IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1999 SESSION

FILED

September 20, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 02C01-9811-CC-00344
	)	
vs.	)	Shelby County
	)	
PTOSHA SIMS and	)	Hon. W. Fred Axley, Judge
DENISE WATSON	)	
	)	(Sentencing)
Appellants.	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendants, Ptosha Y. Sims and Denise L. Watson, pleaded guilty in the Criminal Court of Shelby County to unlawful possession of controlled substances with the intent to sell, a class E felony, and to solicitation to commit a felony, a class E felony. See Tenn. Code Ann. § 39-17-417 (1997) (proscriptive statute); § 39-12-102 (1997) (solicitation). For each offense, each defendant was fined $2000 and sentenced as a Range I offender to one year in the workhouse, to be served concurrently. Each defendant agreed to the sentence in her plea agreement. Also, each agreed to have the trial court determine whether her sentence should be suspended. The trial court ordered each defendant to serve the first two months of her sentence in the workhouse followed by one year of probation. The defendants have appealed the sentencing determination and claim that their sentences should have been probated in full. Upon review of the record, the briefs of the parties, and the law, we find no reversible error and affirm the judgment of the trial court.

In October 1997, the police were in pursuit of Eric Collins on an unrelated charge. Collins rushed into Ptosha Sims's apartment with the police behind him. Once in the apartment, the police saw marijuana and crack cocaine on a table. Sims and Watson were in the apartment. They were arrested and charged with unlawful possession of controlled substances with the intent to sell and deliver. The defendants pleaded guilty to unlawful possession of a controlled substance with the intent to sell and to solicitation to commit a felony, namely, unlawful possession of cocaine with the intent to sell. During the sentencing hearing, the defendants requested a suspended sentence. The trial court sentenced each defendant to incarceration for one year with a $2000 fine for each offense. The trial court allowed the sentences to be served with incarceration from the sentencing date, October 29, until the end of the year (63 days), followed by one year of probation. The defendants appealed the sentencing determination.

The only issue we must consider is the trial court's determination of the manner in which the defendants would serve their sentence. The defendants do not complain of the sentence, which they agreed to in their plea agreements and was the minimum term of confinement for the range. They complain only of the manner of service. Both defendants claim that they should have received full probation.

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 of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). 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 burden of showing that the sentence is improper is upon the appellant." Id. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. Id. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then determines the specific sentence and the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the 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 the enhancement

and mitigating factors, (6) any statements the defendant wishes to make in the defendant's behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210(a), (b) (1997); Tenn. Code Ann. § 40-35-103(5) (1997); State v. Holland, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The record reflects that the trial court considered the relevant factors in determining that the defendants would serve their sentences with a short period of confinement in conjunction with a term of probation. Accordingly, its determination is entitled to the presumption of correctness.

A defendant who "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." Tenn. Code Ann. § 40-35-102(6) (1997). In this case, the defendants were eligible for probation. See Tenn. Code Ann. § 40-35-303(a) (1997). Moreover, the defendants, both Range I offenders, enjoyed the presumption of favorable candidacy for alternative sentencing for their Class E felonies by receiving a short period of confinement in conjunction with a term of probation. See Tenn. Code Ann. § 40-35-104(c)(5) (1997).

Probation is, indeed, an alternative sentencing option. Tenn. Code Ann. § 40-35-104(c)(3) (1997). However, the burden rests with each defendant to show that she is entitled to probation. Tenn. Code Ann. § 40-35-303(b) (1997); see State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App.1995). In Bingham, this court observed:

> It should be pointed out that determining whether a defendant is entitled to an alternative sentence necessarily requires a separate inquiry from that of determining whether the defendant is entitled to full probation. This is so because the inquiries involve different burdens of proof. Where a defendant is entitled to the statutory

> presumption of alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary. Conversely, the defendant has the burden of establishing suitability for full probation, even if the defendant is entitled to the statutory presumption of alternative sentencing.

Bingham, 910 S.W.2d at 455. In Bingham, we cited the following factors which, although "not controlling the discretion of the sentencing court," should be considered in determining the appropriateness of probation:

> (1) The nature and characteristics of the crime, under Tenn. Code Ann. § 40-35-210(b)(4) (1990);
>
> (2) the defendant's potential for rehabilitation, under Tenn. Code Ann. § 40-35-103(5) (1990);
>
> (3) whether full probation would "unduly depreciate the seriousness of the offense," under Tenn. Code Ann. § 40-35-103(1)(B) (1990); and
>
> (4) whether a sentence of full probation would "provide an effective deterrent," under Tenn. Code Ann. § 40-35-103(1)(B) (1990).

Bingham, 910 S.W.2d at 456.

In conducting its analysis, the trial court found that full probation was inappropriate. After the trial court heard all evidence presented at the sentencing hearing for both defendants, the trial court questioned the credibility and candor of both defendants, citing State v. Bunch, 646 S.W.2d 158 (Tenn. 1983). As stated in Bunch, truthfulness is a factor which the trial court can consider relative to probation because it has a bearing on rehabilitation. Id. at 160-61. Also, the trial court found that the interests of the community outweighed the interests of both defendants in receiving a completely probated sentence.

Neither defendant has rebutted the trial court's statements that the interest of the public outweighed that of the defendants or demonstrated that probation "will 'subserve the ends of justice and the best interest of both the public and the defendant.'" Bingham, 910 S.W.2d at 456 (quoting State v. Dykes, 803

S.W.2d 250, 259 (Tenn. Crim. App. 1990)). Thus, they have failed to overcome the presumption of correctness of the trial court's decision to deny total probation.

Finding no error requiring reversal, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE