IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1999

FILED

December 15, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**NO. M1998-00424-CCA-R3-CD**
	)	
Appellee,	)	
	)	**DAVIDSON COUNTY**
V.	)	
	)	
	)	**HON. CHERYL BLACKBURN**
JESSE CLEO MINOR,	)	
	)	
Appellant.	)	**(ATTEMPTED RAPE OF A CHILD)**

FOR THE APPELLANT:

EDWARD J. GROSS
Parkway Towers, Suite 1814
Nashville, TN 37219

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

CLINTON J. MORGAN
Assistant Attorney General
2nd Floor, Cordell Hull Building
425 Fifth Avenue North
Nashville, TN 37243

VICTOR S. JOHNSON, III
District Attorney General

DIANE LANCE
Assistant District Attorney General

NICK BAILEY
Assistant District Attorney General
Washington Square, Suite 500
222 2nd Avenue North
Nashville, TN 37201-1649

OPINION FILED _____

AFFIRMED IN PART; MODIFIED IN PART;

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Jesse Cleo Minor was indicted by the Davidson County Grand Jury for three counts of rape of a child, two counts of aggravated sexual battery, and one count of aggravated assault. Defendant subsequently entered a best interest plea to one count of attempted rape of a child and the State retired the other charges pursuant to a negotiated plea agreement. The terms of the agreement provided that Defendant would receive a sentence of eight years and the trial court would determine the manner of service. Following a sentencing hearing, the trial court sentenced Defendant as a Range I standard offender to a term of eight years in the Tennessee Department of Correction, to be followed by community supervision for life. Defendant challenges his sentence, raising the following issue: whether the trial court erred when it failed to impose probation. After a review of the record, we affirm the judgment of the trial court in part and modify it in part.

I.. BACKGROUND

During the plea hearing, the prosecutor stated that if the case had gone to trial, the State would have proved that in August of 1995, Stephanie Patton asked nine year old A.D. (it is the policy of this court to refer to the victims of child sexual abuse only by their initials) to go with her to Defendant's business to do some painting. When they arrived, Defendant and Patton took A.D. to another location where Patton held a knife to A.D.'s throat and ordered her to do what Defendant wanted. Defendant then had penile/vaginal contact with A.D. and digital penetration of A.D. A.D. was subsequently forced to perform oral sex on Defendant while they

watched a pornographic movie. Defendant agreed that these were the facts the State would attempt to prove at trial.

During the sentencing hearing, Detective Ron Carter testified that during his investigation of this case, he learned that Patton took A.D. to a property owned by Defendant in August of 1995 under the pretense of doing some painting. Patton subsequently placed a weapon to A.D.'s throat in order to facilitate sexual contact between A.D. and Defendant. Defendant subsequently had penile and digital penetration of A.D. and A.D. was subsequently forced to fellate Defendant while watching a pornographic movie. Detective Carter also learned that A.D. was not the first child that Patton had taken to Defendant in response to his requests to obtain children for sexual purposes.

Stephanie Patton testified that she had previously been paid by Defendant to help clean his property and in addition, Defendant also paid her to perform oral sex on him. Patton also testified that Defendant had previously offered to pay her for bringing him young girls for sexual purposes and Patton complied with his requests in order to obtain money to purchase drugs. When Patton brought young girls to Defendant, he paid her between $50.00 and $100.00. Patton recalled that Defendant had paid her $80.00 for bringing A.D. to him, and she remembered Defendant touching A.D. between her legs and rubbing her breasts. Patton observed that when she brought A.D. to Defendant, there did not seem to be anything wrong with his mental state and he appeared to be highly intelligent.

A.D.'s mother testified that as a result of Defendant's conduct, A.D. has gone from being outgoing and happy to being edgy and depressed. In addition, A.D. had

been in in-patient counseling for the past two months because she had been acting out in school and she had also been hearing voices.

Dr. Ed Qualls testified that in his opinion, Defendant has significant cognitive impairments and also suffers from dementia. Dr. Qualls also opined that Defendant would not be able to formulate the intent, plan, and execute the conduct alleged in the charges against him. However, Qualls admitted on cross-examination that the deficits he diagnosed were not necessarily present when the offense in this case was committed in 1995.

Lee Ann Morrison, Connie Spurland, and Frank Ingram testified that Defendant's mental condition had deteriorated over the past few years.

II. DENIAL OF PROBATION

Defendant contends that the trial court erred when it failed to impose probation in this case. We disagree.

A.

When an accused challenges the length, range, or 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) (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).

In conducting a de novo review of a sentence, this court must consider: (1) the evidence, if any, received at the trial and 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) any statutory mitigating or enhancement factors; (6) any statement made by the defendant regarding sentencing; and (7) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (1997 & Supp. 1999).

Under Tennessee law, a defendant is eligible for probation if the sentence imposed is eight years or less and further, the trial court is required to consider probation as a sentencing alternative for eligible defendants. Tenn. Code Ann. § 40-35-303(a)-(b) (1997). However, even though probation must be automatically considered, "the defendant is not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b) (1997) (Sentencing Commission Comments); State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App.1991). Indeed, a defendant seeking full probation bears the burden on appeal of showing that the sentence actually imposed is improper and that full probation will be in both the best interest of the defendant and the public. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App.1995).

When determining suitability for probation, the sentencing court considers the following factors: (1) the nature and circumstances of the criminal conduct involved; (2) the defendant's potential or lack of potential for rehabilitation, including the risk

that, during the period of probation, the defendant will commit another crime; (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes. Tenn. Code Ann. §§ 40-35-210(b)(4), 40-35-103(5), 40-35-103(1)(B) (1997 & Supp.1999); Bingham, 910 S.W.2d at 456.

B.

Under Tennessee law, an especially mitigated or standard offender convicted of a Class C, D, or E felony is generally presumed to be a favorable candidate for probation. Tenn. Code Ann.§ 40-35-102(6) (1997). Because attempted rape of a child is a Class B felony, Tenn. Code Ann. §§ 39-12-107(a), 39-13-522(b) (1997), there is no presumption that Defendant is a favorable candidate for probation.

C.

Defendant's entire argument for this issue is based on a contention that the trial court erroneously applied several enhancement factors and failed to apply several mitigating factors. We note that this argument is not appropriate because Defendant is not challenging the length of his sentence and the factors he complains of pertain to the length of a sentence and not a denial of probation. See State v. Jim Green, No. 02C01-9312-CC-00270, 1994 WL 697974, at *4 (Tenn. Crim. App., Jackson, Dec. 14, 1994) (No Rule 11 application filed). Moreover, although the trial court discussed the applicable enhancement and mitigating factors, the record clearly indicates that the trial court's denial of probation was based on the

seriousness of the offense rather than on the enhancement and mitigating factors. We have considered the enhancement factors applied by the trial court and the mitigating factors proposed by Defendant and we conclude that even assuming arguendo that the trial court erred when it applied or failed to apply these factors, the trial court's denial of probation was justified based solely on the seriousness of the offense in this case.

D.

Regarding the seriousness of the offense, this Court has stated that "[i]n order to deny an alternative sentence based on the seriousness of the offense, 'the circumstances of the offense as committed must be 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 454. We conclude that Defendant's conduct meets this standard. The record indicates that Defendant offered to pay a drug-addicted prostitute to bring him young girls for sexual purposes. As a result, Patton brought A.D. to Defendant and he paid her $80.00. The sixty-nine year old Defendant then alternately inserted his penis and his finger in the nine-year old victim's vagina and then forced her to perform oral sex on him while they watched a pornographic movie. We find this conduct to be shocking, reprehensible, and offensive and we conclude that the trial court properly denied probation in order to avoid depreciating the seriousness of the offense in this case. See State v. Max Eugene Martin, No. 01C01-9609-CR-00415, 1998 WL 188856, at *4 (Tenn. Crim. App., Nashville, April 20, 1998), perm. to appeal denied, (Tenn. 1998) (holding that trial court properly denied probation based on the seriousness

of the offense because the forty-six year old defendant's act of having sexual intercourse with a fifteen year old girl was shocking, reprehensible, and offensive); see also State v. Luther Tootle, No. 02C01-9711-CC-00455, 1998 WL 775652, at *2 (Tenn. Crim. App., Jackson, Nov. 6, 1998), perm. to appeal denied, (Tenn. 1999) (holding that trial court properly denied probation based on the seriousness of the offenses because the sexual abuse of two young impaired children was shocking, reprehensible, and offensive). Defendant is not entitled to relief on this issue.

III. PLAIN ERROR

Although not raised by the parties, we are compelled to address the propriety of the trial court's imposition of lifetime community supervision of Defendant pursuant to Tennessee Code Annotated section 39-13-524(a). The general rule is that appellate courts "will not consider issues that are not raised by the parties; however, plain error is an appropriate consideration for an appellate court whether properly assigned or not." State v. Walton, 958 S.W.2d 724, 727 (Tenn. 1997). An error affecting "the substantial rights of an accused may be noticed at any time . . . where necessary to do substantial justice." Tenn. R. Crim. P. 52(b). This is the case here.

> Section 39-13-524(a) provides:
>
> In addition to the punishment authorized by the specific statute prohibiting the conduct, any person who, on or after July 1, 1996, commits a violation of § 39-13-502, § 39-13-503, § 39-13-504, § 39-13-522, or attempts to commit a violation of any such section, shall receive a sentence of community supervision for life.

Tenn. Code Ann. § 39-13-524(a) (1997).

In this case, the indictment alleges that the charged offenses were committed "on a day in 1995." In addition, the prosecutor stated during the plea hearing that the charged offenses were committed on a Saturday in August of 1995. Further, Detective Carter and A.D.'s mother both testified that the offense in this case was committed in 1995. In short, the offense in this case was not committed "on or after July 1, 1996," and thus, section 39-13-524(a) was not applicable in this case. Therefore, we modify Defendant's sentence to eliminate the provision subjecting him to community supervision for life.

IV. CONCLUSION

For the reasons stated above, we modify Defendant's sentence to eliminate the requirement of community supervision for life. In all other respects, the judgment of the trial court is affirmed.

_____
THOMAS T. WOODALL, Judge

CONCUR:

_____
JOE G. RILEY, JR., Judge

_____
JAMES CURWOOD WITT, JR., Judge