

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

**FILED**

December 27, 1999

Cecil Crowson, Jr.  
Appellate Court Clerk

AT KNOXVILLE

NOVEMBER SESSION, 1999

STATE OF TENNESSEE,

Appellee,

vs.

RONNIE GARDNER,

Appellant.

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C.C.A. No. 03C01-9901-CC-00194

BLOUNT COUNTY

Hon. D. Kelly Thomas, Jr., Judge

(Sentencing)

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OPINION FILED: \_\_\_\_\_

AFFIRMED

**David G. Hayes, Judge**

## **OPINION**

The appellant, Ronnie Gardner, appeals the sentencing decision of the Blount County Circuit Court following his guilty pleas to the offenses of theft of property, two counts of forgery, and two violations of the Habitual Motor Vehicle Offender's Act, all Class E felonies. In accordance with the plea agreement, the appellant received an effective three year sentence with the manner of service of the sentences to be submitted to the trial court.<sup>1</sup> At the sentencing hearing, the court imposed split confinement sentences requiring the appellant to serve six months in jail with the balance of the sentence to be served on supervised probation. The sole issue on appeal is whether the trial court erred by denying the appellant total probation.<sup>2</sup>

Following review, we affirm.

## **BACKGROUND**

The theft conviction stems from the theft of a television and microwave from a neighbor's residence on January 23, 1997. The appellant pawned the stolen property in Knoxville. In November of 1997, the appellant was stopped by an officer for driving while having been declared an habitual motor vehicle offender (HMVO). The forgery convictions stem from his employment at Hom of Plenty; the appellant forged two checks on his employer's account at First Tennessee Bank in the amounts of \$425.00 and \$400.32 on the respective dates of December 11, 1997

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<sup>1</sup>The record reflects that the appellant received the following sentences for the respective five felony convictions: violation of the HMVO Act, one year on each count; theft of property over \$500, one year; forgery, two years on each count. The trial court ordered, pursuant to the plea agreement, that one count violation of the HMVO Act and the theft of property sentence to run concurrently. The forgery counts and the remaining HMVO violation were ordered to run concurrently with one another but consecutively to the other count of violation of the HMVO Act, for an effective three year sentence.

<sup>2</sup>The transcript of the guilty plea hearing is not included in the record. Thus, the specific terms of the plea agreement are unknown. At the sentencing hearing and on appeal the appellant argues only entitlement to total probation. For these reasons, appellate review is limited to the sentencing alternative of probation.

and December 17, 1997. In January of 1998, the appellant was again charged with violation of the HMVO Act.

The appellant has three prior misdemeanor drug offenses, for which he received probation; a prior assault conviction, for which he received probation; two prior theft offenses, for which he received probation; and a prior driving with a suspended license conviction, for which he received probation. The appellant's sentencing history reflects six separate grants of probation. When preparing the presentence report, the appellant tested positive for marijuana and benzodiazepines. He also admitted to cocaine use in the prior months. The appellant testified at the hearing that he used marijuana within the last thirty days.

The twenty-two year old, divorced appellant was unemployed at the time of sentencing hearing in January of 1999. The appellant had been unemployed since August of 1998 when he worked at Texas Roadhouse. At the sentencing hearing, he denied any responsibility for the theft offense claiming that a friend had committed the theft and that when he pawned the items he was unaware they were stolen. He also denied any involvement in either forgery, although the bank teller identified the appellant from a line-up and later identified the appellant at the preliminary hearing. Although the appellant admitted to one instance of violating the HMVO Act, he denied that he was driving a vehicle on the second occasion.

He explained to the court the following reasons for his guilty pleas:

to get it all over with . . . [I]f they would have found me guilty, they would have gave [sic] me more time, so I just thought I would go with the alternate route and just do it all together. . . . Which I feel on several of these cases I'm not guilty, but I pleaded that I was guilty just so I could get through with what I'm going through. . . . And I've been fortunate that I haven't caught any new charges since all of these have been going.

After considering the evidence, the trial court ordered that the appellant serve six months of the three year sentence in confinement followed by intensive

probation and evaluation for drug and alcohol treatment.

### REQUEST FOR PROBATION

The sole issue on appeal is whether the trial court properly denied probation. Although the appellant requests that we conduct a *de novo* review of his sentences, we are precluded from doing so because the record is void of the guilty plea transcript. *De novo* review of a sentence contemplates an independent examination in the same manner and of the same facts in which the matter was originally heard. See Black's Law Dictionary 435 (6<sup>th</sup> ed. 1990); see, e.g., Farmingdale Supermarket, Inc. v. United States, 336 F. Supp. 534, 536 (D. N.J. 1971). The reviewing court essentially rehears the evidence and redecides the case. In imposing a sentence, the trial court is required to consider the "nature and characteristics of the criminal conduct involved." Tenn. Code Ann. § 40-35-210(b)(4) (1997). This court, in a *de novo* review of a sentencing issue, reconsiders all of the evidence with a presumption of correctness of the trial court's ruling and decides the issue under these guidelines. State v. Bingham, 910 S.W.2d 448 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995).

Within the trial context the "nature and characteristics of the criminal conduct" are contained within the transcript of the evidence; within the guilty plea context, this information is contained within the guilty plea transcript as provided by the factual basis for entry of the guilty plea. See Tenn. R. Crim. P. 11(e). The guilty plea transcript is particularly crucial in this case because the appellant after pleading guilty to five felonies now totally denies guilt for four of these offenses. Unlike the trial court which heard the factual basis for the guilty pleas, the record is void as to the "nature and characteristics of the criminal conduct involved." We have repeatedly and exhaustively held that the failure to include the transcript of the guilty plea hearings in the record prohibits this court from conducting a meaningful *de*

*novo* review.

If the appellate record is inadequate, the reviewing court must presume that the trial court ruled correctly. State v. Ivy, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993). The obligation of preparing a complete and adequate record for the issues presented on appeal rests upon the appealing party. See Tenn. R. App. P. 24(b). For this reason, this issue is waived.

Notwithstanding our finding of waiver, we are constrained to note the appellant's request for sentencing leniency while steadfastly denying his guilt.<sup>3</sup> The appellant by his own admission is either guilty of perjury at the guilty plea hearing or perjury at the sentencing hearing. Alternative sentencing options are not designed to aid the offender who either intentionally or recklessly makes materially false statements to the sentencing court.

As noted by the trial court in this case, "you deny your involvement in these cases. Admitting what you've done wrong is the first step in rehabilitation and you go to great lengths not to take that step." We repeat the admonitions of State v. Dowdy, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994):

It has been widely held that the defendant's truthfulness while testifying on his own behalf is probative of his attitudes toward society and prospects for rehabilitation and is thus a relevant factor in the sentencing process. See, e.g., U.S. v. Grayson, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); State v. Bunch, 646 S.W.2d 158, 160 (Tenn.1983). We have held that a defendant's credibility and willingness to accept responsibility for the offense are circumstances relevant to determining his rehabilitation potential. State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App.1992). It is unrealistic to assume that someone who has just pled guilty to a felony conviction, who then offers perjured testimony to the court, denies any criminal wrongdoing for the offense for which they have just pled, and is in general unrepentant is someone who could immediately return to their community and be expected to assume a role as a functioning,

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<sup>3</sup>We acknowledge the appellant's non-specific and hollow statement in redirect examination that "[he is] fully responsible for [his] actions" and that "[he] believe[s] [he] should be punished."

productive and responsible member of society.

The judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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ALAN E. GLENN, Judge

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JOE H. WALKER, III, Special Judge