

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1998 SESSION

F I L E D

March 19, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

* C.C.A. # ~~03C01-9702-CC~~

00070

Appellee,

* SEVIER COUNTY

V.S.

* Hon. Rex Henry Ogle, Judge

MARK DUNLAP,

* (Aggravated Assault)

Appellant.

*

For Appellant:

For Appellee:

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O P I N I O N F I L E D : _____

A F F I R M E D

G A R Y R . W A D E , J U D G E

O P I N I O N

The defendant, Mark Dunlap, entered a best interest plea to a charge of aggravated assault.¹ At the conclusion of the sentencing hearing, the trial court imposed a term of four years, required service of six months in the county jail, and ordered restitution in the sum of \$9,436.00. The balance of the sentence is to be served on probation.

The sole issue on appeal is whether the trial court should have ordered an immediate alternative sentence. We affirm the judgment.

During the early morning hours of September 11, 1995, the defendant was awakened when a rock was thrown by the victim, Hank Burleigh, through his bedroom window. According to the defendant, the victim thought that his girlfriend was staying at the residence. Angry telephone calls were exchanged between the victim and the defendant and the two men agreed to meet and fight at a location on U.S. Highway 441. Later, the victim attempted to sideswipe the defendant's vehicle. The defendant, claiming self-

¹In North Carolina v. Alford, 400 U.S. 25 (1970), the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes that his best interest would be served by pleading guilty.

defense, testified that when he attempted to shoot the tires of the victim's vehicle, he mistakenly shot the victim in the neck. The defendant then returned to his residence and called law enforcement officials. He claimed that he was surprised to learn that the victim had been shot.

The defendant insists that the trial court should have ordered immediate probation or an alternative sentence not involving incarceration. When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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 Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the

arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Among the factors applicable to the defendant's application for probation are the circumstances of the offense, the defendant's criminal record, social history, and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Gear, 568 S.W.2d 285, 286 (Tenn. 1978).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). There is no such presumption for a Class B felon. Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence for each conviction is eight years or less. Tenn. Code Ann. § 40-35-303(a), (b).

A sentence of split confinement involves the grant of probation after the partial service of a sentence. Tenn. Code Ann. § 40-35-306. It may include a jail or workhouse sentence of up to one year with the probationary term to extend for any period thereafter up to the statutory maximum for the offense. Id.

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). That a defendant meets the minimum requirements of the Community Corrections Act of 1985, however, does not mean that he is entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for Community Corrections:

(1) Persons who, without this option, would be incarcerated in a correctional institution;

(2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 2 [repealed],

parts 1-3 and 5-7 or title 39, chapter 13, parts 1-5;

(3) Persons who are convicted of nonviolent felony offenses;

(4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(6) Persons who do not demonstrate a pattern of committing violent offenses; and

(7) Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

The defendant, twenty-three years of age at the time of sentencing, completed the tenth grade before dropping out of school. He is married and has a son and daughter who are four and two years of age respectively at the time the sentence was imposed. The defendant worked as a steel hanger and diesel mechanic in 1994 and 1995 before becoming a self-employed bulldozer operator. During the sentencing hearing, it was determined that the defendant had previously used his shotgun during an argument with another person and fired the gun into the air several times. Charged with reckless endangerment, the

defendant received a deferred sentence. Prior to that, the defendant had been required to appear in the juvenile court for truancy, violation of probation, and, when he was fifteen, driving under the influence and other traffic offenses.

While acknowledging the prior criminal history of the defendant and particularly the use of a gun in an attempt to settle a dispute, the trial court determined that the circumstances of this offense, which included a high-speed chase and the firing of a weapon on a public roadway, were too serious for the grant of immediate probation.

This was a violent crime which precluded placement into a Community Corrections Program. See Tenn. Code Ann. § 40-36-106(a). Moreover, a period of confinement is often necessary to avoid depreciating the seriousness of an offense. That the defendant had a prior criminal history involving the use of a weapon and that the victim was seriously injured by an intentional gunshot presents a set of circumstances which would warrant, in our view, the denial of probation. The brandishing of a weapon on a public right of way is of particular concern. The sentence imposed is entirely appropriate.

The defendant argues the trial judge erred by considering the prior reckless endangerment incident. He contends that the trial court may not consider it because there was no actual judgment of conviction. That there was no criminal conviction does not mean that the incident did not occur. That the defendant had previously received lenient treatment for a misdemeanor and then commits a more egregious offense involving a weapon suggests that "[m]easures less restrictive than confinement have ... been applied unsuccessfully." Tenn. Code Ann. § 40-35-103(1)(C). Under those circumstances, a jail term is appropriate.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

C O N C U R :

Joseph M. Tipton, Judge

William M. Barker, Judge