IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 02C01-9505-CC-00126
Appellee,	*	MADISON COUNTY
VS.	*	Hon. John F. Murchison, Judge
JOHNNY ROBINSON,	*	(Sentencing)
Appellant.	*	

For Appellant:

George Morton Googe
District Public Defender
and
Pamela J. Drewery
Assistant Public Defender
227 W. Baltimore
Jackson, TN 38301

For Appellee:

Charles W. Burson
Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Renee F. Videlefsky
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Don Allen and Nick Nicola
Asst. Dist. Attorneys General
P.O. Box 2825
Jackson, TN 38301

OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Johnny N. Robinson, entered pleas of guilt to driving under the influence, third offense; driving on a revoked license; driving on the wrong side of the road; and vehicular assault. The trial court imposed the following sentences and fines: an 11 month and 29 day sentence at 75% and a $1,000 fine for the DUI; a six month sentence at 75% and a $250 fine for the driving on a revoked license; a 30 day sentence at 75% and a $50 fine for the driving on the wrong side of the road; and a four year, Range I sentence and a $500 fine for the vehicular assault. The sentences were ordered to be served concurrently.

In this appeal of right, the defendant presents two issues for review: (1) whether the four-year sentence for vehicular assault was excessive and (2) whether the denial of alternative sentencing was erroneous. We affirm the judgment of the trial court.

During the early morning hours of May 8, 1994, a vehicle driven by the defendant collided head-on with an oncoming vehicle driven by Kimberly Jones and occupied by her husband Ronnie Jones, the Jones' eleven-year-old son, and a ten-year-old relative. The defendant was driving on the wrong side of the road. The collision caused the Jones' automobile to catch fire. About five minutes later, the Jones' automobile was struck again by a second car.

The Jones' vehicle was totally destroyed in the

accident. Although wearing a seatbelt, Ms. Jones suffered cuts, bruises, and a broken wrist and thumb. She incurred medical expenses and missed four weeks of work. Ronnie Jones required medical attention for a laceration above his eye, scratches and bruises, and injuries to his shoulder and back. He lost wages for four weeks and changed to a lesser paying job because he could no longer lift anything weighing more than forty pounds. The children, although bruised, did not require medical attention.

The defendant, who admitted that he was intoxicated at the time of the accident, suffered injuries to his left thigh and knee and to his right eye. He had been unable to work since the accident.

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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994).

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-l02, -l03, and -2l0; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. l987).

In calculating the sentence for a felony conviction, the presumptive sentence is the minimum within the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). But see 1995 Tenn. Pub. Acts ch. 493 (amending the statute for offenses occurring on or after July 1, 1995, to make the presumptive sentence in a Class A felony the midpoint in the range). If there are enhancement factors but no mitigating factors, the trial court may set the sentence above the minimum. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-210(e). The sentence may then be reduced within the range by any weight assigned to the mitigating factors present. Id.

I

At the conclusion of the sentencing hearing, the trial court found "no significant mitigating factor[s], except that [the defendant] was seriously injured." See Tenn. Code Ann. § 40-35-114(13). The trial court determined that three enhancement factors applied to the vehicular assault

conviction: (1) the defendant had a prior criminal history; (2) the offense involved more than one victim; (3) and the victims suffered substantial losses due to property damage. Tenn. Code Ann. § 40-35-114(1), (3), and (6). We will first consider whether the mitigating and enhancement factors were properly applied in arriving at the four-year sentence.

While the defendant had no prior felony convictions, he did have at least two convictions for driving under the influence, two convictions for driving with a revoked license, and three convictions for public intoxication. Because of their similarity to the present convictions, the trial court, in our view, was entitled to give considerable weight to the factor in assessing the length of the vehicular assault sentence. Thus, enhancement based on the defendant's prior criminal history was appropriate. See Tenn. Code Ann. § 40-35-114(1).

The defendant also contends that the trial court should not have considered as an enhancement factor that there was more than one victim to the vehicular assault. See Tenn. Code Ann. § 40-35-114(3). We disagree. "Victim" as applied in this statutory section was intended to include those "injured" in the commission of the offense. See State v. Raines, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994)(Tenn. Code Ann. § 40-35-114(3) "is limited in scope to a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime."). "Bodily injury" is defined as a cut, abrasion, bruise, burn or disfigurement,

and includes physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty. Tenn. Code Ann. § 39-11-106(2). Here, all four occupants of the car appear to have been injured within the meaning of the statute and thus qualified as "victims" for purposes of this enhancement factor. The defendant complains that the trial court failed to specify the actual number of victims who qualified as having been "injured." That there was "more than one victim" was sufficient for the factor to apply.

The record also supports the finding that the victims suffered extensive property damage. Tenn. Code Ann. § 40-35-114(6). The trial court ruled as follows:

> He caused them to suffer a lot of special damages, which I have totaled up to be over $11,000 in special damages. Of course, that doesn't take into account pain or suffering or disability or anything like that. That is just the medicals -- the property damages and loss of wages.

This court has held that the portion of Tenn. Code Ann. § 40-35-114(6) which deals with "particularly great personal injuries" is an element of vehicular assault. See State v. Tina L. Williamson, No. 01C01-9308-CR-00249, (Tenn. Crim. App., at Nashville, Dec. 19, 1995) (citing State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994). Thus, enhancement may not be based on a finding that the personal physical injuries sustained by the victims were particularly great. See Tenn. Code Ann. § 40-35-114. The Jones' car, however, worth "a little over $3,000," was totally destroyed. That fact warrants the application of this factor. State v. Gregory Lamont Turner, et al., No. 01C01-9402-CR-00068, slip op. at

13-14 (Tenn. Crim. App., at Nashville, Nov. 15, 1995).

The defendant next argues that the trial court improperly refused to consider as a mitigating factor that the defendant was "a classic profile of an untreated alcoholic." The 1989 Act, however, expressly precludes voluntary use of alcohol as a mitigating factor. See Tenn. Code Ann. 40-35-113(8).

The defendant also contends that the trial court erred by failing to find that the defendant was remorseful. Although the record does reflect some expressions of remorse, the trial court heard the evidence, saw the defendant firsthand, and then ruled based upon its observations. When a factual issue is arguable, we must generally defer to the assessment of the trial court.

The trial court did acknowledge that the defendant had been seriously injured in the accident. It chose to consider the defendant's own injuries in mitigation of the sentence and that, in our view, was its prerogative.

The defendant, now thirty years of age, lives with his mother. The defendant has a high school diploma. The defendant admitted that he had experienced drinking problems since the age of sixteen. Although a relative had encouraged the defendant to seek treatment for his alcohol abuse, the defendant chose not to do so.

From all of these facts, we think the trial court acted within its discretion by imposing a sentence of four years. While the four-year sentence is the maximum sentence for a Range I offender, the trial court attached little weight to the defendant's injuries, applied greater significance to the nature of the defendant's prior crimes, and expressed serious concern over the devastating consequences of the offense. We do not disagree.

II

The defendant claims that he was entitled to alternative sentencing. Although the defendant sought a sentence other than incarceration in the Department of Corrections, the trial court failed to specifically state its reasons for denying probation and alternative sentencing. Our review, therefore, must be de novo on the record. See Tenn. Code Ann. § 40-35-401(d); State v. Ashby, 823 S.W.2d at 169.

Among the factors applicable to the defendant's application for probation are the circumstances of the offense, the defendant's criminal record, social history, and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978), cert. denied, 439 U.S. 1077 (1979).

Especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence

of evidence to the contrary." 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) & (b). The ultimate burden of establishing suitability for probation, however, is still upon the defendant. Tenn. Code Ann. § 40-35-303(b).

Alternative sentencing issues must be determined by the facts and circumstances of the individual case. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). "[E]ach case must be bottomed upon its own facts." State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Here, the defendant had a prior criminal history which involved the abuse of alcohol. See Tenn. Code Ann. § 40-35-103(1)(A). He had taken no steps toward rehabilitation. Moreover, the nature and circumstances of the offense are particularly serious. Often the grant of probation may tend to depreciate the seriousness of the offense. See Tenn. Code Ann. § 40-35-103(1)(B). The trial court made the following observation:

> [The defendant] is really lucky somebody wasn't killed in this thing. You are going down the highway and hit head-on that way -- everybody is fortunate to have gotten out as well as they did. It could have killed everybody.

We concur in that assessment. The nature and circumstances of the offense, in combination with the defendant's prior record and social history, warranted the denial of probation.

The defendant also contends that he should have been sentenced to community corrections. Again, the trial court failed to specifically state its reasons for denying a sentence under a community corrections program. See Tenn. Code Ann. § 40-35-401(d); State v. Ashby, 823 S.W.2d 166 at 169.

The state argues that the defendant waived a claim for alternative sentencing under the Community Corrections Act because (1) the defendant did not file a written application for an alternative sentence under the Community Corrections Act, and (2) "no report by the entity administering the Community Corrections Act in Madison County was made and furnished to the trial court." We disagree. While a written application for admission to a Community Correction program is preferred, it is not required. See State v. Estep, 854 S.W.2d 124, 126 (Tenn. Crim. App. 1987). Because the record here contains a presentence report and general discussion about alternative sentencing, we will address the merits of the claim.

The purpose of the Community Corrections Act of 1985 was to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103(a). A Community Corrections sentence provides a desired degree of flexibility that may be both beneficial to the defendant yet serve legitimate societal purposes. State v. Griffith, 787 S.W.2d 340, 342 (Tenn. 1990).

The following offenders are eligible for Community Corrections:

> (1) Persons who, without this option, would be incarcerated in a correctional institution;
>
> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 2 [repealed], parts 1-3 and 5-7 or title 39, chapter 13, parts 1-5;
>
> (3) Persons who are convicted of nonviolent felony offenses;
>
> (4) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;
>
> (5) Persons who do not demonstrate a present or past pattern of behavior indicating violence;
>
> (6) Persons who do not demonstrate a pattern of committing violent offenses; and
>
> (7) Persons who are sentenced to incarceration or on escape at the time of consideration will not be eligible.

Tenn. Code Ann. § 40-36-106(a).

That the defendant meets the minimum requirements of the Community Corrections Act of 1985, however, does not mean that he is entitled to be sentenced under the act as a matter of law or right. State v. Taylor, 744 S.W.2d at 922. Vehicular assault is considered a violent offense. See State v. Braden, 867 S.W.2d 750, 765 (Tenn. Crim. App. 1993) (stating that a defendant is ineligible for community corrections under Tenn. Code Ann. § 40-36-106(a)(3) because vehicular homicide or vehicular assault is a violent offense) (citing State v. Vickie C. Evans, No. 03C01-9112-CR-00411 (Tenn. Crim. App., at Knoxville, April 22, 1992) (vehicular assault)). Moreover, those individuals otherwise ineligible may be sentenced to community corrections only upon an affirmative showing of special needs which could be better addressed in the community. Tenn. Code Ann. § 40-36-106(c). The record here does not adequately establish that "special need." The defendant, who was unemployed at the time of the sentence, was unable to establish why a sentence in the community would be a better alternative.

Accordingly, the judgment of the trial court is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
John H. Peay, Judge

_____
David H. Welles, Judge