IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

April 26, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9505-CC-00153
Appellee,	)
	) Bedford County
V.	)
	) Honorable Charles Lee, Judge
	)
DAVID M. ALLEN,	) (Incest)
	)
Appellant.	)

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, David M. Allen, pled guilty to incest. The trial judge sentenced him to five years confinement and denied his request for alternative sentencing. Appellant appeals, arguing that the trial court erred in denying him alternative sentencing. We affirm the trial judge.

FACTUAL BACKGROUND

The appellant, age 35, was indicted for two counts of aggravated sexual battery and three counts of rape of his thirteen-year old stepdaughter (the victim). The victim's statement reveals that appellant began sexually assaulting her when she "was eight or nine years old." She stated that "[i]t began with him fondling me over my clothes at first - later it was under them." Around six months after the initial incident, he began penetrating her vagina with his fingers. She stated the digital penetration continued until she "was about eleven years old, when it got worse."

In the summer of 1991, the victim stated that appellant forced her to have intercourse with him. She explained that she tried to escape before penetration occurred "but he would grab my arm and jerk me back." When he got on top of her, she was "shocked and scared." "I didn't know if I should hit him or even try anything, as I was afraid of him."

The victim stated that the assaults escalated in frequency. "[A] week or so later, [intercourse] happened again" and began "happening two to three times a week." She also stated that the appellant forced her to perform fellatio on him around September of 1992. She attributed her reticence in exposing the assaults to appellant's threats that "he'd send me and my brothers to a foster home." She also conveyed that she was afraid of the appellant because she had witnessed him physically abuse other members of the family.

The appellant gave a statement to the police. He maintained that the first incident occurred in the fall of 1992. On that occasion, he stated they rubbed each other over their clothes. A week or so after the initial incident, there "was some more rubbing and foreplay, this time under the clothes." He admitted to having digitally penetrated the victim. He further admitted that on one occasion "she put her mouth on [his] bare penis a time or two." His rationalization of the assaults was that he felt "like she enjoyed it, that this wasn't her first time." He denied, however, having had sexual intercourse with the victim.

Prior to trial, an in camera hearing was held. Apparently, the victim's natural mother pleaded with the court to accept appellant's proposed negotiated settlement. The trial judge noted that:

> But for the pleadings of the mother of this child . . . and the State's position that they were of the opinion that to go forward with a trial would work more to the detriment of the victim than the social gains that could be had of a trial, but for that this Court would not have accepted the negotiated settlement. . . ."

Consequently, the charge was amended to a single count of incest to which appellant pled guilty.[1]

At the sentencing hearing, the judge heard testimony that appellant vehemently denied all allegations of sexual assault.[2] The judge also heard testimony of appellant's employer. He indicated that appellant was a dependable employee. The appellant presented two other witnesses testifying that they felt he was innocent despite his having pled guilty under oath.

The appellant next presented the testimony of the victim's mother. She was married to appellant when the alleged incidents occurred. Although she believed and accepted that appellant had sexually abused her daughter, she

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[1]We note, that following the indictments, the victim's mother apparently continued to have contact with the appellant. On at least one occasion prior to trial, the victim's mother permitted appellant to spend the night while the victim was present. Case file notes indicate that the mother "downplayed the event, stating [the appellant] came over and fell asleep on the couch 'accidentally'."

[2]Appellant had informed his "probation officer that he did not do any of these things with which he is charged, and that none of the aforestated actions ever occurred."

advocated that appellant receive probation. She testified that her recommendation that appellant receive probation was premised on the concerns for her "family's needs."

The trial judge began, although hesitantly, with the presumption that appellant was a candidate for alternative sentencing. The judge found:

> . . . the defendant abused, sexually abused, a child less than the age of 12, and part of the report says that this may have dated back until the child was 8 years old.
>
> . . . the presumption of suitability for alternative sentencing is overcome by the facts and circumstances of this case, and the Court feels that it can -- and the record in this case is well documented -- and should look to the facts and circumstances of the crime rather than the conviction in making a determination as to whether the public policy of this state should be that a person is presumed to be a candidate for probation who has sexually abused a child less than the age of 12. This Court's answer is no.
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> The defendant's petition for or request for alternative sentencing based solely upon the offense, the crime -- not the conviction -- is hereby denied.

CONCLUSIONS OF LAW

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an 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).

Appellant pled guilty to incest, a Class C felony. He was sentenced as a standard offender. Pursuant to Tenn. Code Ann. § 40-35-102(6) (1990), appellant is presumed to be a favorable candidate for alternative sentencing unless sufficient evidence rebuts that presumption.

In conducting a de novo review of a defendant's sentence, including the manner in which he or she is to serve the sentence, this Court must consider: (1) the evidence received at the trial and the sentencing hearing, (2) the pre-sentence report, (3) the principles of sentencing and arguments to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating and enhancement 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. §§ 40-35-210 and -103 (1990). Among the factors applicable to the probation determination are the circumstances of the offense, the defendant's criminal record, social history, present condition, the deterrent effect upon the defendant, and the best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn. 1978).

Under the 1989 Act, sentences involving confinement are to be based on the following considerations contained in Tenn. Code Ann. § 40-35-103(1) (1990):

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
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> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .

As can be gleaned from the record, (A) and (C) are not germane. Therefore, whether or not appellant should be denied alternative sentencing will be decided under Tenn. Code Ann. § 40-35-103(1)(B) (1990).

Probation may be denied upon the circumstances surrounding the offense. State v. Hartley, 818 S.W.2d 370, 374 (Tenn. Crim. App. 1991); State v. Travis, 622 S.W.2d 529 (Tenn. 1981). This Court recently held that "[a]lternative sentencing may be denied on the basis of the circumstances of the offense alone, if those circumstances would be described as especially violent,

horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree." Schmidt v. State, No. 03C01-9501-CR-00016 (Tenn. Crim. App. Aug. 3, 1995); State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985). The standard enunciated in Cleavor has essentially been codified in the first part of Tenn. Code Ann. § 40-35-103(1)(B) which provides for confinement if it "is necessary to avoid depreciating the seriousness of the offense." Hartley, 818 S.W.2d at 374.

We find the appellant's offenses reprehensible and offensive. Moreover, we find the offenses excessive and exaggerated based upon the extended period over which the sexual abuse occurred. We also take into account the relative ages of the appellant and the victim. Furthermore, we find appellant to be a poor candidate for rehabilitation. He has been less than candid and has neither accepted responsibility for his acts nor exhibited verifiable signs of remorse. See State v. Neeley, 678 S.W.2d 48, 49 (Tenn. 1984) (holding defendant's untruthfulness is factor which may be considered in determining appropriateness of probation). Accordingly, the presumption of alternative sentencing has been rebutted and a sentence of incarceration is proper.

AFFIRMED

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PAUL G. SUMMERS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID H. WELLES, Judge