IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

STATE OF TENNESSEE,	)	NO. 01C01-9601-CC-00029
	)	
Appellee	)	LAWRENCE COUNTY
	)	
V.	)	HON. JAMES L. WEATHERFORD
	)	JUDGE
MALCOLM LEE WILLIS,	)	
	)	(Sentencing)
Appellant	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

Pursuant to a plea bargain agreement, the appellant, Malcolm Lee Willis, pled guilty to one count of conspiracy to distribute cocaine, twelve counts of sale of cocaine, and one count of possession of cocaine for resale. He was sentenced to six-years' imprisonment for his conspiracy to distribute cocaine offense, eight-years' imprisonment for each sale of cocaine offense, and eight years for possession of cocaine for resale. As a part of the plea bargain agreement, the eight-year sentences were ordered to be served concurrently but consecutively to the appellant's six-year sentence for an effective sentence of fourteen years. The parties and the court agreed at his plea submission hearing that the appellant would be given a sentencing hearing in order for the court to determine the manner of service of the sentences.

At his sentencing hearing, the appellant argued that he was entitled to a community correction sentence, or at the least a sentence of split confinement. The trial court disagreed with the appellant and ordered that his sentences be served in the Tennessee Department of Correction. It is from that decision that the appellant now appeals. For the reasons contained herein, we affirm the trial court.

As a preliminary matter, the State contends that the appellant, by entering a plea of guilty, is precluded from presenting this appeal. We disagree. It is clear from the record that although the plea bargain agreement provided that, in exchange for his guilty pleas, the appellant would be sentenced to an aggregate sentence of fourteen years, it is also clear from the record upon appeal that a sentencing hearing would be conducted, following which the trial judge would determine the manner of sentence. Since the appellant is not appealing from the length of his sentences, to which he agreed, but the manner of the service of those sentences, to which he did not agree, his appeal is properly before this Court. See State v. George Rhodes Rochelle, No. 01C01-9602-CC-00078 (Tenn. Crim. App. at Nashville, January 31, 1997).

The record before us indicates that on July 5, 1994, the Lawrence County Grand Jury returned indictments against the appellant charging him with three counts of conspiracy to distribute cocaine. The indictment specified that the crimes occurred in May of 1994. The appellant was arrested for the indicted offenses in August of 1994 and thereafter posted bond for his relief from custody pending trial.

On December 6, 1994, the Lawrence County Grand Jury returned a second indictment against the appellant charging him with thirteen distribution of cocaine related crimes. This second indictment alleged that these offenses occurred between August 31 and December 2, 1994, which was at a time when the appellant was free on bond following his July 5, 1994, indictments.

On September 11, 1995, after two of the conspiracy to distribute cocaine charges were entered *nolle prosequi* by the State, the appellant pled guilty to the fourteen remaining offenses for which he had been indicted.

When an appellant complains of his or her sentence, we must conduct a *de novo* review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990). This presumption, however, is conditioned upon an 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 established a community-based alternative to incarceration for certain nonviolent offenders and sets out the minimum eligibility requirements. Tenn. Code Ann. §§ 40-36-101--306 (1990, Supp. 1995). Even though an appellant may meet the eligibility standards for a community correction sentence, he or she is not necessarily entitled to such relief. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987); See also State v. Grandberry, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990). The trial judge must also consider the Sentencing Reform Act's policies on incarceration:

> 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 affective 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. . . .

Tenn. Code Ann. § 40-35-103(1)(A)-(C) (1990).

The State properly concedes that as a nonviolent offender, the appellant meets the minimum eligibility requirements to be considered a candidate for a community correction sentence. Likewise, the appellant is one who may be considered for other forms of alternative sentencing, but as a Class B felon, he is entitled to no presumption in favor of alternative sentencing for those offenses. Tenn. Code Ann. § 40-35-102(6) (Supp. 1995).

The record in this case indicates that the appellant, at the time of his sentencing, was fifty-five years old and resided in St Joseph, Tennessee. He was divorced but was cohabiting with a twenty-six-year-old female cocaine addict. Although he maintained regular employment at the Wilson Casket Company, law enforcement officials described him as both a wholesaler and retailer of drugs. Following his arrest, a search of his home revealed drugs and drug paraphernalia on the premises. The presentence report indicated that the appellant's daughter was likewise involved in the business of selling cocaine along with her father.

The appellant suffers from diabetes, nervousness, and stomach problems. He takes medication for those conditions. Further, the appellant was described as a nonviolent person who had been generally cooperative with law enforcement following his arrest.

In 1987, the appellant was convicted of a drug-related felony and sentenced to three-years' imprisonment. There is no evidence in the record that the appellant engaged in the sale of narcotics following his release from prison after his earlier conviction until sometime in 1994.

The State introduced evidence through the testimony of the Sheriff of Lawrence County and another law enforcement officer that there was a serious cocaine problem in Lawrence County, particularly at the southern end of the county near the State border with Alabama. They testified that drugs were routinely transported back and forth between the states of Tennessee, Alabama, and Mississippi. The St. Joseph community, where the appellant resides, is located near Tennessee's border with Alabama in that area of the county particularly infested with drugs.

The appellant contends that the trial judge failed to sentence him to a community correction sentence because the trial judge indicated that his drug-related offenses were violent offenses which disqualified him from being considered for community correction. We agree with the appellant that the trial court erroneously concluded that drug offenders, such as the appellant, are violent offenders. Nevertheless, our *de novo* review of the record leads us to conclude that the appellant was not an appropriate candidate for any type of alternative sentencing, including a community correction sentence.

We find that confinement is necessary to avoid depreciating the seriousness of the appellant's offenses and that confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses. In this case, the appellant pled guilty to fourteen Class B felony offenses. We find it shocking and reprehensible that following his first indictment in July of 1994 for three counts of conspiracy to distribute cocaine, the appellant continued his cocaine enterprise after he had posted bond. While on bond, the appellant committed fourteen additional cocaine-related crimes. Moreover, the State's specific proof of the extensive drug problem in Lawrence County demonstrates a need for the appellant's incarceration to deter others in the County who would engage in similar conduct.

For the foregoing reasons, we affirm the decision of the trial court in ordering the appellant's incarceration in the Tennessee Department of Correction.

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WILLIAM M. BARKER

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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J. STEVEN STAFFORD, SPECIAL JUDGE