

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

**FILED**

February 12, 1997

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

**STATE OF TENNESSEE,** )  
 )  
Appellant )  
 )  
vs. )  
 )  
**LYNDA GAYLE KIRKLAND,** )  
 )  
Appellee )

No. 03C01-9606-CR-00248  
KNOX COUNTY  
Hon. Mary Beth Leibowitz, Judge  
(Theft over \$60,000; computer fraud)  
State Appeal

For the Appellee:

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

AFFIRMED

**David G. Hayes**  
Judge

## OPINION

The appellee, Lynda Gayle Kirkland, pled guilty in the Knox County Criminal Court to theft of property over \$60,000 and to computer fraud over \$60,000, both class B felonies.<sup>1</sup> Following the sentencing hearing, the trial court imposed concurrent eight year sentences for each conviction with all time suspended except for nine months which were ordered to be served in the Knox County Penal Farm at one hundred percent. Additionally, the appellee was placed on supervised probation with various conditions for a period of twelve years, including payment of restitution in the amount of \$202,096.75.

The State brings this appeal contending that the sentence imposed is too lenient. Specifically, the State argues that the trial court erred in not sentencing the appellee to the maximum term of twelve years in the state penitentiary.

After a review of the record, we affirm the sentences imposed by the trial court.

### **I. Background**

In 1985, Robert Unger, part owner of the Chalet Ice Rink in Knox County, employed the appellee as the corporation's bookkeeper. In this position, she maintained the business' financial records in both paper and computer format.

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<sup>1</sup>The offense captioned "computer fraud" on the judgment of conviction is the violation of Tenn. Code Ann. § 39-14-602(a)(2) and is defined, in relevant part:

Whoever knowingly . . . causes to be accessed . . . any . . . computer program, data, computer, computer system . . . for the purpose of:

(2) causing computer output to purposefully be false, for, but not limited to, the purpose of obtaining money, property . . . for oneself or another by means of false or fraudulent pretenses . . . is subject to penalties of § 39-14-105 [grading of theft offenses].

As a trusted employee, she had unrestricted access to the accounts of the business. Prior to November 1, 1989, the appellee began making false entries into the computer to withdraw the company's funds for her personal use. Over the next five years, until January 1994, the appellee used her position to sign extra payroll checks to herself and to write checks to her mortgage company. During this period, the appellee misappropriated approximately \$202,096.75. Moreover, to hinder the corporation's discovery of her theft, the appellee created fraudulent bank reports, destroyed all canceled checks received from the corporation's bank, impeded the delivery of the corporation's mail relating to finances, and transferred \$4236.49 from Mr. Unger's personal Visa card to the corporation's checking account to thwart overdrafts threatened by her theft.

The appellee's activities were only discovered when Larry LaBorde, a co-owner, investigated missing bank statements in February 1994. Through this investigation, LaBorde learned that the bank had discontinued the practice of sending quarterly reports ten years prior, even though, Mr. Unger was still receiving such reports by facsimile. He also discovered that the corporation's savings account, which the owners believed to have a balance of \$230,000, contained only \$1,000. Additionally, he noticed that there were numerous unaccountable checks written to the appellee.

On June 21, 1994, the Grand Jury of Knox County returned an indictment charging the appellee with one count of theft of services over \$60,000, one count of theft of property over \$60,000, one count of computer fraud over \$60,000, and one count of forgery over \$60,000. On January 16, 1996, the appellee entered guilty pleas to one count of theft of property over \$60,000 and to one count of computer fraud. All sentencing decisions were submitted to the trial court for its determination.

On April 30, 1996, the Knox County Criminal Court conducted a sentencing hearing. The evidence presented revealed that the appellee was a forty-five year old wife and mother. The presentence report indicates that she has a twenty-six year old son, a fourteen year old daughter and a twenty-one year old stepson. She is a high school graduate and has completed some additional schooling. The appellee has no prior criminal record and does not have a problem with alcohol or drugs. The appellee explained that she was remorseful for her actions and that she "was stupid for trying to help everyone instead of asking for help myself." She continued to state that many different circumstances triggered her crimes including late payments to creditors, her husband's inability to handle financial pressures, the discovery that her husband was diabetic and manic depressive, and her self-imposed duty to support extended family members. The appellee also stated that she misappropriated funds to provide necessities for her fourteen year old daughter. However, the record reflects that these necessities included skating outfits, skating lessons, and other material possessions. The appellee explained that she was denied these possessions and activities as a child.

Both Mr. Unger and Mr. LaBorde, the co-owners of the Chalet Ice Rink, testified at the hearing. Both related that they "trusted the appellee with everything . . . ," and that the appellee took care of all of the corporation's financial transactions. Mr. Unger stated that "I never expected that she would steal anything." Mr. LaBorde confirmed that the appellee was a friend and also an employee. Moreover, Mr. LaBorde stated that, upon his discovery of the missing bank statements, the appellee made no attempt to cooperate in the investigation.

At the conclusion of the sentencing hearing, the court emphasized the seriousness of the offense and that, although the appellee suffers from a variety

of problems, so do many other people. The trial court applied three enhancement factors. First, the court determined that the amount of property taken from the victim was particularly great. Tenn. Code Ann. § 40-35-114 (6) (1996 Supp.). Next, the court determined that the appellee committed the offenses to gratify her desire for pleasure. Tenn. Code Ann. § 40-35-114 (7). Finally, the court found that the appellee abused a position of trust. Tenn. Code Ann. § 40-35-114(15). In mitigation, the court considered that the appellee was under great mental stress, but applied little weight to this factor.

Before imposing a sentence, the court remarked that its goal, in the present case, was to structure a sentence that would avoid depreciating the seriousness of the offense and, at the same time, permit restitution to the victims. The court then sentenced the appellee to eight years, the minimum sentence in the range, all suspended except for nine months, with twelve years of supervised probation. The court also ordered the appellee to pay restitution in the amount of \$202,096.75.

## **II. Review of Sentence**

When the State challenges the sentence imposed by the trial court, this court conducts a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-402(d) (1990). However, this presumption is only applied if there is an "affirmative showing in the record that the trial court considered relevant sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The record before this court supports application of the presumption of correctness to the trial court's conclusions. Moreover, the party challenging the sentence, herein the State, bears the burden of proving the impropriety of said

sentence. Sentencing Commission Comments, Tenn. Code Ann. § 40-35-401(1990).

Our review requires that we consider the evidence received at the trial and at the sentencing hearing, the presentence report, the principles of sentencing, argument of counsel, the nature and characteristics of the offenses, existing mitigating and enhancement factors, statements made by the offender, and the defendant's potential for rehabilitation. Ashby, 823 S.W.2d at 168; Tenn. Code Ann. § 40-35-210(1990). If our review reveals: (1) that the record adequately supports the trial court's findings of fact, (2) that the trial court followed the statutory sentencing procedure, and (3) that the trial court considered and properly weighed applicable sentencing factors, 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).

#### **A. Length of Sentence**

Initially, the State contends that, because the trial court found "the presence of three enhancement factors and no mitigating factors," the court inappropriately imposed the minimum sentence (eight years) within the range. Consequently, the State avers that the trial court should have enhanced the appellee's sentence to the maximum within the range (twelve years).

Again, the trial court found the presence of three enhancement factors: (6), the amount of property taken was particularly great; (7), the offense was committed to gratify the appellee's desire for pleasure or excitement; and (15), the appellee abused a position of private trust. Tenn. Code Ann. § 40-35-114. Neither party contests the trial court's findings regarding the applicable enhancement factors. Moreover, the State does not contend that any additional

enhancement factors exist. Despite the State's assertion that the trial court did not find any mitigating factors, the record reflects that the court considered one mitigating factor, the mental stress of the appellee. Tenn. Code Ann. § 40-35-113(8) (1990). Thus, the only issue before this court is whether the trial court determined the length of the appellee's sentence according to applicable sentencing guidelines and principles.

The appellee pled guilty, as a range I offender, to two class B felony offenses. The sentence range for a class B felony is eight to twelve years. Tenn. Code Ann. § 40-35-112(a)(2) (1990). In determining the appropriate sentence for a felony conviction, Tenn. Code Ann. § 40-35-210(c) instructs the sentencing court that "[t]he presumptive sentence shall be the minimum sentence in the range if there are no enhancement or mitigating factors." If there are enhancement and mitigating factors, the court must start at the minimum sentence in the range, then enhance the sentence according to the enhancement factors, then reduce the sentence in accordance with the mitigating factors. Tenn. Code Ann. § 40-35-210(e).

Initially, we are aware that a sentence is not determined by the mathematical process of adding the sum of enhancing factors present then subtracting from this figure the mitigating factors present for a net number of years. Rather, the weight to be afforded an existing factor is left to the trial court's discretion so long as the court complies with the purposes and principles of the 1989 Sentencing Act and the record adequately supports its findings. State v. Hayes, 899 S.W.2d 175, 185 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995) (citing Sentencing Commission Comments, Tenn. Code Ann. § 40-35-210; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see Ashby, 823 S.W.2d at 169).

Trial courts may exercise their discretion in determining the sentencing alternatives or the length of the term of confinement and by imposing different sentences depending upon the nature of the crime, the characteristics and history of the criminal, and the circumstances surrounding the particular offense involved. The sentencing act, however, guides the trial court's discretion by establishing general sentencing principles that the courts must follow. In order for the act to be successful, sentencing courts must apply the act on a case-by-case basis, tailoring each sentence to that particular person based upon the facts of that case and the circumstances of that defendant. Moss, 727 S.W.2d at 235. The policy expressed is that the punishment imposed should fit the crime as well as the offender. Id. (emphasis added). See also State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994) (discussing the individualized nature of alternative sentencing).

For the purpose of review, the trial court must preserve in the record the factors it found to apply and the specific findings of fact upon which it applied the sentencing principles to arrive at the sentence. Hayes, 899 S.W.2d at 185 (citation omitted). This was done in the present case. The record reflects that the trial court imposed the minimum sentence, eight years, in order that the appellee would remain eligible for probation. The court then imposed a sentence of split confinement. The sentence included nine months incarceration coupled with twelve years of supervised probation.<sup>2</sup> As the trial court stated, "[t]his way the Court will both avoid the deprecation [sic] of the offense and the Court will also control restitution and Ms. Kirkland for sometime to come." Again, the presumption of correctness applies to the trial court's determination. Thus, the trial court's imposition of the minimum sentence of eight years is justified. This

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<sup>2</sup>See Tenn. Code Ann. § 40-35-306(a) (1990), which provides,

(a) A defendant receiving probation may be required to serve a portion of the sentence in continuous confinement for up to one year in the local jail or workhouse, with probation for a period of time up to and including the statutory maximum time for the class of the conviction offense.



issue is without merit.

## **B. Probation**

In its second challenge to the sentence, the State contends that the trial court erred by granting a term of probation, rather than total confinement. Specifically, the State argues that the appellee's split confinement sentence is improper.

A sentence of split confinement is an alternative sentence. See Tenn. Code Ann. § 40-35-104(c)(3) (1995 Supp.). In determining the appellee's suitability for an alternative sentence, we first determine whether she is entitled to the statutory presumption that she 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 appellee must be convicted of a class C, D, or E felony. Tenn. Code Ann. § 40-35-102(6) (1994 Supp.). She must be sentenced as a mitigated or standard offender. Id. And, she must not fall within the parameters of Tenn. Code Ann. § 40-35-102(5) (1994 Supp.). This means that the appellee 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 appellee was convicted of two class B felonies. Therefore, she is not afforded the presumption favoring alternative sentencing. Moreover, the defendant has the burden of establishing her suitability for probation. See Tenn. Code Ann. §40-35-303(b). To meet this burden, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." Bingham, 910 S.W.2d at 456 (citing State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

Although not afforded the presumption favoring alternative sentence, the appellee is, nonetheless, eligible for probation. Tenn. Code Ann. § 40-35-303(a) ("a defendant shall be eligible for probation . . . if the sentence actually imposed . . . is eight years or less. . . ."). While not controlling the discretion of the sentencing court, the following criteria shall be accorded weight: "(1) the nature and [circumstances] of the conduct involved, Tenn. Code Ann. § 40-35-210(b)(4); (2) the defendant's potential or lack of potential for rehabilitation, Tenn. Code Ann. § 40-35-103(5); (3) whether a sentence of probation will unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B); and (4) whether a sentence other than probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B)." *Id.* The trial court properly considered these factors, including the ongoing nature of the offense, the appellee's lack of a prior criminal record, the appellee's work history, the appellee's position as a wife and mother, the seriousness of the offense, and the need for restitution. The trial court's imposition of a sentence involving a period of confinement followed by supervised probation reflects consideration of these factors. Again, applying the presumption of correctness afforded the sentencing court's determination, we are unable to conclude that the trial court erred by granting the appellee a sentence which includes probation. This issue is, similarly, without merit.

### **III. Conclusion**

In the present case, the trial court correctly applied the sentencing principles to the facts and circumstances of this case. Moreover, the record supports the sentence imposed by the trial court. As such, we cannot find error in the trial court's sentencing decisions. Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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DAVID H. WELLES, Judge

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THOMAS T. WOODALL, Judge