

EIN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

SEPTEMBER SESSION, 1999

FILED
December 30, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 V.)
)
 DAVID McCRANEY,)
)
 Appellant.)

C.C.A. NO. W199-0216-CR-000

SHELBY COUNTY

HON. ARTHUR T. BENNETT, JUDGE

(VEHICULAR ASSAULT)

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OPINION FILED _____

AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERROR

THOMAS T. WOODALL, JUDGE

OPINION

David McCraney pled guilty to one count of vehicular assault and one count of leaving the scene of an accident. He was sentenced by the trial court to two (2) years and to six (6) months, respectively, with the sentences to run concurrently.

McCraney now appeals as of right, and challenges only the trial court's determination that probation was not appropriate. We affirm and remand for correction of a clerical error. Defendant pled guilty to vehicular assault, but the Tennessee Code Annotated section set forth in the judgment form is that for aggravated assault. As a result, we affirm the trial court's sentence in all respects except for this clerical error, and remand for the entry of an amended judgment reflecting the correct code section.

I. Facts

Defendant was indicted on March 5, 1998, on one count of aggravated assault, one count of vehicular assault, and one count of leaving the scene of an accident. On November 5, 1998, Defendant entered into a plea agreement, and pled guilty to one count of vehicular assault, see Tenn. Code. Ann. § 39-13-106 (1997) and one count of leaving the scene of an accident, see id. § 55-10-101. As part of the plea, Defendant was sentenced to two (2) years for the vehicular assault, and six (6) months for leaving the scene, with the sentences to run concurrently. There is no transcript of the guilty plea hearing in the record.

Following the guilty plea hearing, the trial court continued the case to address Defendant's petition to suspend the sentence imposed by the trial court. At the sentencing hearing, Defendant and the victim's mother, Maria Anna Tata, testified.

On the date of the crimes, Defendant went to see his cousin, who he had not seen in some time, in the late morning. At his cousin's house (in Memphis) they socialized, washed some trucks, and at some point began to drink beer. Over the course of the day Defendant consumed about a six pack of beer, and around 8:00 PM he borrowed his cousin's car to go and purchase a mother's day gift for his wife.

After beginning his journey, Defendant did not feel well, and turned around and headed back to his cousin's home. As Defendant approached a red light at

Summer and Holmes streets in Memphis, he rear-ended a Toyota Corsica containing Maria Tata, her husband, and their eleven year old daughter, Eleana. Defendant put the car in reverse, backed-up, put the car in forward gear, and rammed the Tata's car a second time, shattering the rear windshield, and pushing the car into the stopped vehicle immediately in front of it at the light. This second impact cleared a path for Defendant's car, enabling him to get around the Tata's vehicle, and he fled the scene in the car. Defendant returned to his cousin's house.

Maria Tata testified that Eleana Tata sustained muscular injuries as a result of the second impact, which was harder than the first. Defendant hit his head against his windshield on the first impact, and sustained a head wound. Defendant testified that he did not remember anything that happened after the first impact, and that his next memory was of his arrival at his cousin's home.

After leaving the scene of the accident, Defendant did not notify the authorities. Police located Defendant at his cousin's house shortly after the accident.

II. Analysis

Initially, we note that the judgment form entered for Defendant's conviction of vehicular assault contains a clerical error. The judgment form correctly sets forth the name of the offense and the punishment imposed. The judgment, however, states that Defendant was convicted of violating Tennessee Code Annotated § 39-13-102, which is the section addressing aggravated assault. The correct code section for vehicular assault is § 39-13-106. Thus we must remand to the trial court for the entry of an amended judgment that sets forth the correct code section.

We affirm the trial court's ruling in all other respects. When an accused challenges the length, range, or the 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 (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, 103, 210 (1997). See State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and made findings of fact that are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

This standard of review, however, is conditioned upon the ability of this Court to meaningfully review the issues presented on appeal. Under the Tennessee Rules of Appellate Procedure a party seeking appellate review of an issue has a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired at the trial level with respect to that issue. Tenn. R.App.P. 24(b); State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993) (citing State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)). When the record is incomplete, and does not contain a transcript of the proceedings relevant to the issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. Id. at 561 (citing State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim.

App. 1988)). Rather, the appeals court must conclusively presume the ruling of the trial court on the issue was correct. State v. Griffis, 964 S.W.2d 577, 593 (Tenn. Crim. App. 1997); State v. Richardson, 875 S.W.2d 671, 675 (Tenn. Crim. App. 1993).

It is well established that the necessity for a complete record applies to sentencing. See State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998); State v. Hayes, 894 S.W.2d 298, 300 (Tenn. Crim. App. 1994). There is no transcript of the guilty plea hearing in the record before us. As a result, we normally would be precluded from reviewing the trial court's denial of probation.

Nevertheless, the record is still well developed regarding the facts of this case. The trial court's findings of fact are adequately supported by the available record.

In this regard, a defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (1997). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." Id. § 102(5). Thus, a defendant sentenced to eight (8) years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. See id. § 40-35-303(a), (b). However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Ashby, 823 S.W.2d 166, 167 (Tenn. 1991) (quoting State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986)).

When determining if incarceration is appropriate, a court must consider if confinement is (1) necessary “to protect society by restraining a defendant who has a long history of criminal conduct”; (2) necessary “to avoid depreciating the seriousness of the offense”; (3) “particularly suited to provide an effective deterrence to others likely to commit similar offenses”; or (4) needed because “[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” Tenn Code. Ann. § 40-35-103(1) (1997). Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. *Id.* § 103(2), (4). The court should also consider the defendant’s potential for rehabilitation or treatment, or lack thereof, when determining the appropriate sentence. *Id.* § 103(5).

Here, the trial court denied probation because it would depreciate the seriousness of the offense. In 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. *State v. Bingham*, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995) (quoting *State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991)).

We think there is sufficient evidence in the record to rebut the presumption that Defendant is entitled to probation, and show that Defendant’s actions were sufficiently reprehensible to warrant incarceration instead of probation. To begin, Defendant was convicted of a class D felony, sentenced to less than eight (8) years, and does not have a prior criminal record. Thus there is a presumption that Defendant is eligible for an alternative sentence. There is no evidence in the record that the trial court recognized this presumption, and it was error to ignore this statutory requirement. However, there is sufficient evidence to support the denial of probation even when the presumption is properly applied.

The trial court based its denial of probation on Defendant's conduct after the initial collision, when Defendant backed the car up, put the car in gear, and hit the Tata's car again—with more force than the initial crash. Defendant testified that he had no recollection of his actions at this point, but the trial judge did not accredit his testimony, finding instead:

I figure what happened on the second crash is that you were trying to get away from there. You were drinking heavily. You were trying to get away, and you pulled back; and you were still out of control and hit that accelerator again. And you were so out of it you crashed into the car again before you knocked them far enough so you could clear. And you drive off. Sped off and went somewhere and parked the car. That's inexcusable.

The trial judge found that Defendant departed from the accident scene despite the fact that Eleana Tata was injured, without regard for the fact that other persons could be injured:

And then a child was hurt. Luckily she wasn't permanently damaged apparently. But she could have been dead. Some of the others, the grown-ups in there could have been hurt or killed. But you didn't pay any attention to that. You left the scene of an accident and that tells the court that this would depreciate the seriousness of this offense. And I am weighing the fact that you don't have a prior conviction. You don't have a record as such . . . [b]ut it's not—it doesn't weigh enough . . .

Defendant's actions were excessive and shocking. As noted by the trial judge, "[a]t least as a human being, if you make the big momentous mistake of getting drunk and driving and then crashing into somebody, don't make that unforgiving mistake of leaving people in distress, hurt out there, and going about your business." Defendant caused an initial collision between his vehicle and the car in which the victim was a passenger. This was bad enough, but Defendant's conduct in then backing up, accelerating his car, and striking the victim a second time was reprehensible, and a sentence of probation would certainly depreciate the seriousness of the offense.

III. Conclusion

We affirm the judgment of the trial court in all respects except for the clerical error in the judgment in the judgment as noted above. We remand for the entry of an amended judgment that reflects the correct Tennessee Code Annotated section for Defendant's conviction of vehicular assault.

THOMAS T. WOODALL, Judge

CONCUR:

DAVID G. HAYES, Judge

JOE G. RILEY, JR., Judge