IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, l995

FILED

July 23, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 0lC0l-94l0-CC-00340
	)	
	)	COFFEE COUNTY
V.	)	
	)	HON. JOHN W. ROLLINS, JUDGE
	)	
ROSIE LEE WOOTEN	)	(Voluntary Manslaughter)
	)	
APPELLANT	)	

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant, Rosie Lee Wooten, appeals the sentence imposed upon her following her plea of guilty to the charge of voluntary manslaughter.[1] The trial judge sentenced the appellant to a term of three years imprisonment in the Tennessee Department of Correction as a Range I standard offender.

On appeal, the appellant presents only one question for review by this Court. Simply stated, the appellant contends that the trial court erred by refusing to suspend her sentence and place her on probation. Our review of the record reveals no error in the trial court's determinations.

The facts of this case are both tragic and sympathy evoking. During the early evening hours of April 9, 1993, the appellant stabbed the victim, Archie Southerland, Jr., at least four times in the vicinity of his heart as he was trying to get out of bed.[2] The wounds suffered by the victim were fatal. At the time of the incident, the appellant was seventy-seven years old and the victim was sixty-five years old. The victim had lived with the appellant in her home in Hillsboro, Tennessee for approximately the last eight to ten years preceding the incident.

The relationship between the appellant and the victim was basically peaceful when they were sober, but when they were drinking the relationship became more turbulent. Unfortunately, both the appellant and the victim had significant drinking problems. As a consequence, the appellant exhibited a pattern of violence toward the victim during the course of the relationship. At the sentencing hearing, evidence was introduced by the state that the appellant had previously stabbed the victim on two separate occasions, shot him in the foot with a .22 caliber pistol, and threatened him with a knife on at least one other

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[1]The appellant was originally charged with murder in the second degree. Pursuant to her plea bargain agreement, the charge was reduced to voluntary manslaughter.

[2]In her statements given to investigating officers and a probation officer, the appellant stated that the victim came in drunk, choked her, and then threatened to shoot her in the head. She stated that when she stabbed the victim, she thought he was getting out of bed to get a gun. She stated that she stabbed him twice, rather than the four times that he was actually stabbed.

occasion. After each incident, however, the victim returned to live with the appellant, despite urging by his sister to go live with her. In the words of the trial judge, he returned "(l)ike the moth to the flame."

In addition to the appellant's history of violence toward the victim, she has a history of self-inflicted injury which is apparently associated with some type of delusions. Evidence was introduced at the sentencing hearing by the prosecution that three or four years prior to the fatal incident the appellant plucked out all of the hairs on her head with a pair of tweezers, claiming that they were insects which were biting her. On another occasion, she reported to the victim's nephew that she had inserted a knife into her rectum for the purpose of removing worms.

Furthermore, evidence was presented that the appellant poses a threat to third parties other than the victim. The State presented proof at the sentencing hearing of an alleged incident where the appellant "went after" her former live-in boyfriend with a pair of scissors and the same thing allegedly happened with a nephew several months after she killed this victim.

Prior to trial, the appellant was examined by Dr. Mario E. Martinez, a clinical neuropsychologist, and David W. Frensley, a psychological examiner. Their findings were included in the presentence report. They diagnosed the appellant as suffering from "Primary Degenerative Dementia of the Alzheimer's Type, Senile Onset, with depression, and R/O Dementia associated with alcoholism (,) Alcohol abuse."[3]

The appellant presented two witnesses, her daughter and a probation officer. Her daughter, Gloria Prentice, testified that the appellant had been living with her in Fort Worth, Texas while awaiting trial. She stated that she had

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[3]They did not find that she was insane at the time of the offense or that she lacked capacity to stand trial.

denied the appellant access to alcohol, but she realized that the appellant still needed some type of psychiatric treatment, as well as medical attention. She stated that the appellant and the victim loved one another and that she never knew of the victim doing anything that would have provoked an attack by the appellant. The second witness, the probation officer, testified that she found no criminal record concerning the appellant and that the appellant and her daughter cooperated fully with her.

DISCUSSION

As stated earlier, the sole issue on appeal is whether the trial court erred in sentencing the appellant to a three year sentence of confinement in the Tennessee Department of Correction. The appellant urges that, given the circumstances of the offense, she should be placed on probation for the entire term of her sentence. After a thorough and diligent review of the record of the sentencing hearing, and the various exhibits, we find that we cannot agree with the appellant's contention.

In examining the propriety of a sentence rendered against a criminal defendant, this court must conduct a de novo review based on the record. Tenn. Code Ann. § 40-35-401(d). However, this court must presume that the determinations made by the trial court are correct. Id. Therefore, if our review reveals that the trial court imposed a lawful sentence pursuant to the Tennessee Criminal Sentencing Reform Act of 1989 after having given proper consideration and weight to the relevant sentencing factors under the Act and the sentence is based on findings of fact which are adequately supported by the record, then we may not disturb the sentence imposed by the trial court. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). Furthermore, the appellant has the burden of establishing that the sentence rendered by the trial court was erroneous. Sentencing Commission Comments to Tenn. Code Ann. §

40-35-401(d); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Anderson, 880 S.W.2d 720, 727 (Tenn. Crim. App. 1994).

Concerning what constitutes an appropriate punishment, the Sentencing Reform Act provides that the sentence imposed shall be one that is "justly deserved in relation to the seriousness of the offense." Tenn. Code Ann. § 40-35-102(l). The Act also mandates that the sentence be the least severe measure necessary to achieve the purpose for which the sentence is imposed and that inequalities should be avoided. Tenn. Code Ann. § 40-35-103(3) and (4); see State v. Ashby, supra, 823 S.W.2d at 168.

The portion of the Sentencing Reform Act of 1989 codified at Tenn. Code Ann. § 40-35-210(b) established several specific procedures to be followed in the sentencing process. This section mandates that the trial court, in determining the specific sentence and possible combination of sentencing alternatives, shall consider the following: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) any statement the defendant wishes to make in her own behalf about sentencing. Furthermore, the appellant's potential for rehabilitation or treatment must also be considered. Tenn. Code Ann. § 40-35-103(5); Manning v. State, 883 S.W.2d 635, 638 (Tenn. Crim. App. 1994).

Under prior law, our Supreme Court delineated the factors to be considered in determining whether a defendant should be granted probation as the circumstances of the offense; the defendant's criminal record, social history, and present mental, physical or other condition; and the likelihood that probation will "subserve the ends of justice and the best interests of the public and the

defendant." State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978). Those factors are still encapsulated in the sentencing provisions of our Tennessee Code.

With certain statutory exceptions, none of which appear applicable here, the trial court must automatically consider the option of probation if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a) and (b). However, even though probation must automatically be considered, it does not follow that any defendant is automatically entitled to probation as a matter of law. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-303(b).

The appellant contends that this Court's holding in State v. Betty Barker, No. 84, 1986 WL 5311 (Tenn. Crim. App. May 6, 1986) should be applied here because the facts in that case are "very similar" to the facts here. We disagree. Although the cases are similar because of the relative ages of the individuals involved and the role of alcohol in the relationships, other, more significant, facts clearly distinguish the two cases. First, in Barker, the defendant suffered almost forty years of physical and sexual abuse at the hands of the victim before retaliating by killing the victim. Barker, 1986 WL 5311, at *1. Here, contrary to the appellant's contention, we find that the record supports the conclusion that the victim was, for the most part, nonviolent. Indeed, the appellant is the one who has a history of physically abusing the victim. Furthermore, the defendant in Barker, unlike the appellant, neither had a history of mental illness, nor was found to be a threat to herself or others.

Further sentencing guidelines, not argued on appeal but meriting brief discussion, dictate that the appellant, being convicted as a standard offender of a Class C felony and not being considered as one of the most dangerous felons by the legislature, "is presumed to be a favorable candidate for the alternative sentencing options *in the absence of evidence to the contrary*." Tenn. Code Ann. § 40-35-102(6)(emphasis added). In the present case, there is more than ample

"evidence to the contrary" concerning the advisability of placing the appellant on probation. This evidence includes the appellant's fragile mental condition, her propensity to abuse alcohol, her history of violence toward others and self-inflicted harm, and her willful use of a deadly weapon in the commission of the present offense. Other proper considerations include avoiding depreciating the seriousness of the offense and deterrence of others likely to commit similar crimes. Tenn. Code Ann. § 40-35-103(1); State v. Ashby, supra, 823 S.W.2d at 169.

It has been a long-standing proposition in the case law of this State that exceptional circumstances must be shown in order to support probation in cases involving the death of another person. State v. Smith, 662 S.W.2d 588, 590 (Tenn. 1983); State v. Ramsey, No. 03C01-CR-00154, 1995 WL 6379, at *5 (Tenn. Crim. App. Jan. 10, 1995); State v. Blackwood, 713 S.W.2d 677, 682 (Tenn. Crim. App. 1986); Kilgore v. State, 588 S.W.2d 567, 568 (Tenn. Crim. App. 1979). However, in the recent case of State v. Butler, 880 S.W.2d 395, 400-0l (Tenn.Crim.App. l994), this Court held that the mere fact that the conduct of the defendant resulted in the death of another does not, standing alone, justify the denial of probation. Nor can that fact alone overcome the presumption of suitability for probation set forth in Tenn. Code Ann. § 40-35-l02(6).

On appeal, the appellant lists, without further discussion, five factors which she contends support the grant of probation. We address each cited factor individually.

The appellant initially points to her mental and physical condition. While the appellant's degenerative mental state and limited intelligence are sorrowful,

we cannot overlook the fact that it is her mental illness, along with her abuse of alcohol, which has historically contributed to her harming herself and others. Also, since the appellant's condition is degenerative, it is likely that her violent propensities will only intensify, especially if she is given access to alcohol.[4]

Next, the appellant urges consideration of her age and social background. Unquestionably, the advanced age of the appellant, approximately seventy-nine years of age at this writing, raises some concerns about her suitability for incarceration. This factor should not be given undue weight, however, because to do so would, in effect, impart a message to the public that elderly individuals who drink too much may kill without incurring significant repercussions. As the trial court aptly stated, we do not want to "give the Rosa Lee Wootens of the world a hunting license." Moreover, her social background is replete with alcohol abuse, delusions, and violent outbursts.

Thirdly, the appellant emphasizes that she suffered physical abuse at the hands of the victim. Our review of the record reveals that the only evidence to support this contention is the statement made by the appellant to investigators after her arrest. All other evidence at the sentencing hearing, including the testimony by the appellant's daughter, indicated that the victim was a nonviolent man. In fact, no one testified as to having ever seen him act violently toward the appellant.

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[4]These findings are discussed in much greater detail in the neuropsychological report on the appellant which is contained in the presentence report. The trial court, in the Sentencing Order, relied upon those findings as follows:

> It is a very depressing report. The lady is obviously sick with limited intelligence and a myriad of problems. One compelling aspect on the last page states "In addition, the presence of significant pressure and stress is apt to result in inappropriate emotional displays as her dementia has caused a decreased ability to control her emotions and impulses." Left to her own devices, the defendant historically has consumed alcohol to her detriment. In that state, it is the opinion of the undersigned that she is a threat to herself and others . . . .

As a fourth proposition, the appellant correctly states that she does not have a history of criminal convictions. On the other hand, the record reveals that the appellant had previously stabbed the victim on two occasions, and had also shot him. While none of these incidents resulted in criminal convictions, it is not beyond the realm of reason to suggest that these occurrences could have provided the basis for criminal prosecution of the appellant. Both a history of criminal convictions and criminal behavior are enhancement factors under the sentencing act. Tenn. Code Ann. § 40-35-ll4(l).

Finally, the appellant cites to what she calls the "alcoholic relationship of the parties." We are uncertain as to how this factor supports the granting of probation. To the contrary, some cases suggest that the combination of alcohol consumption and the use of a deadly weapon may warrant confinement even when other factors suggest a more lenient sentence so as to avoid depreciating the seriousness of the offense. State v. Butler, supra, 880 S.W.2d at 401. Clearly this concern influenced the trial judge, as manifested in a portion of his statements prior to sentencing the appellant: "[T]hey don't put on your tombstone, 'killed by a 77-year-old woman that drank too much.' They just put 'dead' and you are just as dead."

We find that the foregoing factors cited by the appellant, on balance, weigh more toward incarceration than probation. Moreover, this Court cannot ignore the seriousness of the offense, deterrence concerns, and, perhaps most importantly, the threat that the appellant poses to herself and others. We cannot say, based on the record before us, that the appellant has overcome the presumption that the trial court's determinations were correct. Accordingly, the

judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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DAVID G. HAYES, JUDGE