

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 5, 2019

FILED

07/12/2019

Clerk of the
Appellate Courts

STATE OF TENNESSEE V. BOBBY D. DEWALT

Appeal from the Circuit Court for Lauderdale County
Nos. 10598, 9783 Joe H. Walker III, Judge

No. W2018-01850-CCA-R3-CD

Defendant, Bobby D. Dewalt, pled guilty to three counts of delivery of .5 grams or more of cocaine as a Range II, Multiple Offender in case number 10598 and was sentenced by the trial court to twelve years for each conviction, to be served concurrently. The trial court denied Defendant's request for an alternative sentence. At the same time, Defendant's probation was revoked in case number 9783, for which Defendant was on probation at the time of his guilty plea. Defendant filed a timely notice of appeal. After a review, we determine that the trial court did not abuse its discretion in denying an alternative sentence.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Bryan R. Huffman, Covington, Tennessee, for the appellant, Bobby D. DeWalt.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Mark E. Davidson, District Attorney General; and Joni R. Glenn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In October of 2014, Defendant pled guilty to aggravated burglary and attempted theft in case number 9783. Defendant received a sentence of six years as a Range II, Multiple Offender for the aggravated burglary conviction and a sentence of two years as a Range II, Multiple Offender for the attempted theft conviction, to be served concurrently on supervised probation.

On June 4, 2018, Defendant was indicted by a Lauderdale County grand jury for three counts of the delivery of .5 grams or more of cocaine in case number 10598. The State filed a notice of intent to seek enhanced punishment. In the notice, the State alleged that, based on the number and type of prior criminal convictions, Defendant qualified as a Career Offender.

On June 21, 2018, a violation of probation warrant was issued against Defendant in case number 9783, alleging that he had violated three separate rules of probation. Specifically, the warrant alleged that Defendant had delivered cocaine on three separate occasions in Lauderdale County, was indicted for three counts of delivery of cocaine in June of 2018, and was in arrears in paying supervision fees.

On August 23, 2018, Defendant pled guilty to three counts of delivery of .5 grams or more of cocaine in case number 10598. The State recommended a sentence of twelve years as a Range II, Multiple Offender, to run concurrently with the sentence in case number 9783. The plea agreement specified that the trial court was to determine the manner of service of the sentence at a sentencing hearing. That same day, the trial court entered an order revoking Defendant's probation in case number 9783.

At the sentencing hearing, Defendant, who was 51 years of age, admitted that he was not eligible for probation but that he wanted the trial court to consider a placement on Community Corrections. Defendant explained that prior to the sentencing hearing, he "had a heart attack and a stroke" and that he needed surgery. On cross-examination, Defendant explained that he had "gout in [his] feet" and that he had a "spot" next to his heart. Defendant acknowledged that a sentence on Community Corrections included a lot of rules and regulations, and he claimed that he was willing to follow those rules. Defendant explained that he had performed "a lot of lawn service" in the past but that he was going "to sign up for [his] disability." Defendant also claimed that he would be seeking employment. Defendant asked the trial court to give him a chance with a sentence on Community Corrections and swore this would be the "last time around."

Defendant admitted that he had multiple prior offenses, including aggravated burglary, attempted theft of property, several thefts, assault, several evading arrests, forgery, sale of Schedule II drugs, and several sales of cocaine, among other things. However, Defendant claimed he "ain't never sold no drugs." He explained that he had "got[ten] people" drugs and that the people would "give [him] something for getting it for them." Defendant admitted that people "gave [him] money" to go get drugs but denied that this constituted selling drugs. Defendant also denied using drugs. Defendant explained that the incident that led to his arrest happened when he was "walking from" work and ran into a woman who asked him to get her some drugs. Defendant "told her I know dude where I, you know, where I was working that sold" drugs. The woman gave Defendant \$20 to get her some drugs, and he purchased the drugs with the money.

Defendant wanted another chance in order to “raise” his family and “promise[d]” the trial court that he would comply with a Community Corrections sentence.

After hearing the evidence, the trial court determined that Defendant was “not eligible for probation” and had failed attempts at probation in the past. As a result, the trial court denied the request for an alternative sentence. Defendant filed a timely notice of appeal listing both case numbers 9783 and 10598 on the notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred in denying his request for an alternative sentence, specifically, a sentence on Community Corrections. As part of that argument, Defendant did not allege in the trial court and does not allege on appeal that he is entitled to placement on Community Corrections under the so-called “special needs” provision.¹ Additionally, Defendant does not challenge the revocation of his probation in case number 9783 on appeal. Therefore, this issue is abandoned on appeal. The State insists that the trial court did not abuse its discretion in denying an alternative sentence.

When a defendant challenges the length or manner of service of a within-range sentence, this Court reviews the trial court’s sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012); *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). This presumption applies to “within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act.” *Bise*, 380 S.W.3d at 707. A trial court abuses its discretion in sentencing when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). This deferential standard does not permit an appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). The defendant bears the burden of proving that the sentence is improper. T.C.A. § 40-35-101, Sentencing Comm’n Cmts.

A defendant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a). Moreover, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be

¹ Under the “special needs” provision of the statute, an offender who does not otherwise meet the minimum criteria for Community Corrections “and who would be usually considered unfit for probation due to histories of chronic alcohol or drug abuse or mental health problems, but whose special needs are treatable and could be served best in the community” may be considered eligible for a Community Corrections sentence. T.C.A. § 40-36-106(c). Because Defendant did not raise this issue in the trial court or on appeal, it is waived.

considered a favorable candidate for alternative sentencing absent evidence to the contrary. *See* T.C.A. § 40-35-102(6). Defendant pled guilty to three class B felonies and was sentenced to twelve years for each conviction. Defendant acknowledges that he was not eligible for probation based on the length of his sentence and the fact that he was not an especially mitigated or standard offender. We agree. However, a defendant who is ineligible for probation might still be a candidate for Community Corrections. T.C.A. § 40-36-106(a)(1)(A); *see State v. Kendrick*, 10 S.W.3d 650 (Tenn. Crim. App. 1999).

Tennessee Code Annotated section 40-35-103(1) sets forth the following sentencing considerations, which are utilized in determining the appropriateness of alternative sentencing:

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or

(C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

See also T.C.A. § 40-35-102(5); *State v. Zeolia*, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed.” T.C.A. § 40-35-103(5). A defendant with a long history of criminal conduct and “evincing failure of past efforts at rehabilitation” is presumed unsuitable for alternative sentencing. T.C.A. § 40-35-102(5). Our supreme court has specifically held that the abuse of discretion standard, with a presumption of reasonableness, also applies to a review of a denial of alternative sentencing. *Caudle*, 388 S.W.3d at 278-79.

Here, the trial court noted that Defendant was not eligible for probation. The trial court also determined that Defendant was on “release status” on his sentence in case number 9783 when he was charged with three counts of delivery of .5 grams or more of cocaine, had been “tried multiple times on release status without being able to comply,” and had multiple prior convictions for delivery of cocaine. As a result, the trial court denied an alternative sentence. The trial court did not abuse its discretion. Defendant is not entitled to relief.

TIMOTHY L. EASTER, JUDGE