IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

January 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9505-CR-00144**
Appellee,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. CAROLYN WADE BLACKETT , JUDGE**
GARY E. GROGAN,	)	
	)	
Appellant.	)	(Denial of Probation)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was charged in the indictment with theft of property over sixty thousand dollars ($60,000) in value, a B felony. He was allowed to plead guilty to theft of property over ten thousand dollars ($10,000) in value, a C felony, for which he received an agreed sentence of five years in the Shelby County workhouse. The trial court denied the petitioner's application for a suspended sentence.

The only issue presented for review in this appeal as of right is the trial court's denial of the defendant's petition for probation. We find this issue to be without merit and affirm the action of the trial court.

A brief review of the facts is necessary for a determination of the issue. The only facts available on review come from the transcript of the defendant's testimony at the hearing on his petition for a suspended sentence and the information contained in the presentence report filed with the court.

The defendant, who was the owner of an over-the-road tractor, appropriated a trailer belonging to his employer which was loaded with several hundred cases of Nike athletic shoes. The total estimated value of the trailer and its contents was one million dollars. Over a period of several days, the defendant sold a number of these cases of shoes to pay debts he owed for drugs and to purchase additional drugs. The presentence report indicates that restitution was demanded by his employer in the amount of sixty-eight thousand nine hundred dollars ($68,900) for property that was not recovered.

The defendant, who was twenty-seven years of age at the time of the hearing, is married with three young children. His only previous conviction was for

possession of drug paraphernalia in the state of Ohio in 1992. The defendant admits that he has had a serious drug problem since 1990. The record further reveals that the defendant has participated in two previous alcohol and drug treatment programs which he failed to complete successfully.

At the conclusion of the hearing on the defendant's application for probation, the trial judge denied probation, finding only that the defendant "needs to understand and appreciate the wrong that was committed."

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 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).

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
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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.

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. However, it is also clear that there is an intent to incarcerate those defendants whose criminal histories indicate a clear disregard for the laws and morals of society and a failure of past efforts to rehabilitate.

The defendant, having been convicted of a C felony, is entitled to the presumption of favorability as a candidate for alternative sentencing. Also, since the trial judge failed to make the necessary findings to indicate that the sentencing principles and all relevant facts and circumstances were considered, there is no presumption of

correctness. However, we find that the record supports the trial judge's denial of probation.

The defendant has a long history of drug abuse which supports a finding of an extensive history of criminal activity. Further, the nature and characteristics of the offense, i.e., the theft of a trailer and merchandise valued at approximately one million dollars, and the defendant's previous unsuccessful attempts at drug and alcohol counseling, all support the denial of probation in this case. We find that the State overcame the presumption of entitlement to alternative sentencing and therefore affirm the trial judge.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID H. WELLES, Judge