

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1998 SESSION

FILED

October 23, 1998

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,

*

01C01-9802-CC-00055

Appellee,

*

WILLIAMSON COUNTY

VS.

*

Hon. Donald P. Harris, Judge

SALLY J. LANE,

*

(Sentencing)

Appellant.

*

For Appellant: _____

For Appellee: _____

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Sally J. Lane, pled guilty to simple possession of marijuana, a Class A felony. Tenn. Code Ann. § 39-17-418. The trial court imposed a sentence of eleven months, twenty-nine days at seventy-five percent service and a fine of two hundred fifty dollars. The defendant was ordered to serve sixty days, day for day, followed by supervised probation. In this appeal of right, the defendant challenges the trial court's denial of full probation. We affirm the judgment of the trial court.

The state agreed to dismiss a charge of contributing to the delinquency of a minor in exchange for the defendant's plea of guilty to simple possession of marijuana. There was no agreement as to the sentence. There was no presentence investigation.

At the sentencing hearing, Travis Newcom, a fourteen-year-old neighbor to the defendant, testified that the defendant had given him marijuana cigarettes on two occasions when he had visited in her home.

The defendant, thirty-five years of age, testified that she is disabled by manic depression and a mental disorder and has not worked for ten years. While denying that she ever provided Newcom with marijuana, she did admit to personal use of the drug, an activity she did not view as criminal. She did, however, acknowledge prior convictions for driving under the influence and driving on a revoked license.

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. Grear, 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). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a), (b).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). Misdemeanor sentences must be specific and in accordance with the principles, purposes, and goals of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. §§ 40-35-104, -117, and -302; State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinate sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than seventy-five percent of the sentence should be fixed for a misdemeanor offender; however, a DUI offender may be required to serve the full 100% of his sentence. Palmer, 902 S.W.2d at 393-94. In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Id.

Upon service of that percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. The trial court retains the authority to place the defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The legislature has encouraged courts to consider public or private agencies for probation supervision prior to directing supervision by the Department of Correction. Tenn. Code Ann. § 40-35-302(f). The governing statute is designed to provide the trial court with continuing jurisdiction in misdemeanor cases and a wide latitude of flexibility. The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994).

Alternative sentencing issues must be determined by the facts and circumstances of the individual case. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Here, the trial court did not state on the record the specific reasons for denying immediate probation. The trial court did, however, accredit the testimony of Travis Newcom and concluded that the defendant had been untruthful by denying his allegations. It found that the defendant had a previous history of criminal convictions and criminal behavior. Tenn. Code Ann. § 40-35-114(1). The record supports that assessment. The defendant admitted to having purchased and smoked marijuana for twenty-three years. That she steadfastly defended her actions despite the obvious unlawful nature reflected poorly upon her potential for rehabilitation. Her testimony reflected some belligerence. Tenn. Code Ann. § 40-35-103(5). A period of confinement may be necessary to protect society from the defendant's propensity to repeatedly violate the law. Tenn. Code Ann. § 40-35-103(1)(A). Under these circumstances, we cannot conclude the trial court erred by ordering a period of confinement.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

Thomas T. Woodall, Judge

Curwood Witt, Judge