**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**FEBRUARY 1997 SESSION**

FILED

**March 27, 1997**

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

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| **STATE OF TENNESSEE,** | ) | |
| | ) | **C.C.A. NO. 02C01-9603-CR-00070** |
| Appellee, | ) | |
| | ) | **SHELBY COUNTY** |
| VS. | ) | |
| | ) | **HON. CHRIS B. CRAFT,** |
| **KEVIN D. CASH,** | ) | **JUDGE** |
| | ) | |
| Appellant. | ) | (Sentencing) |

FOR THE APPELLANT:

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**-and-**
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FOR THE APPELLEE:

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OPINION FILED:_____

**AFFIRMED**

JOHN H. PEAY,
Judge

**O P I N I O N**

The defendant was indicted on March 23, 1995, for unlawful possession of a controlled substance with intent to sell and for unlawful possession of a controlled substance with intent to deliver. On August 29, 1995, he pled guilty to unlawful possession of marijuana in excess of 14.175 grams with intent to sell, a Class E felony. He was sentenced to sixteen months in the Shelby County Correctional Center and fined two thousand dollars ($2000). He petitioned the court to suspend his sentence, but his request was denied. It is from this denial that he now appeals. After a review of the record, we find that the trial court was not in error, and we affirm the judgment below.

The defendant was arrested after police officers received a call from the defendant's ex-girlfriend claiming that the defendant was beating her and had threatened to kill her with a gun he had in his car. When officers arrived, the defendant was walking toward his car where his ten-year-old daughter was sitting in the front seat. The officers approached the defendant and obtained consent to search the car. The search revealed 205.8 grams of marijuana, six hundred fifty-five dollars ($655), two telephones, and a beeper. No weapon was located.

The defendant now complains that the trial court erred by refusing to grant him an alternative sentence and place him on Community Corrections. When a defendant complains of his/her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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 Community Corrections Act of 1985 establishes a community based alternative to incarceration for certain offenders and sets out the minimum eligibility requirements. T.C.A. §§ 40-36-101 through -306. This Act does not provide that all offenders who meet the standards are entitled to such relief. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The purpose of the Tennessee Community Corrections Act of 1985 is to establish a policy to punish selected, nonviolent felony offenders through community-based alternatives to incarceration. The goals of the Community Corrections Act include the following: maintaining safe and efficient community correctional programs, promoting accountability of offenders to their local community, filling gaps in the local correctional system through the development of a range of sanctions and services, reducing the number of nonviolent felony offenders in correctional institutions and jails, and providing "opportunities for offenders demonstrating special needs to receive services which enhance their ability to provide for their families and become contributing members of their community . . . ." T.C.A. § 40-36-104(1)-(5).

Before one is entitled to community corrections, he or she must be eligible pursuant to T.C.A. § 40-36-106(a). Mere eligibility, of course, does not end the inquiry. We must also look to the Criminal Sentencing Reform Act of 1989. Under this Act, trial judges are encouraged to use alternatives to incarceration. T.C.A. § 40-35-102(6) states that "a defendant who does not fall within the parameters of subdivision (5) and who is an especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Militating against alternative sentencing are the following considerations:

> Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; [c]onfinement 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 [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . .

T.C.A. §40-35-103(1)(A)-(C). See also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The defendant asserts that he meets the eligibility requirements to be considered for alternative sentencing. Even if true, this does not mean that he is automatically entitled to such relief.

In this case, the trial court denied Community Corrections based on the defendant's prior criminal history, his lack of candor with the court, and his lack of remorse. The record supports this conclusion. The defendant has previously been convicted of assault, reckless driving, selling marijuana, and malicious mischief. He was on probation at the time he was arrested on the assault and the reckless driving charges. Clearly, previous attempts at measures less than incarceration have not been successful with this defendant.

Secondly, the defendant was less than candid with the court at the sentencing hearing. The court called the defendant's version of the facts leading up to his arrest "an incredible story." The defendant told the court that the marijuana found in his car actually belonged to his ex-girlfriend. However, as the court pointed out, if his story were true, the defendant would not have pled guilty and would have insisted on going to trial. This Court has often held that lack of candor is probative of a defendant's prospect

for rehabilitation. See State v. Williamson, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995). And finally, the trial court found that the defendant showed no remorse for his crime. Instead, as pointed out above, the defendant tried to blame someone else for his criminal activities.

The defendant argues that the court should have considered his steady employment and the fact that he has custody of his daughter as reasons for placing him in the Community Corrections program. The fact that the defendant is employed does not entitle him to an alternative sentence. As this Court has stated, "Every citizen in this state is expected to have a stable work history if the economy permits the citizen to work, the citizen is not disabled, or the citizen is not independently wealthy." State v. Keel, 882 S.W.2d 410, 423 (Tenn. Crim. App. 1994). Likewise, that the defendant has custody of his daughter does not entitle him to an alternative sentence. In fact, the child's welfare may be in jeopardy if she remains with the defendant in light of the fact that he places his daughter in the middle of his illegal activities.

Thus, we conclude that the factors cited above are sufficient to overcome the presumption of eligibility for alternative sentencing. The defendant has failed to carry his burden of demonstrating that the evidence preponderates against the trial court's findings, and therefore, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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JOE G. RILEY, Judge