IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

APRIL 1996 SESSION

FILED

June 11, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9504-CC-00108**
Appellee,	)	
	)	**DICKSON COUNTY**
VS.	)	
	)	**HON. ROBERT E. BURCH,**
ROBERT L. THOMPSON,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

REMANDED FOR RESENTENCING

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for and pled guilty to the sale of 5.2 grams of cocaine and possession of marijuana for resale. Under a plea agreement, he was sentenced as a Range I, standard offender, to eight years on the cocaine charge, a Class B felony, and two years on the marijuana charge, to run concurrently. The issue of whether the defendant would receive a suspended or some other form of alternative sentence was reserved for a hearing.

After his hearing, the sentencing court denied the defendant any form of alternative sentencing. He now appeals that decision.

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). “All relevant facts and circumstances” include any mitigating and statutory enhancement factors, id., the presence or absence of which must be placed on the record. T.C.A. § 40-35-210(f) and comment thereto.

T.C.A. § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. 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." T.C.A. § 40-35-103(1). This statute also provides that "the potential or lack of potential for rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed," and "[t]rial judges are encouraged to use alternatives to incarceration." T.C.A. § 40-35-103 (5), (6).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and 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) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. §§ 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b). In addition, the 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.

While the defendant is not entitled to the presumption that he is a favorable candidate for alternative sentencing because his cocaine conviction is a Class B felony, he is still eligible for probation. T.C.A. § 40-35-303(a). Moreover, the sentencing court was required to automatically consider probation for this defendant. T.C.A. § 40-35-303(b). The burden of proving his suitability for probation rests with the defendant. Id. It should be noted, however, that, while the State opposed probation for this defendant "due to the seriousness of the offense," it was amenable to split confinement and so stated at the sentencing hearing.

The sentencing court made the following findings as it imposed its sentence on the defendant (emphasis added):

> [S]ale of cocaine cases are increas[ing] exponentially and . . . we have a serious problem in Dickson County with regard to the sale and the possession for resale of cocaine.
>
> The sale of cocaine is a serious offense. Cocaine, obviously, is a very addictive drug, a dangerous drug, and it is becoming increasingly prevalent and more of a problem. Something has to be done. If nothing else -- I am not a particularly big fan of deterrence, because I don't believe that the fact that I put Mr. Thompson in the penitentiary is going to stop somebody else from selling cocaine. It's just not going to happen. Anyone who thinks that is living in a fantasy world. By the same token, if I put Mr. Thompson in the penitentiary for eight years, it will stop Mr. Thompson from selling cocaine, at least on the outside.
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> The only proof we've had from Mr. Thompson is the defendant's version in the pre-sentence report where Mr. Parker stated that he said, "I only sell marijuana when money is tight and I need to make ends meet." He didn't mention, obviously, the reason for selling cocaine. But the Court is of the opinion that this gentleman is in the practice of selling controlled substances.
>
> Therefore, for the reason of the severity of the offense and the necessity for deterrence, the Court is of the opinion that Mr. Thompson should serve his entire sentence in the Tennessee

> State Penitentiary, and that all individuals who come before this Court found guilty of possession of cocaine for resale or sale of cocaine, should receive a similar sentence.
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> Therefore, the request for any type of suspension or split confinement is denied.

Although the defendant had filed a notice claiming four mitigating factors, the sentencing court made absolutely no findings with respect to mitigating (or enhancing) factors. This failure, combined with the sentencing court's failure to consider the defendant's potential for rehabilitation, defeats the presumption of correctness.

In State v. Dennis Rogers, No. 01C01-9102-CC-00057, Hickman County (filed September 5, 1991, at Nashville), this Court considered the appeal of the trial court's denial of probation to a defendant who had received two Class C felony convictions for the sale of cocaine. Rogers was a thirty-eight-year-old automobile mechanic who had admitted to previous casual use of marijuana and cocaine. Although he admitted to a prior speeding ticket and a remote D.U.I., the probation officer was unable to confirm either of these and found no other criminal record.

The trial court denied probation outright, stating:

> And I have taken a firm stance against people who sell cocaine. Unless there is something about their case that would outweigh the deterrent value of incarceration, I have uniformly made people serve their sentences because I think it's important that this court sends a message to the community that if you deal in this drug in this community, you're going to serve your sentence.
>
> . . . .
>
> Mr. Rogers has a good pre-sentence report, he doesn't have any prior offenses, but he's dealt in something that he knew was causing injury to other people. So I would deny a suspended sentence in this case.

This Court reversed the trial judge's ruling and remanded for resentencing, finding:

> [O]nce the legislature has specifically authorized the use of sentencing alternative[s] to confinement for a particular offense, trial courts may not summarily impose a different standard by which alternative sentencing is denied solely because of the defendant's guilt for that offense . . . . In other words, if the law permits and encourages alternative sentencing for an offense, it cannot be summarily rejected by a policy established by the trial court.

The defendant in this case occupies a position similar to that of Rogers. He was thirty-three at the time the presentence report was prepared and worked for a concrete business. His employer testified that the defendant was a "very good worker" and "very reliable" and that he could keep his job if placed on an alternative sentence. He did not complete high school but later completed a vocational course at Tennessee Technology Center in Dickson. He admitted to a remote conviction for receiving and concealing stolen property, but the probation officer was unable to verify this or to locate any prior juvenile or criminal record. He was in good health, admitted drinking beer, but denied the current use of any illegal drugs. He admitted that he had used marijuana from age eighteen to twenty-two, and that he sold marijuana "when money is tight." The probation officer who prepared the presentence report included a statement that, if the defendant were granted probation, "the defendant would be placed on medium supervision . . . [and] this officer would recommend . . . 200 hours [of] public service work." In spite of able argument by defense counsel, the sentencing court in this case summarily rejected the defendant's plea for an alternative sentence in much the same way that the trial court did in Rogers.

As this Court did in Rogers, therefore, we find that "the record reflects that the trial court decided the issue of alternative sentencing under a policy it had established

which failed to take into account the specific criteria of the 1989 Sentencing Act. Regardless of the merit, or lack thereof, in this case to the defendant's claim of entitlement to alternative sentencing, it was his right for the trial court to evaluate his case as provided by the 1989 Act relative to Class [B] felonies." Accordingly, as was done in Rogers, we reverse the lower court's denial of probation and remand this matter for resentencing in compliance with the 1989 Sentencing Act.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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DAVID G. HAYES, Judge