IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER SESSION 1995

FILED

February 29, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 01C01-9506-CC-00164
Appellee,	)	
	)	Hickman County
	)	
v.	)	Hon. Cornelia A. Clark, Judge
	)	
	)	(Simple Possession of Cocaine)
THOMAS EDWARD CAPPS,	)	
	)	
Appellant.	)	

For the Appellant:

John H. Henderson
Assistant District Public Defender
407 C Main Street
P.O. Box 68
Franklin, TN 37065-0068

For the Appellee:

Charles W. Burson
Attorney General of Tennessee
and
Sarah M. Branch
450 James Robertson Parkway
Nashville, TN 37243-0485

Joseph D. Baugh, Jr.
District Attorney General
and
Donald Schwendimann
Assistant District Attorney General
481 East Main Street
Hohenwald, TN 38462

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Thomas Edward Capps, appeals from his convictions in the Circuit Court of Hickman County for three counts of simple possession of cocaine. He received sentences of eleven months and twenty-nine days for each offense with two sentences to be served concurrently with one another but consecutively to the third. All three sentences were ordered to be served consecutively to a prior unserved sentence in Dickson County. In this appeal as of right, the defendant contends that the trial court erred by ordering two of the sentences to be served consecutively to the third, by ordering the sentences to be served consecutively to the Dickson County sentence and by denying him probation for the present offenses.

In case number 94-5017CR, the defendant entered guilty pleas to two counts of simple possession of cocaine for offenses committed on January 13, 1994 and October 8, 1993, respectively. In case number 94-5093CRB, the defendant entered a guilty plea for simple possession of cocaine for an offense committed on May 5, 1994. At the sentencing hearing held on January 11, 1995, the trial court sentenced the defendant to eleven months and twenty-nine days to be served at seventy-five percent for each offense. The trial court ordered the sentences in case number 94-5017CR to be served concurrently with one another but consecutively to the sentence in case number 94-5093CRB based upon its finding that the defendant was a professional criminal who devoted himself to criminal acts as a major source of his livelihood and an extensive criminal history. See T.C.A. § 40-35-115(b)(1) and (2). It ordered the sentences to be served consecutively to the defendant's prior unserved sentence from Dickson County. The trial court denied probation because of its doubts about the defendant's truthfulness at the sentencing hearing, the need to avoid depreciating the seriousness of the offense, the need to deter drug offenses in the community and its belief that the defendant was not subject to rehabilitation.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing was improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In fact, the weight to be given any applicable sentencing factor is left to the discretion of the trial court. See State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992); T.C.A. § 40-35-210, Sentencing Commission Comments.

Relative to the trial court's finding that the defendant has an extensive record of criminal activity to justify the imposition of consecutive sentences, the presentence report reflects that the defendant has two prior convictions for bootlegging whiskey that date back to 1963 and 1970. Otherwise, the defendant's prior record consists only of the Dickson County conviction for which he was on bail when two of the present offenses were committed.[1] In addition to these prior convictions, the trial court considered the defendant's taped statements made to a confidential informant regarding his extensive dealings in drugs. The record supports the trial court's finding of extensive criminal activity.

Relative to the trial court's finding that the defendant was a professional criminal, in a taped conversation that was played for the trial court, the defendant told a confidential informant that he had a lot of people to supply cocaine to and that he

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[1] In Dickson County case number CR-1355 the defendant was convicted of possession of cocaine and diazepam for resale occurring on October 8, 1993, and received an effective sentence of eight years suspended after the service of sixty days.

always kept a little on hand. He also told the informant that six hundred dollars and some cocaine had been stolen from his home. At the sentencing hearing, the defendant claimed that his only source of income was monthly social security benefits of approximately five hundred dollars; yet, when arrested in Dickson County, he had seven hundred dollars in his pocket. After the Dickson County arrest, the defendant agreed to a search of his home in Hickman County. Sergeant Stuart Goodwin of the Dickson County Sheriff's Department Vice/Narcotics Division testified that during the search, the defendant received four telephone calls from individuals wanting to buy drugs. The defendant also offered ambiguous explanations of a deposit slip for twenty thousand dollars that was recovered during a search. These facts adequately support the trial court's finding that the defendant is a professional criminal.

Regarding the Hickman County sentences being served consecutively to the Dickson sentences, we note that Rule 32(c)(2), Tenn. R. Crim. P., gives discretion to the trial court to impose consecutive sentences when a defendant has "additional sentences not yet fully served." This court has previously held that the exercise of discretion under Rule 32(c)(2) essentially involves the consideration of the consecutive sentencing criteria provided in T.C.A. § 40-35-115(b). See State v. Larry G. Hart, No. 92C01-9406-CC-0001, Hardin Co. (Tenn. Crim. App. June 28, 1995), opinion on pet. for reh'g (Tenn. Crim. App. July 26, 1995); see also State v. William R. Waters, Jr., No. 01C01-9404-CR-00145, Davidson Co. (Tenn. Crim. App. Dec. 22, 1994), app. denied (Tenn. May 1, 1995). In this respect, the trial court's conclusions that the defendant has an extensive record of criminal activity and is a professional criminal are applicable. Finally, we believe that the defendant's criminal history, including his commission of offenses while released on bail for other offenses, warrants the conclusion that the consecutive sentences the defendant received are necessary to protect the public from him and reasonably reflect the severity of his repeated commission of drug offenses. See State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995).

Relative to the trial court's denial of probation, a defendant who is eligible for probation has the burden of establishing suitability for probation. As the Sentencing Commission Comments to T.C.A. § 40-35-303(b) state, although "probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." See Fletcher, 805 S.W.2d at 787. However, as the defendant does not meet the description of one who should be given first priority regarding a sentence involving incarceration under T.C.A. § 40-35-102(5), and has been convicted of misdemeanors, he is presumed to be a favorable candidate for probation in the absence of evidence to the contrary.

The defendant committed one of the offenses in case number 94-5017CR while on bail for the Dickson County offense. Later, he committed the offense in case number 94-5093CRB while on bail for the earlier Hickman County offenses. The defendant's repeated involvement with cocaine, even while on bail, reflects unfavorably on his chances for rehabilitation. The trial court found significant that the defendant admitted to possessing cocaine in the presentence report but at the sentencing hearing, changed his account of the events and stated that he did not deliver any cocaine. Such a lack of candor may be a major factor for denying probation. See State v. Dykes, 803 S.W.2d 250 (Tenn. Crim. App. 1990); State v. Jenkins, 733 S.W.2d 528 (Tenn. Crim. App. 1987). We hold that the trial court did not err in denying probation under these circumstances.

In consideration of the foregoing and the record as a whole, the judgments of conviction are affirmed.

Joseph M. Tipton, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Paul G. Summers, Judge