

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1999 SESSION

FILED

December 15, 1999

Cecil Crowson, Jr.

STATE OF TENNESSEE,	*	#M1998-00026-CCA-R3-CD
Appellee,	*	MONTGOMERY COUNTY
VS.	*	Hon. Robert W. Wedemeyer, Judge
BRETT TOWNSEND,	*	(Theft of Property over \$10,000)
Appellant.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Brett Townsend, entered a plea of guilt to theft of property over \$10,000, a Class D felony. The trial court imposed a Range III sentence of eleven years. In this appeal of right, the single issue presented for review is whether the sentence imposed was excessive.

We affirm the judgment of the trial court.

In January of 1998, police officers observed the defendant sleeping in a car that was parked at a truck stop in Hamilton County, Florida. The police discovered that the vehicle had been reported stolen from Clarksville, Tennessee, and placed the defendant under arrest. At the time, the defendant was on a community corrections sentence for theft of property, aggravated burglary, and forgery.

The defendant had six prior felony convictions. The presentence report indicated that the defendant had violated the terms of his community corrections sentence for failing to abide by his curfew, for changing addresses without notifying his supervising officer, for failing to report for counseling, and for failing to pay court costs and supervision fees. The report also indicated that the defendant had a history of drug abuse and had continued to use illegal drugs despite counseling.

At the sentencing hearing, the defense called six witnesses. Most testified that the defendant's main problem was his drug dependence. The victim, Barbara Peoples, testified that she did not think the defendant deserved a fifteen-year sentence. She also observed that the fifteen months he had served by the

time of the sentencing hearing was not enough.

Carla Townsend, the defendant's wife, testified that it would be beneficial to the family if her husband received drug treatment and was allowed to remain at his residence. She also acknowledged that while the defendant was the father of her seventeen-year-old son, they had been married for only sixteen months. The defendant had not provided any support for his son until after the marriage. Mrs. Townsend also revealed that since the marriage, the defendant had provided only a few hundred dollars in support.

Derick Greenwade, the defendant's son, testified that it would be beneficial to the family if his father was spared incarceration but was ordered to undergo drug treatment. He acknowledged that the defendant had not continued his drug treatment during the periods of time he was not incarcerated.

The defendant testified that he knew his life was out of control and that he needed help. He hoped to turn his life around by extensive treatment and asked for one more chance. He testified that he was skilled as a pipe fitter and could make a good living if he was released from custody.

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 with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies

inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102,-103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987). The record in this case demonstrates that the trial court made adequate findings of fact.

In calculating the sentence for felony convictions committed before July 1, 1995, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-2109c) (1990) (amended July 1, 1995 to provide that the presumptive sentence of a Class A felony as the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210. The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

If the trial court's findings of fact are adequately supported by the

record, this court may not modify the sentence even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). The presumption of correctness is, however, "conditioned upon the affirmative showing in the record that the trial court considered sentencing principles and relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court must place on the record the reasons for the sentence. State v. Jones, 883 S.W.2d 597 (Tenn. 1994).

In the absence of enhancement and mitigating factors, the presumptive length of a sentence for a Class B, C, D, and E felony is the minimum sentence in the statutory range. Tenn. Code Ann. § 40-35-210(c). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence but still within the range. Tenn. Code Ann. § 40-35-210(d). Where both enhancement and mitigating factors apply, the trial court must start at the minimum sentence, enhance the sentence within the range as appropriate to the enhancement factors, and then reduce the sentence within the range as appropriate to the mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight afforded an enhancement or mitigating factor is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the Tennessee Criminal Sentencing Reform Act of 1989 and its findings are supported by the record. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App. 1995).

The record indicates that the defendant pled guilty to a Class D felony and agreed to a Range III persistent offender sentence, with a 45% release eligibility status. The sentence, therefore, could be as little as eight years or as much as twelve years. Tenn. Code Ann. § 40-35-112(c)(4). The trial court found three

enhancement factors: (1) that the defendant has a previous history of prior convictions in addition to those necessary to establish the appropriate range; (2) that the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release in the community; and (3) that the felony was committed while on release into the community under the directions of the Department of Correction or local government authority. Tenn. Code Ann. § 40-35-114(1)(8), and (13).

The trial court determined that five of the defendant's prior felony convictions were necessary to establish a Range III classification. Because the five prior felony convictions could not be used to enhance the defendant's sentence within the range, the trial court had to rely on the sixth prior felony conviction to support the first enhancement factor. Tenn. Code Ann. § 40-35-114(1). Because the presentence report indicated that, at the time of his arrest, the defendant was in violation of the terms of his community corrections sentence, the second enhancement factor applied. Because the defendant stole the automobile while on a community corrections program, the third enhancement factor applied. While the trial court considered the testimony of the defendant and his family, it assigned little weight to any possible mitigating factors.

The defendant specifically contends that the trial court placed too much emphasis on the single felony which was used to support the first enhancement factor. However, "[t]he weight afforded mitigating or enhancement factors derives from balancing relative degrees of culpability within the totality of the circumstances ... In other words, the weight that is given to any existing factor is left to the trial court's discretion so long as ... its findings are supported by the record." State v. Marshall, 870 S.W.2d 532, 541 (Tenn. Crim. App. 1993). Here, the record

clearly supports the trial court's application of all three enhancement factors. Furthermore, the trial court gave some consideration to possible mitigating factors by imposing a sentence one year less than the maximum. In our view, the trial court acted within its discretion.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

John H. Peay, Judge

Norma McGee Ogle, Judge