

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
SEPTEMBER SESSION, 1996

**FILED**

November 27, 1996

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**STATE OF TENNESSEE,** )  
 )  
Appellee )  
 )  
vs. )  
 )  
**CHARLES DAVID WELLS,** )  
 )  
Appellant )

No. 03C01-9512-CC-00385

SULLIVAN COUNTY

Hon. R. Jerry Beck, Judge

(Robbery;Aggravated Assault)

For the Appellant:

Stephen M. Wallace  
District Public Defender

Gale K. Flanary  
Asst. Public Defender  
Post Office Box 839  
Blountville, TN 37617

For the Appellee:

Charles W. Burson  
Attorney General and Reporter

Elizabeth T. Ryan  
Assistant Attorney General  
Criminal Justice Division  
450 James Robertson Parkway  
Nashville, TN 37243-0493

H. Greeley Wells, Jr.  
District Attorney General

Phyllis Miller  
Asst. District Attorney General  
Blountville, TN 37617

OPINION FILED: \_\_\_\_\_

AFFIRMED

**David G. Hayes**  
Judge

## OPINION

The appellant, Charles David Wells, was indicted by a Sullivan County Grand Jury in a two count presentment charging him with one count of aggravated robbery and one count of aggravated assault. Pursuant to a negotiated plea agreement with the State, the appellant pled nolo contendere to one count of robbery as a range II offender and one count of aggravated assault as a range I offender. The agreed sentence was seven years for the robbery conviction and three years for the aggravated assault conviction, to run concurrently. The manner of service of the sentence was left to the discretion of the trial court. Following a sentencing hearing, the Sullivan County Criminal Court denied any form of alternative sentence and imposed a sentence of incarceration in the Department of Correction. The appellant now appeals this decision.

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

### **I. Background**

In the early morning hours of July 28, 1994, the appellant and his co-defendant, Kevin Dykes, prepared to enter the Coastal Mart convenience store in Kingsport. The men were armed with a shotgun and a .22 caliber rifle. They were dressed in dark clothing and their faces were covered. As the two men approached the store, Barney Lee Fields was leaving. One of the men aimed the shotgun at Fields and ordered him to "lay down."<sup>1</sup> The man with the shotgun went inside the store, while the man with the .22 rifle covered Fields. Linda

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<sup>1</sup>Although the presentence report indicates that the shotgun belonged to Dykes, the record does not indicate which man was bearing the shotgun and which man was bearing the rifle.

Marie Given, a clerk at the store, reported that the man with the shotgun demanded that she "give [him] all your money now." While making his request, he aimed the shotgun at Given's face. After obtaining the cash, the two men fled the store on foot. Kevin Dykes later confessed to the crime and implicated the appellant. When questioned by the police, the appellant attempted to blame another person in lieu of himself. However, the police eliminated this individual as a suspect and determined that the appellant and Dykes "definitely committed the robbery." Moreover, although he gave three separate statements to the police, the appellant "never did tell the truth."

At the sentencing hearing on July 28, 1995, the trial court relied upon the information provided in the presentence report along with the testimony of the appellant's mother and fiancée. The appellant declined the opportunity to testify. The presentence report revealed that the appellant was an eighteen year old high school graduate at the time of the offenses. The appellant does not use drugs or alcohol. Although the appellant does not have a prior adult record, the report reveals that the appellant has several reported offenses on his juvenile record, including one shoplifting charge, one assault charge, and one assault conviction. The appellant violated his placement on "indefinite probation" from the assault conviction. Moreover, the appellant has a history of disciplinary problems throughout his educational years.<sup>2</sup>

The presentence report also reveals that, in 1990, school personnel referred the appellant for a psychological evaluation. Pursuant to this evaluation,

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<sup>2</sup>"From 9/26/89 to 1/25/90 David has been involved in fifteen incidents requiring intervention from the principal. The breakdown of behaviors are as follows: disorderly conduct (six incidents); fighting (two incidents); harassment (two incidents); and one incident of each of the following: truancy, misuse/destruction of school property; use of foul/abusive language; insubordination; and refusing to do his work. The consequences of these behaviors include: after school detention; in-school suspension; warnings; sitting in the principal's office; writing a theme; counseling; calling his father, and signing a pact with David."

the appellant was determined to be "seriously emotionally disturbed" and was placed in "resource classes." However, in 1993, the appellant was re-evaluated, at which time he attained a full scale IQ of 102. "It was concluded that there was a significant discrepancy between his full scale IQ and his present academic achievement and that he did meet the criteria as learning disabled."

Regarding his employment history, the appellant began employment at the Piccadilly Cafeteria as a dishwasher several weeks prior to his sentencing hearing. In this position, the appellant earns approximately \$4.25 per hour and works approximately thirty hours per week.<sup>3</sup> Prior to this employment, the appellant's work history is sporadic, consisting mainly of summer employment.

The appellant's mother, Mary Wells, testified that the appellant does not have a prior criminal record. She explained that the appellant agreed to the range II offender status because he "believed it in his best interest to accept the State's offer." Mrs. Wells acknowledged the appellant's trouble with authority as a juvenile. However, she attributed these juvenile matters to the appellant's emotional disturbance caused by his relationship with his "abusive" father. In addition to verifying the appellant's employment and educational history, Mrs. Wells stated that, since this incident, "[the appellant] is withdrawn. He doesn't go out anymore, he mostly. . . just to work and home." Continuing, she testified that the appellant no longer associates with the same people, rather he spends his time with his family and his fiancée. The appellant's fiancée, Christy Davis, stated that she has known the appellant for two and one-half years and that they planned to get married and start a family. She remarked that, after committing the instant offenses, "[the appellant] doesn't go out as much." Both Mrs. Wells and Ms. Davis confirmed that they would provide the appellant with moral and

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<sup>3</sup>The appellant's comments in the presentence report reveal that "he is currently purchasing an automobile for \$1200, he owes \$1000. He gives his mother half of his paycheck toward household expenses and between that and the car payment, he makes 'just enough to keep myself in cigarettes.'"

social support if he was given an alternative sentence.

After considering the evidence presented, the trial court denied alternative sentencing. In making its decision, the trial court focused on the nature of the offense, i.e., it was committed with a weapon in a public place and it involved two victims. The court also considered the appellant's unwillingness to cooperate with the police and his attempt to implicate another in the crimes. Further, the court found that "the [appellant] made no hesitation about committing a crime where the risk to human life was high;" "[the appellant] does have a prior juvenile record; "he had violated the terms of his [juvenile] probation;" and "he has a history of disruptive behavior at school." While not disregarding the appellant's youthfulness and his past psychological problems, the court, "laying great weight to the nature of the offense; . . .the defendant's prior juvenile record . . .; poor school record, [and] poor social history," denied "alternative sentencing in all respects."<sup>4</sup>

## II. Analysis

When a defendant challenges the manner of his sentence, this court must conduct a *de novo* review with the presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In the present case, the trial court properly considered such principles.<sup>5</sup> The presumption of correctness applies.

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<sup>4</sup>The trial court did recommend boot camp in this case, however, the appellant was later found ineligible for this program due to the violent nature of the offense.

<sup>5</sup>Contrary to the appellant's contentions, the trial court did consider all relevant factors, not only the circumstances of the offense.

In determining the appellant's suitability for an alternative sentence, we first determine whether the appellant is entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. State v. Bingham, 910 S.W.2d 448, 453 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995) (citing State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993)). To be eligible for the statutory presumption, three requirements must be met. The appellant must be convicted of a class C, D, or E felony. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). He must be sentenced as a mitigated or standard offender. Id. And, the defendant must not fall within the parameters of Tenn. Code Ann. § 40-35-102(5) (1994 Supp.). This means that the defendant cannot have a criminal history evincing either a "clear disregard for the laws and morals of society" or "failure of past efforts at rehabilitation." Id. The appellant was sentenced as a range II offender. Therefore, he is not afforded the presumption favoring alternative sentencing.

Moreover, we conclude that, even if the appellant was entitled to the presumption, the presumption is rebutted by "evidence to the contrary." Such evidence may be found in the presentence report, the evidence presented by the State, the testimony of the accused, or any other source provided that it is part of the record. Bonestel, 871 S.W.2d at 167; see also Tenn. Code Ann. § 40-35-102(6). Guidance as to what constitutes "evidence to the contrary" may be found in the sentencing considerations codified in Tenn. Code Ann. § 40-35-103 (1990):

(1) Sentencing involving confinement should be based on the following considerations:

(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 and 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.

Bingham, 910 S.W.2d at 454 (citing Ashby, 823 S.W.2d at 169). A court may also apply the mitigating and enhancing factors set forth in Tenn. Code Ann. § 40-35-113 (1990) and -114 (1994 Supp.), as they are relevant to the Tenn. Code Ann. § 40-35-103 considerations. See State v. Zeolia, No. 03C01-9503-CR-00080 (Tenn. Crim. App. at Knoxville, Mar. 21, 1996) (citing Tenn. Code Ann. § 40-35-210 (b)(5)). Finally, the appellant's potential or lack of potential for rehabilitation is a proper consideration in determining whether an alternative sentence should be granted. Tenn. Code Ann. § 40-35-103(5).

A trial court's denial of an alternative sentence based on the seriousness of the offense under Tenn. Code Ann. § 40-35-103(1)(B) can only be upheld if there is evidence in the record that indicates that the circumstances of the offense, as committed, were especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree, and the nature of the offense outweighs all factors favoring a sentence other than confinement. Bingham, 910 S.W.2d at 454 (citations omitted). The court primarily considered the following factors: a weapon was used in the commission of the offense;<sup>6</sup> the appellant made no hesitation about committing a crime where the risk to human life was high; and the offenses involved two victims. While these enhancement factors are clearly present in this case, we are unable to conclude that the circumstances of these offenses were more exaggerated than those in other robbery and aggravated assault cases.

Nonetheless, the trial court properly considered the appellant's juvenile record in denying an alternative sentence. First, his juvenile record was relevant

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<sup>6</sup>The trial court correctly considered this factor because the appellant pled guilty to robbery and not aggravated robbery.

since the appellant was only eighteen years old at the time of the offense. See Zeolia, No. 03C01-9503-CR-00080. The disposition of a child in a juvenile court may be used against the child only in "dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report." Id. (citing Tenn. Code Ann. § 37-1-133 (1991)). Moreover, this court has considered the failure of probation following juvenile adjudications in denying an adult appellant an alternative sentence. Id. (citing State v. Stacey, No. 01C01-9111-CC-00341 (Tenn. Crim. App. at Nashville, Apr. 29, 1992)). In considering the appellant's juvenile record, the trial court properly concluded that the appellant has a "long history of criminal conduct" and that "measures less restrictive than confinement have . . . been applied unsuccessfully to the defendant." Tenn. Code Ann. § 40-35-103(1)(A), -(1)(C). See, e.g., State v. Osborne, No. 01C01-9402-CC-00047 (Tenn. Crim. App. at Nashville, May, 4, 1995); State v. Elliott, No. 02C01-9408-CR-00154 (Tenn. Crim. App. at Jackson, Dec. 14, 1994); State v. Harrison, No. 02C01-9103-CR-00042 (Tenn. Crim. App. at Jackson, Oct. 16, 1991).

Additionally, the trial court commented on the appellant's unwillingness to cooperate with the police exemplified by his blaming another individual for the offenses and his persistent refusal to tell the truth. A defendant's lack of candor, credibility, and willingness to accept responsibility for his crime are relevant considerations in determining his potential for rehabilitation. United States v. Grayson, 438 U.S. 40, 98 S.Ct. 2610 (1978); State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994); see also Tenn. Code Ann. § 40-35-103(5). The appellant has clearly shown, via his actions with the police, that he is a poor candidate for rehabilitation.

After conducting a *de novo* review of the record in this case, with a



presumption that the decision of the trial court is correct, we conclude that the appellant has failed to carry his burden of establishing that he is entitled to alternative sentencing. The appellant's untruthfulness combined with his poor social history, poor employment history, prior criminal history, and past failed efforts at rehabilitation sufficiently support his total confinement in the Department of Correction. Tenn. Code Ann. § 40-35-103(1)(A), -103(1)(C). For these reasons, we affirm the decision of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge