IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION

FILED

September 11, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	C.C.A. No. 01C01-9709-CC-00425
Appellee,	)	
	)	Williamson County
v.	)	
	)	Honorable Henry Denmark Bell, Judge
BARBARA J. COTTON,	)	
	)	(Sentencing)
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

L. T. LAFFERTY, SPECIAL JUDGE

OPINION

The appellant, pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, filed an appeal from a sentence imposed by the Williamson County Criminal Court for the offense of driving on a revoked license. The appellant, referred to as the defendant, entered a guilty plea, on July 19, 1997, to the offense of driving on a revoked license. On September 15, 1997, the trial court ordered the defendant to serve 180 days in the Williamson County Jail and denied alternative sentencing. After a review of the entire record, the briefs of the parties, and applicable law, we affirm the trial court's judgment.

On November 8, 1996, Officer Andrew Green with the Franklin City Police Department observed the defendant driving her car. The defendant had just left the Williamson County General Sessions Court for a similar offense, thus Officer Green was aware the defendant's driver's license had been revoked. Therefore, he stopped the defendant.

At the conclusion of the sentencing hearing, the trial court rejected the defendant's request for an alternative sentence. The trial court stated: "if ever I've heard of a person, now 42, who is absolutely unable or unwilling to conform herself to the law, this is it--been on parole and violated that twice."

SENTENCING CONSIDERATIONS

When a defendant 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). The burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d). 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 (Tenn. 1991).

In arriving at a proper sentence, the trial court must consider the specific procedures of Tenn. Code Ann. § 40-35-210(b): (1) the evidence, if any, received at trial and the

sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) any statement the defendant wishes to make in his or her own behalf about sentencing.

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the trial court is required to allow the parties a reasonable opportunity to be heard on the question of the length of the sentence and the manner in which it is to be served. Tenn. Code Ann. § 40-35-302(a). The sentence must be specific and consistent with the purpose and principles of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-302(b).

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. *State v. Creasy,* 885 S.W.2d 829, 832 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); *State v. Karl Christopher Davis,* No. 01C01-9202-CC-00062, Williamson County (Tenn. Crim App., Nashville, March 17, 1993). In addition, the trial court is required to fix the sentence at not greater than 75 percent so the defendant may be considered for "work release, furlough, . . . and related rehabilitative programs." Tenn. Code Ann. § 40-35-302(d).

SENTENCING HEARING

Since the trial court was somewhat limited in its ruling as to an alternative sentence, we will conduct a *de novo* review without a presumption of correctness. Based on the evidence at the sentencing hearing and the presentence report, the defendant has a lengthy history of criminal convictions and behavior. The presentence report reveals that the defendant, between October, 1983 and October, 1988, was convicted of petit larceny and five offenses of shoplifting. She was sentenced to three years for each offense in the Department of Correction. Also, while serving these sentences, the defendant was granted

parole in March, 1984 which was revoked in May, 1985. Parole was granted again in January, 1987 and revoked again in May, 1988. The defendant was last granted parole in May, 1990. The defendant was convicted of theft on July 9, 1992 and sentenced to forty-five days. On June 28, 1995, the defendant was convicted of criminal impersonation and theft and received six-month sentences in the Williamson County Jail. She was placed on probation, which was revoked on July 17, 1996. On January 20, 1996 and January 29, 1996, the defendant was arrested and charged for two separate offenses of theft. The defendant was convicted by the Williamson County General Sessions Court on July 17, 1996, receiving six months for each offense and placed on probation for eleven months and twenty-nine days.

To counter this life of criminal behavior, the defendant submitted to the trial court a bibliography of her life since birth. Between February, 1997 and July, 1997 the defendant was serving a sentence in the Williamson County Jail for driving on a revoked license, a prior offense. Between July, 1997 and the sentencing hearing of September 17, 1997, the defendant was employed with the Horace Small Apparel Company in Nashville. The defendant began using drugs at the age of 13 and progressed to the point where she was a full-blown addict. The defendant was addicted to heroin and dilaudid. The defendant sought drug treatment 26 months prior to the sentencing hearing and was placed on a methadone program, which in and of itself is an addictive drug. The defendant testified she attended Narcotics Anonymous meetings and is now off methadone. The defendant testified she committed these crimes to support her drug habit and lifestyle. The defendant testified since she has been free of drugs she can handle her children better and live a normal life. If required to serve her sentence, the defendant would lose her job and her children would be separated.

In her plea for probation and/or an alternative sentence, the defendant stated to the trial court, “I can’t tell this court how I plan to get myself straight. I can only tell you I won’t make the same mistakes I made previously. I am too old to continue going down this road. I am basically a good person. I have been to treatment again, at Volunteer Clinic in

Chattanooga, Tennessee and this time I applied myself."

The defendant contends that due to the unusual circumstances in this case and the defendant's efforts to rehabilitate herself from her drug addiction, this Court should place the defendant on full probation. The defendant submits these mitigating factors in support of probation: (1) the defendant's criminal action neither caused nor threatened serious bodily injury; (2) there is a strong possibility of a return of the offender to a normal life in the community; (3) the defendant has the capacity to adjust to law abiding behavior; (4) there is a strong possibility of successful treatment, training and the defendant is likely to comply with the terms of probation; and (5) the defendant has acknowledged her guilt and has shown a willingness to assume responsibility for her conduct.

As to any enhancing factors, the defendant agrees she has a previous history of criminal convictions or criminal behavior and the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community, to wit: two revocations of probation.

The primary purpose of the Criminal Sentencing Reform Act of 1989 is to impose a "sentence justly deserved in relation to the seriousness of the offense." Tenn. Code Ann. § 40-35-102. Again, punishment is appropriate to restrain defendants with a lengthy history of criminal conduct. Tenn. Code Ann. § 40-35-102(3)(B).

Although, the defendant has obtained employment, established some relationship with some of her children, and continues to fight her drug addiction, we believe the record fully supports the trial judge's denial of probation. The defendant in this very case appeared in a general sessions court to answer to the charge of another driving on a revoked license. The defendant blatantly drove away from the courthouse resulting in this case. We believe the defendant's criminal convictions and behavior, plus the two probation revocations in 1996, significantly outweigh the mitigating factors.

From this Court's *de novo* review of the record, we find and agree with the trial court that the defendant is not entitled to probation. The trial court's judgment is affirmed.

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L. T. LAFFERTY, SPECIAL JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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THOMAS T. WOODALL, JUDGE