

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
APRIL 1995 SESSION

FILED
September 20, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 JOYCE COX,)
)
 Appellant.)

C.C.A. NO. 02C01-9412-CR-00287
SHELBY COUNTY
HON. BERNIE WEINMAN,
JUDGE
(Sentencing)

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant was charged in the indictment with aggravated assault, a Class C felony, to which she entered a guilty plea and received a sentence of three years as a Range I offender in the Shelby County Correctional Center. Pursuant to a Petition for Suspension of Sentence, the trial court suspended all but ninety days of the defendant's sentence, and placed her on supervised probation for five years. The defendant requested that she be allowed to serve her ninety days on weekends, but the trial court denied this request.

In this appeal as of right, the defendant presents two issues for review. First, she contends that the trial court abused its discretion by refusing to suspend her entire sentence. Second, she argues that, in the alternative, the trial court abused its discretion by refusing to grant her request to serve her sentence on weekends. After a review of the record in this cause, we affirm the judgment of the trial court.

The defendant is twenty-nine years of age and is employed by the Memphis Pathology Laboratory. Prior to this, she was employed at the Memphis Regional Medical Center for eight years, but was released when the victim advised the Medical Center that the defendant had been charged with a felony. The defendant testified that she has been enrolled at Shelby State Community College since 1986, taking courses towards her nursing degree. The defendant further testified that she is single and lives at home with her mother. The defendant attends church regularly and has been seeking counselling from ministers at her church since the incident in question occurred. She has never been convicted of any criminal offense.

The facts surrounding the incident in this case are disputed. The defendant testified that she was engaged in an argument with the victim, Keisha Baldwin, over a

man named Steve Jones. Apparently, both women were dating Jones. The defendant stated that she had gone to the apartment complex where Jones' grandmother and the victim both resided because she was to meet Jones at his grandmother's apartment. According to her testimony, she had blown her car horn, the victim came out of her apartment, and they exchanged words. She stated that the victim then began hitting her car window with a broom. Shortly thereafter, the victim's mother came outside to try to calm the situation, but the victim had tried to pull her out of the car anyway. The victim's mother came over to help her daughter pull the defendant out of the car, and at that point the defendant reached up to remove the knife she kept in her sun visor for protection and swung it at the victim. She stated that she did not realize that she had cut the victim.

The victim testified that she and the defendant had had confrontations for about a year. On the date in question, the victim testified that the defendant had come to her apartment looking for Jones and that she and the defendant had had a heated argument. According to her testimony, her mother had arrived during the argument and the defendant eventually left the apartment. The victim stated that she had later left the apartment complex as the defendant had been returning. Both women stopped their vehicles and the victim contended that the defendant exited her car and then cut her on the chest and eye area. The victim denied any struggle or fight with the defendant and denied the scenario presented by the defendant.

In her first issue the defendant asserts that the trial court abused its discretion by failing to grant full probation. When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, is conditioned upon an 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).

T.C.A. § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need "to avoid depreciating the seriousness of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. §§ 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b). In addition, the legislature established certain sentencing principles which include the following:

(5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

(6) A defendant who does not fall within the parameters of subdivision (5) and 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.

T.C.A. § 40-35-102.

After reviewing the statutes set out above, it is obvious that the intent of the legislature is to encourage alternatives to incarceration in cases where defendants are sentenced as standard or mitigated offenders convicted of C, D, or E felonies.

In this case the defendant was entitled to the benefit of the presumption since she had been convicted of a Class C felony and was sentenced as a standard offender. However, after reviewing the record in this cause, it is obvious to this Court that the trial court did consider the factors outlined above when determining the sentence of the defendant. The trial court found that the defendant's actions resulted in permanent injuries to the victim, impairing her eyesight. Furthermore, the trial court found the defendant did not act in self-defense nor was she any more remorseful than any other defendant who had been caught. Accordingly, the service of some time is necessary in this case to avoid depreciating the seriousness of the offense. T.C.A. § 40-35-103(1)(B). We conclude, therefore, that the trial court properly required the defendant to serve ninety days in confinement with the balance of her sentence suspended.

In her second issue the defendant argues that the trial court should have, in the alternative, granted her request to serve her ninety day sentence by periodic confinement on the weekends. The record clearly reveals that the trial court recognized the presumption of suitability for alternative sentencing by ordering split confinement. In a similar case this Court affirmed the imposition of a sentence of split confinement. See State v. Kyte, 874 S.W.2d 631, 633 (Tenn. Crim. App. 1993). In that case the defendant entered guilty pleas to driving under the influence of alcohol first offense and vehicular assault. The victim suffered serious injuries which resulted in the removal of her spleen and several facial scars. Although the defendant had no prior offenses and was employed, much like the defendant in the present case, the trial court still found the

nature and circumstances of the crime to be serious.

The record thus supports the trial court's finding that the defendant was not very remorseful and that she inflicted serious and permanent injuries on the victim. Furthermore, we note that the trial court set a zero percentage for special programs eligibility, which means that the defendant will be eligible for immediate work release. As in Kyte, the record before us supports the trial court's imposition of split confinement after considering the appropriate sentencing principles and the relevant evidence presented. For these reasons we affirm the judgment of the trial court

JOHN H. PEAY, Judge

CONCUR:

JERRY SCOTT, Presiding Judge

JOE B. JONES, Judge