IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9503-CC-00065
APPELLEE,	*	WILLIAMSON COUNTY
VS.	*	Hon. Cornelia A. Clark, Judge
JEFFREY WEAR,	*	(Sentencing)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, Jeffrey Wear, pled guilty to one count of passing a worthless check over $1,000. The trial court imposed a Range I sentence of two years, to be suspended after ten days in jail, followed by four years of probation conditioned, among other things, upon the performance of two hundred hours of community service.

In this appeal of right, the defendant asserts that the trial court erred by refusing to grant judicial diversion. He argues, in the alternative, that he should not be incarcerated for any portion of his sentence; that his probationary period was excessive; and that he should not be required to perform community service.

We affirm the judgment of the trial court.

The defendant pled guilty to passing a worthless check in the amount of $1,900 to purchase a computer from the victim, Jeff Wallace. At the sentencing hearing, the defendant contended that the entire incident was actually a mistake. He claimed that the victim had agreed to hold the check until the defendant was able to resell the computer.

The defendant admitted having been previously charged in Georgia with speeding, driving on a revoked license, and theft of gasoline. Although the defendant spent six days in jail, the theft charge was eventually dropped; the defendant forfeited a cash bond in satisfaction of the other

charges. The defendant also contended that the Georgia incident was a mistake; he claimed that he had a valid Florida driver's license at the time of his arrest and that he had not stolen the gasoline. Yet the defendant was unable to produce a copy of a letter from Florida officials that should have verified his driving status. Moreover, the defendant acknowledged that he had been driving regularly despite the fact that his Tennessee license had been suspended.

At the time of sentencing, the defendant, age 28, was unemployed. Although he had not kept a presentence interview appointment with his probation officer, the defendant eventually cooperated in the completion of the report. The defendant explained that he had forgotten and that he had experienced transportation problems. Upon cross-examination by the state, the defendant confirmed that he had not been completely truthful in the application he had made earlier for pretrial diversion. Of the $1,900 owed the victim, $1,600 had been repaid by the time of the hearing.

I

The defendant initially claims that the circumstances of the offense, his lack of a prior criminal record, and his personal history warranted the grant of judicial diversion. We disagree.

Judicial diversion allows a trial judge, upon a finding of guilt by plea or trial, to place a defendant on probation without the imposition of a conviction. Upon

successful completion of all probationary conditions, the charge will be dismissed. Tenn. Code Ann. § 40-35-313. This court has described judicial diversion as similar in purpose to the pretrial diversion program. See Tenn. Code Ann. §§ 40-15-101 to -105. The grant or denial is discretionary with the trial court. If there is "any substantial evidence to support the refusal," the trial court's decision will be upheld. Cf. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983). That conclusion can be overturned only in the event of the trial court's abuse of discretion. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). There was clearly no abuse of discretion here. The defendant was not entirely candid, had minor prior offenses, and exhibited a less than responsible attitude toward the presentence investigator.

II

Next, the defendant claims an entitlement to a fully probated sentence, a shorter period of supervision, and relief from the obligation of community service. Again, we disagree.

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 defendant 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, 862 (Tenn. Crim. App. 1987).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates for other alternative sentencing options. Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a) and (b).

In arriving at the sentence in this case, the trial court applied one enhancement factor, that the defendant had a previous history of criminal convictions or behavior, and one mitigating factor, that the defendant's conduct neither caused nor threatened serious bodily injury. See Tenn. Code Ann. §§ 40-35-114(1) & 40-35-113(1). While acknowledging that the defendant qualified for probation, the trial court expressed

grave concern about the defendant's "spinning of stories" and refusal to accept full responsibility for his actions. Of further concern was that the defendant had flagrantly disregarded the law by continuing to drive without a valid license. The trial court ultimately concluded that a two-year sentence was the least severe measure possible. Partial probation in the form of a sentence of split confinement was to be granted after only ten days in jail.

By his own admission, the defendant had repeatedly violated the law by continually driving a vehicle despite the suspension of his license. Lack of candor, alone, may often be the basis for the denial of immediate probation. State v. Poe, 614 S.W.2d 403 (Tenn. Crim. App. 1981). Here that was evident. Moreover, the failure to take responsibility for a criminal offense may, in appropriate circumstances, suggest a lack of amenability toward rehabilitation. For these reasons, we find no error in the imposition of a ten-day jail sentence.

These same reasons warrant the requirement of community service and a relatively long period of probation. They appear necessary here to insure that the defendant might come to appreciate the wrongfulness of his conduct. In summary, the defendant has failed to carry his burden of showing that any part of the sentence was excessive.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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David H. Welles, Judge

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Robert E. Corlew, III, Special Judge