IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1999

FILED

February 24, 1999

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	C.C.A. NO. 01C01-9803-CR-00106
	)	
Appellee,	)	
	)	
	)	DAVIDSON COUNTY
VS.	)	
	)	HON. STEVE DOZIER
JOHN WALTER WHITTEN,	)	JUDGE
	)	
Appellant.	)	(Direct Appeal - Delivering a Schedule I Controlled Substance)

FOR THE APPELLANT:

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OPINION FILED .....

AFFIRMED

JERRY L. SMITH, JUDGE

O P I N I O N

On April 21, 1997, Appellant Jacob W. Whitten pleaded guilty to two counts of delivering a Schedule I controlled substance. After a sentencing hearing held on January 9 and February 4, 1998, the trial court sentenced Appellant as a Range I standard offender to ten years for both counts, with the sentences to be served concurrently. Appellant contends that the trial court erroneously imposed longer sentences than he deserves. After a review of the record, we affirm the judgment of the trial court.

F A C T S

On January 6, 1996, Appellant met with an undercover police officer and discussed the sale of lysergic acid diethylamide ("LSD"). Appellant then gave the undercover officer two sheets containing 100 "hits" of LSD in exchange for money.

On January 12, 1996, Appellant met with the undercover officer and a confidential informant. Appellant then gave the informant 100 "hits" of LSD in exchange for $250.00. Shortly

thereafter, Appellant was stopped and arrested. At that time, Appellant had 505 "hits" of LSD and $850.00 in his possession.

ANALYSIS

Appellant contends that the trial court imposed excessive sentences for both of his convictions. We disagree.

"When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d) (1997). "However, the presumption of correctness which accompanies the trial court's action 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 review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant's statements, the nature and character of the offense, and the defendant's potential for rehabilitation. Tenn. Code Ann. §§ 40-35-102(5), -210(b) (1997 & Supp. 1998); Ashby, 823 S.W.2d at 169. "The defendant has the burden of demonstrating that the sentence is improper." Id. Because the record in this case indicates that the trial court properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

In this case, Appellant pleaded guilty to two counts of delivering a Schedule I controlled substance, a Class B felony. See Tenn. Code Ann. §§ 39-17-408, -417 (1997 & Supp. 1998). The sentence for a Range I offender convicted of a Class B felony is between eight and twelve years. Tenn. Code Ann. § 40-35-112(a)(2) (1997). When both enhancement and mitigating factors are applicable to a sentence, the court is directed to begin with the minimum sentence, enhance the sentence within the range

as appropriate for the enhancement factors, and then reduce the sentence within the range as appropriate for the mitigating factors. Tenn. Code Ann. § 40-35-210(e) (1997).

In imposing a ten year sentence for each conviction, the trial court found that enhancement factor (1) applied because Appellant had a history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate sentencing range. See Tenn. Code Ann. § 40-35-114(1) (1997).[1] Appellant does not challenge the application of this factor and we conclude that it was correctly applied. However, Appellant does challenge the trial court's conclusion that no mitigating factors applied to his sentences.

First, Appellant contends that the trial court should have applied mitigating factor (1) to his sentences because his conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997). In this case, we conclude that even if factor (1) had been applied, it would have been entitled to little weight and would not have affected the length of Appellant's sentences. See State v. Charlie Marshall Floyd, No.

[1] The record indicates that Appellant has previous convictions for fraud in Tennessee and for battery and possession of forged notes in California.

[illegible]-[illegible]-[illegible]-[illegible]-[illegible], [illegible] WL [illegible], at *1 (Tenn. Crim. App., Jackson, Sept. 19, 1997) (stating that even if mitigating factor (1) was applicable, it would be entitled to only "negligible" weight); State v. Boyte Dow and Carroll, No. [illegible]-[illegible]-[illegible]-[illegible], [illegible] WL [illegible] at *4 (Tenn. Crim. App., Knoxville, Aug. 12, 1997) (holding that in cases involving drugs, mitigating factor (1) is entitled to little weight).

Second, Appellant contends that the trial court should have applied mitigating factor (8), that he was suffering from a mental or physical condition that significantly reduced his culpability for the offenses. See Tenn. Code Ann. § 40-35-113(8) (1997). Specifically, Appellant claims that this factor was applicable because he has a manic type of bipolar disorder. The record does contain some evidence that Appellant has suffered from bipolar disorder in the past. Ronnie Jenkins, Appellant's former substance abuse counselor, testified that Appellant had previously been diagnosed with bipolar disorder by a psychiatrist. The record also contains the psychiatrist's report, which although it is somewhat cryptic, seems to indicate that Appellant was in fact diagnosed with bipolar disorder. However, the

psychiatrist who made the report did not testify and nothing in the report indicates that Appellant's bipolar condition significantly reduced his culpability for the offenses at issue here. Further, although Jenkins theorized that Appellant's mental condition contributed to his bad judgement, Jenkins equivocated when pressed as to whether Appellant's mental condition caused him to commit the offenses at issue here. Under these circumstances, we cannot conclude that the trial court erred when it failed to apply mitigating factor (8). See State v. Treva Strickland, No. 03C01-9611-CC-00427, 1997 WL 785675, at *5 (Tenn. Crim. App., Knoxville, Dec. 16, 1997) (stating that mitigating factor (8) did not apply because there was no proof that defendant's alleged mental condition significantly reduced her culpability for the offenses); State v. Kenneth Blanchard, No. 01C01-9403-CR-00099, 1995 WL 392902, at *7 (Tenn. Crim. App., Nashville, July 6, 1995) (stating that mitigating factor (8) did not apply because there was no proof about how defendant's mental condition reduced his culpability in the incident for which he was convicted).

Third, Appellant contends that the trial court should have considered the support of his family as a mitigating factor under Tennessee Code Annotated section 40-35-113(13). It is true that several members of Appellant's family testified that they would support his efforts in obtaining psychiatric care and treatment for his drug problem. However, even if this evidence had warranted the application of a mitigating factor (13), we conclude that this factor would have been entitled to little weight and it would not have affected the length of Appellant's sentences. See, e.g., State v. Zachary Wayne Tillery, No. 01C01-9510-CC-00322, 1996 WL 148328 (Tenn. Crim. App., Nashville, March 31, 1996) (stating that trial court did not abuse its discretion when it concluded that defendant's strong family ties were not entitled to any weight as a mitigating factor).

In our de novo review, we conclude that enhancement factor (1) was correctly applied to Appellant's sentences, and we conclude that this factor was entitled to significant weight. Further, we conclude that even if mitigating factors (1) and (13) had been applied to Appellant's sentences, they would have been entitled to little weight and would have been significantly

outweighted by enhancement factor (1). Thus, we hold that a ten year sentence for each conviction is entirely appropriate in this case.

Accordingly, the judgment of the trial court is AFFIRMED.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID M. WELLES, JUDGE

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THOMAS T. MOORHEAD, JUDGE