

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1996 SESSION

FILED
Dec. 31, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)	
)	No. 02-C-01-9501-CR-00312
APPELLEE,)	
)	Shelby County
v.)	
)	William H. Williams, Judge
)	
JOHN L. RYAN,)	(Obtaining a Controlled Substance
)	by Fraud, Misrepresentation and
)	Deception)
APPELLANT.)	

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OPINION FILED: _____

AFFIRMED AS MODIFIED

Joe B. Jones, Presiding Judge

OPINION

The appellant, John L. Ryan, entered pleas of guilty to eight counts of obtaining a controlled substance by fraud, misrepresentation and deception, a Class D felony, without any agreement as to punishment. After a sentencing hearing, the trial court found that the appellant was a standard offender and imposed a sentence consisting of a \$5,000 fine and confinement for four (4) years in the Shelby County Correctional Center on each count. The effective sentence imposed was confinement for four (4) years and fines totaling \$40,000. In this Court, three issues are presented for review. The appellant contends that the fines imposed by the trial court were excessive, the term of confinement was excessive, and the trial court should have granted him an alternative sentence. After a thorough review of the record, the briefs submitted by the parties, and the authorities that control the issues, it is the opinion of this Court that the judgment should be affirmed as modified.

In 1978, the appellant developed gallstones. This caused the appellant to suffer considerable pain. He opted not to have surgery. His doctor prescribed Demerol to ease the pain. He took this medication for six years. He finally decided to have the gallstones removed. The medication was no longer necessary.

In 1986, the appellant was diagnosed as having arthritis in his knees, ankles, and feet. His doctor prescribed Wygensic to alleviate the pain. He continued to take this medication until he was arrested for the offenses of which he now stands convicted.

The appellant admitted at the sentencing hearing that he had smoked marijuana on a few occasions. He also admitted that he ingested cocaine at two different time intervals. He first used cocaine in either 1983 or 1984 after he graduated from college. He used this substance until his source left the city. He also ingested cocaine in 1991 or 1992. Again, he used the substance until his supplier left the city. According to the appellant, he ingested cocaine for approximately ninety days on each occasion. He admitted he "used it quite a bit" whenever he could obtain it. He did not quit until he was arrested.

The appellant became addicted to the pain medication. The Wygensic medication that he was obtaining by a valid prescription was not adequate to satisfy his addiction. The

appellant was aware that he had an addiction. However, he did not seek assistance to overcome the addiction. To the contrary, he began obtaining a variety of pain medication without a valid prescription.

The appellant met Linda K. Campbell, a pharmacist at a Walgreen's Drug Store, through a friend and fraternity brother who was dating Ms. Campbell. The appellant approached Ms. Campbell late one evening at her place of employment, advised her of his medical condition, advised her that he was leaving town the next morning, and he needed a refill of his prescription. Ms. Campbell checked the computer. She found that he had a history of taking the medication. However, the prescription had expired, and there were no further refills available. It was too late to call the doctor. She decided to provide the appellant with the medication. The appellant subsequently approached Ms. Campbell and asked her to refill the prescription a second time. She provided the appellant with the medication without a valid prescription authorizing the dispensing of the medication.

When the appellant sought a third refill without a valid prescription, Ms. Campbell advised the appellant that she could not supply him with additional medication without a valid prescription. She was acutely aware that she could have her license revoked if what she had done was detected. The appellant reminded Ms. Campbell that he was an assistant district attorney general. He also told her that "he could turn it into something it wasn't." Ms. Campbell considered this a threat. She thought that the appellant "was going to somehow report [what she had done] to the Board of Pharmacy and make it look like it was [her] fault." Based on these circumstances, Ms. Campbell furnished the appellant with Wygensic, Darvocet, Hydrocodone, and Phenaphen with Codeine.

The appellant apparently obtained a prescription pad from Ms. Campbell. He would prepare the prescription, name the drug of his choice, the number of refills, show himself or a fictitious person as the patient, and forge the name of a doctor. He used several names for "the patient" who had been prescribed the medication. According to Ms. Campbell, the appellant was getting the pain medication every two weeks.

This arrangement lasted for approximately eighteen months. The appellant submitted as many as thirty prescriptions. Most of the prescriptions called for as many as five refills. Each prescription and refill was for 100 pills. In short, the appellant acquired

several thousand pills from Ms. Campbell. It continued until the arrangement was discovered by police officers.

Although Ms. Campbell furnished the appellant with the names and telephone numbers of doctors who could assist the appellant with his addiction, he did not contact any of the doctors. However, once the scheme was discovered, he sought help with his addiction. He was confined to a hospital for approximately thirty days. He saw psychiatrists and psychologists. He also sought the assistance of group therapy offered by such agencies as Alcoholics Anonymous and Lawyers Helping Lawyers, which is sponsored by the Memphis Bar Association. Two lawyers who assisted him in the bar association program testified at the sentencing hearing. A prominent Memphian who attended the same group programs with the appellant testified. Other prominent Memphians and elected officials wrote letters supporting the appellant.

I.

When an accused challenges the length of a sentence or how a sentence must be served, it is the duty of this Court to conduct a de novo review of the record with a presumption that “the determinations made by the trial court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-30-401(d). This presumption is “conditioned upon the 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). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused or to the determinations made by the trial court that are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App., 1993). However, when the facts are controverted, this Court must give great weight to the trial court’s determination of the witnesses’ credibility based upon the court’s observations regarding the demeanor and appearance of each witness.

In conducting a de novo review of a sentence, this Court must consider (a) any

evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987). The accused, as the appellant, has the burden of establishing that the sentences imposed were erroneous based upon these factors. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311.

II.

The trial court found that two enhancement factors were supported by the record: (a) the appellant was a leader in the commission of the offenses, Tenn. Code Ann. § 40-35-114(2); and (b) the appellant abused a position of public trust, Tenn. Code Ann. § 40-35-114(15). The appellant contends that the trial court abused its discretion by using factor (15) to enhance his sentence within the appropriate range.

As previously stated, when Ms. Campbell advised the appellant that she was not going to provide him additional pain medication, he reminded her that he was an assistant district attorney general. He also told her that "he could turn it into something it wasn't." Ms. Campbell considered this a threat. There can be no question that the appellant wanted Ms. Campbell to think that he held a position of authority and respectability. She thought that the appellant "was going to somehow report [what she had done] to the Board of Pharmacy and make it look like it was [her] fault." This is precisely the fear that the appellant sought to impose through the use of his office as an assistant district attorney general. While the appellant denied this happened, the trial court specifically found that Ms. Campbell was the more credible witness. In summary, the state established factor (15) and the trial court properly used it to enhance the appellant's sentences within the appropriate range. See State v. Dockery, 917 S.W.2d 258 (Tenn. Crim. App. 1995).

The record is replete with criminal acts committed by the appellant. The unindicted

crimes of procuring drugs in the same manner, the use of marijuana, and the use of cocaine constituted criminal behavior within the meaning of Tenn. Code Ann. § 40-35-114(1). This behavior was not an element of the offenses of which the appellant stands convicted. Furthermore, the appellant candidly admitted that he committed these offenses during his testimony at the sentencing hearing. Each possession of marijuana and cocaine constituted a separate offense. Each acquisition of pain medication other than those for which he was convicted constituted a separate offense. Based upon evidence adduced during the sentencing hearing, there were over 100 unindicted acquisitions of pain medication by fraud, misrepresentation, and deception.

The trial court should have considered Tenn. Code Ann. § 40-35-113(1) as a mitigating factor albeit this factor has very little weight in determining the length of the sentences in this case. The appellant neither caused nor threatened serious bodily injury to Ms. Campbell or any other person. Also, the trial court should have considered the appellant's remorse as a mitigating factor. Tenn. Code Ann. § 40-35-113(13). The trial court did not make a finding of fact on this issue. The record does establish that the appellant did have remorse.

III.

The appellant next contends that the fines imposed by the trial court were excessive. The appellant testified that he was an expert regarding autographs of historic and noted individuals. He has a collection of autographs and the silver of a famous Civil War general. The presentence report states that the collection is worth \$200,000. He made \$20,000 the year before the sentencing hearing from this business. He testified that he has made "six figures" in past years. He also owns a house. He states he owes \$150,000 on the house. There is nothing that establishes the value of the residence. He has a sports car that he valued at \$10,000.

While this Court has the authority to reduce a fine, State v. Bryant, 805 S.W.2d 762 (Tenn. 1991), the trial court did not abuse its discretion in assessing fines totaling \$40,000. The trial court considered the assets of the appellant when assessing the fines. See State v. Marshall, 870 S.W.2d 532, 542 (Tenn. Crim. App.), per. app. denied (Tenn.

1993). The appellant possesses sufficient assets to warrant the imposition of fines totaling \$40,000.

IV.

The appellant sought judicial diversion in the trial court pursuant to Tenn. Code Ann. § 40-35-313. A different standard of review applies when reviewing these issues. This Court reviews the record to determine if the trial court abused its discretion in denying the accused's request for the imposition of such a sentence. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992); State v. George, 830 S.W.2d 79, 80 (Tenn. Crim. App. 1992); Bonestel, 871 S.W.2d at 167. As this Court said in Anderson:

The standard by which we must review a judicial diversion decision is not specifically provided in the 1989 Act. In T.C.A. §§ 40-35-401 and -402, appellate review of the range, length or manner of service of a sentence is de novo upon the record with the trial court's determinations being presumed correct. However, judicial diversion entails more than these sentencing characteristics -- it affects the underlying conviction as well. Also, the sentencing alternatives provided by the legislature in T.C.A. § 40-35-104 do not include judicial diversion.

We conclude that judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under T.C.A. § 40-15-105. Therefore, upon review, if "any substantial evidence to support the refusal" exists in the record, we will give the trial court the benefit of its discretion. State v. Hammerley, 650 S.W.2d 352, 356 (Tenn. 1983). Only an abuse of that discretion will allow us to overturn the trial court.

857 S.W.2d at 572. The accused is not entitled to the presumption of fitness for an alternative sentence pursuant to Tenn. Code Ann. § 40-35-102(6).

The appellant qualifies for judicial diversion. The record reflects that the appellant (a) was convicted of Class D felonies, (b) has never been convicted of a felony or a Class A misdemeanor, and (c) consented to the deferment of the proceedings and the imposition of probation for up to the maximum length of punishment for the crime in question. Tenn. Code Ann. § 40-35-313(a)(1). However, the fact that the appellant qualifies for judicial diversion did not entitle him to such a sentence. Bonestel, 871 S.W.2d at 168. The statute

states that a trial court “may” grant judicial diversion in appropriate cases. In other words, “whether an accused should be granted judicial diversion is a question which addresses itself to the sound discretion of the trial court.” Bonestel, 871 S.W.2d at 168.

The criteria that must be considered in determining whether an eligible accused should be granted judicial diversion includes: (a) the accused’s amenability to correction, (b) the circumstances of the offense, (c) the accused’s criminal record, (d) the accused’s social history, (e) the status of the accused’s physical and mental health, and (f) the deterrence value to the accused as well as to others. See State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). An additional consideration is whether judicial diversion will serve the ends of justice -- the interests of the public as well as the accused. See Hammersley, 650 S.W.2d at 355.

In this case, the trial court did not abuse its discretion in refusing to grant the appellant judicial diversion. The appellant’s pattern of criminal behavior as outlined hereinabove, his position as an assistant district attorney general, the use of his position to intimidate Ms. Campbell, and the need to deter the appellant as well as others support the trial court’s refusal. There was evidence presented that two lawyers were recovering from either drug abuse or alcohol abuse, and another assistant district attorney general had participated in the ingestion of the illicit drugs with the appellant.

V.

The appellant further contends that the trial court should have placed him on immediate probation or imposed a community corrections sentence. As support for this, he cites his amenability for rehabilitation, his health, and his lack of a prior criminal record. Both probation and community corrections are sentencing alternatives. Tenn. Code Ann. § 40-35-104(2) and (8).

When an accused has been convicted of a Class C, D, or E felony and sentenced as an especially mitigated or standard offender, there is a presumption, rebuttable in nature, that the accused is a favorable candidate for alternative sentencing unless disqualified by some provision of the Tennessee Criminal Sentencing Reform Act of 1989.

In this case, the appellant is entitled to the presumption. He was sentenced as a standard offender and he was convicted of Class D felonies.

In State v. Ashby, 823 S.W.2d 166 (Tenn. 1991), the Supreme Court said: "If [the] determination [of whether the accused qualifies for an alternative sentence] is favorable to the defendant, the trial court must presume that he is subject to alternative sentencing. If the court is presented with evidence sufficient to overcome the presumption, then it may sentence the defendant to confinement according to the statutory provision[s]." 823 S.W.2d at 169 (emphasis added). The presumption can be successfully rebutted by facts contained in the presentence report, evidence presented by the state, the testimony of the accused or defense witnesses, or any other source provided it is made a part of the record.

Probation is a privilege or act of grace which may be granted to an accused who is eligible and worthy of this largesse. Stiller v. State, 516 S.W.2d 617 (Tenn. 1974). In determining whether an accused should be granted probation or a community corrections sentence, the trial court and this Court must consider and weigh all of the Stiller factors. State v. Michael, 629 S.W.2d 13, 15 (Tenn. 1982); Franks v. State, 543 S.W.2d 613, 615 (Tenn. Crim. App. 1976). The Stiller factors include the accused's criminal record, social history, present physical and mental condition, the circumstances of the offense, the deterrent effect upon the criminal activity of the accused as well as others, and the accused's potential for rehabilitation or treatment in determining whether the accused should prevail. Stiller, 516 S.W.2d at 620.

This Court is of the opinion that the State of Tennessee rebutted the presumption of fitness for an alternative sentence. The appellant's extensive criminal behavior, his status as an assistant district attorney while he was obtaining the pain medication from Ms. Campbell, the use of cocaine during this period, and the use of his position of trust to intimidate Ms. Campbell were sufficient to rebut the presumption. There is also a need to deter others similarly situated. There is evidence in the record that another assistant district attorney general had consumed illicit drugs with the appellant.

The record establishes that the appellant has arthritis in his knees, ankles, and feet. This can cause extreme pain. The appellant weighed close to 300 pounds when the sentencing hearing was conducted. He is grossly overweight given his short stature. The

record establishes that the appellant is amenable to rehabilitation. The trial court invited the appellant to apply for probation after he had completed a program for recovering alcoholics and those previously addicted to drugs. It is obvious that the trial court thought that the appellant should be confined to jail for some period of time.

This Court believes that justice must be tempered with mercy in certain cases. This case warrants a degree of mercy. The appellant has caused his mother and siblings to suffer severe mental anguish and pain. Of course, the appellant is ashamed of this as well as the reflection his actions have had upon lawyers, more particularly those individuals who are charged with prosecuting citizens who have committed crimes. He too has suffered mentally and physically by the expectation of having to serve a four year sentence. He has lost the right to practice his profession. The effort, energy, and money spent in obtaining a law degree have been wasted. The appellant's medical condition is a major consideration.

It is the opinion of this Court that the appellant must serve six months of the sentence imposed by the trial court day for day. This will be followed by four years of intense probation. The trial court will conduct an evidentiary hearing on remand to determine if the appellant should be permitted to serve the sentence on weekends, straight confinement, straight confinement with the possibility of work release, or any other creative sentence that is apt and fitting given the circumstances in this case. The trial court shall also impose the conditions that the appellant must follow while on probation. These conditions shall include periodic drug screens, a weight reduction program, the continuation of the group meetings heretofore attended by the appellant, and reasonable community service.

A period of confinement is required to avoid depreciating the seriousness of the offenses committed and to deter the appellant and others from engaging in the same or like conduct. Tenn. Code Ann. § 40-35-103(1)(B). The time that the appellant must serve is the least severe measure necessary to achieve the purposes of the sentence imposed. Tenn. Code Ann. § 40-35-103(4). Finally, the appellant has taken the initial steps to rehabilitate himself. Tenn. Code Ann. § 40-35-103(5). Since he is amenable to rehabilitation and treatment, he is being given the opportunity to prove to his family,

society, and, more importantly, to himself, that he can overcome his addiction to drugs.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

DAVID G. HAYES, JUDGE