

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
OCTOBER 1996 SESSION

FILED
Jan. 29, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)	
)	C.C.A. NO. 02C01-9607-CR-00206
Appellee,)	
)	SHELBY COUNTY
VS.)	
)	HON. W. FRED AXLEY,
MICHAEL W. MOORE,)	JUDGE
)	
Appellant.)	(Sentencing)

FOR THE APPELLANT:

FOR THE APPELLEE:

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-and-
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OPINION FILED: _____

REMANDED FOR RESENTENCING

JOHN H. PEAY,
Judge

OPINION

The defendant was charged in the indictment with aggravated burglary and with theft of property valued over ten thousand dollars (\$10,000). He entered guilty pleas to the indicted charges and a sentencing hearing was held. At the sentencing hearing, the trial judge denied the defendant's request for judicial diversion or other alternative sentencing and imposed concurrent sentences of three years on each conviction.

The defendant now appeals as of right, contending that the trial judge erred in denying judicial diversion and in denying some other form of alternative sentencing. After reviewing the record in this cause, we find the defendant's complaint to be meritorious and set aside the sentence imposed by the trial judge.

The defendant, along with two codefendants, burglarized the victim's home and stole jewelry, compact discs, and other items valued at over ten thousand dollars (\$10,000). Although he first denied participation, the defendant later admitted to his participation in the burglary and theft and the attempted sale of a portion of the compact discs.

Evidence presented at the sentencing hearing, including the presentence report, indicated that the defendant was only two months past his eighteenth birthday when these offenses occurred. He had not completed high school but was pursuing a GED and had been employed for approximately one year at the time of sentencing.

Although the defendant had no criminal record, as a juvenile he had been charged with two minor offenses which were not adjudicated. While testifying at the

sentencing hearing, the defendant admitted to a shoplifting incident at age eleven and a marijuana possession at age seventeen. However, he testified that he had not used any marijuana for two years and did not drink intoxicating beverages. Further, he testified that he had successfully passed three drug screenings during his period of employment.

When a defendant complains of his or 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).

T.C.A. § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need “to protect society by restraining a defendant who has a long history of criminal conduct,” the need “to avoid depreciating the seriousness of the offense,” the determination that “confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses,” or the determination that “measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” T.C.A. § 40-35-103(1).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics

of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. §§ 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b). In addition, the legislature established certain sentencing principles which include the following:

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

(6) A defendant who does not fall within the parameters of subdivision (5) and 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.

T.C.A. § 40-35-102.

After reviewing the statutes set out above, it is obvious that the intent of the legislature is to encourage alternatives to incarceration in cases where defendants are sentenced as standard or mitigated offenders convicted of C, D, or E felonies.

The record in this cause reveals that the trial judge failed to consider all of the sentencing principles along with the relevant facts and circumstances and, therefore, there is no presumption of correctness attached to the sentence. Because of the defendant's youthful age, his work record, and his apparent attitude of attempting to amend his lifestyle, we find that this defendant is the type for whom Community Corrections is well suited.

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).

We therefore remand this matter to the trial court to resentence the defendant to a reasonable term to be served in Community Corrections. This sentence should include reasonable restitution, completion of the defendant’s GED requirements, and other reasonable terms and conditions placed upon him by the trial court.

JOHN H. PEAY, Judge

CONCUR:

PAUL G. SUMMERS, Judge

DAVID G. HAYES, Judge