IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

April 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9504-CC-00107**
Appellee,	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. FRANKLIN MURCHISON ,**
ALEX HUGH MORROW,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

PAMELA J. DREWERY
227 West Baltimore
Jackson, TN 38301

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

SARAH M. BRANCH
Counsel for the State
450 James Robertson Pkwy.
Nashville, TN 37243-0493

JERRY WOODALL
District Attorney General

DONALD P. ALLEN
Asst. District Attorney General
P.O. Box 2825
Jackson, TN 38302

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for aggravated robbery. He pled guilty to robbery with no agreement on his sentence. After a hearing, the trial court sentenced the defendant as a Range I offender to five years in the penitentiary. The defendant now appeals claiming that his sentence is excessive and that he should have been given alternative sentencing. We agree with the trial court that alternative sentencing is not appropriate for this defendant, and that the sentence of five years incarceration is proper.

On the night of April 17, 1993, the defendant and codefendant, Rufus Greer, approached the victim, W. C. Clark, while Clark was in or near his car speaking on the telephone. On this occasion, the defendant had been looking for Clark because he believed that Clark had earlier been harassing his girlfriend. Clark and the defendant were cousins, and the defendant testified that they had spent many weekends getting drunk together. There was testimony that Clark was very intoxicated on this occasion, as well.

A fight broke out during which the defendant and Greer struck Clark about the head and side, knocking him unconscious. He suffered cuts to his face requiring stitches, and badly bruised ribs. After the defendant knocked Clark to the ground, he and Greer got in Clark's car and drove it some distance away. The defendant testified that he drove off to get away from Clark, and that he had driven Clark's car with permission many times before. He testified that he thought Clark had had a gun, and that he didn't realize Clark had been seriously hurt. Clark later recovered his car. Clark and the defendant each testified that the other threw the first punch.

After hearing all of the evidence presented at the sentencing hearing, the

trial court found that three enhancement factors were applicable: a previous criminal history of several prior misdemeanors including an assault; bodily injury to the victim; and being a leader in the commission of the offense. T.C.A. § 40-35-114. The trial court made no reference whatsoever to any mitigating factors, stating simply, "The Court is of the opinion that Mr. Morrow got his break when this charge was reduced to robbery [from aggravated robbery]. And with his record, he should not be placed on probation or in any alternative program." The court then sentenced the defendant as recommended by the State to five years incarceration.

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).

The Sentencing Reform Act of 1989, codified at T.C.A. § 40-35-210, further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

In this case, the trial court made no findings whatsoever with respect to

mitigating factors, in spite of the fact that the defendant offered proof of his past relationship with the victim and the victim's provocation. The defendant also offered proof of a positive work record and his past and continued support of his girlfriend and her minor child. The trial court erred by making no findings with respect to this proof. Accordingly, we review the record de novo with no presumption of correctness. Our review requires an analysis of (1) the evidence received at the 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) any enhancing and mitigating factors, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b). We must also consider "the defendant's potential for rehabilitation or treatment." State v. Brewer, 875 S.W.2d 298, 302 (Tenn. Crim. App. 1993).

In this case, the defendant contends that he should have been placed either on probation or in community corrections. Our 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
>
> (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. Thus, because the defendant is a standard offender convicted of a Class C felony, and because robbery is not one of the "most severe offenses," he is

entitled to the presumption that he is a favorable candidate for alternative sentencing unless there is evidence to the contrary. The issue, then, is whether there is such evidence.

Guidance as to what constitutes "evidence to the contrary" is found in the sentencing considerations codified at T.C.A. § 40-35-103(1). 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."

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.

In this case, the trial court found that the defendant "has a criminal record. He doesn't have any felonies, but he has some serious misdemeanors -- about six of them. He has an assault. He's got an 11/29 sentence there. He's got a six month sentence on the bad check law. He's got a shoplifting conviction. Apparently, a forgery conviction which was reduced to some minor misdemeanor. I'm not going to pay that much attention to that. Another bad check case. He had another bad check case where he got eight months on several counts each. He has a long record." The most recent of

these was the assault conviction in 1988.

The defendant's "long history of criminal conduct" is sufficient to rebut the presumption in favor of alternative sentencing. Moreover, the defendant committed additional misdemeanor offenses, and finally this felony, after having received suspended sentences and/or fines for his earlier convictions. Thus, it is obvious that "[m]easures less restrictive than confinement" have not convinced him to refrain from criminal conduct. T.C.A. § 40-35-103(1). This sentencing consideration also militates against probation. Therefore, we agree with the trial court that the defendant is not entitled to probation for this offense.

Nor is the defendant eligible for community corrections. Offenders convicted of certain crimes against the person, including robbery, are eligible for community corrections only where they "would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution." T.C.A. § 40-36-106(a)(2), (c). This Court has construed the words "who would be usually considered unfit for probation" as meaning that the defendant must otherwise be eligible for probation to be considered for community corrections under this provision. State v. Staten, 787 S.W.2d 934 (Tenn. Crim. App. 1989). The defendant in this case does meet the statutory eligibility criteria for probation. T.C.A. § 40-35-303(a). However, as set forth above, the defendant is considered unfit for probation for reasons other than a history of chronic substance abuse or mental health problems. The trial court made no finding of any form of chronic substance abuse, or of any mental health problems, and the record does not support such a finding by us.[1] Thus,

[1]We are not willing to make such a finding based only on the defendant's testimony that he and the victim had often gotten drunk together on weekends.

the record does not support the defendant's contention that he is eligible for community corrections under the "special needs" provision.

The sentencing range for robbery for a standard offender is three to six years. T.C.A. § 40-35-112(a)(3). The enhancing factors applicable in this case justify the sentence imposed of five years. Accordingly, the defendant's sentence is affirmed.

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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