

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1999

FILED
Dec 5 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

DEBRA L. TROTTER,

Appellant.

) C.C.A. NO. W1999-00556-CCA-1999D
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)
)

) SHELBY COUNTY
)
)
)

) HON. CAROLYN WADE BLACKETT
)
)
)

) (THEFT OF PROPERTY)
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)
)

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

On June 9, 1998, the Shelby County Grand Jury indicted Defendant Debra L. Trotter for theft of property worth \$60,000.00 or more. On October 15, 1998, Defendant pled guilty to theft of property worth \$60,000.00 or more. Under the negotiated plea agreement, Defendant agreed to an eight year sentence and she reserved the right to have the trial court determine the manner in which the sentence would be served. Following a sentencing hearing on October 15, 1998, the trial court sentenced Defendant as a Range I standard offender to a term of eight years in the Tennessee Department of Correction. That same day, Defendant asked for and received a delay of execution of sentence. On October 26, 1998, Defendant asked the trial court to consider ordering her to serve her sentence in the Community Corrections Program and the trial court subsequently denied the request. Defendant challenges her sentence, raising the following issue: whether the trial court erred when it failed to impose alternative sentencing. After a review of the record, we affirm the judgment of the trial court.

BACKGROUND

Defendant was employed as a budget coordinator by Catherine's Store in Memphis, Tennessee from May 11, 1992, to March 16, 1998. During the period from July of 1995 to February of 1998, Defendant submitted fraudulent invoices in the name of her sister to Catherine's Store. These fraudulent invoices resulted in the payment of \$149,756.99 from Catherine's Store to the account of Defendant's sister. In addition, there were other invoices in the amount of \$14,905.01 that were not paid.

During the sentencing hearing on October 15, 1998, Defendant asked the trial court to impose probation instead of incarceration. Defendant argued that she was

a good candidate for probation because she was remorseful, she had no prior criminal record, and she was willing to make partial restitution.

Defendant testified that in order to steal the money from her employer, she “created” a company that was named after her sister. Defendant then told her sister that she was doing independent contract work for her employer, but her employer would not issue a check in her name. Defendant told her sister that because of her employer’s policy, payment for the independent contract work had to be made by checks made out in her sister’s name. Defendant also told her sister that she would give her part of the money to pay income taxes.

Defendant testified that she began stealing the money because she had a family member who needed help because of a health problem and she continued to steal money because it felt good to help other people. Defendant admitted that she did not steal the money because she was in financial stress or had needs that were not being met. Defendant also admitted that she used some of the money to buy a computer, to take a trip to Florida, and send her son to a sports camp. However, Defendant claimed that much of the money she stole was used to purchase paper towels, toilet paper, food, and clothes for other people.

At the conclusion of the sentencing hearing, the trial court denied Defendant’s request for probation. The trial court based its ruling on its findings that Defendant had not been candid with the court, Defendant had not shown remorse for her actions, the offense was serious, and there was a need for deterrence.

During the hearing on October 26, 1998, Defendant made a request that she be placed in the Community Corrections Program. The trial court stated that Defendant should have made her request earlier so that the presentence report could have addressed issues relating to Community Corrections. However, the trial court stated that it had reviewed Defendant’s previous testimony, the evidence

presented at the sentencing hearing, and the court's notes. The trial court then denied the request for placement in the Community Corrections Program.

ANALYSIS

Defendant contends that the trial court erred when it denied her requests to either be placed on probation or in the Community Corrections Program.

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. 1998).

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 alternative sentencing. Tenn. Code Ann. § 40-35-102(6) (1997). Because theft of property worth \$60,000.00 or more is a Class B felony, Tenn. Code Ann. § 39-14-105(5) (1997), there is no presumption that Defendant is a favorable candidate for alternative sentencing.

Initially we note that because Defendant's sentence is eight years or less and none of the statutory exceptions apply, Defendant was eligible for probation. See Tenn. Code Ann. § 40-35-303(a) (1997). We also note that as an offender convicted of a nonviolent property-related felony offense, Defendant was eligible for the Community Corrections Program. See Tenn. Code Ann. § 40-36-106(a) (Supp. 1998). However, even though Defendant was eligible for probation, she was "not automatically entitled to probation as a matter of law." Tenn. Code Ann. § 40-35-303(b) (1997) (Sentencing Commission Comments). Similarly, the fact that Defendant satisfied the minimum requirements of the Community Corrections Act does not mean that she is entitled to be sentenced under the Act as a matter of law or right. State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998).

When determining suitability for alternative sentencing, 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 the alternative sentence, the defendant will commit another crime; (3) whether imposition of an alternative sentence would unduly depreciate the seriousness of the offense; and (4) whether a sentence of confinement would provide an effective deterrent to others likely to commit similar crimes. Tenn. Code Ann. §§ 40-35-210(b)(4), -103(5), -103(1)(B) (1997 & Supp. 1998); State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

As previously stated, the trial court denied Defendant's request for alternative sentencing on the seriousness of the offense, the need for deterrence, Defendant's lack of remorse, and Defendant's lack of candor with the court.

We do not agree with Defendant that the circumstances of this offense are insufficient to support a denial of alternative sentencing. The general rule is 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 455. The offense in this case was clearly of an excessive nature. Indeed, Defendant stole \$149,756.99 in numerous increments over a period of slightly less than three years and there were \$14,905.01 in fraudulent invoices that had not yet been paid when her scheme was discovered. Further, by Defendant's own admission, she accomplished the theft in this case by "creating" a phony company, lying to her sister, and defrauding her employer. Moreover, it appears that Defendant's criminal activity ended only because she was caught.

We also conclude that the record supports the trial court's finding that Defendant demonstrated a lack of candor toward the court and we hold that this was a proper basis for a denial of alternative sentencing. Indeed, this Court has previously stated that a defendant's lack of candor to the court reflects poorly on the defendant's rehabilitative potential and thus, is a basis for denial of alternative sentencing. State v. Leggs, 955 S.W.2d 845, 851–52 (Tenn. Crim. App. 1997). The record indicates that during the sentencing hearing, Defendant maintained that instead of stealing the money for her own gratification, she used most of the money to help others. The trial court's determination that Defendant was lying about spending much of the \$149,756.99 she stole on items such as toilet paper, paper towels, food, and clothes for others is certainly justified. In addition, the bank records Defendant submitted to the trial court indicate that during the period that Defendant was stealing money from her employer, Defendant made numerous purchases at restaurants, retail clothing stores, and toy stores.

Although not expressly stated, it is evident from the record that the trial court also based its denial of alternative sentencing on Defendant's failure to accept full responsibility for her criminal conduct. Failure to accept responsibility for one's criminal conduct also reflects poorly on rehabilitative potential and thus, is a basis

for denial of probation. State v. Zeolia, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996). Even though Defendant admitted that she used some of the money she stole for herself, she continued to maintain that the only reason she began stealing was to help other people and the reason she continued to steal was her continued desire to help others.

Regarding the trial court's reliance on the need for deterrence, we note that there is currently a split of authority about whether the need for deterrence is always sufficient to deny alternative sentencing in cases such as this one. See State v. Lisa Mae Malone, No. 01C01-9706-CC-00234, 1998 WL 427387, at *9–10 (Tenn. Crim. App., Nashville, July 30, 1998), perm. to appeal denied, (Tenn. 1999) (holding that it was appropriate to deny alternative sentencing based on the need for deterrence where the defendant had stolen \$125,909.80 from her co-employees and her employer even though there was no proof of the need for deterrence); State v. Grissom, 956 S.W.2d 514, 519–20 (Tenn. Crim. App. 1997) (before trial court could consider deterrence in determining whether alternative sentencing was appropriate in employer/employee theft case, there must have been proof presented); State v. Millsaps, 920 S.W.2d 267, 271 (Tenn. Crim. App. 1995) (holding that in the context of employees using special skills and/or access to employers' finances, deterrence is an appropriate basis for denial of alternative sentencing even though there is no proof of the need for deterrence). Defendant is correct that the State failed to introduce any proof about the need for deterrence in this case. However, we conclude that the denial of probation was proper regardless of whether the trial court correctly considered the need for deterrence.

Based on the circumstances of the offense, Defendant's lack of candor to the court, and Defendant's failure to accept full responsibility for her conduct, we hold that the trial court did not abuse its discretion when it denied alternative sentencing in this case. Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, Judge

CONCUR:

DAVID G. HAYES, Judge

JOE G. RILEY, JR., Judge