

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**FEBRUARY SESSION, 1995**

<b>STATE OF TENNESSEE,</b>	)	<b>C.C.A. NO. 02C01-9410-CR-00217</b>
	)	
Appellee,	)	
	)	
<b>VS.</b>	)	<b>SHELBY COUNTY</b>
	)	
<b>MICHAEL RICHMOND,</b>	)	<b>HON. JOSEPH B. MCCARTIE</b>
	)	<b>JUDGE</b>
	)	
Appellant.	)	(Sentencing)

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF SHELBY COUNTY**

FOR THE APPELLANT:

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OPINION FILED \_\_\_\_\_

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

# OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant pleaded guilty to operating a motor vehicle after having been found to be a Habitual Motor Vehicle Offender. He was sentenced to one year in jail. The Defendant then petitioned for a suspended sentence and asked that he be sentenced under the Community Corrections Act. After a hearing, the trial court ruled that the Defendant was not eligible for community corrections as a matter of law. It denied the Defendant's petition and ordered the original judgment to be executed. We reverse the judgment of the trial court and remand this case for further proceedings.

The Defendant argues two issues in this appeal: (1) Whether Habitual Motor Vehicle Offenders can be sentenced to community corrections, and (2) whether the trial court erred in denying the Defendant's petition to be sentenced under community corrections.

The Defendant was convicted of the Class E felony<sup>1</sup> of operating a motor vehicle when there was a judgment from the court ordering the Defendant not to do so. From testimony at the hearing, it appears that the Defendant's license was first taken away because of his failure to pay his speeding tickets. The present violation occurred when the Defendant, as part of his job as a car salesman, had to deliver some contracts. The Defendant ran a stop sign and hit a car while running this errand. The order prohibiting him from driving was in effect at the time.

I.

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<sup>1</sup>Tenn. Code Ann. § 55-10-616.

The subsection of the Habitual Motor Vehicle statute that is in question reads, "[t]he court shall have no power to suspend any such sentence or fine." Tenn. Code Ann. § 55-10-616(c). According to the record of the hearing on the Defendant's petition for a suspended sentence, the trial court decided as a matter of law that the Defendant was not eligible for community corrections because it could not suspend the Defendant's sentence under this statute and place him on community corrections.

We disagree with the trial court. We conclude that a community corrections sentence does not constitute a suspension of sentence. The community corrections statute reads in part:

Notwithstanding any other provision of the law to the contrary, the court is authorized to sentence an eligible defendant as defined in this section to any appropriate community-based alternative to incarceration provided in accordance with the terms of this chapter, and under such additional terms and conditions as the court may prescribe, in lieu of incarceration in a state penal institution or local jail or workhouse.

Tenn. Code Ann. § 40-36-106(e)(1) (emphasis added). "In lieu of" means instead of or in place of. Black's Law Dictionary 787 (6th ed. 1990). A community corrections sentence is a sentence served in a program as an alternative to incarceration. In other words, a community corrections sentence is a sentence which is served outside of jail or prison, but it is not "probation" which requires the suspension of a defendant's sentence.

This case demonstrates some confusion about whether community correction programs are in essence a stricter form of probation and should be treated like probation, or if the two alternative manners of serving a sentence are separate altogether. We conclude that they are separate and distinct. Probation requires a

suspended sentence according to statute. Tenn. Code Ann. § 40-35-303(c). The community corrections statute does not require a suspended sentence. Tenn. Code Ann. § 40-36-106. A defendant is eligible for probation if he is sentenced to eight (8) years or less and has not been convicted of a few excluded offenses. Tenn. Code Ann. § 40-35-303(a). The eligibility requirements for community corrections are much more detailed, but there is no statutory limitation concerning length of sentence. Tenn. Code Ann. § 40-36-106 (a)-(c).

A trial court can have a defendant serve part of his sentence in incarceration and put him on probation for the remainder of his sentence. Tenn. Code Ann. § 40-35-303(c). If a defendant is placed in community corrections, the defendant serves his entire sentence in community corrections, but the court is able to alter or amend the length, terms or conditions of the defendant's sentence. Tenn. Code Ann. § 40-36-106(e)(2). If a defendant violates his probation, the judge can revoke his probation and suspension of sentence, and order the execution of the original judgment. Tenn. Code Ann. § 40-35-311(d). A trial court may revoke the community corrections sentence because of the defendant's conduct or if the community corrections program is terminated or modified, and "the court may resentence the defendant to any appropriate sentencing alternative, including incarceration, for any period of time up to the maximum sentence provided for the offense committed." Tenn. Code Ann. § 40-36-106(e)(3).

Probation can be either supervised or unsupervised. Tenn. Code Ann. § 40-35-311(c). If the probation is to be supervised, the supervision is generally by a probation officer who is a state employee with the Department of Correction. Community corrections programs are run by private agencies or local governments. Tenn. Code Ann. § 40-36-103(2). Community corrections programs always require supervision of the defendant by the entity that runs the program. Community corrections is not

uniformly available in all areas of the state because it is based on the voluntary participation of local governments or private enterprises. Probation is a statutory provision, and is available statewide.

At the hearing, the assistant district attorney also argued that the Defendant was not eligible for probation because his sentence could not be suspended under the statute, and he was therefore, ineligible for community corrections. The assistant district attorney referred to this court's opinion in State v. Staten, 787 S.W.2d 934 (Tenn. Crim. App. 1989), in his argument.

In Staten, the issue was whether the defendant was statutorily eligible for community corrections. The defendant in that case had robbed a bank. This court explained that eligibility requirements for community corrections are found at Tennessee Code Annotated section 40-36-106(a), (b), and (c). Staten, 787 S.W.2d at 936. Subsection (a) contains the minimum requirements. The defendant in Staten could not meet two of the requirements under subsection (a) because robbery is a "crime against the person," and it is a violent felony offense. Id. Subsection (b) was not applicable in the case. The court then analyzed whether the defendant was eligible for community corrections under subsection (c). Id. That subsection states, "[f]elony 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 would best be served by serving their sentence in the community could be sentenced under community corrections. Tenn. Code Ann. § 40-36-106(c). This court then held that because the defendant was ineligible for probation due to the length of sentence as opposed to the "special needs" listed in the statute, he was not eligible for community corrections under subsection (c). Id. at 936-37.

Therefore, a defendant who is not eligible under subsection (a) should then be considered under subsection (c). If the defendant is ineligible for probation for reasons other than the special needs listed in the statute he should not be considered for community corrections. This analysis would not necessarily apply to someone who was a Habitual Motor Vehicle Offender. Someone convicted under this statute could easily meet the minimum requirements:

- (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 2 [repealed], parts 1-3 and 5-7 or 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
- (7) 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).

Therefore, we conclude that a person who is an offender under the Habitual Motor Vehicle Act and who meets the minimum requirements under subsection (a) may be considered for a community corrections sentence.

II.

The Defendant's second issue is whether he should have been sentenced to community corrections. The Defendant filed a petition to suspend his sentence, which he apparently relied upon to receive consideration for a community corrections sentence. As we have stated, community corrections sentences do not require the suspension of a defendant's sentence. In addition, in this particular case, suspension of a sentence is forbidden. We note that we have previously held that a defendant is not required to make a written application for the trial court to place a defendant in community corrections. State v. Estep, 854 S.W.2d 124, 127 (Tenn. Crim. App. 1992), perm. to appeal denied, id. (Tenn. 1993). In this case, the trial court ruled that the Defendant was not eligible for community corrections as a matter of law. We have concluded that this was error.

We reverse the trial court's judgment that Habitual Motor Vehicle offenders are not eligible for community corrections, and remand this case for the trial court to exercise its discretion to determine the Defendant's suitability for such a program.

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DAVID H. WELLES, JUDGE

CONCUR:

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JERRY SCOTT, PRESIDING JUDGE

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JOSEPH M. TIPTON, JUDGE