IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 23, 2002

STATE OF TENNESSEE v. JEFFREY DOUGLAS STRATTON

Appeal from the Circuit Court for Blount County
No. C-12551 D. Kelly Thomas, Jr., Judge

No. E2001-00357-CCA-R3-CD
June 5, 2002

The defendant, Jeffrey Douglas Stratton, pleaded guilty to seven counts of theft involving checks that he had forged. Pursuant to a plea agreement with the state, the defendant was sentenced to four years on each count, and two of the sentences were to be served consecutively for an effective sentence of eight years. The trial court was to determine the manner of service of the sentences. After a sentencing hearing, the trial court imposed fully incarcerative sentences to be served in the Department of Correction. The defendant appeals this sentencing determination. We affirm the judgment of the trial court.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which GARY R. WADE, P.J. and NORMA MCGEE OGLE, J., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal); Raymond M. Garner, District Public Defender; and Shawn G. Graham, Assistant Public Defender (at trial), for the Appellant, Jeffrey Douglas Stratton.

Paul G. Summers, Attorney General and Reporter; Thomas E. Williams, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Tammy Harrington, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

On various dates in January, February, and March 2000, Jeffrey Stratton forged checks totaling $33,100, for which he was charged, *see* Tenn. Code Ann. § 39-14-114 (1997), and later pleaded guilty. The forged checks were drawn on a First Tennessee Bank account in Maryville. The account belonged to the defendant's great-aunt and great-uncle, William and Reva Hall, who were 98 and 94 years old, respectively, and who were extremely ill. The defendant pleaded guilty to an effective sentence of eight years based on an agreement with the state that for each count he would receive a four-year sentence, that counts one and five would be served consecutively, and that

counts two, three, four, six, and seven would be served concurrently to count one. The manner of serving the sentences and the question of restitution were reserved for the trial court's determination.

At the defendant's sentencing hearing, Maryville Police Detective Carlos Hess testified that he investigated the forgeries. The forged checks at issue were signed in the name "Reva Hall," and they were made payable to "Jeff Stratton." Detective Hess interviewed the Halls, and because of his concerns regarding their poor health, he videotaped their statements. Prior to being arrested, the defendant gave a written statement to Detective Hess in which he admitted to writing "about fifteen checks" on the account.[1] Detective Hess stated that the defendant, who was not living with the Halls, claimed that the Halls had given him permission to write the checks, "but he [felt] he exceeded what they had intended and that he was sorry."

Mr. and Mrs. Hall's niece, Carolyn Gregory, also testified at the sentencing hearing. In February of 2000, the elderly couple spoke with Ms. Gregory about their declining health. Mrs. Hall was in the early stages of Alzheimer's disease, and Mr. Hall had crippling arthritis. Ms. Gregory already had been assisting the couple with their finances by adding up their bills and writing out the checks to pay the bills, which Mr. Hall then would sign. By February, however, Mr. Hall was experiencing difficulty writing, and he wanted Ms. Gregory to be added as an authorized signatory on the checking account. According to Ms. Gregory, the defendant had stayed overnight with the Halls "from time to time," but he was not living with or taking care of the Halls.

Ms. Gregory testified that after she was added to the account, she went to the bank and asked about the existing balance. She was told that there was slightly more than $20,000 in the account and that the next statement would be mailed out in approximately ten days. When the bank statement did not arrive in the mail, Ms. Gregory returned to the bank. She was informed that the statement had, in fact, been mailed. When the bank employee checked the account, the balance showing was $2,000. When Ms. Gregory questioned what withdrawals had been made, copies of the checks drawn on the account were obtained, at which time the defendant's involvement was discovered.

The defendant testified at the sentencing hearing. At the time of the hearing, the defendant was 33 years old. He was married and living in Maryville with his wife and two teenage stepchildren. The defendant had been employed for six months as a forklift operator with Intec Supply. He supported his wife and stepchildren, and he also paid child support for his eight year-old son.

The defendant acknowledged his extensive criminal history, in which alcohol played a prominent role. In the last twenty years, the defendant had been arrested or issued citations on 35 occasions. As confirmed in the presentence investigation report, he has four prior convictions for

[1] According to Detective Hess, only seven of the checks were located, and these were the forged checks to which the defendant pleaded guilty.

driving under the influence of an intoxicant and approximately seven driving-on-revoked-license convictions. He was declared at one time to be a motor vehicle habitual offender, and he had been convicted of operating a motor vehicle in contravention of his habitual offender status. After the defendant's privilege to operate a motor vehicle had been restored, his license was again revoked as a result of another conviction for driving under the influence of an intoxicant. Additionally, in 1989 the defendant was convicted of third-degree burglary in connection with breaking into the Maryville City Fire Department to steal gasoline.

The defendant testified that his alcohol use began before he could drive. He had sought alcohol treatment once at Koala in Oak Ridge. The Halls paid for that treatment program. Otherwise, his only other treatment attempt had been a two-day detoxification program at Peninsula Hospital. As for his current treatment plans, the defendant testified that he had not yet received an insurance card from his new employer, "but that was on [his] list of to-do's." For the past five years, he said that he had worked odd jobs that did not provide any health insurance benefits.

The defendant was asked how he had used or applied the proceeds of the forged checks. He stated that all of the money had been spent. One of the checks was written for $10,000. The defendant testified that, as a result of his recent marriage, he used that money to prepay rent and a damage deposit on a residence for his new family. Part of the money was used also to pay for his honeymoon in Daytona, Florida. Proceeds from other checks, the defendant said, were used to repair his vehicle and to buy gasoline, food, and medicine. He also admitted that he purchased a lot of alcohol with the purloined money. Once the defendant started writing the checks, he testified that he took advantage of the situation with the Halls. He maintained, however, that he asked his great-aunt about every check that was written.

The defendant summarized his attitude in this case in the following fashion:

> I wish I hadn't of did it. I wish I had figured out some other way to let the money go through somebody else's hands to where I didn't have any part of it. But, I mean, I care about my aunt and uncle. I still do. I wish I could see them.

Regarding restitution, the defendant proposed that if granted a probationary sentence, his earnings from working at Intec Supply could be garnished. He did express that he felt "bad" about what he had done and agreed that he "need[ed] to be punished." The defendant solicited the trial court to grant him probation because, if incarcerated, he would lose his job, and he did not wish for his family to be punished.

At the conclusion of the hearing, the trial court sentenced the defendant to an eight-year incarcerative sentence, as a Range I offender with a 30 percent release eligibility date. In ordering a fully incarcerative sentence, the trial court found that the defendant had a lengthy history of criminal conduct, that rehabilitation was not feasible, that the defendant's behavior showed a clear disregard for the laws and morals of society, that measures less restrictive than confinement had been

unsuccessfully used in the past, and that incarceration was warranted to avoid depreciating the seriousness of the offense. Based on the defendant's financial situation, he was relieved from making restitution payments for the money stolen.

The defendant now appeals to this court and argues that the trial court failed to consider his potential for rehabilitation, his employment status, and mitigating circumstances surrounding the offense. Consideration of these factors, the defendant contends, supports a less onerous sentence than incarceration with the Department of Correction for an effective term of eight years, as a Range I offender. Because we disagree, we affirm the sentences imposed by the trial court.

Our standard of review is a familiar one. When the length, range, or manner of service of a sentence is disputed, this court undertakes a *de novo* examination of the record with a presumption that the determinations reached by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1997). The presumption, however, is predicated "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.* Should the record fail to reflect the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* On the other hand, should the record show that the trial court properly took into account all pertinent factors and that 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 arriving at a sentence, the trial court, at the conclusion of the sentencing hearing, determines the range of sentence and then decides 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 on 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(b) (Supp. 2001), 40-35-103(5) (1997); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

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) (1977). Nevertheless, a defendant who commits "the most severe offenses, possesses a criminal history evincing a clear disregard for the laws and morals of society, and [has failed] past efforts at rehabilitation" does not enjoy the presumption. *Id.* § 40-35-102(5), (6); *see State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Furthermore, a defendant's potential for rehabilitation or lack thereof should be examined when determining if an alternative sentence is appropriate. Tenn. Code Ann. § 40-35-103(5) (1997). Sentencing issues are to be determined by the facts and circumstances made known in each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

The record in this case reflects that the trial court engaged in a proper review of the relevant sentencing principles and considerations. Accordingly, its sentencing determinations are entitled to the presumption of correctness.

The defendant in this case, a Range I offender, enjoyed the presumption of favorable candidacy for alternative sentencing for his Class D felonies. *See* Tenn. Code Ann. § 40-35-102(6) (1997). Moreover, he was eligible for probation. *See id.* § 40-35-303(a) (Supp. 2001). We will first consider the question of probation.

Determining entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to an alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). Unlike the presumption of favorable candidacy for alternative sentencing in general, a defendant bears the burden of demonstrating suitability for full probation. *See* Tenn. Code Ann. § 40-35-303(b) (Supp. 2001); *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *Bingham*, 910 S.W.2d at 455-56. To carry that burden, the defendant must show that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1999), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

The defendant pleaded with the trial court for a probationary sentence so that he would not lose his job and so that his family would not be punished. This uninspired plea was hardly adequate to carry his burden, and it finds no sympathetic ear with this court, particularly in light of the defendant's abysmal criminal history and the dismal odds against his rehabilitation.

On appeal, the defendant advances additional reasons why he was deserving of a probationary sentence. First, he argues that as regards the $10,000 check, he was motivated by the need to provide housing and necessities for himself and his family. The defendant criticizes the trial court for not taking this mitigating circumstance into account. The defendant, however, used some of the proceeds from that check to pay for a honeymoon trip to Daytona, Florida, and he testified that he bought a "lot" of alcohol with the money. The defendant also claimed that some of the money was used to repair his vehicle and to purchase gasoline, which is hardly laudable given his penchant for consuming alcohol and then operating a motor vehicle. As for housing, the defendant supplied no evidence that he actually prepaid one year's rent to obtain suitable accommodations.

The defendant also points to his steady employment as a mitigating circumstance. He claims that his health insurance benefits will allow him to obtain alcohol abuse treatment and that if employed, he can pay more toward restitution. The trial court, however, relieved the defendant from paying restitution to First Tennessee Bank. Furthermore, incarcerating the defendant will not necessarily deny him treatment. *See* Tenn. Code Ann. § 41-21-204(f)(1), (3) (Supp. 2001) (department of correction may contract for psychological services, including treatment for chemical dependency).

Finally, the defendant insists that he "does not completely lack all potential for rehabilitation, but rather that his rehabilitation has been only partially successful thus far and needs great structuring for complete success." This argument addresses itself to a community corrections sentence. At any rate, however, the trial court made a finding based on the evidence before it that the rehabilitation was not feasible for the defendant.

In short, all factors advanced by the defendant are clearly inadequate to carry his burden to show that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *Dykes*, 803 S.W.2d at 259. The trial court, we hold, properly rejected full probation as a sentencing option in this case.

Turning next to the presumption of favorable candidacy for alternative sentencing effected by Code section 40-35-102(6), the evidence in the record soundly rebuts the presumption. The defendant's criminal history is, by his own admission, extensive. *See* Tenn. Code Ann. § 40-35-103(1)(A) (1997) (confinement "necessary to protect society by restraining a defendant who has a long history of criminal conduct"). Nothing indicates that the defendant has any serious commitment to breaking the cycle of criminal activity, which is largely driven by alcohol addiction, and we agree with the trial court that rehabilitation is not feasible. "The 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." *Id.* § 40-35-103(5). Relevant to the alternative sentencing calculus is an acceptance of responsibility for criminal behavior. *State v. Guitierrez*, 5 S.W.3d 641, 647 (Tenn. 1999); *State v. Alda Michelle Paetz*, No. M2001-01012-CCA-R3-CD, slip op. at 10 (Tenn. Crim. App., Nashville, Mar. 19, 2002). The defendant's version of his behavior, reported by the presentence investigator, was that he was living with the Halls and taking care of them. The defendant told the investigator, "They were in bad health. They told him he could spend their money on himself for whatever he needed. The other side of the family got upset about it. He did admit that he went too far." These sentiments fall somewhat short of acknowledging the seriousness of the defendant's criminal behavior and his responsibility for what occurred. Particularly relevant to the defendant's candidacy for alternative sentencing options is that measures less restrictive than confinement have frequently been applied unsuccessfully to the defendant. *See* Tenn. Code Ann. § 40-35-103(1)(C) (1997). The presentence report reflects multiple occasions when the defendant received suspended sentences and was sentenced to probation.

Although the defendant's alcohol dependency could arguably fall within the "special needs" category of eligibility for a community corrections sentence, the trial court's assessment that the defendant is a bad risk for any sentence involving release into the community is entitled to considerable deference. *See State v. Taylor*, 744 S.W.2d 919 (Tenn. Crim. App. 1987) (defendant is not necessarily entitled to be sentenced under the Community Corrections Act of 1985 as a matter of right). We decline to second-guess or disturb the trial court's assessment in this case.

All things considered, we conclude that the trial court was warranted in rejecting all forms of alternative sentencing short of total confinement. For these reasons, we affirm the trial

court's judgment sentencing the defendant to eight years in confinement, as a Range I standard offender.

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JAMES CURWOOD WITT, JR., JUDGE