

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1994 SESSION

FILED
May 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)	C.C.A. # 02C01-9309-CC-00201
)	
Appellee,)	
)	FAYETTE CRIMINAL
VS.)	
)	
CELIA KILE DEVILLIER)	Honorable Jon Kerry Blackwood, Judge
)	
Appellant.)	(Arson)

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OPINION FILED: _____

MODIFIED AND REMANDED

John Maddux, Special Judge

OPINION

The defendant, Celia Kile Devillier, entered pleas of guilty to two counts of arson for which she received concurrent, four-year sentences to be served in the Tennessee Department of Corrections.

The issue on appeal is whether the trial court erroneously denied sentencing her to Community Corrections.

We modify the sentencing order.

This is the second time that this case has been appealed to the Court of Criminal Appeals. The first appeal (02C01-9204-CC-00077, Fayette Criminal) was "... remanded to the trial court for a rehearing to consider Community Corrections as a sentencing alternative." The trial court denied defendant's request for sentencing to Community Corrections and the defendant appealed.

The sentencing and this appeal are governed by the Criminal Sentencing Reform Act of 1989, Tenn. Code Ann. Sec. 40-35-117(a). The standard for review of the issue presented in this case is a "de novo review ... with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. Sec. 40-35-401(d). The sentencing commission comments state that "... the burden of showing that the sentence is improper is upon the appealing party."

The appellate review requires consideration of (1) evidence presented at the sentencing hearing, (2) the presentence report, (3) sentencing principles and statements of counsel, (4) the nature of the offense, (5) mitigating or enhancing factors, (6) statements of the defendant in her own behalf, and (7)

the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. Secs. 40-35-102, -103 and -210; *State v. Smith*, 735 S.W. 2d 859, 863 (Tenn. Crim. App. 1987).

Factors to be considered in regard to the defendant's request for probation are the circumstances of the offense; the criminal record of the defendant as well as her social history and present condition; the deterrent effect; and the best interest of the defendant and general public. *State v. Grear*, 568 S.W. 2d 285. (Tenn. 1978).

The defendant was born in Stuttgart, West Germany. She is a 34-year old who attended McCelleny High School in McCelleny, Florida where she completed the ninth grade in 1975. In 1985, she attained a GED while living in Atlanta, Georgia. A Community Corrections supervision report indicated that her criminal record includes being a runaway at age 12; being abandoned by her father at age 13; being in and out of juvenile court in Florida and California many times and being in foster homes from age 2 to age 19. Her parents were killed in a automobile accident when she was very young. She has lived in at least eighty (80) different foster homes. She first became pregnant when she was 10 years old. At the age of 22 she was also convicted of prostitution in Atlanta, Georgia, and was placed on probation for eleven months. She otherwise has no prior adult felony convictions but has had a prior history of drug abuse. She does not now have a drug problem.

The defendant currently lives with Mr. Lawrence Devillier who is a quadriplegic. Mr. Devillier cannot take care of himself. At one time the

defendant and Mr. Devillier were divorced. Currently they are remarried. The defendant takes care of Mr. Devillier on a constant basis. She feeds him, bathes him, dresses him, helps him get in and out of bed, and tends to his catheter. The defendant was working for Mr. Devillier when she committed the two acts of arson to which she pled guilty. The defendant pled guilty to the arson of two out buildings, one was a barn and one was a garage. The value of one of the buildings and its contents was \$32,488.59. The defendant made the following statement which is a part of the pre-sentence report: "I truly wish none of this happened, but it did."

The learned trial judge filed a detailed memorandum opinion commenting on the defendant and her actions in this case. The trial court indicated that she would be living in the same neighborhood where she committed these crimes; that she has no skills at all other than caring for her husband; and that her husband has other resources to provide for his care. The trial court also stated: "Lastly, the Court must consider the psychological impact that returning this defendant to the same environment would have upon the victims of this crime in this neighborhood. These people have suffered substantial financial loss as a result of the activities of the defendant. More importantly, however, her release into the neighborhood would leave them in constant anxiety. The Court must consider these emotions and the safety and well-being of this community."

The trial court further opined that the potential for rehabilitation and treatment of the defendant under the Community Corrections Act did not

appear promising. He further stated that her release under the Community Corrections Act would "deprecate the seriousness of this offense."

The trial court's frustration is evident and appropriate. Society should be outraged by the crime of arson. Our legislature, however, has given us sentencing guidelines which we must interpret. Our review requires us to consider prior cases with similar fact situations so that the decisions of this court will be consistent and based upon legal precedent. In *State vs. Thomas*, 776 S.W. 2d 547 (Tenn. Cr. App. 1989), a different panel of our court held, under similar circumstances, that the defendant should be sentenced to the Community Corrections program. The Criminal Sentencing Reform Act of 1989 states: Defendants who receive a sentence of eight years or less are presumed in the absence of the contrary to possess capabilities for rehabilitative alternative sentencing options in the discretion of the court and these are specifically encouraged. Tenn. Code Ann. Sec. 40-35-102(6).

The legislature has further directed our courts to "assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions." Tenn. Code Ann. Sec. 40-35-102(2). Although the trial court was not convinced that the defendant was capable of rehabilitation, the legislature has directed courts to encourage rehabilitation by using alternative sentencing and correctional programs. Tenn. Code Ann. Sec. 40-35-102(3)(C). The legislature has also addressed the problem of available prison space by enacting a statute which states: "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." Tenn. Code Ann. Sec. 40-35-102(5).

This offense is the defendant's first as an adult. "Measures less restrictive than confinement" have never been applied. Tenn. Code Ann. Sec. 40-35-103(1)(C). Under this Act sentences are to be the "least severe...necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. Sec. 40-35-103(4). The law further directs trial courts to "use alternatives to incarceration that include requirements of reparation, victim compensation, and/or community service." Tenn. Code Ann. Sec. 40-35-103(6).

The burning of a building is a reprehensible act. Society deserves to know that persons who commit the crime of arson will be punished. The prior legal precedent, however, coupled with the legislature's policy requires this court to hold that the defendant has overcome the presumption of correctness in regard to her sentence. This case is remanded to the trial court where the defendant will be placed in a Community Corrections program for the remainder of her sentence. This shall include such community service and other sentencing conditions as the trial court shall order. Consideration may be given to any of the defendant's circumstances which may have occurred during the appeal process. If the Community Corrections program is not

available, the defendant shall be placed under intensely supervised probation with conditions ordered by the trial court.

The judgment is modified and the case is remanded for sentencing under the Community Corrections program.

JOHN MADDUX, SPECIAL JUDGE

CONCUR:

GARY R. WADE, JUDGE

JERRY SCOTT, JUDGE