IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9503-CC-00097**
	)	
Appellee,	)	
	)	
	)	**RUTHERFORD COUNTY**
VS.	)	
	)	**HON. JAMES K. CLAYTON, JR.**
WILLIAM L. ARMSTRONG,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CIRCUIT COURT OF RUTHERFORD COUNTY

FOR THE APPELLANT:

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and
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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right from the sentence of confinement imposed upon him by the Rutherford County Circuit Court for the offenses of aggravated burglary and driving while his license was suspended.[1] He entered guilty pleas to these offenses in exchange for an agreed six-year sentence as a Range II multiple offender for the Class C felony and six months for the Class B misdemeanor. The manner of service of the sentences was left to the discretion of the trial court. The trial court denied the Defendant's request for probation and ordered the sentence served with the Department of Correction. The Defendant appeals from the trial court's denial of probation or any other sentence alternative to incarceration. We affirm the judgment of the trial court.

On October 11, 1993 at about eight thirty a.m., the victim of the burglary was asleep in an upstairs bedroom of his home. He was awakened by someone ringing his doorbell and banging on his door. He looked out the window and saw a car that he did not recognize in his driveway. He decided not to answer the door. He then heard wood cracking as the Defendant broke through the locked back door of his residence, tearing the facing off the door frame. The victim grabbed a baseball bat and went downstairs where he found the Defendant rummaging through some things in a basket by the back door. The victim threatened the Defendant with the baseball bat, persuaded the Defendant to lie down on the floor, and called 911. When the law enforcement officer arrived at the victim's house, he found the Defendant lying on the floor in the kitchen area being carefully guarded by the victim armed with the baseball bat.[2]

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[1]Tenn. Code Ann. §§ 39-14-403 and 55-50-504.

[2]The charge of driving on a suspended license is unrelated to the burglary and we see no need in discussing the facts of the driving offense.

As part of his plea agreement, the Defendant agreed to the length of the sentences to be imposed for his crimes. It is from the order of the trial court that the Defendant's sentences be served in confinement that the Defendant appeals.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that 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). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987) .

The presentence report reflects that the Defendant was thirty-six years old, married, and the father of three children. He was separated from his wife at the time of sentencing. He dropped out of high school, but obtained his GED while incarcerated. At the time of the sentencing hearing, the Defendant was employed as a construction worker/supervisor and was making ten dollars an hour.

At the time the Defendant committed the burglary discussed herein, he was on parole after having served time in the penitentiary for convictions on several counts of forgery. On the forgery charges, he was originally given probation, but he violated his probation and his suspended sentence was revoked.

The prior record of the Defendant is quite remarkable. His first adjudication of delinquency as a juvenile came at the age of thirteen as a result of a burglary. Subsequent adjudications of delinquency were for larceny of an automobile, possession of marijuana, and public intoxication. His record of convictions as an adult consists of at least nine traffic offenses, two DUI's, four public intoxications, eight forgeries, two drug convictions, one theft conviction, and one conviction for jumping bail.

Because of the Defendant's conduct which resulted in the burglary charge addressed herein, the Defendant's parole was revoked, and he was returned to the Department of Correction. He served approximately one year prior to being released and was then convicted of and sentenced for the burglary. During that last period of incarceration, the Defendant took advantage of rehabilitative programs of the Department of Correction. At the sentencing hearing, he testified that he was drug free and was determined to stay that way. He continued to participate in programs to help him stay off of drugs and alcohol after he was released from the penitentiary. The Defendant was released from the penitentiary on September 23, 1994. The trial judge conducted the hearing to determine the manner of service of the Defendant's sentence in the case sub judice on December 12, 1994. Although the Defendant argues that he has "done everything he can to change his future, " we point out that at the time the trial judge determined that he was not a favorable candidate for a suspended sentence, the Defendant had been free from incarceration less than three months.

The Defendant argues that the trial court erred in denying his request for probation. 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
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> (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 normally would carry with it the statutory presumption that he is a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. However, he was sentenced as a multiple offender. His criminal history evinces a clear disregard for the laws and morals of society, and numerous past efforts at rehabilitating him have failed. Therefore, the Defendant does not enjoy the presumption.

The Criminal Sentencing Reform Act of 1989 sets forth the sentencing considerations to be considered by trial courts in ordering sentences involving confinement.[3] Among the considerations are that confinement may be ordered if necessary to protect society by restraining a defendant who has a long history of criminal conduct. Another consideration is that confinement may be ordered if

[3]Tenn. Code Ann. § 40-35-103.

measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

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 whether a sentence alternative is appropriate. Tenn. Code Ann. § 40-35-103(5).

As previously stated, the trial court's determination not to suspend the Defendant's sentence is clothed with a presumption of correctness. The burden of establishing suitability for probation rests with the Defendant. Tenn. Code Ann. § 40-35-303(b). The trial judge determined that the Defendant had not carried this burden.

This is a somewhat unusual case. Both the prosecuting attorney and the trial judge stated during the hearing on the Defendant's request for a suspended sentence that they had known the Defendant for a long time and that they personally liked the Defendant. From the Defendant's record, it is clear that he had made frequent trips to the courthouse. When asked why he broke into the victim's house, the Defendant said, "Besides stupidity, I had a drug addiction at the time . . . Really, to be honest, I don't know why I went into the man's house." It may well be that the Defendant will turn his life around and not commit further crimes. The trial judge had his doubts about that, and he has known the Defendant for twenty years.

We commend the Defendant's attorney for the effort he has made on behalf of his client in this appeal. The prior record of this Defendant, combined with the presumption of correctness which accompanies the trial court's decision, do not allow

us to conclude that the trial court erred or abused its discretion in denying the Defendant probation or any other alternative to incarceration.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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PAUL G. SUMMERS, JUDGE