

May 28, 1996
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE

AT JACKSON

FILED

May 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
Plaintiff-Appellant,

v.

WAYNE BURDIN,
Defendant-Appellee.

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(Shelby Criminal
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(Hon. W. Fred Axley, Judge
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(S. Ct. No. 02S01-9505-CR-00037
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For Plaintiff-Appellant:

Charles W. Burson
Attorney General & Reporter
Nashville

Kathy Morante
Deputy Attorney General
Nashville

For Defendant-Appellee:

Brett B. Stein
Memphis

OPINION

JUDGMENT OF COURT OF CRIMINAL
APPEALS AFFIRMED; CASE REMANDED
TO TRIAL COURT.

REID, J.

This case presents an appeal from a condition of probation imposed by the trial court upon a guilty plea to a charge of sexual battery. The judgment of the Court of Criminal Appeals removing the condition is affirmed, and the case is remanded to the trial court.

The offense was committed in December 1992 at the defendant's residence while he was wrestling with the 16-year-old victim. When the victim refused the defendant's request that he take his clothes off, the defendant unzipped the victim's trousers and fondled him. The defendant offered the victim money to have oral sex with him. Instead, the victim immediately went home and reported the incident to his parents and the police.

Following the incident, the defendant tried unsuccessfully to commit suicide. After treatment at a hospital, he was referred to a program for child molesters at the sexual abuse clinic at the University of Tennessee. At the time of the sentencing hearing, the defendant had attended the weekly treatment sessions for four months. Psychological reports entered into evidence at the sentencing hearing by stipulation contained admissions that the defendant had abused other teenage boys, including his three stepsons. The defendant testified that the child molester program assisted him in managing his anxiety, identifying risk factors, and coping with his condition.

At the sentencing hearing, the victim's father was allowed to read a statement, which provided in part as follows:

. . .

I have a couple of options I would like for the Court to consider. Option One: Two years in jail,

Option two: Place a four foot by eight foot sign in his front yard where it will state: Warning, all children, Wayne Burdin is an admitted and convicted child molester. Parents beware. This sign must stay in clear view of all to see for six months. And Wayne Burdin must be under night-time home arrest for that six months' period under court order.

. . .

The trial court sentenced the defendant as a Range I standard offender to one year in the correctional center and imposed a \$500.00 fine. The court suspended the sentence and placed the defendant on two years' probation. The conditions of probation were that the defendant continue therapy sessions and that he place in the yard of the residence where he lived with his mother a four-by-eight foot sign with black letters over a yellow background stating: "Warning, all children. Wayne Burdin is an admitted and convicted child molester. Parents beware." The court ordered that the sign be maintained for a period of six months during which the defendant would be under house arrest.

The defendant contends that requiring that he erect the

sign at his residence as a condition of probation is not a punishment authorized by the Criminal Sentencing Act of 1989 and, further, that imposition of the condition violates the Eighth Amendment to the Constitution of the United States and Article I, Section 16 of the Constitution of Tennessee.

"The burden of showing that the sentence is improper is upon the appellant." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Review of a sentence is governed by the Tennessee Criminal Sentencing Reform Act of 1989. See Tenn. Code Ann. § 40-35-117.

Section 40-35-401 of the Act sets forth the standards for reviewing the trial court's decision on probation:

When reviewing sentencing issues . . . including the granting or denial of probation . . . the appellate courts shall conduct a de novo review . . . with a presumption that the determinations made by the court from which the appeal is taken are correct.

However, the presumption of correctness which accompanies the trial court's action 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).