IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION



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| STATE OF TENNESSEE, | ) | |
| | ) | |
| Appellee, | ) | NO. 03C01-9505-CR-00130 |
| | ) | |
| | ) | McMINN COUNTY |
| V. | ) | NO. 94-620 and 94-621 |
| | ) | |
| | ) | HON. R. STEVEN BEBB, JUDGE |
| SHIRLEY ANNETTE KIRBY, | ) | |
| | ) | (Sale of marijuana, two counts) |
| | ) | |
| Appellant. | ) | |

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OPINION FILED:_____

Affirmed

Lee Russell, Special Judge

## OPINION

_____This appeal is taken as of right from the trial court's requirement that the Defendant serve thirty days of a two year sentence imposed at a sentencing hearing following pleas of guilty to two charges of selling a Schedule VI controlled substance. The Defendant contends that the trial court should have suspended the entire period of her concurrent sentences based upon the presumption contained in Tennessee Code Annotated § 40-35-102(6). The State contends that the trial judge properly required service of thirty days of incarceration based upon the need to deter the sale of drugs and based upon the Defendant's untruthfulness in the information she provided for her presentence report. This court affirms the trial court's requirement of incarceration for thirty days.

On June 29, 1993, an agent of the C.I.D. Department of the Tennessee Highway Patrol visited the home of the Defendant, Shirley Kirby, to attempt to purchase marijuana from the Defendant. The agent gave the Defendant $1,150.00 with which to make a purchase, and one of the Defendant's three children present in the home asked the agent whether he wanted a "half" or a "quarter", obviously referring to the amount of marijuana to be purchased. The agent responded that he wanted a half. The Defendant returned to her home in forty minutes and delivered a large plastic bag of marijuana to the agent. A second controlled purchase from the Defendant occurred on July 7, 1993.

The July, 1993, term of the McMinn County Grand Jury returned indictments on two counts of the sale of marijuana in an amount more than one half ounce but less than ten pounds, in violation of Tennessee Code Annotated § 39-17-417(g)(1). The Defendant subsequently entered pleas of guilty to two counts of selling a Schedule VI controlled substance. At a sentencing hearing on December 5, 1994, the trial judge sentenced the Defendant to two two year terms, one term for each of the two offenses, and allowed the sentences to run concurrently. The trial judge fined the Defendant $2,000.00 for each offense and required her to serve only thirty days of her sentence, plus thirty days of community service, with the balance of her sentence suspended. The

Defendant appeals only the requirement that thirty days of the sentence be served.

No live testimony was offered at the sentencing hearing. The only evidence was the stipulated presentence report, plus representations made by counsel. The report revealed that the Defendant was a thirty-three year old female who had been married to the same husband, a co-defendant, since 1978. The Defendant had three children and was gainfully employed as an inspector at Damien Industries, where she has worked since 1988. This employer advised that the Defendant would be able to keep her job if her sentences were suspended. The presentence report indicated that the Defendant had no prior criminal record, and the report contained this assessment by the author of the report: "Because of the Defendant's apparent lack of a prior criminal record and her expressed remorse, it is the opinion of this officer that Mrs. Kirby may be a good candidate for a suspended sentence, unsupervised."

The presentence report contained this handwritten statement by the Defendant: "This incident was a one time offense and I deeply regret doing it." The presentence report included the statement of the agent who made the controlled purchase, and the agent reported as follows concerning the occasion of the first purchase: "Before [the Defendant] left, one of the kids went to the door [of the mobile home] as [the Defendant] was turning around and asked this writer whether this writer wanted a half or a quarter referring to marijuana."

At the sentencing hearing the trial judge made this statement:

> Now, in this case I want you all to realize one thing: I want you to realize right quick that this Court does not believe for one instant, one instant, that this was your only involvement in selling marijuana, and I don't believe that because it is ludicrous to believe it, and it is ludicrous even more so when you read the undercover agent's side of what happened here when you left, Mrs. Kirby, to go get these drugs one of the children said, "Did you want a half or a quarter?" I mean to me, you know, maybe you have got three children and maybe you are good parents, I don't know, but it sounds to me like you had them involved in a criminal enterprise. And I do not believe for one instant that this is a one time offense. However, I must take into consideration that you have no prior convictions. . . .

There is no evidence in the record concerning the extent of the drug problem in McMinn County, and there is no explicit discussion of the presumption in favor of alternative

sentencing, the overcoming of that presumption, or of precisely how the trial judge's disbelief of the Defendant's claim to be a first time offender entered into his decision to require her to serve thirty days of incarceration.

The Defendant in this case was eligible for consideration of probation based upon Tennessee Code Annotated § 40-35-303(a). Tennessee Code Annotated § 40-35-303(b) states that the burden of establishing suitability for probation at the trial court level rests with the criminal defendant. Under Tennessee Code Annotated § 40-35-401(d), this appellate court's review of the manner in which a trial judge orders a criminal defendant to serve a sentence is *de novo* with a presumption of the correctness of the trial judge's determination. This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles contained in the Sentencing Reform Act and considered all relevant facts and circumstances. See *State v. Ashby,* 823 S.W.2d 166, at 169 (Tenn. 1991). The Sentencing Commission Comments to Tennessee Code Annotated § 40-35-401 state that the burden of showing on appeal that the sentence is improper is upon the appealing party.

Review *de novo* of the partial denial of probation requires application of the sentencing principles set forth in Tennessee Code Annotated § 40-35-103 to the facts and circumstances in the record which are deemed relevant in Tennessee Code Annotated § 40-35-210(b). These facts and circumstances include the evidence at the sentencing hearing, the presentence report, the arguments of counsel as to sentencing alternatives and on other issues, the nature and characteristics of the criminal conduct involved, the prior criminal record of the criminal defendant, any statement by the criminal defendant and any other evidence in the record which bears on the criminal defendant's potential for rehabilitation.

A criminal defendant is rebuttably presumed to be entitled to a sentence not involving incarceration provided that he or she meets the requirements of Tennessee Code Annotated §40-35-102(6). The State concedes that the presumption exists in this

case, and the issue then is whether the State presented sufficient evidence at the sentencing hearing to rebut the presumption. The evidence to overcome the presumption must be of a type which bears on the sentencing considerations set out in Tennessee Code Annotated §40-35-103. The consideration contained in Tennessee Code Annotated §40-35-103(1)(A) applies to defendants who have long histories of criminal conduct, and that does not apply to the Defendant here. The consideration contained in Tennessee Code Annotated § 40-35-103(1)(C) applies to defendants for whom less restrictive measures have "frequently or recently been applied unsuccessfully." This consideration does not apply because this Defendant has not previously been the object of discipline by the court system. The consideration contained in Tennessee Code Annotated § 40-35-103(1)(B) is whether confinement is "necessary to avoid depreciating the seriousness of the offense or where incarceration is particularly suited to provide an effective deterrence to others likely to commit similar offenses." This consideration, plus the consideration of rehabilitation potential mentioned in Tennessee Code Annotated § 40-35-103(5), have application to the facts of the case now before this court.

The Defendant argues that there was insufficient evidence presented by the State at the sentencing hearing to rebut the presumption in favor of alternative sentencing. The Defendant points out a number of facts contained in the presentence report which in fact support the granting of probation, including lack of any prior criminal record, a good employment record, a stable marital relationship, and expressions of remorse. The Defendant relies heavily on the case of *State v. Hartley,* 818 S.W.2d 370 (Tenn. Crim. App. 1991), for the proposition that the presumption of suitability for alternative sentencing has not been overcome by the State.

At the sentencing hearing in the present case, the trial judge did not explicitly acknowledge the existence of the presumption in favor of alternative sentencing and did not expressly acknowledge any requirement on the State to overcome that presumption. The trial judge did not state expressly that the presumption had been overcome and did

not recite in any formal manner to which of the sentencing considerations he applied the facts which he found in order to overcome the presumption in favor of alternative sentencing. However, it is implicit in the trial judge's statements and actions at the sentencing hearing that he made the appropriate analysis required by statute. First, the trial judge suspended a year and eleven months of the sentence, all except one month or about four percent of the sentence. The trial judge expressly referred to the absence of a prior criminal record as a "factor" in suspending most of the sentence. He made a finding that the Defendant had been untruthful in providing information for the presentence report and points out that the Defendant had exposed her minor children to a criminal enterprise, both factors that a trial judge can legitimately consider when applying the sentencing considerations contained in Tennessee Code Annotated §40-35-103, as discussed below. Finally, although the trial judge did not mention deterrence and heard no testimony on the need to deter drug use in McMinn County the State asserts that the trial judge considered deterrence as a sentencing consideration in this case. Therefore the untruthfulness of the Defendant, the need for deterrence of the crimes and the nature of the crime and its surrounding circumstances, are the sentencing considerations to be considered in our review of this partial denial of probation.

The trial judge concluded that the Defendant had been untruthful because she denied in a written statement prepared for her presentence report that she had previously been dealing drugs. The trial judge logically inferred from the agent's report of his conversation with the Defendant's child that the child had witnessed prior drug sales by the Defendant. The child demonstrated a knowledge of the jargon of the drug trade and demonstrated a knowledge of the appropriate inquiry to be made of a customer in a drug transaction. The child was allowed by the Defendant to be present for the transaction, suggesting familiarity with such transactions and reflecting no fear of an adverse reaction to a first exposure to drug dealing. The evidence was that the Defendant's minor children lived in this home, with both their parents, and not in another household where they might have been exposed to drug trafficking. The trial judge's inference of untruthfulness on the part of the Defendant is altogether justified.

Untruthfulness by a criminal defendant is a factor that may be considered in determining the appropriateness of probation. See *State v. Chrisman,* S.W.2d 1834, 840 (Tenn. Cr. App. 1994); *State v. Byrd,* 861 S.W.2d 377, 380 (Tenn. Cr. App. 1993); *State v. Neely,* 678 S.W.2d 48, 49 (Tenn. 1984); *State v. Bunch,* 646 S.W.2d 158, 160 (Tenn. 1983). Lack of truthfulness is probative on the issue of amenability to rehabilitation, the impetus behind probation. *See Byrd; United States v. Grayson,* 438 U.S. 41, 50, 98S.Ct. 2610, 2616, 57 L.Ed.2nd 582 (1978). Prior to passage of the Sentencing Reform Act, untruthfulness at trial could be the primary and indeed the only expressed grounds for denying probation, provided that the untruthful statements were more than a mere refusal to admit guilt. *See State v. Bunch,* 646 S.W.2d at 160. Untruthfulness at a sentencing hearing as opposed to untruthfulness at trial, has expressly been held to be a factor that may be considered in denying probation. *See State v. Dykes,* 803 S.W.2d 250 (Tenn. Cr. App. 1990).

The nature of the offense and circumstances surrounding the offense are important considerations in determining suitability for probation but is only one consideration and will not by itself warrant denial of probation unless the act was "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." *See Byrd,* 861 S.W.2d at 380; *Hartley*, 818 S.W.2d at 374; *State v. Travis,* 622 S.W.2d 529, 534 (Tenn. 1981). In the present case, the Defendant mother not only allowed drug sales to occur in the family home where her three minor children lived and in the presence of one or more of the children, but she also allowed this to occur with enough frequency for one of the children to learn the jargon and the appropriate inquiries to be made of customers. The Defendant allowed a minor child actually to participate in the transaction by consulting the customer. Such conduct is at the very least reprehensible and offensive, and although it might not standing alone justify denial of probation, it is certainly a factor to be considered in assessing whether probation would depreciate the seriousness of the offense and whether denial of probation would deter similar offenses.

Deterrence of crime is a valid consideration, at least where there is proof of a specific kind of crime problem in a specific industry. *See Byrd, 861 S.W.2d* at 380 (thefts of jewelry by jewelry store employees). On the other hand, it has been held that a finding of deterrence cannot be conclusory only but must be supported by proof. *See State v. Ashby,* 823 S.W.2d 166, at 170 (Tenn. 1991) (sixty year old retired farmer reselling prescription valium). In order to be the sole grounds for denying probation, there should be proof that those likely to violate criminal laws will be deterred by the incarceration of this particular criminal defendant, because a need to deter is inherent in every crime and is not by itself a realistic and reasonable way to distinguish between those who should receive probation and those who should not. *Id.*

In the *Dykes* case, relied upon by the State and decided under the Sentencing Reform Act, drug trafficking was singled out as particularly in need of deterrence and as being a problem of such statewide magnitude as to obviate the necessity of producing a great deal of location-specific evidence on the need to deter. This court held as follows while affirming denial of probation:

> Deterrence is also a factor which may be considered. Today, the sale and use of illicit narcotics are running rampant in every Tennessee community. While our federal government, state government, local government, and law enforcement officials are continually taking steps to curtail the sale and use of illicit narcotics as well as to rehabilitate the users, drug trafficking continues to flourish. In fact, the gross sales and use of narcotics continue to increase annually; and crimes that are directly related to the sale and use of illicit narcotics also continue to increase.
>
> While the record is void of any evidence that the sale or use of drugs is running rampant in Hawkins County, this crime is deterrable *per se.* There has been and is an increasing public awareness of the need to deter individuals who engage in the sale of illicit narcotics; and this awareness continues to be a matter of growing concern. Therefore, the [Defendant] is not entitled to probation due to the deterrent effect that such judgment will have on those who are engaged in like or similar conduct.

*Id.* at 260.

In the *Hartley* case on which the Defendant relies, the eighteen year old accused was a guest in the home of the intended object of a controlled buy of cocaine. The

contact called the home, and the homeowner stated that he did not at that time have access to any cocaine. Another guest in the home spoke up that he might be able to obtain a quantity of the drug. The homeowner could not leave the premises to drive the other guest to his source because the homeowner was babysitting his nephew. Therefore Defendant Hartley drove the vehicle that transported the other guest to his source and ultimately was arrested in the vehicle in which the other guest had the cocaine. There was no evidence that Defendant Hartley had any pecuniary interest in the transaction, but he was of course aware of why he was transporting the other man.

The trial judge in *Hartley* sentenced the young man to three years in the workhouse and declined to grant probation. Defendant Hartley had only relatively minor offenses on his record, had a job available to him if he could receive probation, was enrolled in high school, and expressed remorse for his actions. The trial judge denied probation after noting that cocaine is a "particularly bad kind of poison" and equating it with "shooting a rifle in a crowd." The trial judge stated that although he was not saying that he "would never grant probation . . . it would have to be a very unusual case and this is not an unusual case." This court reversed the denial of probation and ordered probation with split confinement.

In *Hartley* this court held that the trial court imposed its own standard for suitability for probation "which was not authorized by the law in effect at the time of sentencing." *Id.* at 374. This court held, "Once the legislature has specifically authorized the use of sentencing alternatives to confinement for a particular offense, trial courts may not summarily impose a different standard by which probation is denied solely because of the defendant's guilt for that offense." *Id.* The court in *Hartley* noted that neither Tennessee Code Annotated § 40-35-103(1)(A) nor 103(1)(C) applied because of the limited past record and absence of past confinement of Defendant Hartley. Focus was therefore on subsection 103(1)(B), the issue of whether confinement was necessary to avoid depreciating the seriousness of the offense or confinement was particularly suited to provide an effective deterrence to others likely to commit similar offenses. *Id.* The

court found that subsection 103(1)(B) could not be relied upon to overcome the presumption of suitability because Defendant Hartley had a minor role in the offense, no personal intent to commit a crime, and no financial interest in the transaction. *Id.* at 375.

The court in *Hartley* noted that probation may properly be denied based solely on the circumstances surrounding the offense, but only where the circumstances of the offense committed are "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." *Id.* at 374; *State v. Cleavor,* 691 S.W.2d 541, 543 (Tenn. 1985). The court in *Hartley* appeared to hold that the need for deterrence in drug cases, in the abstract and not tied to conditions in the judicial district, and standing alone as a sentencing consideration, would not support a denial of probation under Tennessee Code Annotated § 40-35-103(1)(B). *Id.* at 375.

The various cases examining the need for deterrence as a sentencing consideration can readily be reconciled. There is a general acknowledgment of a widespread and serious problem with drugs which must be deterred. However, the General Assembly has not seen fit to declare drug offenders as a group unfit for probation, and therefore the usual sentencing criteria should be applied. When a past criminal history or repeated or recent failures to rehabilitate are not present, then an examination is made of the particular offender or the particular locality to determine whether there is, under Tennessee Code Annotated § 40-35-103(1)(B), a need to avoid depreciating the seriousness of an offense or to deter others likely to commit similar offenses. In the case of a sixty-odd year old farmer who resells only valium prescribed to him, there is no uniquely acute need to deter, as the *Ashby* court held. In the case of a very young adult who drove a vehicle for a casual seller of drugs and who had no pecuniary interest in the transaction and provided neither the drugs nor the customer for them, there is relatively little likelihood of depreciating the seriousness of the offense or of others committing similar offenses, as the *Hartley* court held. In the case of a seller of marijuana making multiple sales of marijuana to a stranger, who also at trial presents an elaborately concocted and fraudulent alibi for his whereabouts at the time of the sales,

there is a need to deter others and to avoid depreciating the seriousness of the offense, as the *Dykes* court held.

In the case *sub judice,* the trial judge concluded, based on a very reasonable interpretation of the facts, that the Defendant was a repeat seller of marijuana in relatively substantial quantities, half and quarter bags, out of her own home. This conduct clearly needed to be deterred, especially as it involved sales in the presence of and with the participation of one or more minor children. The need to deter other similar activity, the need not to depreciate the seriousness of involving children in the drug trade, and the logical conclusion that the Defendant was untruthful in submitting information for her presentence report combine to support a finding that the trial judge was correct in determining that the State overcame the presumption of suitability for alternative sentencing.

The judgment of the trial court is affirmed.

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_____LEE RUSSELL, SPECIAL JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

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JOHN K. BYERS, SENIOR JUDGE