IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
FEBRUARY SESSION, 1999

FILED

April 16, 1999

Cecil W. Crowson
Appellate Court
Clerk

STATE OF TENNESSEE,)
) No. 01C01-9804-CC-00177
Appellee)
) MARION COUNTY
vs.)
) Hon. Thomas Graham, Judge
JACKIE R. ELLIS,)
) (Sentencing)
Appellant)

For the Appellant:

William S. Killian
Number One Dark Avenue
Reporter
Jasper, TN 37347

For the Appellee:

John Knox Walkup
Attorney General and

Kim R. Helper
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

James Michael Taylor
District Attorney General

Stephen Strain
Steven Bryant
Asst. District Attorneys General
Jasper, TN

OPINION FILED: _____

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

David G. Hayes
Judge

OPINION

The appellant, Jackie R. Ellis, appeals the sentencing decision of the Marion County Circuit Court following his guilty plea to the offense of voluntary manslaughter. The terms of the plea agreement provided that the appellant would receive a sentence from three to five years and the court would determine the manner of service of the sentence. The trial court imposed a four-year sentence in the Department of Correction. On appeal, the appellant contends that the trial court erred (1) in its application of the enhancing and mitigating factors and (2) by failing to grant an alternative sentence.

Based upon our review of the record, the length of the sentence is affirmed; however, we remand for resentencing consistent with this opinion.

FACTS

Following the appellant's guilty plea on February 11, 1998, a sentencing hearing was conducted on April 9, 1998. The appellant's plea arises from the December 13, 1998, shooting death of his close friend, Kenneth Parker, which occurred at the residence of the appellant's mother. At the time of the shooting, the victim and the appellant were both extremely intoxicated. At the sentencing hearing, no testimony was presented by the appellant or by the State. To further complicate matters, the record before us does not include the transcript of the guilty plea hearing; therefore, we are precluded from conducting a proper de novo review

of the nature and circumstances of the offense, other than stated above. See Tenn. Code Ann. § 40-35-210(b)(4) (1997).[1] If the appellate record is inadequate, the reviewing courts must presume that the trial judge ruled correctly. See State v. Ivy, 188 S.W.2d 124, 142 (Tenn. Crim. App. 1998); State v. Beech, 744 S.W.2d 944, 947 (Tenn. Crim. App. 1988). The obligation of preparing a complete and adequate record for the issues presented on appeal rests upon the appealing party. See Tenn. R. App. P. 24(b).

The only facts contained in the record are those anticipated facts included within the presentence report and those gleaned from the trial court's findings. The presentence report reflects that the appellant has two prior misdemeanor convictions of driving under the influence. Also attached to the presentence report are mental health records which establish that the appellant is an alcoholic and has previously been treated for substance abuse. The appellant was admitted to Veterans Hospital Mental Health Institute in October of 1998 where he was diagnosed with depressive disorder, adjustment disorder, and impulse control disorder.

I. SENTENCING

This court's review of the length, range, or manner of service of a sentence is

[1] Upon de novo review, we are required to consider the evidence heard at trial and at sentencing, the presentence report, the arguments of counsel, the nature and characteristics of the offense, any mitigating and enhancement factors, the defendant's statements, and the defendant's potential for rehabilitation. Tenn. Code Ann. § 40-35-102, -103(5), -210(b) (1997) (emphasis added). The burden is on the appellant to show that the sentence in question was improper. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Sherrer, 755 S.W.2d 672, 673 (Tenn. Crim. App. 1988); Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(b).

the record with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d) (1997). See also State v. Ziegler, 111 S.W.2d 441 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). This presumption is only applicable if the record demonstrates that the trial court properly considered relevant sentencing principles. Ashby, 111 S.W.2d at 111. The record reflects that the trial court considered the relevant principles of sentencing; accordingly, the presumption is afforded.

A. Enhancement and Mitigating Factors

In sentencing the appellant with regard to enhancement factors, the trial court applied, "previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range," see Tenn. Code Ann. § 40-35-114(1) (1997), and "the [d]efendant possessed a firearm" during the commission of the offense. See Tenn. Code Ann. § 40-35-114(9). The record before us supports the application of both enhancement factors.

Next, the appellant argues that the following mitigating factors should apply:

(1) The appellant acted under strong provocation;

(3) Substantial grounds exist tending to excuse or justify the appellant's criminal conduct;

(8) The appellant was suffering from a mental or physical condition that significantly reduced his culpability for the offense; however, the voluntary use of intoxicants does not fall within the purview of this factor; and

(11) The appellant, although guilty of the crime, committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct.

Tenn. Code Ann. § 40-35-113 (1997).

In arguing the application of the mitigating factors, appellant's counsel relied extensively upon his version of the facts, which on occasion were at odds with the prosecutor's version. The arguments of counsel, at trial and on appeal, and the narration of the facts contained in the briefs are not evidence and may not be considered as such. See State v. Roberts, 755 S.W.2d 836 (Tenn. Crim. App. 1988). In the absence of the transcript of the guilty plea hearing or testimony at the sentencing hearing as to the nature and circumstances of the criminal conduct, there are simply no facts before us other than the findings by the trial court and the presentence report. The trial court found that the crime was committed under such aggravating circumstances that it is unlikely that the appellant had a sustained intent to violate the law. See Tenn. Code Ann. § 40-35-113(11) (1997). The trial court gave "some weight to that mitigating factor" but found it "substantially outweighed by his conduct with regard to alcohol." Again, with an inadequate record, the reviewing court must presume that the trial judge ruled correctly. See id., 755 S.W.2d at 836.

In sum, we conclude that no enhancement factors apply, see Tenn. Code Ann. § 40-35-114(1) and (8) and one mitigating factor applies, see Tenn. Code Ann. § 40-35-113(11). When both enhancement and mitigating factors are present, the reviewing court must begin at the minimum sentence within the range, in this case eight years within the agreed sentence range, and reduce the sentence by the mitigating factors. Tenn. Code Ann. § 40-35-210(e). Applying this procedure to the limited facts before us, we conclude these facts justify a sentence of four years.

B. Alternative Sentencing

The appellant argues that the trial court erred by denying him an alternative sentence. Because the appellant was convicted as a range I standard offender for a Class C felony, he is entitled to the statutory presumption favoring alternative sentencing. Tenn. Code Ann. § 40-35-102 (6) and (6). A sentence involving incarceration in the Department of Correction requires a finding after consideration of the following considerations:

> (A) . . . to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) . . . 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(1); see also Ginglen, 911 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 168).

> In imposing a penitentiary sentence in this case, the trial court stated,
>
> I found that three, (A) (B) and (C) all applied under Tenn. Code Ann. § 40-35-102. That all of them in the degrees that I thought I discussed did apply, some more, some less, but that they all had relevance and needed to be applied in this case.

The trial court's findings are presumed correct unless the evidence preponderates to the contrary. Ashby v. State, 823 S.W.2d 166, 169 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991). Accordingly, we review under this principle.

The trial court found that the appellant had a history of criminal conduct and that measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the appellant. See Tenn. Code Ann. § 40-35-103(1)(A), -103(1)(C). We acknowledge misinterpretations finding that our review of the length of the appellant's sentence is frustrated by the incomplete record. However, regarding the appellant's entitlement to an alternative sentence, the record, which is before us, preponderates against the trial court's findings that the sentencing considerations of 40-35-103(1)(A) and 103(1)(C) are applicable. Specifically, the presentence report indicates two prior misdemeanor convictions: a DUI conviction in 1992 and a second DUI conviction which occurred in 1996.[1] Because we find that two DUI convictions do not constitute a "long history of criminal conduct," we find this consideration was misapplied. See Tenn. Code Ann. 40-35-103(1)(A). However, the record establishes that on the date of this offense, December 18, 1998, the appellant had been convicted of only one offense, that being DUI, first, which occurred in 1992. Although the presentence report indicates the appellant has been arrested on more than a few occasions, an arrest or charge may not be considered as evidence of the commission of a crime. State v. Marshall, 870 S.W.2d 532, 540 (Tenn. Crim. App. 1993). We must presume that if the State chose to dismiss the charges against the appellant it had a good reason to do so. In any event, we are unable to conclude that the appellant's one prior misdemeanor conviction qualifies him as a recidivist.

[1] The 1998 DUI offense occurred on June 11, 1998; however, the appellant pled guilty to this offense on January 11, 1999, following the charge of second degree murder in this case.

"[C]onfinement may be appropriate for certain recidivists who have been past beneficiaries of other [no]n-less restrictive than confinement. . . ." State v. Ross, 177 S.W.2d 222, 225 (Tenn. 1998) (citing Tenn. Code Ann. § 40-35-103(1)(C)).

Finally, the trial court found that confinement is necessary to avoid depreciating the seriousness of the offense. Tenn. Code Ann. § 40-35-103(1)(B). In so finding, the trial court stated, "[I]n fact, there's no question that it was a serious offense. . . ." Although we presume the trial court's findings are correct, the court's findings as they relate to the seriousness of the offense are insufficient to justify a denial of a sentence other than confinement. The appellate courts of this state have repeatedly held that a defendant's conduct which results in death to another will not per se justify a denial of alternative sentencing. State v. Travis, 622 S.W.2d 824, 826 (Tenn. 1981); Bingham, 910 S.W.2d at 454; State v. Butler, 900 S.W.2d 305, 311-312 (Tenn. Crim. App. 1994). The legislature has classified voluntary manslaughter as a Class C felony. See Tenn. Code Ann. § 39-13-211 (1997). To apply a different standard solely because a death is involved "would fail to comply with the mandates of the 1989 [Sentencing] Act and would confuse inconsistency and unjustified disparity in sentencing unrelated to the purpose of the Act." Bingham, 910 S.W.2d at 454-455 (quoting State v. Hartley, 818 S.W.2d 374, 374 (Tenn. Crim. App. 1991).

> The trial court's denial of an alternative sentence based on the seriousness of the offense under Tenn. Code Ann. § 40-35-103(1)(B) can only be upheld if there is evidence in the record that indicates that the circumstances of the offense as committed were especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 455 (citing Hartley, 818 S.W.2d at 374-375).

In this case, again, we are without the benefit of facts and circumstances of the offense, with the exception of the trial court's findings at the sentencing hearing. These findings reflect that the appellant and victim were good friends, and on the day of the shooting, both were extremely intoxicated. In denying an alternative sentence, the court stated,

> I think the proof seems to be that it [shooting] was done in such a fashion that there was very little thought, if any, given to it. That it was a reactive type of situation, nevertheless he put himself in that situation and an awful event occurred.

It is not our intent to minimize the appellant's criminal conduct or the resulting tragic loss of life, however, we are unable to conclude from the court's findings that the circumstances of the offense were so especially "violent, horrifying, or shocking" as to outweigh all factors favoring a sentence other than confinement.

Based upon the foregoing review of the record, we are compelled to conclude that the evidence is insufficient to overcome the appellant's statutory entitlement to an alternative sentence. Accordingly, we remand for imposition of an appropriate sentencing alternative with the instruction that the court consider a community corrections sentence, if special needs are established, Tenn. Code Ann. § 40-36-106(a), or a sentence of split confinement. See generally, Tenn. Code Ann. § 40-35-104(c). In all other respects, the sentence imposed by the trial court is affirmed.

.....
[illegible] E. [illegible], Judge

[illegible]:

.....
[illegible] [illegible] [illegible] [illegible], Judge

.....
[illegible] [illegible] [illegible], Judge