

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

FILED

December 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

Appellee)

vs.)

KEVIN W. BURNS,)

Appellant)

No.M1998 00449 CCA R3 CD

WILLIAMSON COUNTY

Hon. Donald P. Harris, Judge

(Sentencing)

For the Appellant:

Judson Phillips
Attorney for Appellant
315 Deaderick St., Suite 2395
Nashville, TN 37238-2395

For the Appellee:

Paul G. Summers
Attorney General and Reporter

Georgia Blythe Felner
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

William Whitesell
District Attorney General Pro-Tem
P. O. Box 937
Franklin, TN 37065

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Kevin W. Burns, appeals the sentencing decision of the Williamson County Criminal Court denying him a non-incarcerative alternative sentence. Pursuant to a plea agreement, the appellant pled guilty to the class C felonies of aggravated assault and sale of cocaine. Following a sentencing hearing, the trial court imposed split confinement sentences for both convictions. On appeal, the appellant argues entitlement to a “suspended” sentence.

Following review, we affirm.

On June 12, 1998, the appellant pled guilty to the offenses of aggravated assault and sale of cocaine. Following his conviction for sale of cocaine, the appellant was sentenced to five years suspended with one year to be served in the workhouse, followed by ten years probation. For aggravated assault, the appellant received a concurrent sentence of four years suspended with one year to be served in the workhouse, followed by ten years probation. The aggravated assault offense occurred on May 22, 1997, and the cocaine sale occurred in August of 1997.

Although the appellant requests that we conduct a *de novo* review of his sentences, which requires an examination of the “nature and characteristics of the criminal conduct involved,” Tenn. Code Ann. § 40-35-210(b)(4) (1997), the record is void of such evidence. Moreover, we are unable to glean from the video transcript of the sentencing hearing, after considerable effort to do so, a sufficient factual basis of the criminal conduct involved. We have repeatedly held that failure to include the transcript of the guilty plea hearings in the record prohibits this court from conducting a meaningful *de novo* review. See State v. Ellis, No. 01C01-9804-CC-00177 (Tenn. Crim. App. at Nashville, April 16, 1999); State v. McCutcheon, No. 02C01-9708-CC-00298 (Tenn. Crim. App. at Jackson, May 22, 1998); State v. Horn,

01C01-9606-CC-00256 (Tenn. Crim. App. at Nashville, Nov. 20, 1997). If the appellate record is inadequate, the reviewing court must presume that the trial judge ruled correctly. See State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993). 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). For this reason, this issue is waived.

Notwithstanding waiver, we are compelled to note that the proof at the sentencing hearing established that the twenty-one year old appellant has a previous history of criminal convictions both as a juvenile and as an adult. See Tenn. Code Ann. § 40-35-103(1)(A) (1997). The record also supports the finding that measures less restrictive than confinement have recently been applied unsuccessfully in that the appellant was on probation when he committed the offenses of aggravated assault and sale of cocaine. See Tenn. Code Ann. § 40-35-103(1)(C). Moreover, the appellant's brief and the pre-sentence report indicate that the cocaine sale was committed while on bail for aggravated assault.¹

The record reflects that the trial court considered the relevant principles of sentencing; accordingly, the trial court's determination is afforded the presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1997); see also State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). Moreover, the appellant bears the burden of showing that the sentence imposed by

¹If, indeed, the appellant committed the felony drug offense while on bail for aggravated assault, which the record clearly suggests, then the appellant's concurrent sentences are illegal as they violate Tenn. R. Crim. P. 32(c)(3)(C) (mandatory consecutive sentences for offenses committed while on bail); see also State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978); State v. Ervin, No. 03C01-9707-CC-00311 (Tenn. Crim. App. at Knoxville, Oct. 2, 1998) (requiring remand of sentence to trial court for determination of whether sentence was illegally imposed pursuant to Rule 32). Because the record is incomplete and because our jurisdiction is appellate only, we are unable to resolve this factual issue. Moreover, we note the appellant's sentences were based upon a negotiated plea agreement. If the sentences are illegal and the pleas were contingent upon his receiving concurrent sentences, the appellant is entitled to withdraw his guilty pleas. Burkhart, 566 S.W.2d at 873; Ervin, No. 03C01-9707-CC-00311. If the trial court determines the pleas were not conditioned upon the concurrent service of the sentences, then the trial court has the authority to correct the illegal sentences and should do so. Ervin, No. 03C01-9707-CC-00311. However, we emphasize that this court cannot tacitly or otherwise approve of an illegally structured sentence, irrespective of the fact that the sentence was the product of a negotiated plea agreement.

the trial court is improper and the burden of establishing his suitability for probation. See Tenn. Code Ann. §§ 40-35-210(b)(3), -303(b) (1997). The appellant has failed to carry his burden. Considering his prior criminal history as a juvenile continuing into his adulthood, this appellant continues his downward spiral into more criminal behavior evincing a lack of rehabilitative potential. See Tenn. Code Ann. § 40-35-210(b)(4) (1997). The appellant cannot demonstrate that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” Bingham, 910 S.W.2d at 456. The appellant has failed to establish the impropriety of the trial court’s denial of a non-incarcerative alternative sentence.²

The judgment of the trial court is affirmed.

DAVID G. HAYES, Judge

CONCUR:

JERRY L. SMITH, Judge

NORMA MCGEE OGLE, Judge

²The appellant frames his issue of error within the context of denial of a suspended sentence, specifically the denial of total probation. However, he argues, in his brief, entitlement to community corrections as well as probation. A community corrections sentence constitutes neither a probated nor suspended sentence. The appellant is statutorily ineligible for community corrections for the following reasons: (1) he was convicted of aggravated assault, a crime against the person; (2) he used a weapon in the commission of the aggravated assault; (3) his past criminal history indicates a present or past pattern of behavior indicating violence; and (4) he failed to demonstrate that the relevant offenses were causally connected to a chronic of history alcohol abuse, drug abuse, or mental health problems. See Tenn. Code Ann. §§ 40-36-106(a)(2), (4), and (5); -106(c) (1997).