IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

STATE OF TENNESSEE,	)	NO. 02C01-9510-CR-00295
	)	
Appellee	)	SHELBY COUNTY
	)	
V.	)	HON. L. TERRY LAFFERTY
	)	JUDGE
DAVID T. PANN,	)	
	)	(Vehicular Homicide - Sentencing)
Appellant	)	

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OPINION FILED: _____

REVERSED AND REMANDED

William M. Barker, Judge

OPINION

The appellant, David T. Pann, appeals as of right from the judgment of the Shelby County Criminal Court ordering him to serve his three (3) year sentence for vehicular homicide in the Shelby County Correctional Center. The sole issue presented in this appeal is whether the trial court erred when it refused to order an alternative sentence.

We find that the appellant is entitled to an alternative sentence and accordingly reverse the judgment of the trial court and remand the case for resentencing.

On September 5, 1993, at approximately 10:00 a.m., the victim, Albert Emory, was traveling with his granddaughter, Daphne Wilson, westbound on Shelby Drive in Shelby County, Tennessee. The appellant was traveling on Kirby Parkway and ignored a stop sign at the intersection of Shelby Drive and Kirby Parkway. As a result, the appellant struck the car driven by Mr. Emory causing serious injury to both Mr. Emory and Ms. Wilson. Mr. Emory was taken to the hospital and died almost two months after the collision as a result of pneumonia and septic shock with auto renal failure, all secondary to the injuries sustained in the collision. The appellant admitted to deputies who arrived on the scene of the accident that he had been drinking. Additionally, the appellant had two six-packs of beer in his car at the time of the accident. The defendant's blood alcohol level was .10. The appellant pled guilty to vehicular homicide with an agreed sentence of three years.

The record reveals that at the time of the sentencing hearing the appellant was twenty-seven years old, had a high school degree, and had been employed by the Walgreen's Drug Company for the past ten years. The appellant has no prior criminal history. The Department of Correction recommended an intensive supervision program.

The trial court denied any form of alternative sentencing to the appellant and ordered him to serve his three (3) year sentence confined in the Shelby County Correctional Center.

When a defendant complains of his or her sentence, we conduct a de novo review with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d) (1990 Repl.). This presumption, however, 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). However, the burden of showing that the sentence is improper is upon the appealing party. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments.

In determining an appropriate sentence, the Court shall consider the following: (1) any evidence from the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing; (4) the nature and characteristics of the offense; (5) information offered by the parties concerning enhancing and mitigating factors as found in Tennessee Code Annotated sections 40-35-113 and 114, and (6) the defendant's statement in his or her own behalf concerning sentencing. Tenn. Code Ann. § 40-35-210(b) (1995 Supp.). As a defendant with no significant criminal history convicted of a class C felony, the appellant was "presumed to be a favorable candidate for alternative sentencing." Tenn. Code Ann. § 40-35-102(6) (1995 Supp.). However, this presumption can be overcome by "evidence to the contrary." Id.

As a threshold matter it is necessary to address the trial court's statement that alternative sentencing "means probation." Probation is merely one of several sentencing alternatives to which a defendant may be entitled. See generally Tenn. Code Ann. § 40-35-104 (1995 Supp.). The trial court correctly recognized that as a Class C felon with no prior criminal history, the appellant was presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. However, the trial court was under the misconception that in cases of

vehicular homicide the presumption for alternative sentencing is against the defendant unless there is "clear convincing proof on the record they [are] fit candidates." The court stated that "in cases of violent crimes involving homicides . . . individuals who ask for . . . probation are not presumed to be good candidates for alternative sentencing, because of the very nature of the offense, those being homicides."

In State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), this Court made clear that the law of this State is that "[w]here a defendant is entitled to the statutory presumption of alternative sentencing, the State has the burden of overcoming the presumption with evidence to the contrary." (emphasis added). Tennessee Code Annotated section 40-35-103(1) sets forth the sentencing considerations for determining whether or not a defendant should be incarcerated.

Evidence sufficient to overcome the statutory presumption includes proof of 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." Tenn. Code Ann. § 40-35-103(1) (1990 Repl.). The evidence introduced by the State established none of the above considerations. However, the trial court referred to two of the above considerations when giving its reasons for denying probation. The first of these was that because a death had occurred as a result of the appellant's criminal conduct, to order probation would depreciate the seriousness of the offense. The evidence does not support such a conclusion.

In State v. McKenzie Monroe Black, No. 01C01-9401-CC-00006 (Tenn. Crim. App., at Nashville, July 14, 1995), we held that "in cases where the defendant is entitled to the statutory presumption of alternative sentencing, the existence of a death

by itself cannot justify a sentence of total confinement under the provisions of the Sentencing Act." As in Black, we understand and sympathize with the trial court's unwillingness to sentence one who has taken the life of another to anything less than total confinement. However, the legislature has made it clear that in the absence of "evidence to the contrary," a defendant convicted of vehicular homicide is presumed entitled to precisely that. Accordingly, we are constrained to conclude that the trial court's refusal to order an alternative sentence on grounds that the appellant's criminal conduct resulted in a death was error.

The second consideration relied upon by the trial court in denying an alternative sentence was that full confinement was necessary to deter others in the community from similar crimes. The trial court mentioned that drinking and driving is a problem throughout the State. However, the State introduced no evidence to that effect. In order for general deterrence to provide a sufficient basis to overcome the presumption for alternative sentencing, there must be proof in the record that total confinement will have a deterring effect on similar crimes in the community. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). There is no evidence in the record that appellant's confinement would have a deterring effect in the community beyond that inherent in the punishment for any criminal offense. As in Dowdy, the trial court's comments concerning the problem of drinking and driving in the community do not constitute evidence. Id. at 305. Accordingly, the need for general deterrence was an insufficient basis upon which to deny an alternative sentence.

Although we hold that the appellant was entitled to an alternative sentence, we do not hold that the appellant is necessarily entitled to full probation. In Bingham, we recognized that when determining whether probation is an appropriate alternative sentence, the burden of proof rests upon the defendant. Id. See also Tenn. Code Ann. § 40-35-303(b) (1995 Supp.).

This case is remanded to the trial court for resentencing in accordance with the holding of this opinion.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

GARY R. WADE, JUDGE