IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1999 SESSION

FILED

December 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

DONALD HIGBEE and KIMBERLY HIGBEE,	)	
	)	C.C.A. No. 03C01-9808-CR-00286
Appellants,	)	
	)	Washington County
vs.	)	
	)	Hon. Lynn W. Brown, Judge
STATE OF TENNESSEE,	)	
	)	(Child Neglect)
Appellee.	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendants, Donald Higbee and Kimberly Higbee, appeal the Washington County Criminal Court's imposition of confinement for their conviction of child neglect, a Class D felony. The defendants pleaded guilty to child neglect and agreed to a sentence outside the range for the offense, but the manner of service was left for determination by the trial court. At the sentencing hearing, the trial court sentenced the defendants to serve seven years in the Tennessee Department of Correction. In this appeal the defendants claim that they should have received an alternative sentence. After a review of the record, the briefs of the parties, and the applicable law, we affirm the sentence.

The defendants were indicted for child abuse and neglect in violation of Tennessee Code Annotated section 39-15-401 (1997). These charges were brought because the Higbees were starving their oldest son, R.H.[1] The defendants pleaded guilty to child neglect. Desiring an alternative sentence and not total confinement, they complain of the manner of service of their agreed to seven-year sentence. We affirm because we find that the trial court's denial of alternative sentencing is supported in the record.

In 1992 when the Higbees were living in California, three-week-old R.H. was removed from their home by the California authorities when the Higbees were accused of domestic violence. One week later and before charges could be brought against the Higbees, they moved to Texas. Eighteen months later they regained custody of R.H. from the California authorities. During this period and afterwards, the Higbees received services from the Texas child protective services office. These services included training and instruction in proper nutrition.

In 1996 the Higbees moved to Tennessee. The Higbees then divorced and Donald Higbee moved back to Texas. Kimberly Higbee and the Higbees' two children lived with her father. When Kimberly Higbee called her ex-husband and told him that her father was abusing her and the children, Donald

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[1]Due to the victim's age and the nature of the offense, we identify the victim by initials.

Higbee returned to Tennessee. Once back, he and Kimberly Higbee moved into a small trailer with the children. They did not remarry.

In October 1996 the Tennessee Department of Child Services investigated a report of child abuse of four-year-old R.H. A child protective services investigator found no evidence of physical abuse, but she was concerned about the Higbees' living conditions and their treatment of the victim. Based on her investigation, the department provided training and instruction on proper nutrition and parenting.

Shortly after the Higbees began receiving services from the state, the investigator received reports that the victim was seen eating food out of trash cans and drinking water out of a toilet. The investigator testified that she had no proof of physical abuse of the victim, but she observed that he had several injuries and seemed to be the subject of constant punishment. She noted that the victim's younger brother was injury free and not disciplined.

The investigator testified to seeing a metal bar with a latch securing the Higbees' refrigerator door. She did not see a padlock. She said that the Higbees said that they had to secure the refrigerator door because the victim was getting up at night and eating food.

After the initial investigation was completed, child protective service follow-up was performed by Debbie Bradley. She testified that on her first, unannounced visit to the Higbees' home she found the home in total disarray. She testified that the Higbees' babysitter, a 12-year-old neighbor girl, was there smoking a cigarette. Ms. Bradley counseled the Higbees on underage smoking and on having such a young babysitter for their youngest child, a four-month-old baby. She asked about R.H. and was told by Kimberly Higbee that he was doing his chores and that he could not eat until he finished his chores.

Ms. Bradley testified that in a six week period she made nine unannounced visits to the Higbees' home. She planned her visits around mealtimes because she wanted to see if the victim was being fed. She saw the victim eating on only two visits, although the rest of the family were eating during her visits.

On the afternoon of the victim's removal from the Higbee home, Ms. Bradley was alone with R.H. and asked him when he last ate. She testified that she determined that he had one small bowl of cereal in the previous 24 hours. She left and sought removal of the children from the Higbee home. When she returned to the Higbee home later that day, the Higbees had just finished dinner. She testified that there were not enough dinner plates on the table for each family member to have one, and the victim had not eaten.

On the day that the victim was removed, he was two months shy of being five years old and weighed 29 pounds. She testified that he gained three pounds during the next three days. At the time of the sentencing hearing, eleven months later, the victim weighed 50 pounds.

The Higbees were arrested and charged with child abuse and neglect of a child less than six years old, a Class D felony. They both pleaded guilty to child neglect, a Class D felony, and agreed to a sentence of seven years, which is a sentence outside the Class D range for a standard offender. The trial court, after a sentencing hearing, sentenced each defendant to serve seven years in the Tennessee Department of Correction. The trial court denied probation.

The defendants take issue with the manner of service of their sentence imposed by the trial court. 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 of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). 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 burden of showing that the sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct involved, (5) evidence and information offered by the parties on the enhancement and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. § 40-35-103(5) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (1997). The presumption in favor of alternative sentencing may be rebutted if (1) “confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct,” (2) “confinement is necessary 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 (3) “measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” Tenn. Code Ann. § 40-35-103(a)(A)-(C) (1997); see Ashby, 823 S.W.2d at 169. Furthermore, the defendant’s potential for rehabilitation or lack thereof should be examined when

determining whether an alternative sentence is appropriate. Sentencing issues are to be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The record of the case at bar reflects that the trial court engaged in a thorough review of the relevant principles and considerations. Accordingly, its determination is entitled to the presumption of correctness.

The defendants, both Range I offenders, enjoyed the presumption of favorable candidacy for alternative sentencing for their Class D felonies. See Tenn. Code Ann. § 40-35-102(6) (1997). Moreover, they were eligible for probation. See Tenn. Code Ann. § 40-35-303(a) (1997).

Initially, we note that a sentencing court properly considers, *inter alia*, the "mitigating and statutory enhancement factors" when determining sentencing issues, including the aptness of probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); State v. Beverly, 894 S.W.2d 292, 294 (Tenn. Crim. App. 1994).

In conducting its analysis, the trial court found that the defendants were presumed to be favorable candidates for alternative sentencing, but it found sufficient proof to overcome that presumption. The trial court noted that neither defendant had a criminal conviction history, but it found that both defendants had "a substantial and extended degree of criminal behavior" based upon their continued failure to properly feed the victim. The defendants argue that the trial court erred in finding that they have a criminal history based on the same conduct to which they pleaded guilty. We do not agree with the defendants. See State v. Carico, 968 S.W.2d 280, 287-88 (Tenn. 1998) (holding that evidence of criminal acts other than the acts on which the conviction is based that were committed against the victim can be used during sentencing and such use does not violate due process). The trial court found that over an extended period of time, the defendants were warned about feeding the victim, including the time they were living in Texas.

We also note that the record reflects that the California authorities were concerned enough about the defendants' treatment of the victim that they removed the victim from the defendants' home. Even though the defendants had no "long history of criminal conduct" which would, *ipso facto*, deprive them of a presumption of suitability for alternative sentencing, see Tenn. Code Ann. § 40-35-103(1)(A) (1997), there is evidence to support the finding that they "had a previous history of . . . criminal behavior." See Tenn. Code Ann. § 40-35-114(1) (1997); see also Carico, 968 S.W.2d at 287-88. This factor is properly considered in assessing the aptness of probation.

Also, the trial court found that the victim was treated with exceptional cruelty by being made to work before being fed. See Tenn. Code Ann. § 40-35-114(5) (1997). Food is a basic need for a child and the defendants were not so limited that they could not realize that the child needed food. The trial court found that although both defendants denied starving their child, the evidence was to the contrary. The trial court also found that the defendants abused a position of private trust. See Tenn. Code Ann. § 40-35-114(15) (1997). It noted that the child was dependent upon his parents for food. Parents are entrusted with the care of their children, and in that position, the defendants ignored the needs of their child. The trial court found no applicable mitigating factors and that the defendants were not amenable to rehabilitation.

Finally, the trial court found that confinement was "necessary to avoid depreciating the seriousness of the offense under these circumstances where they were warned that they were committing an offense." See Tenn. Code Ann. § 40-35-103(1)(B) (1997). The defendant argues that the trial court should not have denied probation based upon section 40-35-103(1)(B), the seriousness of the offense, because there was no showing that the offense was "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree," outweighing all other factors favoring an alternative sentence. See State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995); State v. Hartley, 818

S.W.2d 370, 374-75 (Tenn. Crim. App. 1991); State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981).

However, the trial court's findings and the record bear out the serious, especially reprehensible nature of this offense. The trial court placed great weight on its finding that the defendants' conduct toward the victim covered the entire life of the victim, other than when he was in foster care, and that the defendants continued to starve the victim despite counseling and repeated warnings. The defendants received counseling in three states regarding parenting and proper nutrition. The victim was a very young child that was helpless and depended upon the defendants, his parents, for his care. The trial court found that the defendants treated the victim with "exceptional cruelty" by withholding food from the victim until he had completed his chores. Obviously, by placing emphasis on the extensive duration of the defendants' conduct toward the victim, the victim's vulnerability, and the defendants' breach of trust, the trial court found the defendants' crimes particularly reprehensible. Accordingly, we concur with the trial court's denial of probation based on the circumstances of the offense. See, e.g., State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995) ("Denial of probation may be based on one applicable factor alone.") (citing Powers v. State, 577 S.W.2d 684, 685-86 (Tenn. Crim. App. 1978)); State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997) (finding that the defendant's criminal and social history, the circumstances of the crime, and his poor amenability to rehabilitation made him unsuitable for probation); State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992) (breach of trust sufficient basis for denial of probation) (citing Woodson v. State, 608 S.W.2d 591 (Tenn. Crim. App. 1980)).

The defendants make several additional arguments in favor of their receiving alternative sentencing. These include the assertions that confinement would prevent the defendants from caring for their children and that the defendants are remorseful for their actions. After due consideration, we conclude that they have no merit.

On appellate review, the defendants have offered us nothing which overcomes the presumptive correctness of the sentence imposed. The sentence imposed by the trial court is, therefore, affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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JERRY L. SMITH, JUDGE