IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
OCTOBER SESSION, 1995

FILED

February 6, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9504-CR-00117
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. **D. KELLY THOMAS, JR.**, Judge
RUSS PAINTER,	)	
	)	(Facilitation of Sale of Controlled
Appellant	)	Substance)

For the Appellant:

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(ON APPEAL)

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(AT TRIAL)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

O P I N I O N

The appellant, Russ Painter, appeals from the sentence imposed by the Circuit Court of Blount County pursuant to his plea of guilty to facilitating the sale of marijuana, a class A misdemeanor.[1] In accordance with the plea agreement, the appellant received a sentence of 11 months and 29 days. The trial court ordered the appellant to serve 90 days of his sentence in the county jail. The appellant contends that the trial court erred in failing to grant him total probation.

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

A sentencing hearing was held on December 6, 1994, to determine the manner in which the sentence should be served. Testimony at the sentencing hearing revealed that the appellant was twenty-six years of age and lived with his parents in Blount County. At the time of the hearing, he was employed with a local painting contractor. The appellant testified that he had recently been released from the county jail, where he had served 120 days of a 180 day sentence for DUI, third offense.

The proof established that the instant offense, resulting in the facilitation conviction, occurred prior to the commission of the DUI offense. After serving his sentence for the DUI offense, the appellant pled guilty to facilitation and was released pending a sentencing hearing. For purposes of completing the pre-sentence report, the pre-sentence officer interviewed the appellant concerning any existing drug or alcohol problems. At the sentencing hearing, the appellant acknowledged that he lied to the pre-sentence officer when he denied use of

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[1]The appellant was initially charged with possession of marijuana with intent to sell or deliver, sale of marijuana, and delivery of marijuana. Pursuant to the plea agreement, the appellant pled guilty to the offense of facilitation of a felony. Tenn. Code Ann. 39-11-403 (1991). The remaining charges were dismissed by the State.

marijuana since his release from the county jail. Only when advised by the interviewing officer that he would be required to submit to a drug screen did the appellant admit to the recent use of marijuana. The appellant further acknowledged that he had used marijuana since the age of 12. Finally, the appellant's presentence report reflects twelve prior misdemeanor convictions, primarily involving the use of alcohol.

In denying total probation, the trial court found:

> Your sentence in the DUI case was 180 days and you didn't have to serve but 120. You got out immediately and started smoking marijuana. And then you went to your probation officer and lied about that until you found out that you were going to get caught anyway, and then you told her that you had. And that's -- you know, after a person has been in jail four months and they come out and break the law just immediately, that tells me that there is something going on that needs to be corrected.

At the conclusion of the sentencing hearing, the trial court imposed a sentence of split confinement. Additionally, the trial court granted the appellant an opportunity to attend an in-patient treatment program and ordered that any program time completed be credited against the 90 day period of incarceration.

The appellant has the burden of establishing that the sentence imposed by the trial court was erroneous. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); State v. Fletcher, 805 S.W.2d 785, 786 (Tenn. Crim. App. 1991). Appellate review of a sentence is *de novo*, with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990). The presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." Ashby, 823 S.W.2d at 169. Specifically, with respect to misdemeanor offenders, the trial court must consider the principles, purposes, and goals of the Sentencing Act. State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995); see also Tenn. Code Ann. § 40-35-302 (1994

Supp.). Moreover, "the court can grant probation immediately or after a period of split or continuous confinement." Id.

The appellant has the burden of establishing his suitability for total probation. See Tenn. Code Ann. §40-35-303(b) (1990). To meet this burden, the appellant must demonstrate that probation will " 'subserve the ends of justice and the best interest of both the public and the defendant.' " State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990) (citation omitted). When considering whether total probation is the appropriate sentencing alternative, the following statutory provisions are relevant:

> (1) Sentences involving confinement should be based on the following considerations:
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> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.
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> (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentencing alternative or length of a term to be imposed . . . .

Tenn. Code Ann. § 40-35-103(1) and (5) (1990).

The trial court's statements at the sentencing hearing indicate that the court did consider principles, purposes, and goals of the Act; the appellant's prior criminal history; and the appellant's rehabilitative potential. See Tenn. Code Ann. § 40-35-103(1)(A), -103(1)(C), and -103(5) (1990). Our review is, therefore, *de novo* with a presumption of correctness. The presentence report reveals an extensive history of criminal conduct. As noted earlier, the appellant has been convicted of twelve offenses since the age of eighteen. The record also reflects that the appellant has previously received suspended sentences, which have

obviously failed to deter the appellant from further misconduct. We agree with the trial court that illegal activity, i.e. the appellant's drug use, immediately following his most recent release from the county jail does not commend itself to the entitlement of probation in this case. Finally, the proof at the sentencing hearing established that the appellant was less than candid concerning his use of marijuana. "It has been widely held that the defendant's truthfulness . . . on his own behalf is probative of his attitude toward society and prospects for rehabilitation and is thus a relevant factor in the sentencing process." State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994) (citing U.S. v. Grayson, 438 U.S. 41, 98 S.Ct. 2610 (1978)). In other words, a defendant's untruthfulness is a factor which may be considered in determining the appropriateness of probation. State v. Neeley, 678 S.W. 48, 49 (Tenn. 1984). See also State v. Leone, 02C01-9206-CR-00148 (Tenn. Crim. App. at Jackson, September 29, 1993). We, therefore, conclude that the appellant has not demonstrated his entitlement to total probation.

The judgment of the trial court is affirmed.

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David G. Hayes, Judge

CONCUR:

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John H. Peay, Judge

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Joseph M. Tipton, Judge