IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1996 SESSION

FILED

January 31, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9602-CC-00078**
Appellee,	)	
	)	**MARSHALL COUNTY**
VS.	)	
	)	**HON. CHARLES LEE,**
GEORGE RHODES ROCHELLE,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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(On appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for aggravated sexual battery in violation of T.C.A. § 39-13-504. He entered a best interest plea to the offense of attempted aggravated sexual battery, a Class C felony. The defendant agreed to a three year sentence as a part of the plea agreement. At the sentencing hearing, the defendant asked for alternative sentencing, but his request was denied. It is from this denial that the defendant 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 on February 18, 1995, on charges of sexual battery and public intoxication. Earlier that day, the defendant had invited his nine-year-old neighbor to his home. When the child arrived, the defendant took the child's hand and placed it on the defendant's groin area. The child left immediately and notified his parents. The defendant was arrested at his home shortly thereafter.

Before discussing the sentencing issue, we briefly address the State's contention that because the defendant entered into a plea agreement he cannot now complain about his sentence.

A defendant has a right of appeal upon a plea of guilty or nolo contendere if:

> (i) Defendant entered into a plea agreement under Rule 11(e) but explicitly reserved with the consent of the state and of the court the right to appeal a certified question of law that is dispositive of the case; or
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> (ii) Defendant seeks review of the sentence set and there was no plea agreement under Rule 11(e); or
>
> (iii) The error(s) complained of were not waived as a

> matter of law by the plea of guilty or nolo contendere, or otherwise waived, and if such errors are apparent from the record of the proceedings already had; or
>
> (iv) Defendant explicitly reserved with the consent of the court the right to appeal a certified question of law that is dispositive of the case.

Tenn. R. Crim. P. 37(b)(2). Here, the defendant seeks a review of his sentence only. The State maintains that he cannot do so because he entered into a plea agreement.

"[W]hen a defendant pleads guilty pursuant to a plea agreement, he waives his right to challenge the sentencing ranges to which he agreed." Eric Williamson v. State, No. 02C01-9305-CR-00096, Shelby County (Tenn. Crim. App. filed May 11, 1994, at Jackson), *citing* State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987). Also, a defendant does not have a right to appeal from a sentence which complies exactly with his plea agreement. State v. Charles David Raines, No. 03C01-9407-CR-00254, Hamblen County, (Tenn. Crim. App. filed March 21, 1995, at Knoxville)(finding no basis for appeal where defendant agreed to a particular sentence pursuant to a plea bargain).

In this case, the defendant is neither challenging the range of his sentence nor an agreed upon particular sentence. He is only challenging the manner in which the sentence is to be served. While the defendant did agree to a three year sentence, he did not agree to incarceration. We find no authority that addresses this specific issue, and we find no reason to bar the defendant from pursuing this appeal.

We now turn to the appropriateness of the defendant's sentence. 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).

Tennessee Code Annotated § 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
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> (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. However, it is also clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate.

The defendant complains that he should not have been denied alternative sentencing. Because the defendant pled guilty to a Class C felony, he is presumably entitled to alternative sentencing in absence of evidence to the contrary. T.C.A. § 40-35-102(6).

In this case, the sentencing court denied alternative sentencing based on the fact that the defendant was on unsupervised probation at the time of this offense, the defendant's long history of alcohol abuse and alcohol-related offenses, his sporadic work history and his unstable social history. The record supports this conclusion. In May of 1994, the defendant pled guilty to criminal trespassing, and as a result was placed on unsupervised probation. The offense which led to this case occurred prior to the conclusion of his probationary period. This fact is certainly a proper one for the trial court to consider in determining an appropriate sentence. Secondly, the defendant admitted that he had a long history of alcohol abuse. He began drinking at age thirteen and was drinking heavily by the time he was eighteen. He has a string of offenses such as driving under the influence, public intoxication, driving on a revoked license, and other traffic

offenses. In fact, the defendant testified at the sentencing hearing that he had been drinking heavily on the day the current offense occurred and that as a result, he is unable to recall what happened. He has entered treatment programs for his alcohol abuse on two occasions, but neither was successful. Finally, the defendant has a sporadic work history. At the time of the sentencing hearing he was employed part-time as a landscaper. The presentence report reflected that he has had at least six different jobs since 1982 and that he drew unemployment from 1991 to 1993. The report also indicated that the defendant has been married four times since 1966 and that he has two children, neither of which he has any contact with.

Thus, we conclude that these factors cited by the trial court 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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DAVID H. WELLES, Judge

_____
JERRY L. SMITH, Judge