IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1996

FILED

September 11, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 02C01-9509-CR-00255**
	)	
Appellee,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. ARTHUR T. BENNETT**
ERIC W. FRIEDL,	)	**PRESIDING JUDGE**
	)	
Appellant.	)	**(Sentencing)**

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OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Eric W. Friedl entered a plea of guilty to the offense of vehicular assault. As part of the plea agreement, the State recommended that he receive a sentence of 1.8 years confinement. No agreement was reached with respect to the issue of whether Appellant's sentence would be suspended in whole or in part; that matter was to be determined by the trial court following a hearing. The trial court accepted the guilty plea and, following a hearing, granted Appellant a partial suspension of sentence but ordered him to serve 120 days of weekend confinement in the county workhouse.[1] Appellant claims in this appeal that he should have received full suspension of his sentence. He claims that the trial court adopted an erroneous standard in denying full suspension of the sentence and that there is no proof that confinement is necessary to deter further acts of drunken driving.

We find no reversible error and affirm the judgment of the trial court.

On March 3, 1994, Appellant attended a party at a friend's apartment. Over the course of the evening, Appellant consumed approximately eight beers. At some point, Appellant became violent and was asked to leave the party. He left the apartment accompanied by another party-goer, Patrick Ferris. While driving home, Appellant lost control of his vehicle and struck a utility pole on a Memphis city street. The vehicle overturned in the roadway, injuring both Appellant and Ferris. Appellant refused to submit to a blood alcohol test following the accident but later admitted that he was intoxicated when the collision occurred. While Appellant's injuries were not serious,

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[1]During the sentencing hearing, both the trial judge and the prosecutor referred to Appellant's sentence as split confinement. The trial court's order on the petition for a suspended sentence indicates the petition was granted in part. The Appellant is therefore on probation save for the 120 days he must serve on weekends. Thus, the sentence is actually one of probation coupled with periodic confinement. See Tenn. Code Ann. § 40-35-307 (1990); see also Tenn. Code Ann. § 40-35-104(c)(3) (authorizing such a sentence in appropriate circumstances). Appellant's assertion that the sentence is unlawful is therefore without merit.

Ferris suffered a head injury, a broken pelvis, and a fractured leg. He later had a kidney removed due to internal injuries. He was unable to walk for an extended period of time, endured multiple surgeries during his recovery, and may suffer some permanent disability. Despite the seriousness of his injuries, Ferris supported Appellant's request for full probation.

When an appeal challenges the length, range, or manner of service of a sentence, appellate review is de novo, with a presumption that the determination of the trial court was correct. Tenn. Code Ann. § 40-35-401(d) (1990); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). However, this presumption of correctness only applies when the record demonstrates that the trial court properly considered the relevant sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In this appeal the record reflects that the trial judge did in fact comply with the mandates of the sentencing act as well as the pronouncements of our Supreme Court in Ashby. Therefore, in conducting our de novo review, we must presume Appellant's sentence is proper.

Tenn. Code Ann. § 40-35-102(5) provides in pertinent part that "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 of rehabilitation shall be given first priority regarding sentencing involving incarceration. "A defendant who does not fall into the category set forth in Section 40-35-102(5) and who is an especially mitigated or standard offender 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." Id. § 40-35-102(6); Ashby, 823 S.W.2d at 169. This simply means that the trial judge must presume such a defendant to be a favorable candidate for a sentence which does not involve incarceration. Byrd, 861

S.W.2d at 379-80. This presumption is however rebuttable and incarceration may be ordered if the court is presented with evidence which establishes

> (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 or 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.

Tenn. Code Ann. § 40-35-103(1); Ashby, 823 S.W.2d at 169.

This Court has recognized for some time that one or more of the factors in Section 40-35-103(1) which, if properly established, rebut the presumption of entitlement to a non-incarcerative sentence and justify the imposition of confinement, may also serve to justify the denial of full probation. See, e.g., State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995); State v. Chrisman, 885 S.W.2d 834, 840 (Tenn. Crim. App. 1995); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991) (recognizing § 40-35-103(1)(B) as codification of principle that nature and circumstances of offense and need for deterrence may justify denial of probation). A fortiori, a discretionary denial of probation may be justified on the basis that the evidence shows that defendant falls into the category of felons described at Section 40-35-102(5) as being the most deserving of a sentence involving incarceration. See, e.g., Chrisman, 885 S.W.2d at 840. Therefore, in reviewing a denial of probation on appeal, when the record demonstrates that the defendant may not claim the presumption of entitlement to a non-incarcerative sentence, or that the presumption has been rebutted, and that Section 40-35-401(d) applies so that a sentence involving confinement is presumptively correct, this Court must sustain the discretionary denial of probation and

affirm the period of confinement imposed. See Fletcher, 805 S.W.2d at 789 (holding that this Court may not disturb a sentence when the presumption of correctness is properly applicable).

As an especially mitigated offender convicted of a Class D felony, Appellant is entitled to the presumption that he should receive a sentence other than one involving confinement. However, the trial court determined that some confinement was necessary in order to avoid depreciation of the seriousness of the offense. As noted earlier, the record demonstrates the injuries of the victim were very severe. This Court has previously held that in vehicular assault cases involving drunken driving where the victim sustains severe injuries, some confinement is warranted in order to avoid depreciating the seriousness of the offense. State v. Kyte, 874 S.W.2d 631 (Tenn. Crim. App. 1993). Further, exposing passengers and other motorists to the dangers of drunken driving has been held to be a sufficiently reprehensible circumstance of the offense of vehicular homicide to justify a denial of full probation and an imposition of a period of confinement. Bingham, 910 S.W.2d at 456; State v. Butler, 880 S.W.2d 395, 401 (Tenn. Crim. App. 1994).

The trial judge also determined that some period of confinement was necessary in order to deter others from acts of drunken driving. Appellant complains that there is no proof in the record that a period of confinement and a denial of probation in this case would have any impact on the problem of driving under the influence of an intoxicant. It is true, as Appellant asserts, that the Tennessee Supreme Court and this Court have held that there must be sufficient evidence of a particularized need for deterrence in any given case. Ashby, 823 S.W.2d at 170; State v. Michael, 629 S.W.2d 13, 14 (Tenn. 1982); State v. Bonestal, 871 S.W.2d 163, 169 (Tenn. Crim. App. 1993). However, offenses occurring as a result of driving under the influence of an intoxicant have been recognized as an exception to this general rule since the need for

deterrence is obvious. State v. Cleavor, 691 S.W.2d 541, 543 (Tenn. 1985); Kyte, 874 S.W.2d at 633; State v. Hagan, No. 01C01-9304-CC-00122, 1994 WL 65151 (Tenn. Crim. App. March 3, 1994).[2]

It thus appears that the record in this case substantiates the conclusion that Appellant's entitlement to the presumption of a non-incarcerative sentence has been sufficiently rebutted. The record also reflects that the sentence of periodic confinement coupled with probation carries with it the presumption that it is correct. Despite the fact that there is a good deal of evidence which would have justified a grant of full probation, or a lesser period of confinement, we are not free under the circumstances to disturb the sentence as imposed. The decision of the trial court is therefore affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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LYNN W. BROWN, SPECIAL JUDGE

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[2]Although the trial judge made reference to the need for "retribution" in this case, it is clear from the record the trial court was speaking of the need for "deterrence." Appellant's assertion that the court relied on an improper factor in concluding some incarceration was warranted is therefore meritless.