IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1998 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9708-CR-00329
Appellee,	*	DAVIDSON COUNTY
VS.	*	Hon. J. Randall Wyatt, Jr., Judge
MICHAEL D. MARTIN, JR.,	*	(Vandalism and Burglary)
Appellant.	*	

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OPINION FILED:_____

AFFIRMED AS MODIFIED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Michael D. Martin, Jr., entered pleas of guilt to vandalism and burglary. The plea agreement provided that the sentences would be concurrent and that, after a hearing, the trial court would determine both the length of the sentence and the method of service. At the conclusion of the sentencing hearing, the trial court imposed a six-year sentence for vandalism over $10,000.00, a Class C felony, and a four-year sentence for burglary, a Class D felony.

In this appeal of right, the general issue is whether the sentence was appropriate. For the reasons hereafter stated, we modify the judgment of the trial court to provide for four-and-one-half-year and three-year sentences. Otherwise the judgment is affirmed.

On July 27, 1996, Reverend Barry L. Cox, Sr., the pastor at Scott's Chapel A.M.E. Church, received a telephone call from a church custodian, who had discovered damage to the premises. Upon inspection, Reverend Cox discovered that church funds had been stolen, the building had been vandalized, and office equipment had been destroyed. He estimated the cost of repair at $35,000.00. The church, which was over 100 years old, was caused to miss tithes and offerings due to canceled services for which Reverend Cox sought restitution. He stated that insurance costs had doubled and as a result of the defendant's misconduct, that a security system had to be installed, and that certain of the members had been emotionally scarred by the experience. The congregation is composed primarily of African-Americans. Reverend Cox sought "the maximum sentence."

There was evidence that the defendant and two of his juvenile friends, ages seventeen and fifteen, had damaged the church organ. At least one of the

youths made photo copies of his buttocks and placed them throughout the church. One or more of them urinated in the sanctuary. A refrigerator and a water cooler were damaged and change was taken from a drink machine. The defendant damaged a drum set. Computers and televisions were broken.

The defendant, who had been in jail for approximately one year at the time sentence was imposed on August 1, 1997, was eighteen years old at the time of the offense. Although he had quit school, he obtained his GED during his confinement. He produced medical records from the Vanderbilt Psychiatric Facility for Adolescents indicating a history of suicide attempts and self-mutilation. He was counseled at the Luton Mental Health Services Facility and was diagnosed as having an attention deficit disorder.

The defendant, who had no prior adult record, testified that he had no place of residence at the time of his offense and for about one year had slept in a clubhouse "in the woods." He stated that he listed his residence with his mother and stepfather and had limited contact with his natural father. While conceding that he was the oldest of the three individuals involved in the incident, he claimed that he was not the leader and had entered a window of the church only after the others had done so. He claimed that his aim was to steal money from the Coke machine. He stated that when his friends began to vandalize the church, he followed suit only to show that he was not a "sissy." He conceded that he had attempted suicide and had experienced truancy in school. He claimed a history of drug and alcohol usage:

> I was more or less killing myself, I guess you would say. I ... didn't have nowhere to stay and I [was] just always real depressed and ... that was my down point in life, I guess.

During his confinement in jail, the defendant completed a Teen

Challenge course and participated weekly in a Bible study offered by Life Challenge Ministries and led by Mary Novak.

The defendant acknowledged that he was responsible for fifteen to twenty percent of the vandalism in the church. The defendant, a Caucasian, claimed that none of his actions were racially motivated. He stated that if released, he would work with his father, live with his aunt, and pay for the damages done to the church. He asked to continue in psychological and drug counseling. The defendant admitted that he had broken into a lawnmower shop in Wilson County[1] and stolen a motorcycle on the same night as these crimes and was responsible for vandalizing some equipment there.

The defendant's mother, Cynthia Pittman, confirmed that the defendant had been living on the streets and had refused to attend school despite her efforts to require his attendance through the juvenile court. She blamed the absence of the defendant's father for his emotional problems. She testified that the defendant had been placed in the Vanderbilt Psychiatric Unit on four different occasions, some of which were due to suicide attempts. Ms. Pittman claimed that her son was remorseful for his misdeeds, had changed for the better, and regularly adhered to his prescription schedule of Ritalin and Clonidine.

Mary Ann Harris, the defendant's aunt, testified that the defendant could reside in her two-bedroom condominium. An employee of Wright Industries in Nashville, she stated a willingness to report any violation of conditions of release should the defendant be granted a Community Corrections sentence. Several

[1]The defendant was convicted for arson in Wilson County and received a Community Corrections sentence.

supportive letters appear in the file.

The assistant district attorney general sought the maximum sentence but asked for a jail sentence rather than a sentence to the Department of Corrections. The trial court also refused bail on appeal. The Davidson County Community Corrections report suggested an assessment and proposed a plan of supervision as follows:

1. The defendant to find a residence which is suitable for the court and Co

2. Participate with any treatment deemed necessary through the DCCCP day reporting center.

3. Secure and maintain fulltime employment. Work must consist of forty hours per week, be verified by payroll checks, and not exceed curfew restrictions.

4. Perform 240 hours of community service work at a rate of 16 hours per month.

5. Undergo random drug tests.

6. Comply with all levels of supervision that will consist of a:

   7:00 PM curfew with two weekly contact visits the first 90 days, 8:00 PM curfew with two weekly contact visits the next 90 days, 9:00 PM curfew with one weekly contact visit thereafter.

7. Pay supervision fee of $45.00 per month.

8. Pay court costs and fines; monthly payments to be made.

9. Adhere to all recommendations of the court and the DCCCP.

The trial court, in imposing the maximum sentence, placed emphasis upon the "senseless and outrageous conduct" of the defendant which had resulted not only in damage to the church but also to its pastor and members as well. The

sentence imposed required incarceration in the Department of Correction:

> This is a case that involves the house of God, a place that these people, under the direction of Reverend Cox, come to worship and to praise God.... [T]hey were in that church and, obviously, did what they did as a result of some distorted attitude toward a church and the people that come to that church and worship.
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> * * *
>
> I think he was destroying, desecrating a church.... I think he probably knew who went to that church and, even though it can't be clear from what I heard here today, that probably ... this matter had racial overtones.... ...This church has been there since the 1800's.... I think what he did was outrageous, inexcusable, something that this court has a zero tolerance for.

The trial court determined that the sentence should be enhanced due to the significant damage done and because the crime appeared to be committed to gratify a desire for excitement. Tenn. Code Ann. § 40-35-114(6), (7). While the trial court did not determine that the defendant was a leader in the commission of the offense, it did determine that the offense involved more than one victim. Tenn. Code Ann. § 40-35-114(3). The trial court, while acknowledging the defendant had done some "good things," did not find mitigating circumstances and concluded that placement on a Community Corrections program would depreciate the seriousness of the offense.

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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). The Sentencing Commission Comments provide that the burden is on the defendant to

show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

At the time of the offense, the presumptive sentence for these Class C and Class D felonies was the minimum of the range if there were no enhancement and mitigating factors. Tenn. Code Ann. § 40-35-210(c). Should the trial court find mitigating and enhancement factors, it must start at the minimum, enhance the sentence based upon any applicable enhancement factors, and then reduce the sentence based upon any appropriate mitigating factors. Tenn. Code Ann. § 40-35-210(e). The weight given to each factor is discretionary with the trial court so long as the record supports its findings and it complies with the 1989 Sentencing Act. See Ashby, 823 S.W.2d at 169. The trial court must, however, make specific findings on the record which indicate its application of the sentencing principles. Tenn. Code Ann. §§ 40-35-209, -210.

Among the factors applicable to the defendant's application for probation are the circumstances of the offense, the defendant's criminal record, social history, and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978).

Especially mitigated or standard offenders convicted of Class C, D, or

E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a), (b).

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103. The Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal aims. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990). That a defendant meets the minimum requirements of the Community Corrections Act of 1985, however, does not mean that he is entitled to be sentenced under the Act as a matter of law or right. State v. Taylor, 744 S.W.2d 919 (Tenn. Crim. App. 1987). The following offenders are eligible for Community Corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
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> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 2 [repealed], parts 1-3 and 5-7 or title 39, chapter 13, parts 1-5;
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> (3) Persons who are convicted of nonviolent felony offenses;
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> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
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> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
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> (6) Persons who do not demonstrate a pattern of committing violent offenses; and

> (7) Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

The defendant contends that the trial court failed to consider many of the statutory principles in the imposition of sentence. In particular, he complains that the sentence imposed should be the least severe measure necessary to achieve the purpose of the 1989 Act. Tenn. Code Ann. § 40-35-103(4). He argues that the trial court failed to consider his potential for rehabilitation despite a legislative mandate encouraging alternatives to incarceration. Tenn. Code Ann. § 40-35-103(5), (6).

The defendant also argues that nothing in the record indicates that the crimes were either racially or religiously motivated and that the trial court erred by inferring that from the race of the defendant or the makeup of the church. The defendant points out that the sentencing guidelines do not authorize trial courts to make distinctions in sentencing based upon the use of the building burglarized or vandalized:

> There is no question of the sincerity and good intentions of the trial court, but it is submitted that the sentence was based upon impermissible factors. A state trial court cannot impose a greater sentence for vandalizing a church than it would for vandalizing an adult book store. Our law and sentencing structures do not authorize this type of deviation based upon the personal values and preferences of the trial court, even though those views might reflect the view of the majority of the citizens.

Finally, the defendant argues that the trial court erred by determining that "the whole congregation was a victim" in applying that enhancement factor. See Tenn. Code Ann. § 40-35-114(3). He argues that a public or private building used or supported by a group of individuals, such as a high school or a country club, would not have required the application of the enhancement factor described in Tenn. Code Ann. §

40-35-114(3).

Among the many applicable statutory factors in the imposition of a sentence is that the sentence imposed should be "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(4). The 1989 Act encourages "alternative sentencing in correctional programs that elicit voluntary cooperation of defendants...." Tenn. Code Ann. § 40-35-102(3)(C). Prison space is limited and our statute contemplates the use of the Department of Correction for "convicted felons committing the most severe offense, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation...." Tenn. Code Ann. § 40-35-102(5). The potential for rehabilitation is an important consideration. Tenn. Code Ann. § 40-35-103(5). "Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation and/or community service." Tenn. Code Ann. § 40-35-103(6). The 1989 Act encourages trial courts to review not only the enhancement factors in the imposition of sentence but also the mitigating factors. Tenn. Code Ann. § 40-35-113, -114.

In this instance, the record establishes that the trial court did not consider certain of the principles applicable to sentencing. There were enhancement factors and the trial court did reject the state's assertion that the defendant was a leader in the commission of the offense. We do not disagree with any of the conclusions reached in those regards; however, there was no specific finding as to the presence or absence of possible mitigating factors. The proof suggests that mitigating factors were present. For example, there was no indication that the defendant's conduct threatened serious bodily injury. Tenn. Code Ann.

§ 40-35-113(1). There was proof that the defendant, because of his youth, lacked substantial judgment. Tenn. Code Ann. § 40-35-113(b). The defendant's history of psychiatric care, evidence of depression, his living circumstances, and his diagnosis of attention deficit disorder which improved during incarceration through medication and treatment, provide support to the presence of that mitigating factor. Moreover, the record confirms that the defendant suffered from a "mental ... condition" that may have had an effect upon his degree of culpability. Tenn. Code Ann. § 40-35-113(8). Some, although not great weight, should have been attached to those factors. That the defendant earned his GED in jail, that he took his prescribed medications, and that he had improved himself through participation in programs available to jail inmates are perhaps of more importance and, at a minimum, suggest a potential for rehabilitation. Tenn. Code Ann. § 40-35-113(13). That the trial court failed to consider any one of these as possible mitigation in determining the length of the sentences indicates that our review should be de novo without a presumption of correctness. Tenn. Code Ann. § 40-35-401(d); Ashby, 823 S.W.2d at 169.

Offenders, especially youthful offenders, who are convicted of property-related crimes rather than violent offenses have been recognized by the Legislature as legitimate candidates for a Community Corrections sentence. Because this defendant had spent a considerable amount of time in jail and could have been ordered into the Community Corrections program with specific conditions attached, including more jail time, an alternative sentence may have been a better option under these circumstances. There would have been an incentive for continued good behavior, a monitoring of restitution efforts, and, at the same time, punishment for other crimes. This sentencing issue is, however, largely moot because the defendant, who could not make a $30,000.00 bail before entering the

plea agreement, was denied the opportunity of bail on appeal. By the time this case was assigned for disposition, he had been placed on parole by the Department of Correction.

In summary, by the application of all of the principles and considerations governing sentencing, this court modifies each of the two sentences to mid-range. There were enhancement factors which warranted a greater weight than those mitigating factors present. The sentence for burglary, a Class D felony, which may be from two to four years for a Range I offender, is modified to three years. For vandalism over $10,000.00, involving a possible range of three to six years, the sentence is modified to four and one-half years. While a Community Corrections sentence coupled with a term in jail would have been a more constructive alternative in these circumstances, the fact that the defendant is now on parole compels us to affirm the denial of his request for a Community Corrections sentence.

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Gary R. Wade, Presiding Judge

CONCUR:

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John H. Peay, Judge

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Jerry L. Smith, Judge