

**FILED**  
 September 28, 1995  
 Cecil Crowson, Jr.  
 Appellate Court Clerk

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT NASHVILLE**

**MAY SESSION, 1995**

<b>STATE OF TENNESSEE,</b>	)	<b>C.C.A. NO. 01C01-9502-CC-00039</b>
Appellee,	)	
	)	
<b>VS.</b>	)	<b>WILLIAMSON COUNTY</b>
	)	
<b>INEZ DOBBINS,</b>	)	<b>HON. CORNELIA A. CLARK</b>
	)	<b>JUDGE</b>
Appellant.	)	(Sentencing)

**ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE  
 CIRCUIT COURT OF WILLIAMSON COUNTY**

FOR THE APPELLANT:

VANESSA P. BRYAN  
 407 C. Main Street  
 P.O. Box 68  
 Franklin, TN 37065-0068

FOR THE APPELLEE:

CHARLES W. BURSON  
 Attorney General and Reporter

DAVID N. SMITH  
 Assistant Attorney General  
 450 James Robertson Parkway  
 Nashville, TN 37243-0493

JOE D. BAUGH, JR.  
 District Attorney General

DEREK K. SMITH  
 Assistant District Attorney General  
 P.O. Box 937  
 Franklin, TN 37065-0937

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

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant brings this appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. She pleaded guilty to one count of the sale of cocaine. After a sentencing hearing, the trial court sentenced her as a Range I standard offender to four years in the Department of Correction, suspended after the service of ninety days, and five years of supervised, intensive probation. The Defendant appeals from the refusal of the trial court to grant full probation or order some other sentence alternative to incarceration and argues that the trial court erred in applying the enhancing and mitigating factors. We affirm the judgment of the trial court.

When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

On June 21, 1994, the Defendant met a confidential informant in Franklin, Tennessee. During the meeting, the Defendant sold the informant two rocks of crack cocaine in an amount less than .5 grams. The police videotaped the sale. On August 8, 1994, the Defendant was indicted by the Williamson County grand jury for the sale of cocaine and for the delivery of cocaine. The second charge was nolle, and the Defendant entered a plea of guilty to the sale of cocaine with the sentence to be determined by the trial court after a sentencing hearing.

At the sentencing hearing, the proof consisted of the Defendant's testimony and the presentence report. The presentence report reflects the Defendant was thirty-four years old when she was arrested. She has three children, and at the time of the hearing, was being incarcerated for contempt for failure to pay child support to the father of her two youngest children. The Defendant had previously worked for fast food restaurants, but does not have a steady employment history. She admitted to having a drug addiction for three and a half years. Otherwise, her physical health is fair, and she apparently has no mental health problems. The Defendant went through two drug rehabilitation programs in 1991 and 1992. She has a ninth grade education and has not attempted to get a GED.

The Defendant first argues that the trial court erred in finding one enhancement factor and in not applying any mitigating factors. The Defendant filed notice of eight

mitigating factors with the court, two of which are specifically set out in Tennessee Code Annotated section 40-35-113:

- (3) Substantial grounds [her drug addiction] exist tending to excuse or justify her criminal conduct, though failing to establish a defense; and
- (7) The Defendant was motivated by a desire to provide necessities for her family.

Tenn. Code Ann. § 40-35-113. The Defendant also submitted the following mitigating factors which would fall under the purview of factor (13) as "[a]ny other factor consistent with the purposes of this chapter." The additional factors included:

- (1) There is a strong possibility of a return of the offender to a normal life in the community;
- (2) The Defendant has the capacity to adjust to law abiding behavior;
- (3) There is a strong possibility of successful treatment, training and the Defendant is likely to comply with the terms of probation;
- (4) The Defendant is repentant and contrite;
- (5) The Defendant has acknowledged her guilt and shown a willingness to assume responsibility for her conduct; and
- (6) The Defendant has made the expense of a public trial unnecessary.

In considering the mitigating factors, the trial court noted that despite the Defendant's claim that she sold the drugs to get things for her family, she only made twenty dollars in the offense for which she was arrested, an amount not substantial enough to provide for the needs of her children. Although the Defendant claimed that she had the capacity to adjust to law abiding behavior, that she could return to a normal life in the community, and that she would comply with the terms of probation, the court found the Defendant's prior two unsuccessful attempts at drug rehabilitation indicative that she was a poor candidate for probation and that some time in confinement might help to break the cycle of addiction.

The court found the Defendant's addiction did not excuse her actions of selling drugs. In considering how the Defendant would serve her sentence, the trial court noted that selling drugs is a serious offense and some deterrent effect must be created through sentencing. Although the Defendant only admitted to one prior incidence of selling drugs to support her three-year drug habit, she did concede that she knew several people that also sold drugs.

The State filed no enhancement factors. However, the trial court found factor (1), that the Defendant had a history of criminal behavior, applicable based on the Defendant's testimony that she had a three-year cocaine addiction and had sold drugs on one prior occasion that was not charged. We conclude that the trial judge committed no error in applying enhancing and mitigating factors.

The Defendant next argues that the trial court erred in not granting probation or some other sentencing alternative. The sentencing of this Defendant is governed by the sentencing Reform Act of 1989. Through the enactment of Tennessee Code Annotated section 40-35-102, 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.

Tenn. Code Ann. § 40-35-102.

The Defendant was convicted of a Class C felony which carries with it the statutory presumption that she is a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.<sup>1</sup> The principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(3), (4). The court should also consider the potential for rehabilitation or treatment of the Defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

The trial court sentenced the Defendant to four years incarceration, with suspension of the sentence after the service of ninety days. The court required the Defendant to attend daily meetings of either Alcoholics Anonymous or Narcotics Anonymous for forty consecutive days beginning upon the day of her release from confinement. The court imposed five years of intensive probation which would require that the Defendant submit to regular drug screenings and to attend classes in working toward a GED. Her sentence to a period of continuous confinement followed by a term of probation is an authorized sentencing alternative.<sup>2</sup>

Although the Defendant had no prior record except for serving time for violating child support responsibilities, the Defendant had failed to maintain sobriety after recently attending two rehabilitation programs. Because of the Defendant's long-term drug usage and her admitted prior criminal involvement with drugs, the trial court implicitly found the Defendant to be a poor candidate for a totally suspended sentence.

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<sup>1</sup>The Tennessee Supreme Court has explained that guidance as to what will constitute "evidence to the contrary" is found in Tennessee Code Annotated section 40-35-103(1). State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Sentences involving confinement should be based on the following considerations: confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct; 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 measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. Id.

<sup>2</sup>Tenn. Code Ann. § 40-35-104(c)(4).

The court, however, imposed only ninety days of actual confinement and five years of intensive probation during which the Defendant would be required to comply with some rehabilitative measures such as attending Alcoholics Anonymous and working toward her GED. We conclude that the evidence in the record supports the trial court's determination that the Defendant is a less than favorable candidate for a sentence totally suspended.

Moreover, in imposing the sentence, the trial court noted that drug-related crimes are a serious problem. The court determined that some confinement was necessary in this case to avoid depreciating the seriousness of the offense and to provide an effective deterrent to others likely to commit similar offenses.

We again note that a trial judge has a certain amount of discretion in setting an appropriate sentence and that a presumption of correctness accompanies that determination. Furthermore, we do not intend to place trial court judges in a judicial straight-jacket by infringing on their discretionary powers when their actions are supported by valid considerations. State v. Ashby, 823 S.W.2d 166, 171 (Tenn. 1991); Moten v. State, 559 S.W.2d 770, 773 (Tenn. 1977). In light of the Defendant's long-term addiction and her prior criminal activity with drugs, we conclude that the trial court did not abuse its discretion in sentencing this Defendant.

The judgment of the trial court, therefore, is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE