IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION



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| STATE OF TENNESSEE,<br><br>Appellee<br><br>v.<br><br>MILTON ANTHONY KAFOGLIS,<br><br>Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | C.C.A. NO. 03C01-9504-CR-00128<br><br>HAWKINS COUNTY<br><br>HON. JAMES E. BECKNER, JUDGE<br><br>Simple possession of Schedule II controlled substance |
| STATE OF TENNESSEE<br><br>Appellee<br><br>v.<br><br>SCOTT BLOOMQUIST,<br><br>Appellant | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | C.C.A. NO. 03C01-9504-CR-00129<br><br>HAWKINS COUNTY<br><br>HON. JAMES E. BECKNER, JUDGE<br><br>Simple possession of Schedule II controlled substance; possession of drug paraphernalia |

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OPINION FILED _____

AFFIRMED AS MODIFIED

JOHN K. BYERS
SENIOR JUDGE

**O P I N I O N**

The appellant Kafoglis was found guilty of simple possession of a Schedule II controlled substance and fined $2,500.00 by the jury. The appellant Bloomquist was found guilty of simple possession of a Schedule II controlled substance and possession of drug paraphernalia; he was fined $2,500.00 by the jury on each count. The trial judge sentenced each appellant to 11 months and 29 days at 30% service. The trial judge denied probation.

The appellants argue that the sentences imposed are excessive and not imposed in accordance with the sentencing guidelines; that the court erred in denying probation or alternative sentencing; that the jury could not find the appellant Kafoglis guilty of simple possession of a Schedule II controlled substance and not guilty of selling or delivering of a Schedule II controlled substance under the facts of this case nor appellant Bloomquist guilty of simple possession of a Schedule II controlled substance and possession of drug paraphernalia while finding him not guilty of selling or delivering a Schedule II controlled substance under the facts of this case; and that the trial court erred in permitting a rebuttal witness to testify when such witness had been in the courtroom and TENN. R. EVID. 615 had been invoked.

We affirm the judgment of the trial court, but modify the sentences.

Mr. Kafoglis was a friend and employee of Mr. Bloomquist, a regional circuit race car driver. He came to work for Mr. Bloomquist when he developed problems with a business partner and with his marriage. Mr. Bloomquist also allowed Mr. Kafoglis to live with him.

In December 1992, Mr. Bloomquist ran into Kristi Candler at a nightclub. The two had dated previously, and both testified that they had an emotional attachment to each other. Ms. Candler spent the night with Mr. Bloomquist. She testified that he gave her some cocaine to keep her awake on the drive home. He testified that it was her cocaine. She was arrested after police officers pulled her over for a suspected D.U.I. and found the cocaine in her car. When she informed the officers

that Mr. Bloomquist gave her the cocaine, the Third Judicial District Drug Task Force made an arrangement with her for leniency if she would cooperate in an investigation of Mr. Bloomquist.

On December 9, 1992, Ms. Candler first asked Mr. Bloomquist to provide her with some cocaine. On February 4, 1993, at Mr. Bloomquist's garage, Mr. Kafoglis gave Ms. Candler some cocaine, for which she paid him $300.00 in marked bills. On March 17, March 25, and April 21 of the same year, the Mr. Kafoglis provided cocaine to Mr. Bloomquist, who, in turn, provided it to Ms. Candler for $300.00, $300.00 and $260.00 in marked bills respectively.

On April 21, 1993, following the final transaction, the Third Judicial District Drug Task Force obtained a search warrant and searched Mr. Bloomquist's apartment, garage and other outlying buildings. They found a straw in Mr. Bloomquist's front pocket which had white powder on it, which was found to be cocaine residue. They did not find any other cocaine or any marked bills. They found some $700.00 in unmarked bills which Mr. Bloomquist testified was kept available to pay for C.O.D. racing car parts. The task force investigators also searched Mr. Kafoglis's vehicle, but only found unmarked cash which the appellant testified was intended for food, gas, car parts and emergencies during travel between races.

Mr. Bloomquist testified that he was not a drug dealer and had only provided the drugs to Ms. Candler because he had strong feelings for her. He further testified that he had never sold any drugs before and was not even certain where to purchase them. He testified that he had used cocaine provided by Mr. Kafoglis twice before the investigation of this case began.

Mr. Kafoglis testified that he did not make any profit on these transactions, but paid the entire amount to the man who had sold him the cocaine. He further testified that he purchased the cocaine because he knew that Mr. Bloomquist had an emotional attachment to Ms. Candler, the state's agent, and he felt that this was

a good opportunity for him to repay Mr. Bloomquist for all Mr. Bloomquist had done for him. He further testified that he has never sold cocaine before. He testified that he had used cocaine twice before Ms. Candler had approached Mr. Bloomquist for cocaine and that Mr. Bloomquist had also used cocaine on at least one of these occasions.

We will discuss the issues presented by the appellants in reverse of the order in which they have raised them.

As to the issue of the rebuttal witness called by the State, the appellant Kafoglis did not object to his testimony at trial, and he is thus barred from raising this issue on appeal. TENN. R. APP. P. 36(a). Furthermore, we find no prejudicial error was committed against the appellant by the admission of this testimony.

The appellant Bloomquist's attorney objected to Mr. Moore being called as a witness because he had been in the courtroom in violation of TENN. R. EVID. 615.

During the trial, Mr. Bloomquist called on Ken Russell, who had been Sheriff of Hawkins County from 1986 to 1990, to testify. Mr. Russell testified that he had no recollection or any written notes of any information connecting Mr. Bloomquist and drug-dealing. In rebuttal, the State called on Bob Moore, a narcotics investigator for the Hawkins County Sheriff's Office. Mr. Moore testified that he had been in the courtroom for a short time the previous day, during which he heard some of the State's testimony, but not the defense testimony of Mr. Russell. He testified that he made up a list of suspected drug dealers in 1986, when he first came to work in Hawkins County, and Scott Bloomquist's name was on it. He further testified that he remembered being present about the same time period when Sheriff Russell was told by another detective that he had information that Mr. Bloomquist sold drugs.

The admissibility of testimony under these circumstances is a matter of discretion with the trial judge, to be disturbed on appeal only for abuse of discretion. *Bailey v. State* (Hawkins County, C.C.A. No. 03C01-9207-CR-00226, filed at Knoxville, November 22, 1993). Rule 615's advisory comments state, "If a witness

inadvertently and unintentionally hears some trial testimony, the sense of the rule would permit the judge to allow the witness to testify if fair under the circumstances." Here, the witness had not heard any of the testimony he was called to rebut and had not known he would be called to testify until the morning of the day during which he testified. The defense cross-examined Mr. Moore concerning both his testimony and his presence in the courtroom. We find the trial judge did not abuse his discretion here.

The appellants argue that because they only had possession of the cocaine for the purpose of delivering it to Ms. Candler, the jury's verdict of not guilty of sale and/or delivery of cocaine due to entrapment necessarily makes them not guilty of possession of cocaine due to entrapment.

In Tennessee, verdicts from a single multi-count indictment need not be consistent or logical, but merely supported by the evidence since each count is considered a separate indictment. *Wiggins v. State*, 498 S.W.2d 92, 93-94 (Tenn. 1973). The Court in *Wiggins* reasoned:

> An acquittal on one count cannot be considered res judicata to another count even though both counts stem from the same criminal transaction. This Court will not upset a seemingly inconsistent verdict by speculating as to the jury's reasoning if we are satisfied that the evidence establishes guilt of the offense upon which the conviction was returned. *Wiggins*, 498 S.W.2d at 94.

This reasoning clearly applies to inconsistent verdicts on the offense charged in the indictment and its lesser-included offenses for which a defendant may be found guilty under the indictment. There is ample evidence to support a guilty verdict on simple possession of a Schedule II controlled substance against both of these appellants. There is also ample evidence to support a guilty verdict on possession of drug paraphernalia against appellant Bloomquist.

The appellants contend that the trial court erred in denying them probation and/or alternative sentencing. A misdemeanor offender is presumed to be a favorable candidate for alternative sentencing; however, the ultimate burden for

establishing an entitlement to probation remains on the applicant. *State v. Gennoe*, 851 S.W.2d 833, 837 (Tenn. Crim. App. 1992).

Factors applicable to a defendant's application for probation include: (1) the circumstances of the offense, (2) the defendant's criminal record, (3) his social history, (4) his present physical and mental condition, and (5) the deterrent effect upon and best interest of the defendant and the public. *State v. Kear*, 809 S.W.2d 197, 198 (Tenn. Crim. App. 1991).

We find that the trial court did not erroneously deny probation and/or alternative sentencing to appellant Kafoglis. The trial judge cited appellant Kafoglis's history of drug and alcohol abuse and deterrence as confinement factors. We find no evidence in the record concerning the alcohol abuse. In addition to the offense for which he was convicted, the appellant testified that he has used cocaine twice before. The trial judge also cited the appellant's entanglement with possession of cocaine throughout the several months of the undercover operation. The trial judge cited the problems of drug use in general and in Hawkins County for the need for confinement for deterrence purposes.

We find that the trial judge's denial of probation for appellant Bloomquist was not improper. He again cited the appellant's previous use of cocaine and entanglement with possession of cocaine throughout the several months of the investigation. He also cited the need for confinement for deterrence purposes, emphasizing the appellant's role model position as a well-known race car driver. We find this emphasis inappropriate; a defendant's legitimate career should not be weighed against him in evaluating his application for probation. However, a negative finding on any factor is sufficient to support a denial of probation. *See State v. Baron*, 659 S.W.2d 811, 815 (Tenn. Crim. App. 1983).

The appellants also argue that the sentences imposed are excessive. Our review of the length and manner of a sentence must be conducted *de novo* with a presumption that the determinations made by the trial court are correct. TENN. CODE

ANN. § 40-35-401(D). This presumption of correctness is conditioned upon an affirmative showing in the record that the trial court considered the sentencing principles and the relevant facts and circumstances. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If the appellate court finds that the trial court did give due consideration and proper weight to the sentencing factors and its findings were adequately supported by the record, the appellate court must affirm even if it would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In determining appellant Kafoglis's sentence, the trial court found one enhancement factor and no mitigating factors. The court found that the appellant had a previous history of criminal convictions or criminal behavior, based upon previous Ohio D.U.I. convictions and the previous use of cocaine. Although the record contains no record of the disposition in the Ohio cases, appellant's counsel admitted these convictions and appellant did not contest this admission. The application of this enhancement factor is appropriate due to these prior convictions, but not for the prior illegal use of controlled substances. Although extensive prior illegal use of controlled substances may support the application of this enhancement factor, *see State v. Clark* (Shelby County, No. 40, filed at Jackson, Nov. 2, 1988, LEXIS 666 (Tenn. Crim. App. 1988)), we do not believe that the legislature intended this enhancement factor to apply under these facts. In view of the entire record, we find that appellant Kafoglis's sentence should be reduced to six months at 30% service.

In determining appellant Bloomquist's sentence, the trial court found that two enhancement factors and no mitigating factors. The trial court found that the enhancement factor of a previous history of criminal convictions or criminal behavior applied. In so finding, he cited the appellant's use of cocaine twice before the undercover operation began, as testified to by appellant. For the reasons discussed above in reference to appellant Kafoglis's sentence, we find that the application of

this enhancement factor was inappropriate. The trial court also applied the enhancement factor of abuse of a public or private trust, citing the appellant's popularity and role model status among children due to his position as a race car driver. We find no authority for the proposition that the legislature intended to apply against defendants in positions such as this. We find that no enhancement and no mitigating factors applied in this case. We, therefore, modify the appellant Bloomquist's sentence to six months at 30% service.

We affirm the judgment of the trial court as modified. Costs are taxed to the appellee, the State of Tennessee.

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John K. Byers, Senior Judge

CONCUR:

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Gary R. Wade, Presiding Judge

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Joseph M. Tipton, Judge