

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY SESSION, 1998

FILED
June 4, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

TED ALLEN GOUGE,

Appellant.

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C.C.A. NO. 03C01-9706-CR-00231

CARTER COUNTY

HON. ARDEN L. HILL, JUDGE

(AGGRAVATED ASSAULT)

FOR THE APPELLANT:

DAVID F. BAUTISTA
District Public Defender

ROBERT Y. OAKS
Assistant Public Defender
Main Courthouse
Elizabethton, TN 37643
(At Trial)

GERALD L. GULLY
P.O. Box 1708
Knoxville, TN 37901-1708
(On Appeal Only)

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General & Reporter

MICHAEL J. FAHEY, II
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

DAVID E. CROCKETT
District Attorney General

KENNETH CARSON BALDWIN
Assistant District Attorney General
900 East Elk Avenue
Elizabethton, TN 37643

OPINION FILED _____

AFFIRMED AS MODIFIED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Ted Allen Gouge, appeals as of right from the sentencing order of the Criminal Court of Carter County. After being charged in a nine (9) count indictment for the offenses of assault, aggravated assault, evading arrest, aggravated burglary and harassment, Defendant pled guilty in an agreement with the State to three (3) counts of aggravated assault and one (1) count of evading arrest. At the sentencing hearing Defendant requested full probation, but the trial court sentenced Defendant to a five (5) year sentence, with Defendant to serve one (1) year in prison followed by five (5) years of probation. Defendant argues that the trial court erred by sentencing the Defendant to serve a period of incarceration rather than complete probation or another form of alternative sentencing. We affirm the judgment of the trial court.

When an accused challenges the length, range or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory

mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Defendant testified at the sentencing hearing. Defendant is employed by Slope Side Rentals at Beech Mountain. He described the events preceding the assaults as resulting from a “messy divorce that [he] didn’t want.” Defendant stated that he lost everything and that another man was moving into his house. On the date the criminal offenses occurred, Defendant’s son was staying with him for the weekend. He went to his ex-wife’s home to get his son a sleeping bag. Defendant was depressed and was taking muscle relaxers. First, Defendant called and asked his ex-wife, Teresa Gouge, to bring him the sleeping bag or to put it on the porch. After she refused, Defendant went to her home, knocked on the door and asked her to bring it to the door. Defendant heard Teresa Gouge’s boyfriend, James, say that Defendant would “have to kick the door in, if [he] got in.” Defendant “felt like the man was sitting on [his] couch in [his] children’s home, so [he] kicked the door in and flew mad.”

After Defendant got inside, a light hit him in the face and he could not see. He knocked the source of the light out of his way and then someone came up behind him and hit him over the head with a piece of metal. Defendant later found out that this blow was from brass knuckles. Defendant hit the floor and was bleeding everywhere. Defendant thought that if he did not do something, then James was going to kill him. Defendant recalled that his son had a gun in his bedroom and he

got it to defend himself, planning to use it as if the gun were a ball bat. The gun was unloaded when he found it.

Defendant left and went to his apartment where he laid the gun down. He went into the bathroom to clean up and saw himself in the mirror. Defendant remembered he looked so bad from the bleeding that he "went off again." He took the gun back to his ex-wife's home. Defendant had a loaded gun at his home, and that is the weapon which he took back to his ex-wife's home, but he claimed that he thought he was picking up the unloaded gun. When he got back to his ex-wife's home he never got inside as several police officers were already present. They told him to put the gun down. When he heard an officer yell, "Drop it," he turned around and was shot. Defendant claimed that the gun was down at his side and not pointed at anyone when he was shot by Steve Galyon, an officer of the Tennessee Highway Patrol.

Defendant has received counseling since this incident and has learned how to "let [anger] go and just go on with [his] life." He did not want to be bothered by all this and did not feel resentment towards his ex-wife or Officer Galyon. Since June of 1996, Defendant claimed there have not been any further incidents with his ex-wife. When asked if he learned his lesson, Defendant answered, "Yes. I don't feel like being shot again. That's for sure." Later, Defendant stated that this was a terrible mistake and that he would not bother anybody nor did he want to be bothered.

On cross-examination, Defendant described two (2) prior occasions on which he violated the order of protection his ex-wife had obtained. He stated that he

thought his brother tried to block his path with his car to keep him from returning to his ex-wife's home that night because it may have been obvious that he was drinking and angry. He described that he was "going to use [the gun] like a baseball bat and I was going to beat his brains out for what he had did [sic] to me." Defendant admitted that he had a bad temper and that he had violence counseling at the Charlotte Taylor Center.

Justin Adam Gouge, Defendant's younger son, testified that the gun that was used on December 22, 1995, was his gun and that he did not keep it loaded. Three or four weeks prior to his testimony, Justin stated that Defendant was angry with his mother, Teresa Gouge, and stated that "she was going to keep pushing him until it doesn't matter about going to prison." His father often called his house and argued with Justin's mother, then came to their house and spun his tires in their front yard.

Steve Galyon, an officer of the Tennessee Highway Patrol, testified that he was a next-door neighbor to Defendant's ex-wife at the time of the events on December 22, 1995. Teresa's boyfriend James came over to Galyon's home and reported that Defendant was in their trailer and they were having an altercation. Eventually all of the family came over to Galyon's home and the Defendant left. They called the Sheriff's Department and reported the incident. Thirty (30) minutes later, Teresa returned to Galyon's home stating that she received a telephone call that Defendant was coming back to her home and was going to kill them.

Galyon was putting his shoes on when he heard a gun shot. He thought that the Defendant shot one of the deputies already on the scene, so he got his weapon and ran outside. Galyon stood between his house and the trailer where he could

see the deputy's vehicle. He heard a lot of yelling, then looked to his left where Defendant was standing at the back of Galyon's yard, facing the deputies. Galyon stopped where he was, crouched down and took aim as the deputies yelled for Defendant to drop his weapon. Defendant repeatedly stated that he would not drop the weapon, then walked towards Galyon with the weapon pointed straight at him. Galyon fired and the Defendant fell to the ground.

Teresa Gouge, Defendant's ex-wife, testified that on the evening of December 22, 1995, an order of protection was in effect against the Defendant. Defendant had previously broken this order on two (2) occasions. After returning home from shopping that day, there was a message from Defendant stating that he was coming over to get a sleeping bag and she better have it ready. Teresa had been advised to use her camcorder to videotape any activities of the Defendant entering onto her property, so she was getting the camera loaded with a videotape when the Defendant ran onto her porch and hit the door. Defendant demanded the sleeping bag, but she refused to let him in. Defendant kept insisting that they unlock the door, and finally Teresa's boyfriend, James, stated that if Defendant was to come inside, then he would have to kick the door down. Immediately, the Defendant busted the door down and knocked down James' son. Defendant removed the camcorder from Teresa's hands and threw it. He came towards Teresa, so James tried to protect her by hitting the Defendant. The two fought while James reached for the phone to call 911. Defendant yanked the telephone out and continued to fight James. The children were screaming while Teresa tried to keep the two from fighting. Finally, it appeared that Defendant was knocked out, so she told James to run to the neighbor's to get help. James took his daughter with him, and when

Teresa turned to get James' other son, J.C., out of the house, Defendant was sitting on the couch with a gun pointed straight at her.

Teresa picked up J.C. and ran to Steve Galyon's home next door where they called the police. The police arrived and took their statements regarding the incident. James and Teresa returned to her home to see what damage had been done. While they prepared to come to the police station to make a report on that damage, they received a telephone call from Defendant's brother, Dayton. Dayton told Teresa that Defendant had a loaded gun and was coming over to her home and they should all leave. The police advised them to leave, so they went back to Officer Galyon's home. Teresa did not see the events which followed during which the Defendant was shot.

Teresa stated she was left with constant fear and did not feel safe anywhere. She has nightmares each night and eventually lost her home. Teresa was forced to file bankruptcy because Defendant had no job so she was not receiving any child support.

Defendant was sentenced to a five (5) year sentence to be served as split confinement, with one (1) year of incarceration followed by five (5) years of probation. Pursuant to Tennessee Code Annotated section 40-35-306(a), a defendant who receives probation may be required to serve a portion up to one (1) year in continuous confinement, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense. As a standard Range I offender, Defendant's sentence for a Class C felony is not less than three (3) nor more than six (6) years. Tenn. Code Ann. § 40-35-112(a)(3).

While incarcerated, Defendant was permitted to be on work release so that he could continue his employment with Slope Side Rentals. When sentencing the Defendant, the court stated that Defendant was “less than truthful when he testified.”

The trial court further reasoned that:

I think he loaded the gun and he remembers it. I think he conveniently forgot a lot of places that he thought would help him if he testified that way. So I think he has been far less than truthful. And I think he has a temper. He might or might not have it under control. Time and only time will tell.

When determining whether probation was appropriate, the trial court relied upon the seriousness of the offense. The trial court stated that by placing Defendant on probation, he would still have some control over him and that Defendant’s actions would be better than if he was supervised on parole. In summation, the trial court noted that Defendant was “getting a break” because he did not have anything other than a few prior misdemeanors on his record.

A defendant sentenced to eight (8) years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. Rebuttal evidence to rebut the presumption includes:

- A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103.

However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

In determining whether to grant probation, the trial court must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

When determining whether Defendant should have been granted full probation, the Defendant has the burden of establishing his suitability for full probation and proving that the trial court's sentence was erroneous. Tenn. Code Ann. § 40-35-303(b); State v. Bingham, 910 S.W.2d 448, 455-56 (Tenn. Crim. App. 1995). In order to meet his burden of proof, Defendant must demonstrate to this court that full probation will subserve the ends of justice and the best interest of both the public and himself. Bingham, 910 S.W.2d at 456.

The trial court failed to set forth within the record the factors he considered in sentencing the Defendant to a sentence of split confinement. Therefore, our review is de novo, without a presumption of correctness. While not specifically stated in the record before this court, it is evident that there was an agreed sentence within the

plea agreement for a five (5) year sentence with the trial court to determine the manner of service of the sentence at the sentencing hearing. As the length of the sentence is not an issue, we need not address the application of those factors, but only the application of the factors applicable to alternative sentencing.

While the trial court recognized that Defendant was a favorable candidate for alternative sentencing, he denied Defendant's request for full probation for the duration of his sentence based upon the nature and circumstances of the offense, the Defendant's lack of potential for rehabilitation and that the fact that full probation would depreciate the seriousness of the offense. First, the nature and circumstances of the offense justify the trial court's imposition of one (1) year of incarceration followed by five (5) years of probation. While Defendant was under an order of protection, Defendant came to his ex-wife's home uninvited, knocked down the front door when denied entrance, and then proceeded to physically assault his ex-wife and her boyfriend. Furthermore, angered by the incident, Defendant retrieved a weapon that he planned to use as a baseball bat "to beat his [James'] brains out." While Defendant failed to recall all the events of December 22, 1995, it is obvious that the nature and circumstances of this potentially life-threatening offense to both his ex-wife and police officers who came to investigate at the scene justify a period of incarceration.

The trial court also relied upon the Defendant's lack of potential for rehabilitation. The trial court noted that while Defendant stated his remorse, he was less than truthful at the sentencing hearing, "conveniently forgetting" some pertinent events of that evening. In addition to this particular incident, Defendant previously violated the protection order twice. On both violations, Defendant was given

minimal punishment. Therefore, it is evident that the Defendant's repeated course of unlawful conduct justifies the denial of full probation.

The trial court found the offenses of December 22, 1995, to be very serious, and imposing full probation would serve only to unduly depreciate the seriousness of the offense. Tenn. Code Ann. § 40-35-103(1)(B). Officer Galyon testified that Defendant refused to obey the instructions to drop his weapon, instead turning and aiming his gun at the officer. Defendant also aimed the weapon at his wife, and admitted that he wanted to use the weapon to beat someone's brains out. Not only were the lives of the officers at risk, but the lives of Defendant's ex-wife and children were at risk. As these crimes were as a result of Defendant's acts of domestic violence, and given the pervasive problem of domestic violence, a sentence of incarceration is necessary in order to avoid depreciating the seriousness of the offense. State v. Mario Gutierrez, No. 02C01-9502-CC-00043, slip op. at 16, Hardin County (Tenn. Crim. App., at Jackson, May 15, 1997) perm. to appeal granted (Tenn. 1998).

In addition, it is evident from our review of the Defendant's presentence report that measures less restrictive than confinement have recently been applied unsuccessfully to the Defendant. Tenn. Code Ann. § 40-35-103(1)(C). In addition to this incident during which Defendant violated an order of protection, he violated the order twice within the four (4) preceding months. On both of those occasions, the measures taken by the court were unsuccessful in persuading the Defendant to comply with the provisions of that order. As a result, on the third violation of the order of protection, Defendant's criminal behavior resulted in three (3) aggravated assaults.

Based upon the above reasoning, Defendant has not demonstrated that full probation is the appropriate manner of service of his sentence. In addition to allowing part of the sentence to be served on probation, Defendant was allowed to be on work release during his incarceration so that he can continue to support his children. It is pertinent that the trial court took into account the fact that no one other than the Defendant was seriously injured and imposed only one (1) year of incarceration, followed by five (5) years of probation. This issue is without merit.

While we agree that manner of the service of the sentence is correct under our review, the judgments do not correctly reflect this sentence. The judgments were prepared and signed by the judge and filed with the clerk prior to the sentencing hearing. They reflect a sentence of five (5) years incarceration in the Department of Correction. The judgments of the aggravated assault convictions are modified to correctly reflect the trial court's ruling that the five (5) year sentences are to be served concurrently by split confinement of one (1) year in the Carter County jail followed by five (5) years of probation.

THOMAS T. WOODALL, Judge

CONCUR:

JERRY L. SMITH, Judge

WILLIAM B. ACREE, JR., Special Judge