IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

FILED

October 29, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9509-CC-00297
	)	
	)	Marshall County
v.	)	
	)	Hon. Charles Lee, Judge
	)	
BEN INGRAM,	)	(Selling over one-half gram of a
	)	Schedule II controlled substance --
Appellant.	)	3 counts)

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Ben Ingram, pled guilty in the Marshall County Circuit Court to three counts of selling over one-half gram of cocaine base, a Schedule II controlled substance. As a Range I, standard offender, the defendant received for these Class B felonies three concurrent eight-year sentences. However, the trial court ordered the defendant to be placed in the community corrections program, subject to serving 365 days in jail (work release granted), followed by 323 days house arrest, with the balance of the sentence to be suspended with the defendant on probation for a period of ten years. In this appeal as of right, the defendant contends that the trial court erred in allowing a presentence report to be considered which contained information regarding a mere arrest and in imposing too severe a sentence . We believe the defendant was properly sentenced.

The record reflects that on August 31, 1994, the defendant sold three small plastic bags containing crack cocaine to a confidential informant. In exchange for the drugs, the informant gave the defendant one hundred dollars. The sale was tape recorded and observed by a police officer. Similar sales under surveillance were conducted on September 16 and 19, 1994.

The sentencing hearing[1] revealed that the defendant was a nineteen-year-old, high school graduate with a decent work history. He testified that he was charged in September 1993[2], as a juvenile, with breaking and entering and criminal trespass and that the charges were dismissed for failure to prosecute. The defendant stated that the confidential informant was a family friend who had even lived with his family for three

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[1] Unfortunately, neither party's brief includes a statement of the facts developed at the sentencing hearing, although it constitutes the primary source of the trial court's sentencing decision.

[2] The presentence report reflects that these charges were brought in general sessions court at a time when the defendant was eighteen years old.

months. He denied using cocaine, himself, and said that he had obtained the crack cocaine from a person in the projects known to him as Joe. He claimed not to know anything else about the man, but noted that Joe rode with him to the informant's home where the sales occurred.

The parties stipulated that the Marshall County sheriff would have testified that the sale of drugs, particularly crack cocaine, was a serious problem that was on the increase in Marshall County. The trial court stated that it would have sent the defendant to the penitentiary, but for his young age. It noted his previous good record and the support he had from his family, but it also found that his attitude, exhibited during his testimony, was poor and that his testimony was not truthful regarding the sequence of events, primarily concerning the source of the drugs. The trial court then imposed the sentences in the manner previously noted.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. See T.C.A. § 40-35-401(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence. See State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

The defendant complains that the trial court relied upon a record of the defendant's previous arrest. He argues that the fact of the arrest should not have been considered by the trial court for any purpose. We agree that the mere fact a defendant is arrested should have no bearing on his sentence. See State v. Marshall, 870 S.W.

2d 532, 542 (Tenn. Crim. App.), app. denied, (Tenn. 1993). Contrary to the defendant's view, though, we believe that the trial court effectively gave the previous charges no weight in its sentencing determinations.

Relative to his desire for a more lenient sentence, the defendant complains about the trial court's lack of specific findings regarding his attitude or untruthfulness. We respectfully disagree with the defendant's evaluation of the record. The record reflects that the defendant responded rather insolently during cross-examination and that, regarding truthfulness, the trial court was focused upon the defendant's explanation of how he knew where to get drugs. Given the fact of the defendant's involvement in three crack cocaine sales, the record reflecting his lack of remorse, and the record not rebutting the trial court's findings, the defendant has not overcome the presumption that the trial court's determinations are correct. The judgments of conviction are affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Gary R. Wade, Judge

_____
William M. Barker, Judge