IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9511-CR-00341
Appellee	)	
	)	SHELBY COUNTY
vs.	)	
	)	Hon. Joseph B. Dailey, Judge
JAMES H. JONES,	)	
	)	(Aggravated Burglary, Four Counts)
Appellant	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, James H. Jones, appeals the Shelby County Criminal Court's denial of an alternative sentence. On May 8, 1995, the appellant pled guilty to four counts of aggravated burglary, a class C felony. The negotiated plea agreement provided for a sentence recommendation of twelve years for each count, as a Range III persistent offender, to be served concurrently. The manner of service of the sentence was submitted for the trial court's determination. On May 30, 1995, the trial court ordered that the sentences imposed be served in the Department of Correction. On appeal, the appellant contends that the trial court erred in not sentencing him under the Community Corrections Act.

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

I. Background

The proof at the sentencing hearing revealed that, on the morning of May 24, 1994, the appellant and a friend smoked crack cocaine. Because of the drug's effect, the appellant "skipped work and committed the burglary." He states that he went into an open garage and took a chainsaw and a lawnmower. Shortly thereafter, he was apprehended by the police. While the appellant was in custody, the police charged the appellant with three burglaries committed in the same area.[1] At the time of his arrest, the appellant was on parole for a 1993 burglary conviction.

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[1]The district attorney general indicated that approximately forty burglaries had recently been committed in the neighborhood in which the appellant was apprehended. Witnesses to three of these burglaries were able to positively identify the appellant as the perpetrator.

The presentence report indicated that the appellant was thirty-nine years old with a long history of criminal conduct and substance abuse. Specifically, the appellant has a history of property-related crimes, including aggravated burglary, burglary, and theft, in excess of those necessary to establish the appellant as a range III offender.[2] As explanation for his criminal record, the appellant blamed his addiction to crack cocaine and/or alcohol. However, he admitted receiving treatment for his addiction, in 1977, when incarcerated for a seven year period. He testified that, at this time, he aided in the organization and operation of the facility's rehabilitative program, PMAA. After completing this program, he remained "clean" for eight years. In 1992, the appellant again received treatment at the Alcohol Treatment Unit at the Correction Center. At the time of the sentencing hearing, the appellant was participating in the Direct Supervision A & D Program at the Shelby County Jail. Even with past failed attempts at rehabilitation, the appellant asserted that "[he] can be helped" and stated that he desired more treatment.

The appellant graduated from Fayette-Ware High School and obtained an associates degree in medical records at State Technical Institute. He explained that he had three children by three different women and that he was delinquent in paying his $15 per month child support payment for his youngest child. His previous employment history includes the positions of "landscaper, warehouse

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[2]In addition to the present four counts of aggravated burglary, the appellant's record consists of the following:

June 1994:	Violation of Parole
May 1994:	Possession of Controlled Substance
*February 1993:	Aggravated Burglary
June 1992:	Aggravated Robbery
December 1991:	Theft of Property
November 1991:	Theft of Property
November 1991:	Theft of Property
*September 1990:	Burglary
*September 1988:	Grand Larceny
February 1989:	Possession Controlled Substance
*March 1976:	Robbery
*March 1976:	Assault with Intent to Commit Rape

*Convictions used to establish the appellant as a Range III, Persistent Offender. See Tenn. Code Ann. § 40-35-107(a)(1) (1990).

manager, assistant manager, and a tractor trailer driver." However, all reported employment was terminated due to either incidents of drug use or incarceration. In response to the State's inquiries as to his extensive criminal record, the appellant replied that he had been rehabilitated for every past crime he had committed.

The trial court denied the appellant's petition for an alternative sentence, stating:

> You need to go ahead and serve this sentence. You've been in and out of custody for the past twenty years. You've been through rehab programs before. You help found the PMAA program. You've had all of the opportunities made available to you to avail yourself of these programs.
>
> At this point in time, I hope you get help. I hope you get involved in this program you're talking about, but it's going to have to be within the confines of the institution.

II. Analysis

Again, the appellant contends that the trial court erred by denying him an alternative sentence. Specifically, the appellant argues that the trial court erred by not sentencing him pursuant to the Community Corrections Act. We disagree.

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). It is not apparent from the record whether the court considered relevant sentencing principles. Thus, the presumption is inapplicable

and we do not defer to the trial court's findings. Notwithstanding this fact, the burden remains on the appellant to demonstrate that the sentence imposed by the trial court is improper. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210(b)(3) (1990).

A sentence to community corrections is a non-incarcerative alternative sentence. Tenn. Code Ann. § 40-35-104(c)(8) (1994 Supp.). Whether the trial court should have granted the appellant an alternative sentence begins with the determination of whether he 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)). A defendant is presumed to be a favorable candidate for alternative sentencing if he is an especially mitigated or standard offender, he is convicted of a class C, D, or E felony, and he does not have a criminal history evincing either a "clear disregard for the laws and morals of society" or a "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5), -102(6) (1994 Supp.). The appellant, in the present case, was sentenced as a persistent offender. Tenn. Code Ann. § 40-35-102(6). The appellant does not challenge this classification. Moreover, his record indicates both a "disregard for the laws and morals of society" and "failure of past efforts at rehabilitation." Tenn. Code Ann. § 40-35-102(5). Accordingly, the presumption favoring an alternative sentence does not apply. Thus, the appellant bears the burden of showing his entitlement to alternative sentencing. See Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(d).

Sentences involving confinement should be based on several considerations, including:

> (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 an 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 appellant.

Tenn. Code Ann. § 40-35-103(1)(A)-(C) (1990). Because "measures less restrictive than confinement have been frequently or recently applied unsuccessfully to the defendant" and because the appellant "has a long history of criminal conduct," we conclude that confinement is appropriate in the present case. Tenn. Code Ann. § 40-35-103(1)(A), (C) (1990). Thus, we conclude that the appellant is ineligible for an alternative sentencing option.

Again, the appellant specifically requested sentencing under the Community Corrections Act. Although the appellant meets the requirements of Tenn. Code Ann. § 40-36-106(a) (1)-(7) (1994 Supp.), we note that the prerequisites to alternative sentencing articulated in the Sentencing Act of 1989 provide an initial gateway through which the appellant must pass in order to arrive at the Community Corrections Act. Tenn. Code Ann. § 40-35-104(c)(8). Thus, because the requirements of the Sentencing Act support a sentence of confinement in the instant case, the appellant has failed to show his entitlement to a sentence pursuant to the Community Corrections Act.

Accordingly, the judgment of the trial court in imposing a sentence of total confinement is affirmed.

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DAVID G. HAYES, JUDGE

CONCUR:

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GARY R. WADE, Judge

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WILLIAM M. BARKER, Judge