IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
NOVEMBER SESSION, 1997

FILED

January 20, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 02C01-9612-CC-00450
Appellee	)	
	)	DECATUR COUNTY
vs.	)	
	)	Hon. C. Creed McGinley, Judge
TIMOTHY S. WANESS,	)	
	)	(Vehicular Homicide;
Appellant	)	Vehicular Assault)

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OPINION FILED: ____________________

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Timothy S. Maness, appeals as of right, the imposition of sentences of confinement for the crimes of vehicular homicide and vehicular assault. On appeal, the appellant contends that the trial court erred in denying a non-incarcerative alternative sentence of either probation or a Community Corrections sentence.

After a review of the record, we affirm the judgment of the trial court.

Analysis

The appellant, pursuant to a plea agreement, pled guilty to one count of vehicular homicide, a class C felony, and one count of vehicular assault, a class D felony.[1] Under the terms of the plea agreement, the appellant received concurrent sentences of three years for vehicular homicide and two years for vehicular assault. The issue of the manner and service of the sentences was submitted to the trial court for its determination. A sentencing

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[1] The appellant was initially indicted in the alternative for two counts of vehicular homicide e.g., as a 'result of intoxication' and as a 'result of conduct creating a substantial risk of death or serious bodily injury.' The appellant's guilty plea was to the latter offense. Tenn. Code Ann. 39-13-213(a)(1).

hearing was held on July 30, 1996. The trial court denied any form of alternative sentence and ordered the sentences to be served in the Department of Correction.

Before beginning our review of the appellant's issues, we note that the appellant has failed to include a transcript of the evidence at the guilty plea hearing and the presentence report, see State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993) (citing Tenn. Code Ann. §§ 40-35-102, -103, and -210 (1994); State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987)), thus, precluding this court from providing a meaningful review of the issues. See, e.g., State v. Jackson, No. 02C01-9503-CC-00092 (Tenn. Crim. App. at Jackson, June 10, 1996). The appellant has the burden to prepare a record on appeal that presents a complete and accurate account of what transpired in the trial court with respect to the issues on appeal. Tenn. R. App. P. 24(b). The failure to do so results in a waiver of such issues and a presumption that the findings of the trial court are correct. Jackson, No. 02C01-9503-CC-00092 (citing State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991) (footnote omitted)).

Notwithstanding waiver and presuming the findings of fact by the trial court are correct, we conclude that the appellant's sentencing issues are without merit. Although a transcript of the guilty plea hearing is not included in the record, supra, it is apparent that these convictions stem from the appellant's unlawful operation of a vehicle, resulting in the death of the appellant's best friend and injury to another who were passengers in his vehicle. At the time these offenses occurred, the appellant was nineteen years old, had a blood alcohol content of .10 percent and admitted to drinking five beers earlier that evening. At the sentencing hearing, the trial court extensively commented upon the appellant's pattern of underage drinking and driving and other offenses showing a total "disrespect to the law."[1] Additionally, the court placed emphasis on the death of one of the victim's. Although providing the appellant with the presumption favoring alternative sentencing, the trial court denied alternative sentencing based upon the appellant's long history of criminal conduct, Tenn. Code Ann. § 40-35-103(1)(A)

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[1] Specifically, as to the appellant's prior record, the court stated:

> I've got one standing before the Court with a juvenile record starting in July of 1993 with DUI, reckless driving, and fleeing to avoid arrest. That's essentially one continuous course of criminal conduct. But it's the very type of conduct that led to the results here.
>
> Also, a month later: Reckless driving, violation of underage Drug and Alcohol Law, and disorderly conduct. Placed in juvenile probation. Apparently, it didn't do anything whatsoever to curb his conduct.
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> Then once he becomes an adult, this is . . . about eight months later after he was placed on probation, he is charged with assault in March of 1994. On the 28th, two weeks after that, he's charged with underage drinking and, also, disorderly conduct.
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> Then we wait almost a year before we get involved with marijuana and drug paraphernalia. And then some five months later, underage drinking, which was slightly less than one month prior to killing his best friend and injuring another friend.

(1990); the need for deterrence, Tenn. Code Ann. § 40-35-103(1)(B); and the fact that measures less restrictive have been applied to the appellant unsuccessfully, Tenn. Code Ann. § 40-35-103(1)(C). See Tenn. Code Ann. § 40-35-102(6) (presumption favoring alternative sentencing may be rebutted by evidence to the contrary). Specifically, the court stated:

> The Court is faced with determining whether or not something can be done to send a message to the community as far as general deterrence; that something must be done to stop the carnage, the death and the loss of our young people. I'm looking both at specific deterrence and general deterrence. I'm looking at the loss of life and the terrible injury to another one.
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> In looking at [the appellant's] record in considering all of these factors, including considering his present physical condition, his past employment history which is good, the Court finds that to put him on probation, quite simply, would send the wrong message to the community. . . .
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> That he's been given every opportunity in the past to conform his conduct to the requirements of the law. And he had shown nothing whatsoever toward any type of rehabilitation despite his testimony to the contrary today that this one specific event will turn his life around. Past history would dictate otherwise.

Upon de novo review, we agree with the trial court's conclusion that "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct," and that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1)(A), -103(1)(C). We note, however, that before an alternative sentence may be denied on the basis of deterrence, there must be some evidence contained in the record that the sentence imposed will have a deterrent effect within the jurisdiction. _State v. Bingham_, 910 S.W.2d 448, 455 (Tenn. Crim. App.), _perm. to appeal denied_, (Tenn. 1995) (citing _State v. Bonestel_, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993)). This court has repeatedly held that the finding that there will be a deterrent effect within the jurisdiction cannot be merely conclusory but must be supported by proof. _Bingham_, 910 S.W.2d at 455 (citation omitted). In the present case, no proof was submitted to support such a conclusion. Accordingly, deterrence cannot support a denial of an alternative sentence in the present case. Notwithstanding this error, the trial court correctly concluded that a sentence of confinement was appropriate.

After review of the issues before us, we conclude that the appellant has failed to establish that the sentence rendered by the trial court was erroneous. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d)(1990); _State v. Ashby_, 823 S.W.2d 166, 169 (Tenn. 1991). Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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GARY R. WADE, Judge

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JOE G. RILEY, Judge