IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1997 SESSION

FILED

January 28, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 03C01-9703-CR-00090
	)	
vs.	)	Bledsoe County
	)	
ADAM SHORT,	)	Hon. Thomas W. Graham, Judge
	)	
Appellant.	)	(Sentencing)
	)	

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OPINION FILED: _____

AFFIRMED

CURWOOD WITT
JUDGE

OPINION

The defendant, Adam Short, pleaded guilty in the Bledsoe County Circuit Court to one count of sale of a Schedule II controlled substance, a class C felony. See Tenn. Code Ann. § 39-17-417 (1997). As part of his plea agreement, other counts of the presentment against him were dismissed. The court sentenced him to 3 years and 6 months, the first 30 days to be served in the county jail and the remaining 3 years and 5 months to be served on probation conditioned upon participation in Community Corrections.[1] The defendant has appealed the sentencing determination, claiming the trial court erred in imposing split confinement, rather than allowing him to serve his entire sentence on probation, or alternatively, in Community Corrections. Having reviewed the record and the arguments of the parties, we affirm the judgment of the trial court.

The only issue we must consider is the trial court's determination of the manner in which the defendant would serve his sentence. In determining whether the trial court has properly sentenced an individual, this court engages in a de novo review of the record with a presumption the trial court's determinations were correct. Tenn. Code Ann. § 40-35-401(d) (1997). 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). In conducting our de novo review, we must consider the evidence at sentencing, the presentence report, the sentencing principles, the arguments of counsel, the statements of the defendant, the nature and characteristics of the offense, any mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. §§ 40-35-210(b), 40-35-103(5) (1997); Ashby, 823 S.W.2d at 168. On appeal, the appellant has the burden of showing the sentence imposed is improper. Tenn.

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[1]At the sentencing hearing, the judge referred to Community Corrections as a component of a probationary sentence. The judgment form simply reflects confinement coupled with Community Corrections. When the judgment and transcript conflict, the transcript controls. State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991).

Code Ann. § 40-35-401(d), Sentencing Comm'n Comments (1997); Ashby, 823 S.W.2d at 169. The record in this case reflects that the trial court considered the appropriate factors. Thus, we conduct our de novo review accompanied by the presumption the trial court's determination was correct.

Having received a sentence of less than eight years, the defendant is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6) (1997). Moreover, he is eligible for probation. See Tenn. Code Ann. § 40-35-303(a) (1997). He argues he should receive straight probation, rather than confinement coupled with probation conditioned upon Community Corrections.

First, we point out that the defendant did receive an alternative sentence.[2] Split confinement is an alternative sentencing option. State v. James A. Howard, No. 03C01-9608-CC-00284, slip op. at 7 (Tenn. Crim. App., Knoxville, February 24, 1997), appl. perm. app. dismissed (Tenn. 1997); State v. James E. Allred, No. 03C01-9504-CR-00110, slip op. at 2 (Tenn. Crim. App., Knoxville, March 20, 1996); State v. Marjorie Jeanette Sneed, No. 03C01-9410-CR-00369, slip op. at 3 (Tenn. Crim. App., Knoxville, October 17, 1995); Ernest Lee Lands, Jr. v. State, No. 03C01-9404-CR-00145, slip op. at 3 (Tenn. Crim. App., Knoxville, May 19, 1995), perm. app. denied (Tenn. 1995); State v. Danny Allison, No. 03C01-9403-CR-00106, slip op. at 3 (Tenn. Crim. App., Knoxville, March 23, 1995); State v. Alvin Lee Lewis, No. 01C01-9404-CC-00125, slip op. at 7-8 (Tenn. Crim. App., Nashville, March 14,1995), perm. app. denied (Tenn. 1995); see Tenn. Code Ann. § 40-35-104(c) (1997). The benefit the defendant enjoyed in being presumed a suitable candidate for alternative sentencing has been depleted.

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[2]Code section 40-35-102 does not specifically authorize a sentence of confinement followed by a term of Community Corrections. However, this section does authorize a sentence of confinement in conjunction with a term of probation. Tenn. Code Ann. § 40-35-102(c)(4) (1997). The Community Corrections statute authorizes the court to sentence a defendant to Community Corrections as a condition of probation in conjunction with a suspended sentence, split confinement or periodic confinement under chapter 35. Tenn. Code Ann. § 40-36-106(f) (1997). Thus, the sentence imposed is generally an appropriate alternative to incarceration.

Accordingly, we move to the question of probation. The defendant seeks total probation. Probation is, indeed, an alternative sentencing option. Tenn. Code Ann. § 40-35-104(c)(3) (1997); Tenn. Code Ann. § 40-35-303(b) (1997). However, the burden rests with the defendant to show that he is entitled to probation. Tenn. Code Ann. § 40-35-303(b) (1997); see State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App.), perm. app. denied (Tenn. 1995). In Bingham, this court observed:

> It should be pointed out that determining whether a defendant is entitled to an alternative sentence necessarily requires a separate inquiry from that of determining whether the defendant is entitled to full probation. This is so because the inquiries involve different burdens of proof. Where a defendant is entitled to the statutory presumption of alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary. Conversely, the defendant has the burden of establishing suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing.

Bingham, 910 S.W.2d at 455. To prevail in the quest for full probation, a defendant must demonstrate that probation "will 'subserve the ends of justice and the best interest of both the public and the defendant.'" Bingham, 910 S.W.2d at 456 (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)). In Bingham, we cited the following factors which, although "not controlling the discretion of the sentencing court," should be considered in determining the appropriateness of probation:

> (1) The nature and characteristics of the crime, under Tenn. Code Ann. § 40-35-210(b)(4) (1990);
> (2) the defendant's potential for rehabilitation, under Tenn. Code Ann. § 40-35-103(5)(1990);
> (3) whether full probation would "unduly depreciate the seriousness of the offense," under Tenn. Code Ann. § 40-35-103(1)(B) (1990); and
> (4) whether a sentence of full probation would "provide an effective deterrent," under Tenn. Code Ann. § 40-35-103(1)(B) (1990).

Bingham, 910 S.W.2d at 456. In the case at bar, the court expressed reservations about a grant of total probation. It found that granting total probation would depreciate the seriousness of the offense. The court also questioned the defendant's potential for rehabilitation because he refused to name his drug supplier. On appeal, the defendant has failed to persuade us that the trial court inappropriately relied on these factors, and thus, he has failed to overcome the

presumption of correctness of the trial court's denial of total probation.

With respect to the defendant's alternative argument that he should serve all of his sentence in Community Corrections, we are likewise unpersuaded. Short claims he will be unable to provide child care for his daughter while his girlfriend is at work if he is incarcerated in the county jail for 30 days. Although we approve of the defendant's desire to meet his family obligations, there is nothing in the record or the defendant's appellate argument which defeats the presumption of correctness of the trial court's choice of sentencing alternatives. As we have often observed, we are not allowed to disturb a lower court's sentencing determination simply because we might prefer a different result. See, e.g., State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Finding no error, we affirm the judgment of the trial court.

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CURWOOD WITT, JUDGE

CONCUR:

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JOSEPH B. JONES, PRESIDING JUDGE

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PAUL G. SUMMERS, JUDGE