IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9602-CR-00061**
	)	
Appellee,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. THOMAS H. SHRIVER**
CARLOS L. ACEVEDO,	)	**JUDGE**
	)	
Appellant.	)	(Certified Question & Sentencing)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF DAVIDSON COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3(b) of the Tennessee Rules of Appellate Procedure and Rule 37(b)(2)(i) of the Tennessee Rules of Criminal Procedure. The Defendant pleaded nolo contendere to one count of possession of cocaine with intent to deliver and to one count of possession of marijuana. In his petition to enter the plea, the Defendant noted that he and the State had explicitly agreed to certify a dispositive question of law concerning the validity of the search which resulted in his convictions. He was sentenced as a Range I Standard Offender to eight (8) years for the cocaine conviction and to eleven months and twenty-nine days at thirty percent (30%) for the marijuana conviction, with the sentences to run concurrently. In this appeal, the Defendant contends that the search which produced the evidence supporting his convictions was unlawful and that the trial court erred in denying him probation. We conclude that the Defendant's issues lack merit. His convictions and sentences are therefore affirmed.

On July 9, 1993, Agent Gary Luther of the Twenty-First Judicial Task Force telephoned Officer Perry Buck, who was assigned to the Federal Drug Task Force at the Nashville International Airport. Luther informed Buck that he was "working" the Defendant, a drug courier who was about to fly from Nashville to Texas. Luther stated that he was attempting to arrive at the airport before the Defendant's plane departed but was unsure as to whether he would be able to do so. As a result, Luther asked Buck to "surveil" and "interview" the Defendant. He gave Buck the name of the Defendant and a physical description.

Buck and three other officers began looking for the Defendant. As they walked toward the gate of the Defendant's departing flight, they identified a man fitting the description given by Agent Luther sitting at a restaurant in the concourse. They approached him, identified themselves, and asked if they could speak with him, to which the Defendant responded affirmatively. The officers asked the Defendant where he was going and other "preliminary" matters, and then requested his plane ticket. They informed the Defendant that they suspected him of carrying drugs and asked him for consent to search his person. According to Buck, the Defendant willfully consented. They subsequently asked the Defendant if he wanted to go to a more private location for the search. According to Buck, the Defendant responded affirmatively, and they all went to a men's restroom adjacent to the restaurant.

The officers conducted a pat-down search of the Defendant which revealed no contraband. They then asked the Defendant to remove his boots. As the Defendant removed one of his boots, a quantity of United States currency fell onto the floor. The Defendant fled the scene but was apprehended in the concourse after a short chase. The officers discovered a quantity of both cocaine and marijuana in the Defendant's socks.

The defendant was subsequently indicted for possession of cocaine with intent to deliver and for possession of marijuana with intent to deliver. On June 8, 1994, he filed a motion to suppress the drugs and currency discovered during the search at the airport. He argued that the law enforcement officers had not had a reasonable suspicion to detain him under the Aguilar-Spinelli principles set forth in State v. Jacumin, 778 S.W.2d 430 (Tenn. 1989). The trial court denied

the motion to suppress, ruling that the discovery of the drugs and currency occurred pursuant to a lawful consent search. In the wake of the trial court's ruling, the Defendant filed a petition to enter a plea of nolo contendere to possession of cocaine with intent to deliver and simple possession of marijuana. In the petition, the Defendant stated the following:

> Defendant and state explicitly agree that the Defendant reserves the right to appeal the issues raised at the Motion to Suppress hearing, to wit: whether the stop and seizure of the Defendant at the airport was valid based upon a reasonable and articulable suspicion. The central issue is whether the tip or information given to the airport police came from a reliable source with a sufficient basis of knowledge regarding these events and whether this information was supported at the suppression hearing based upon Aguilar-Spinelli standards as adopted and applied by Tennessee Courts in State v. Jacumin, State v. Coleman and State v. Wilson. Parties agee [sic] that this suppression issue is dispositive of the case.

On August 2, 1995, the trial court accepted the plea of nolo contendere through an order which incorporated the provisions of the Defendant's petition. Moreover, at the hearing on the plea, the trial court informed the Defendant of the significance of pleading guilty and specifically addressed the ramifications of the anticipated Rule 37(b)(2)(i) appeal.

In his first issue, the Defendant raises the search question which he sought to preserve for appeal in his plea of nolo contendere. As the State points out, however, the final judgment form does not contain a statement of the dispositive certified question of law, as is required under State v. Preston, 759 S.W.2d 647, 650 (Tenn. 1988). The Defendant concedes that the final judgment does not comply with the Preston requirements, but nevertheless asks this Court to address the merits of the issue because the State allegedly suffered no prejudice from the simple omission of the certified question from the final judgment.

In Preston, our Supreme Court clarified the prerequisites to the consideration of a question of law certified pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. The Court stated:

> Regardless of what has appeared in prior petitions, orders, colloquy in open court or otherwise, the final order or judgment from which time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved.

Preston, 759 S.W.2d at 650. Our Supreme Court reiterated these unambiguous requirements in the recent case of State v. Pendergrass, ___ S.W.2d ___ (Tenn. 1996). In Pendergrass, the defendant entered guilty pleas to several drug charges and attempted to preserve a search issue pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure. The defendant made the trial court aware of her intention to certify a dispositive question of law for appeal, and while accepting the guilty pleas, the trial judge even explained the ramifications of a Rule 37 appeal. Yet because the judgments contained no reference to the reservation of a certified question of law, the Court found that the defendant had waived the issue. See Pendergrass, ___ S.W.2d at ___.

In the present case, it is clear from the record that the Defendant, with the agreement of the State and the trial court, attempted to reserve a certified question concerning the validity of the airport search. It is equally clear, however, that the judgments entered on September 28, 1995 fail to comply with the requirements of Preston and Rule 37. In fact, the judgments make no reference whatsoever to a certified question of law for appeal. Given the clear, mandatory language of Preston and Pendergrass, we must conclude that the Defendant has waived the search issue which he had attempted to preserve for appeal.

In his second issue, the Defendant argues that the trial court erred in denying him probation. Initially we note that the Defendant has failed to make appropriate references to the record. As a result, this issue has been waived. See Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988), perm. to appeal denied, id.; see also T.R.A.P. 27(a)(7) and (g). Even if we were to address the issue, however, we could only conclude that it lacks merit.

The trial court conducted a sentencing hearing on September 28, 1995. At the sentencing hearing, the Defendant asserted several mitigating factors and requested that the trial court place him on probation. The trial judge found that no mitigating factors applied to the Defendant's case and discussed two possible enhancement factors: (1) that the Defendant had a previous history of criminal behavior in addition to that necessary to establish his range, and (2) that the Defendant had a previous history of unwillingness to comply with the conditions of a sentence involving release into the community. See Tenn. Code Ann. §§ 40-35-114(1) and (8). It is unclear from the transcript of the hearing, however, whether the trial judge actually found these enhancement factors to be applicable. In any event, the trial court imposed the minimum sentence of eight (8) years in the Department of Correction for the cocaine conviction and eleven months and twenty-nine days at thirty percent (30%) for the marijuana conviction.

The Defendant does not contend that the trial court improperly applied or denied any enhancement or mitigating factors, nor does he contend that his sentence is excessive. Instead, the Defendant's main complaint stems from the

fact that the trial judge did not specifically address the reasons supporting the denial of probation.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

When imposing a sentence of total confinement, our Criminal Sentencing Reform Act mandates the trial court to base its decision on the considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations which militate against alternative sentencing include: the need to protect society by restraining a defendant having a long history of criminal conduct, whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense, the need to avoid depreciating the seriousness of the offense, and the need to order confinement in cases in which less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1).

In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the Defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The record reveals that the Defendant was statutorily eligible for probation because he received sentences of eight years or less. See Tenn. Code Ann. § 40-35-303(a). Because he was convicted of a Class B felony, however, he was not presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In considering possible enhancement factors, the trial court found that the Defendant had an extensive history of criminal behavior and

that measures less restrictive than confinement had been unsuccessfully applied to the Defendant. These circumstances militate against the granting of probation. See Tenn. Code Ann. § 40-35-103(1). Furthermore, as this Court has previously held, confinement for drug convictions of this type is particularly suited to deter others likely to commit similar offenses. See State v. Dykes, 803 S.W.2d 250, 260 (Tenn. Crim. App. 1990). Accordingly, from a review of the entire record, we can only conclude that the Defendant has failed to carry his burden of demonstrating that his sentence was improper and that he was entitled to probation. His second issue is therefore without merit.

For the reasons set forth in the discussion above, we conclude that the Defendant's issues on appeal lack merit. His convictions and sentences are affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

_____
JERRY L. SMITH, JUDGE