IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	)	NO. 03C01-9505-CR-00153
	)	
Appellee	)	WASHINGTON COUNTY
	)	
V.	)	HON. LYNN W. BROWN
	)	JUDGE
LLOYD MILLS MATTHEWS, JR.,	)	
	)	(Sentencing - Attempted Incest,
Appellant	)	Attempted Aggravated Sexual
	)	Battery)

FOR THE APPELLANT:

David F. Bautista
District Public Defender

Jeffrey C. Kelly
Assistant Public Defender
142 East Market Street
Johnson City, Tennessee 37601

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Elizabeth T. Ryan
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

David E. Crockett
District Attorney General

Kent W. Garland
Assistant District Attorney General
P.O. Box 38
Jonesboro, Tennessee 37659

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Lloyd Mills Matthews, Jr., was indicted by a Washington County Grand Jury on one count of aggravated rape, one count of rape, and two counts of incest. On October 3, 1994, he entered guilty pleas to one count of attempted incest and one count of attempted aggravated sexual battery and was sentenced to concurrent Range I sentences of three years and six years respectively. Following a sentencing hearing on January 20, 1995, the trial court denied the appellant's request for alternative sentencing and ordered incarceration.

The appellant's sole issue is whether the trial court erred in denying him an alternative sentence. After a careful review of the record on appeal, briefs, and applicable law, we conclude that the trial court did not err when it denied an alternative sentence in this case.

At the sentencing hearing, the appellant admitted fondling both of his daughters many times over several years. He admitted that he digitally penetrated one of his daughters and that he got some pleasure from it. The appellant called five witnesses on his behalf. The witnesses consisted of family and friends who all testified that they believed the appellant was a good, honest, hard-working man who would abide by the conditions of probation. Additionally, one of these witnesses stated that she did not believe that the appellant had committed the crimes even though he had admitted that he had. The appellant's first cousin, testified that although she believed the abuse occurred, she believed that the crimes were the appellant's daughters' fault. The victims' mother testified on behalf of the appellant. She acknowledged that she would stand by her husband notwithstanding the fact that she knew that the allegations of abuse by her husband against her daughters were true. She believed that the appellant was a good man and a good father. Initially, Mrs. Matthews did not believe the allegations raised by her children against her husband. During the hearing it was revealed that when the older of the two victims was a small child, between six and eight years old, she told her mother that the

appellant had been molesting her. At that time, Mrs. Matthews accused her daughter of lying and the child was sent to live with relatives for awhile. When this young victim returned to her house, the sexual abuse resumed.

The presentence report indicates that the appellant has a previous criminal history of several misdemeanor convictions. The most recent of these convictions occurred in 1970. The appellant dropped out of high school in the tenth grade and is currently employed as a heavy equipment operator with a construction company. The vice president of the construction company sent a letter to the court which was made an exhibit to the hearing. It stated that the appellant is an excellent employee and that his job is secure.

Also an exhibit to the hearing was a report from Counseling and Consultation Services, Inc., where the appellant underwent a psycho-sexual evaluation. The evaluation revealed the appellant to be passive, guarded about his sexual experiences, and defensive when discussing his sexual arousal responses. The author of the report opined that the appellant is extremely out of touch with his emotions and suffers from substantial distortions about human sexuality. One such distortion exhibited by the appellant, and common to sexual offenders, is the belief that a child will never have sexual contact with an adult unless the child really wants to. The report indicated that the appellant unjustifiably minimizes his own risk for re-offending. The report details admissions by the appellant that he began molesting his older daughter when she was five or six years old. However, at the sentencing hearing the appellant denied molesting the child when she was that young. The report indicates that the appellant was not being completely truthful with his counselors concerning his sexual experiences. The report recommended intense psycho-sexual counseling for the appellant, and that it was possible, with such intense therapy, that the he could be rehabilitated and the risk that he would sexually abuse others could be minimized.

Both victims testified to the serious emotional pain suffered as a direct result of their father's criminal conduct. The older daughter, sixteen years old at the time of the hearing, gave powerful testimony about the devastating effects which her father's sexual abuse continues to have on her. She testified that the sexual abuse by her father had occurred for many years on an almost daily basis. Additionally, a letter she wrote to the court, which was made an exhibit to the hearing, detailed what can only be described as the complete collapse of a young woman's world at the hands of her sexually abusive father.

When a defendant complains of his or her sentence, we conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990 Repl.). This presumption, however, is conditioned upon an 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). However, the burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments.

In determining an appropriate sentence, the Court shall consider the following: (1) any evidence from the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the nature and characteristics of the offense; (5) information offered by the parties concerning enhancing and mitigating factors as found in Tennessee Code Annotated sections 40-35-113 and 114, and (6) the defendant's statement in his or her own behalf concerning sentencing. Tenn. Code Ann. § 40-35-210(b) (1995 Supp.).

The appellant argues that it was error for the trial court to deny probation or some other form of alternative sentencing. As a defendant with no significant criminal history convicted of a class C felony and a class D felony, the appellant was "presumed to be a favorable candidate for alternative sentencing." Tenn. Code Ann. §

40-35-102(6) (1995 Supp.). However, this presumption may be overcome by "evidence to the contrary." Id.

"Evidence to the contrary" may include a finding that one or more of the following sentencing considerations apply.

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (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.

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

Insofar as they are relevant to the -103 considerations, courts may apply the mitigating and enhancing factors set forth in Tennessee Code Annotated, section 40-35-113 and-114. See Tenn. Code Ann. § 40-35-210(b)(5) (1995 Supp.); State v. Tony Lynn Zeolia, No. 03C01-9503-CR-00080 (Tenn. Crim. App., at Knoxville, March 21, 1996). Finally, Tennessee Code Annotated section 40-35-103(5) provides that in determining whether an alternative sentence is appropriate, courts should consider the defendant's potential or lack of potential for rehabilitation

In this case, the trial court gave the following reasons for denying alternative sentencing.

> (1) Confinement is necessary because the appellant has a long history of criminal conduct involving repeated sexual offenses against innocent victims over years;
>
> (2) Confinement is necessary to avoid depreciating the seriousness of the offenses committed; and,
>
> (3) Confinement is necessary to provide an effective deterrence to others.

The record on appeal contains no evidence indicating the need in the community for a general deterrence. Given the state of the record, general deterrence was not an appropriate factor upon which to deny an alternative sentence. See State

v. Ashby 823 S.W.2d at 170; State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). However, the remaining two considerations are well-supported by the record, and accordingly, we affirm the judgment of the trial court.

The trial court found the testimony of the victims in this case to be credible while finding the testimony of the appellant and his witnesses generally incredible. The court found that the appellant had unlawful sexual contact with his younger daughter on an almost daily basis. This conduct resulted in a guilty plea to attempted incest for which the appellant received three (3) years. The trial court found, and the evidence supports, that the appellant sexually penetrated his older daughter and had other unlawful sexual contact with her on a regular basis for years, for which he pled guilty to attempted sexual battery and received the maximum sentence of six (6) years. The court found that although not prosecuted for the crime, the appellant molested his older daughter when she between six and eight years old. Based upon these findings the court stated that "[i]t would appear [the appellant has] committed hundreds of criminal offenses" and concluded that the appellant had a substantial history of criminal conduct. We agree that the evidence in this case supports a denial of alternative sentencing based upon the long-standing and extensive criminal conduct of the appellant which was revealed during the sentencing hearing.

We also agree that incarceration was necessary in order to avoid depreciating the seriousness of the offenses. In order to deny an alternative sentence because incarceration is necessary to avoid depreciating the seriousness of the offense, the court must find that 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, as committed, must outweigh all factors favoring probation. State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981); see also State v. Hartley, 818 S.W. 2d 370, 374-75 (Tenn. Crim. App. 1991). The trial court found that the crimes were committed to gratify the appellant's's

desire for pleasure, and that in perpetrating these crimes, the appellant abused a position of trust. See Tenn. Code Ann. 40-35-114(7),(15) (1995 Supp.).

In reviewing the propriety of a sentence, this court will look beyond a plea agreement to determine the true circumstances of an offense. See State v. Hollingsworth, 647 S.W.2d 937, 939 (Tenn. 1983); State v. Raymond Benton Dupree, No. 01-C01-9305-CC-00158 (Tenn. Crim. App., at Nashville, March 17, 1994), perm. to appeal denied (Tenn. 1994). The record clearly shows that the abuse suffered by the victims in this case was unrelenting and occurred over many years. Further, it is clear that evidence would have supported a conviction for the sexual penetration of the appellant's older daughter because on at least one occasion when she was between eleven and thirteen years old, the appellant digitally penetrated her vagina. Obviously, a conviction for this crime would have rendered the appellant ineligible for an alternative sentence.

The trial court took into account the appellant's "good" social history, but found that it should be given very little weight considering the magnitude of the appellant's criminal conduct. In addition, although the appellant apologized to the children in court, the trial court found that the appellant was not truly remorseful.

Based upon the facts of this case, we hold that the record fully supports the trial court's determination that the nature and circumstances of these crimes were especially reprehensible, offensive and of an exaggerated degree and outweighed all factors favoring alternative sentencing. See State v. Gary Samuel Vaughn, No. 2 (Tenn. Crim. App., at Jackson, June 15, 1988), (holding sexual abuse by father of seventeen year old daughter over a three year period was "especially ... horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree...").

Another reason cited by the trial court for denying an alternative sentence was its finding that the appellant's potential for rehabilitation was poor. The court based

this determination on its findings that the appellant was not truly remorseful, had a strong sexual attraction to children, and was not being truthful with the court or counselors. We conclude that the trial court appropriately considered the appellant's poor prospects for rehabilitation as a factor militating against an alternative sentence.

The evidence sufficiently overcame the presumption that the appellant was a favorable candidate for alternative sentencing. We, therefore, hold that the trial court did not err when it ordered the appellant to serve his sentence in the Tennessee Department of Correction.

Accordingly, the judgment of the trial court is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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DAVID G. HAYES, JUDGE