

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
January 26, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

V.

MICHAEL DeMATTEO,

Appellant.

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C.C.A. NO. 03C01-9903-CR-00093

SULLIVAN COUNTY

HON. PHYLLIS H. MILLER, JUDGE

(SELLING 1/2 OUNCE OR MORE
OF A CONTROLLED SUBSTANCE)

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

Defendant Michael DeMatteo pled guilty in the Sullivan County Criminal Court to three Class E felony counts of selling one-half ounce or more of a Schedule VI controlled substance, two Class D felony counts of selling a Schedule III controlled substance, two Class C felony counts of selling a Schedule II controlled substance, one Class A misdemeanor count of casual exchange of a Schedule VI controlled substance, one Class A misdemeanor count of possession of a Schedule VI controlled substance with intent to sell, and one Class A misdemeanor count of possession of drug paraphernalia. Following a sentencing hearing, the trial court imposed a total sentence of twenty years in the Tennessee Department of Correction followed by eight years of intensive probation. Defendant challenges the trial court's sentencing determinations, raising the following issues:

- 1) whether the trial court imposed excessive sentences for the two Class C felony convictions;
- 2) whether the trial court erred when it imposed partial consecutive sentencing;
- 3) whether the trial court erred when it failed to order all ten sentences to be served on full probation; and
- 4) whether the trial court erred when it failed to place Defendant in the Community Corrections Program.

After a review of the record, we affirm the judgment of the trial court.

I. BACKGROUND

On May 16, 1997, a confidential police informant paid Defendant \$180.00 in exchange for 22.4 grams of marijuana. On May 19, 1997, an undercover police officer paid Defendant \$180.00 in exchange for 24.5 grams of marijuana. On May 20, 1997, an undercover officer paid Defendant \$225.00 for one ounce of marijuana and nine dihydrocodeinone tablets. On June 2, 1997, an undercover officer paid Defendant and another individual \$75.00 in exchange for seven dihydrocodeinone

tablets and four morphine tablets. On June 13, 1997, an undercover officer paid Defendant \$50.00 in exchange for 7.9 grams of marijuana. On June 18, 1997, an undercover officer paid Defendant \$200.00 in exchange for twenty morphine tablets. Later that same day, the police executed a search warrant for Defendant's residence. During the search, the officers discovered 2.6 grams of marijuana as well as drug paraphernalia.

Following the sentencing hearing, the trial court sentenced Defendant as a Range II multiple offender to four years for each Class E felony conviction, eight years for each Class D felony conviction, ten years for each Class C felony conviction, and eleven months and twenty-nine days for each Class A misdemeanor conviction. In addition, the trial court ordered all Class A misdemeanor sentences, all Class E felony sentences, and one Class D felony sentence to run concurrently with one Class C felony sentence, and ordered the remaining Class C felony sentence and Class D felony sentence to run consecutively to all other sentences. Finally, the trial court ordered Defendant to serve the two ten year Class C felony sentences in the Tennessee Department of Correction followed by the eight year Class D felony sentence to be served on intensive probation.

II. LENGTH OF SENTENCES

Defendant contends that the trial court erred when it imposed sentences of ten years for each of his Class C felony convictions. Defendant has not challenged the length of the sentences imposed by the trial court for his other convictions.

“When reviewing sentencing issues . . . including the granting or denial of probation and the length of sentence, the appellate court shall conduct a de novo

review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d) (1997). “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). In conducting our review, we must consider all the evidence, the presentence report, the sentencing principles, the enhancing and mitigating factors, arguments of counsel, the defendant’s statements, the nature and character of the offense, and the defendant’s potential for rehabilitation. Tenn. Code Ann. §§ 40-35-103(5), -210(b) (1997 & Supp. 1999); Ashby, 823 S.W.2d at 169. “The defendant has the burden of demonstrating that the sentence is improper.” Id. Because the record in this case indicates that the trial court properly considered the sentencing principles and all relevant facts and circumstances, our review is de novo with a presumption of correctness.

_____ Under Tennessee law, the sentence for a Range II offender convicted of a Class C felony is between six and ten years. Tenn. Code Ann. § 40-35-112(b)(3) (1997). If the court finds that enhancement and mitigating factors are applicable, the court must begin with the minimum and enhance the sentence to appropriately reflect the weight of any statutory enhancement factors and then the court must reduce the sentence to appropriately reflect the weight of any mitigating factors. Tenn. Code Ann. § 40-35-210(e) (Supp. 1999).

The record indicates that in determining that Defendant should receive a sentence of ten years for each of these two convictions, the trial court found that the following enhancement factors applied: (1) Defendant had a previous history of criminal behavior or convictions in addition to those necessary to establish the appropriate sentencing range and (8) Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release into the

community. See Tenn. Code Ann. § 40-35-114(1), (8) (1997). The trial court found that these two factors were entitled to significant weight. In addition, the trial court found that mitigating factor (1) applied because Defendant's conduct did not cause or threaten serious bodily injury. See Tenn. Code Ann. § 40-35-113(1) (1997). However, the trial court found that this factor was entitled to little weight.

Defendant does not expressly challenge the application of enhancement factor (1), and we conclude that it was properly applied. Indeed, the record indicates that Defendant's prior criminal record consists of two felony drug convictions; two felony forged prescription convictions; two felony burglary convictions; a felony conviction for receiving stolen property; a felony conviction for illegal possession of a firearm; and misdemeanor convictions for driving on a suspended license, petit larceny, and shoplifting.

Defendant initially appears to challenge the application of enhancement factor (8), but he subsequently appears to concede that the factor was applicable and merely argues that the trial court gave it too much weight. Regardless, we conclude that the factor was correctly applied because the record indicates that Defendant has previously received a suspended sentence that was later revoked.

Neither Defendant nor the State contends that the trial court erred when it applied mitigating factor (1) and failed to apply any other mitigating factors. We conclude that the trial court did not err when it applied mitigating factor (1), but we note that in cases involving drugs, this factor is generally entitled to little weight. See State v. Hoyt Edward Carroll, No. 03C01-9607-CC-00254, 1997 WL 457490, at *4 (Tenn. Crim. App., Knoxville, Aug. 12, 1997), perm. to appeal denied, (Tenn. 1998). We also conclude that no other mitigating factors were applicable in this case.

Essentially, Defendant's argument that the lengths of these two sentences are excessive amounts to a contention that the trial court erroneously gave too much

weight to the enhancement factors and too little weight to the mitigating factor. However, it is well-established that the weight to be given to each enhancement and mitigating factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. State v. Zonge, 973 S.W.2d 250, 259 (Tenn. Crim. App. 1997); State v. Baxter, 938 S.W.2d 697, 705 (Tenn. Crim. App. 1996). The record indicates that in determining the weight of these factors, the trial court complied with the sentencing purposes and principles. In addition, the record supports the trial court's findings. The trial court did not abuse its discretion when it determined the weight of the enhancement and mitigating factors in this case.

In our de novo review, we conclude that two enhancement factors apply to Defendant's sentences, and the record supports the trial court's finding that those factors are entitled to significant weight. In addition, we conclude that one mitigating factor applies, and that factor is entitled to only minimal weight. Under these circumstances, we conclude that the lengths of the sentences in this case are entirely appropriate. Defendant is not entitled to relief on this issue.

III. CONSECUTIVE SENTENCING

Defendant contends that the trial court erred when it imposed partial consecutive sentencing in this case.

Consecutive sentencing is governed by Tennessee Code Annotated section 40-35-115. The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). The record indicates that the trial court imposed consecutive sentencing based on a determination that (1) Defendant is a professional criminal who has knowingly devoted his life to criminal acts as a major

source of his livelihood and (2) Defendant is an offender whose record of criminal activity is extensive. See Tenn. Code Ann. § 40-35-115(b)(1), (2) (1997).

Initially, we agree with Defendant that the record does not support the trial court's finding that Defendant was a professional criminal who knowingly devoted his life to criminal acts as a major source of his livelihood. Although the record indicates that Defendant obtained approximately \$860.00 by committing the offenses at issue in this case, there is no proof in the record that Defendant obtained a major source of his livelihood through criminal means. Indeed, the record indicates that Defendant received most of his income through disability payments from the government.

Notwithstanding our conclusion that the trial court erred when it found that Defendant was a professional criminal, we conclude that the trial court properly imposed consecutive sentencing because Defendant is a criminal with an extensive criminal record. As previously mentioned in Part II of this Opinion, Defendant's prior criminal record consists of eight felony convictions and three misdemeanor convictions. This criminal record clearly qualifies as "extensive." As this Court has previously stated, "[e]xtensive criminal history alone will support consecutive sentencing." State v. Adams, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997).

Defendant does not challenge the trial court's determination that he has an extensive criminal record. Instead, Defendant argues that consecutive sentencing is not appropriate because the trial court failed to find that consecutive sentences: (1) are reasonably related to the severity of the offenses committed; (2) serve to protect the public from further criminal conduct by the offender; and (3) are congruent with general principles of sentencing as required by State v. Wilkerson, 905 S.W.2d 933, 939 (Tenn. 1995). However, the Tennessee Supreme Court has recently held that the trial court is only required to find that consecutive sentences: are reasonably related to the severity of the offenses committed and serve to protect

the public from further criminal conduct by the offender when consecutive sentencing is based on a determination that the defendant is a dangerous offender under Tennessee Code Annotated section 40-35-115(b)(4). State v. David Keith Lane, --- S.W.3d ---, No. 03S01-9802-CC-00013, slip op. at 8–9 (Tenn. Sept. 27, 1999). In this case, the trial court imposed consecutive sentencing because Defendant is an offender with an extensive criminal record, not because Defendant is a dangerous offender. Thus, the trial court was not required to find that the first two Wilkerson factors were applicable. Moreover, as previously discussed, consecutive sentencing in this case is clearly congruent with general principles of sentencing. Defendant is not entitled to relief on this issue.

IV. PROBATION

Defendant contends that the trial court erred when it failed to impose full probation for all ten sentences in this case.

We note that Defendant did receive a sentence of eight years of probation following the two ten year Class C felony sentences of confinement. Because these two Class C felony sentences were longer than eight years, Defendant was statutorily precluded from serving these two sentences on probation. Tenn. Code Ann. 40-35-303(a) (1997) (stating that all defendants who receive a sentence of more than eight years are ineligible for probation as a matter of law). Defendant is not entitled to relief on this issue.

V. COMMUNITY CORRECTIONS

Defendant contends that the trial court erred when it failed to order him to serve his two ten year Class C felony sentences in the Community Corrections Program rather than in the Tennessee Department of Correction.

The purpose of the Community Corrections Act is to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103(1) (1997). The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn.1990). "That a defendant meets the minimum requirements of the Community Corrections Act . . . however, does not mean that he 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).

The following offenders are eligible for placement in the Community Corrections Program:

- (1) Persons who, without this option, would be incarcerated in a correctional institution;
 - (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5;
 - (3) Persons who are convicted of nonviolent felony offenses;
 - (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
 - (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
 - (6) Persons who do not demonstrate a pattern of committing violent offenses; and
- Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a) (1997). Defendant is correct that as an offender convicted of nonviolent drug-related offenses, he meets the minimum eligibility requirements under section 40-36-106(a). However, that does not end our inquiry.

Because a Community Corrections sentence is an alternative sentence, we must determine whether Defendant is a suitable candidate for alternative sentencing. Especially mitigated or standard offenders convicted of a class C, D, or E felony and who do not possess a criminal history evincing a clear disregard for the laws and morals of society and a failure of past efforts at rehabilitation are presumed to be favorable candidates for alternative sentencing options, absent evidence to the

contrary. Tenn. Code Ann. § 40-35-102(5), (6) (1997). Because he was sentenced as a Range II multiple offender, Defendant is not presumed to be a favorable candidate for alternative sentencing. Moreover, Defendant's lengthy criminal history demonstrates a clear disregard for the laws of society and the previous revocation of a suspended sentence demonstrates a failure of past efforts at rehabilitation.

In addition, Tennessee Code Annotated section 40-35-103 provides that a sentence of confinement can be based on a determination that "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." Tenn. Code Ann. § 40-35-103(1)(A) (1997). Further, an offender's potential or lack of potential for rehabilitation should be considered by the trial court in determining whether to impose an alternative sentence. Tenn. Code Ann. § 40-35-103(5) (1997).

In this case, Defendant's prior criminal record consists of convictions for eight felony offenses and three misdemeanor offenses that were committed over a twenty-nine year period. In addition, two of the felony convictions were for selling controlled substances. Further, Defendant committed the ten drug related offenses in this case within a period of approximately one month. Clearly, Defendant has an extremely poor potential for rehabilitation and society needs protection from this Defendant who has a long history of criminal conduct. Under these circumstances, we conclude that the trial court did not abuse its discretion when it determined that Defendant should not be placed in the Community Corrections Program under section 40-36-106(a).

Although it is not entirely clear, Defendant apparently contends that he was also entitled to placement in the Community Corrections Program under section 40-36-106(c), which provides:

Felony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable

and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Tenn. Code Ann. § 40-36-106(c) (1997). However, "[b]efore an offender may be sentenced pursuant to subsection (c), the offender must be found eligible for probation." State v. Grigsby, 957 S.W.2d 541, 546 (Tenn. Crim. App.1997) (citation omitted). As previously stated in Part IV of this Opinion, Defendant is not eligible for probation for his two Class C felony sentences because they are longer than eight years. See Tenn. Code Ann. 40-35-303(a) (1997). Thus, Defendant is not eligible for Community Corrections under section 40-36-106(c).

In short, we conclude that the trial court did not abuse its discretion when it determined that Defendant should serve a portion of the total sentence in this case in the Tennessee Department of Correction rather than in the Community Corrections Program. Defendant is not entitled to relief on this issue.

Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JERRY L. SMITH, Judge