

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1998

FILED
February 2, 1999
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

LEONARD G. OWENS,

Appellant.

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C.C.A. NO. 01C01-9709-CC-00433

WILLIAMSON COUNTY

HON. HENRY DENMARK BELL,
JUDGE

(SALE OF COCAINE)

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, Leonard G. Owens, appeals as of right his sentence following convictions for sale of cocaine in the Williamson County Circuit Court. In his sole issue on appeal, Defendant argues that the sentences imposed by the trial court are excessive. We affirm the judgment of the trial court.

In Case No. II-496-114-B, a confidential informant contacted Defendant on January 8, 1996. Defendant told the informant that he had already sold his supply for that day. However, Defendant set up and participated in a deal later with the informant and another person (the co-defendant). Defendant pled guilty in this case to one count of sale of cocaine, a Class C felony.

In Case No. II-496-115, the record reveals that a confidential informant negotiated a deal to purchase three rocks of crack cocaine from Defendant for fifty dollars. The transaction was completed in the early morning hours of January 18, 1996. An audio tape was recorded of the drug deal. Following a two-day jury trial, Defendant was convicted of sale of cocaine, a Class C felony.

Following a consolidated sentencing hearing, the trial court sentenced Defendant as a Range II Multiple Offender to the maximum of ten years in each case, and fined Defendant \$3,000 in each case. The sentences were ordered to run concurrently with each other but consecutively to the sentences for which he was on parole at the time the present offenses were committed. In sentencing Defendant, the trial court stated that the enhancement factors under Tenn. Code Ann. § 40-35-114 outweighed the mitigating factors suggested by Defendant in Tenn. Code Ann.

§ 40-35-113. Defendant argues in this appeal that the trial court erred in sentencing him to the maximum of ten years in each case as a Range II Multiple Offender.

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 the evidence adduced at trial and the sentencing hearing, the presentence report, the principles of sentencing, the arguments of counsel relative to sentencing alternatives, the nature of the offense, and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-210; State v. Parker, 932 S.W.2d 945, 955-56 (Tenn. Crim App. 1996).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Upon review of the record, we find that the trial court did not state specific findings of fact justifying application of the enhancement and mitigating factors and how it determined the weight to be applied to each of them. Therefore, we conclude that the trial court failed to follow proper statutory sentencing guidelines and that review by this Court will be de novo without a presumption of correctness.

When announcing Defendant's sentence, the trial judge stated that he agreed with the enhancement factors outlined by the State, and that although the mitigating factors set forth by Defendant did "apply to some degree," the enhancement factors nevertheless outweighed the mitigating ones. In regards to the enhancement factors, the State asserted that Defendant had an extensive history of criminal convictions and criminal behavior, that Defendant had a history of unwillingness to comply with the conditions of a sentence involving release into the community, and that the present felonies were committed while Defendant was on a release status. See Tenn. Code Ann. § 40-35-114(1), (8) and (13)(B). As to enhancement factor (1), the presentence report reveals that Defendant has the following felony convictions: one conviction for attempt to sell/deliver cocaine, three convictions for sale of cocaine, one conviction for conspiracy to sell cocaine, one conviction for delivery of cocaine, and one conviction for sale of counterfeit drugs. Defendant also has numerous misdemeanor convictions. Defendant admitted at the hearing that the presentence report was accurate. The trial court was correct in applying enhancement factor (1) to Defendant's convictions. See Tenn. Code Ann. § 40-35-114(1).

In regards to enhancement factor (8), Defendant has a history of unwillingness to comply with the conditions of a sentence involving release in the community,

Defendant's criminal history speaks for itself. See Tenn. Code Ann. § 40-35-114(8). The presentence report introduced at trial reveals violations of criminal laws on at least seven occasions when Defendant was on some type of release status in the community. We find that Defendant has failed at past efforts involving release into the community and the trial court therefore correctly applied enhancement factor (8). Likewise, we find that the trial court properly applied enhancement factor (13), that the present felonies were committed while Defendant was on a release status. See Tenn. Code Ann. § 40-35-114(13)(B). Defendant admitted that he was on parole for prior felony drug convictions at the time the present felony drug offenses occurred.

Defendant, in seeking a lesser punishment, outlined four mitigating factors, all of which the trial court said "appl[ied] to some degree." First, Defendant suggested that his conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1). This Court has recognized that mitigator (1) may be appropriate in cases involving small sales to willing buyers. See, e.g., State v. Michael Wayne Henry, C.C.A. No. 02C01-9611-CC-00382, Obion County (Tenn. Crim. App., Jackson, May 29, 1997), perm. to appeal denied (Tenn., Mar. 2, 1998). However, this Court has also held that "[w]hile [defendant's] conduct did not threaten or cause serious bodily injury to anyone, this mitigating factor's importance is diminished by the nature of the offenses [five counts of selling less than .5 grams of cocaine] and the seriousness of the enhancement factors [a previous history of criminal behavior, a history of unwillingness to comply with conditions of release into the community and the offenses subject to appeal were committed while the defendant was on release status]." State v. Solomon Akins, C.C.A. No. 02C01-9509-CC-00250, slip op. at 2, Dyer County (Tenn. Crim. App., Jackson, Feb. 27,

1997) (no Rule 11 application filed). The trial court did not expressly rule out this factor during the hearing. Even giving Defendant the benefit of the existence of this mitigating factor, we cannot say that it carries much weight against the applicable enhancement factors.

Defendant also points to his favorable work history. Tenn. Code Ann. § 40-35-113(13). The presentence report reveals three separate periods of employment at McDonald's when Defendant was not incarcerated. Defendant also claimed he had held additional odd jobs to supplement his income. However, no additional evidence of these jobs was presented at the hearing. Furthermore, even allowing consideration of this factor in the instant case, a stable work history does not automatically entitle Defendant to a reduction in his sentence. See State v. Keel, 882 S.W.2d 410, 422 (Tenn. Crim. App. 1994), perm. to appeal denied (Tenn. 1994).

Defendant next lists his graduation from high school as a mitigating factor. Tenn. Code Ann. § 40-35-113(13). The trial court did point out that Defendant had graduated from high school, but while a court may consider this as a factor, it is not entitled to great weight. State v. Rocky Shane Bolton, C.C.A. No. 02C01-9510-CC-00315, slip op. at 3, Madison County (Tenn. Crim. App., Jackson, Oct. 17, 1996), perm. to appeal denied (Tenn., Mar. 3, 1997).

Finally, Defendant points to his lengthy history of substance abuse as a mitigating factor. Tenn. Code Ann. § 40-35-113(13). Again, the court was entitled to take this into consideration, but in the case sub judice, it should be afforded little, if any, weight. Defendant blames the State for having an inadequate treatment program in prison. However, even upon Defendant's release from prison, he only

saw a drug abuse counselor twice. Furthermore, this Court stated in a case where the defendant complained that his sentence for conspiracy to sell and deliver cocaine was excessive, that a defendant's conduct was not "mitigated by the voluntary use of drugs." State v. Kenny Cheatham, C.C.A. No. 01C01-9506-CC-00196, slip op. at 7, Williamson County (Tenn. Crim. App., Nashville, June 11, 1996) (no Rule 11 application filed).

The appealing party carries the burden of showing that the sentence imposed is improper. State v. Franklin, 919 S.W.2d 362, 365-66 (Tenn. Crim. App. 1995). While Defendant asserts that he is entitled to a sentence of some period less than ten years in each case, he cites no specific reasons. Instead he seems to suggest that this Court should reweigh the trial court's findings. While the trial court may have failed to specify certain facts to support the sentences imposed, we find that the record provides the facts necessary to affirm the trial court's decision. Even if some evidence of mitigation existed, which was acknowledged by the trial court, where the mitigating factors are strongly outweighed by the enhancement factors, the maximum sentence is warranted. State v. Ruane, 912 S.W.2d 766, 785 (Tenn. Crim. App. 1995). Based upon Defendant's lengthy criminal history involving felony drug convictions and the fact that the present offenses were committed while Defendant was on parole from prior felony drug convictions, it was well within the trial court's discretion to impose the maximum sentence of ten years in each case.

Accordingly, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, Judge

CONCUR:

GARY R. WADE, Presiding Judge

JAMES CURWOOD WITT, JR., Judge