994), per. app. denied (Tenn. 1995).

The enhancement factors found in Tenn. Code Ann. § 40-35-114 may be used to rebut the presumption of fitness in favor of alternative sentencing. State v. Roy David McCarter, Blount County No. 03-C-01-9402-CR-00050 (Tenn. Crim. App., Knoxville, July 14, 1994), per. app. dismissed (Tenn. November 28, 1994). There are several factors present in this case which this Court may consider.

First, the defendant has a history of criminal conduct and behavior. Tenn. Code Ann. § 40-35-114(1) (1995). The defendant was arrested and being held for prosecution for reckless endangerment, a felony, leaving the scene of an accident involving property damage, driving without a license, and evading arrest. The facts supporting these offenses are set forth in detail in the presentence report.

Second, there can be no question these rape offenses were committed to gratify the defendant's desire for sexual pleasure and excitement. Tenn. Code Ann. § 40-35-114(7). The defendant had sexual intercourse with the victims while he was dating the woman he married. Yet he told both victims he was going to marry them after they graduated from high school. He had sexual intercourse with one of the victims the day after he married his present wife. When confronted with the issuance of a marriage license, the defendant told the victim he had to marry so he could remain in the United States.

There is evidence in the record regarding the emotional injuries sustained by K.B. Tenn. Code Ann. §40-35-114 (6); State v. Smith, 891 S.W.2d 922, 929-30 (Tenn. Crim. App.), per. app. denied (Tenn. 1994). She was in counseling. She stole a motor vehicle. She ran away from home on more than one occasion. Her grades rapidly declined. She began associating with the wrong people. While this might not be sufficient to support this enhancement factor, these facts should be considered on the issue of alternative sentencing.

The defendant fraudulently induced the victims to continue engaging in sexual intercourse with him. As previously stated, he promised the victims he would marry them when they graduated from high school. The defendant knew he was not going to marry either victim because he was dating and became engaged to the woman he married.

The presumption in favor of alternative sentencing was rebutted by the facts in the record. Moreover, incarceration is necessary to avoid depreciating the seriousness of the offenses in question. Tenn. Code Ann. § 40-35-103(1)(B). Incarceration is also necessary to serve as an effective deterrent to others likely to commit similar offenses. Tenn. Code Ann. § 40-35-103(1)(B).

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

CURWOOD WITT, JUDGE