IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 20, 2008 Session

STATE OF TENNESSEE v. LISA B. FULCHER

Appeal from the Circuit Court for Wilson County
No. 06-0991 John D. Wootten, Jr., Judge

No. M2007-02160-CCA-R3-CD - Filed January 20, 2009

Upon her plea of guilty, the Defendant, Lisa B. Fulcher, was convicted of driving while under the influence of an intoxicant (fifth offense), a Class E felony. In exchange for her guilty plea, additional charges of evading arrest, violation of the implied consent law, violation of the open container law and failure to yield the right-of-way were dismissed. In accordance with her plea agreement, sentencing for the Defendant's DUI (fifth offense) conviction was left to the discretion of the trial court. Following a sentencing hearing, the Defendant was sentenced to four years in the Department of Correction. One hundred and fifty days of this sentence was ordered to be served day-for-day.[1] This sentence was ordered to be served consecutively to a sentence the Defendant was serving at the time of sentencing. In this appeal, the Defendant argues that the trial court erred by: (1) finding her to be a Range II, multiple offender, (2) setting her sentence at the maximum of four years for the Class E felony conviction, and (3) denying any form of alternative sentencing. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and NORMA MCGEE OGLE, JJ., joined.

Manuel B. Russ (on appeal); and John Herbison (at trial), Nashville, Tennessee, for the appellant, Lisa B. Fulcher.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Tom P. Thompson, District Attorney General; and Linda Walls, Assistant District Attorney General, for the appellee, State of Tennessee.

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[1] See Tenn. Code Ann. § 55-10-403(a)(1)(A)(vi).

OPINION

We first note that the record on appeal does not contain a transcript of the guilty plea proceeding. Therefore, the underlying facts of the offense stated in this opinion have been gleaned from the documents contained in the technical record and the transcript of the sentencing hearing and the exhibits filed therewith.

Facts

Tennessee Highway Patrol Trooper Josh Brown was on patrol in Wilson County at approximately 3:00 p.m. on September 2, 2006. He traveled northbound on Highway 109 as the Defendant was operating a vehicle southbound on Highway 109. The Defendant's vehicle turned left in front of the vehicle that was traveling immediately in front of Trooper Brown's vehicle. Trooper Brown testified that both he and the driver of the vehicle immediately in front of him had to pull off the roadway to avoid colliding with the Defendant's vehicle. Trooper Brown immediately activated his blue lights and pursued the Defendant's vehicle. The Defendant continued to drive her vehicle for one or two miles after Trooper Brown activated his blue lights. While he was following the Defendant's vehicle, several other vehicles had to pull over to the side of the road to avoid a collision with the Defendant's vehicle.

The Defendant eventually stopped her vehicle. Trooper Brown stated that when he approached her vehicle, he could smell the odor of alcohol coming from the Defendant's vehicle and from her person. It appeared that she had either spilled something in her lap or perhaps had urinated on herself. There was an open alcoholic beverage in the vehicle as well as other unopened alcoholic beverages.[2]

The date of the offense was September 2, 2006. The Defendant was indicted on December 12, 2006. On May 18, 2007, the State filed a notice of intent to seek punishment of the Defendant as a Range II, multiple offender, specifying two prior Class E felony convictions: (1) DUI (fourth offense) in Sumner County Criminal Court, on December 7, 1999, and (2) a habitual traffic offender in Sumner County Criminal Court, on September 16, 2004. On June 21, 2007, the Defendant filed her petition requesting the court to accept her plea of guilty to DUI (fifth offense) with sentencing to be determined by the trial court.

SENTENCING

A sentencing hearing was conducted on August 20, 2007. At the sentencing hearing, the State introduced certified copies of the Defendant's judgments of conviction for "driving after

[2] Trooper Brown's testimony was presented at the sentencing hearing. Because the Defendant had previously entered her guilty plea, the State did not elicit further testimony to establish that the Defendant was under the influence of an intoxicant.

habitual traffic offender"[3] and DUI (fourth offense).[4] The State also introduced the presentence report. The presentence report reflected that at the time of sentencing, the Defendant was thirty-six years old. She was divorced and had no children. She completed the tenth grade and subsequently received her G.E.D. The Defendant reported that she did not have a "verifiable work history." She reported that in the past, she had worked cleaning apartments and had been paid in cash. The presentence report also reflected a significant history of previous criminal convictions, most of which involved alcoholic beverages. Among the convictions the Defendant had accumulated during the sixteen years immediately preceding her current conviction were eleven convictions for assault, nine convictions for public intoxication, six convictions for DUI, one conviction for possession of marijuana and one conviction for possession of drug paraphernalia.

At the conclusion of the sentencing hearing, the trial court found that the Defendant was a Range II, multiple offender. For her Class E felony conviction, the Defendant's sentencing range was therefore two to four years.

The court found no mitigating factors. As enhancement factors, the trial court found that the Defendant had an extensive history of prior criminal convictions, noting, "It goes on for multiple pages in this presentence report, so clearly that enhancement factor applies in this case." See Tenn. Code Ann. § 40-35-114(1). The court also found, based upon Trooper Brown's testimony, the video tape introduced at the sentencing hearing, and the number of cars on the highway at the time of the offense, that the Defendant had no hesitation about committing a crime when the risk to human life was high. See Tenn. Code Ann. § 40-35-114(10). The trial court also found that the Defendant's current offense occurred within two years after the Defendant received a two-year sentence for driving after being found to be an habitual traffic offender. Based upon this finding, the court found as an enhancement factor that at the time the Defendant committed the current DUI (fifth offense), she was on release into the community under the direct or indirect supervision of a state or local government authority or a private entity contracting with the state or local government. See Tenn. Code Ann. § 40-35-114(13)(G).

Based upon its application of these three enhancement factors, the trial court sentenced the Defendant to four years in the Department of Correction. As required by statute, the Defendant was fined $3000 and ordered to serve 150 days of her sentence "day for day." See Tenn. Code Ann. § 55-10-403(a)(1)(A)(vi). The trial court ordered that this sentence be served consecutively to any sentence the Defendant was serving at the time she was sentenced in this case.[5]

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[3] See Tenn. Code Ann. § 55-10-616.

[4] See Tenn. Code Ann. §§ 55-10-401, -403(a)(1)(A)(vi).

[5] The trial court based its order of consecutive sentencing on its finding that the Defendant was an offender whose record of criminal activity is extensive, that the Defendant is a dangerous offender and that the Defendant committed this crime while she was on a form of probation. See Tenn. Code Ann. § 40-35-115(b)(2), (4), and (6). On appeal, the Defendant does not challenge the order of the trial court directing consecutive sentences.

On appeal, the Defendant argues that the trial court erred in (1) finding that she should be sentenced as a Range II, multiple offender, (2) setting her sentence at the maximum term of four years, and (3) denying any form of alternative sentencing.

Analysis

A. Waiver

The facts and circumstances of the offense in this case were obviously important to the trial court's sentencing determination. We have noted that the transcript of the guilty plea proceeding is not contained in the record on appeal. Because of this omission, it would be proper for us to presume that the trial court's sentencing decision is correct. See State v. Keen, 996 S.W.2 842, 844 (Tenn. Crim. App. 1999). However, the evidence introduced at the sentencing hearing provides us with an adequate record to review the sentencing decision of the trial court in this case. Thus, we will review the issue on the merits.

B. The Defendant's Status as a Range II, Multiple Offender

The Defendant argues that the notice of her prior convictions which the State filed on May 18, 2007, was inadequate to put her on notice that the State was seeking a Range II, multiple offender classification. Specifically, the Defendant argues that the listing of the offense as "habitual traffic offender" was not a listing of a "criminal offense in its own right." She notes that the criminal offense involves driving after having been ordered not to drive, based upon an habitual offender order. The content of the notice about which the Defendant complains was filed prior to the Defendant's entry of her guilty plea. The notice listed the date of the conviction and the county in which the conviction was entered. The notice specifically advised the Defendant that the State intended to seek enhanced punishment of the Defendant as a "Multiple offender (Range II)." In our view, the notice filed by the State on May 18, 2007, was sufficient to advise the Defendant of the "nature of the prior felony convictions" upon which the State relied. See Tenn. Code Ann. § 40-35-202(a). The notice clearly expresses the State's intention to seek sentencing outside of the standard offender range. See State v. Livingston, 197 S.W.3d 710, 713 (Tenn. 2006). The State gave the Defendant "fair" notice, if not "perfect" notice. See id. At the Defendant's sentencing hearing, the State introduced a certified copy of each of the Defendant's convictions. Under these circumstances, we conclude that the trial court did not err in finding the Defendant to be a Range II, multiple offender.

In her brief on appeal, the Defendant argues that she might not have pleaded guilty had she known for certain that she would be considered a Range II, multiple offender. She argues that on this basis her guilty plea might not have been knowing and voluntary. We conclude that the record fails to support a finding that the Defendant's guilty plea was not voluntary and knowing. We also note that the Defendant did not move to be allowed to withdraw her guilty plea. See Tenn. R. Crim. P. 32(f). This issue has no merit.

C. Length and Manner of Service of the Defendant's Sentence

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n

Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). However, this presumption "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. Pettus, 986 S.W.2d 540, 543-44 (Tenn. 1999); see also State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008). If our review reflects that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see also Carter, 254 S.W.3d at 344-45.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

The Defendant's conduct occurred subsequent to the enactment of the 2005 amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. As further explained by our supreme court in Carter,

> the trial court is free to select any sentence within the applicable range so long as the length of the sentence is "consistent with the purposes and principles of [the Sentencing Act]." [Tenn. Code Ann.] § 40-35-210(d). Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," [Tenn. Code Ann.] § 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," [Tenn. Code Ann.] § 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," [Tenn. Code Ann.] § 40-35-103(5).

Id. (footnote omitted).

The 2005 Amendment to the Sentencing Act deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory, as opposed to binding, upon the trial court's sentencing decision. Id. Under current sentencing law, the trial court is nonetheless required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. Id. at 344. The trial court's weighing of various mitigating and enhancing factors is now left to the trial court's

sound discretion. Id. Thus, the 2005 revision to Tennessee Code Annotated section 40-35-210 increases the amount of discretion a trial court exercises when imposing a sentencing term. Id. at 344.

To facilitate appellate review, the trial court is required to place on the record its reasons for imposing the specific sentence, including the identification of the mitigating and enhancement factors found, the specific facts supporting each enhancement factor found, and the method by which the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. See id. at 343; State v. Samuels, 44 S.W.3d 489, 492 (Tenn. 2001). If our review reflects that the trial court applied inappropriate mitigating and/or enhancement factors or otherwise failed to follow the Sentencing Act, the presumption of correctness fails and our review is de novo. Carter, 254 S.W.3d at 345.

In our view, the Defendant's extensive and lengthy history of criminal convictions, standing alone, supports the trial court's ordering the Defendant to serve a four-year sentence in the Department of Correction. In sentencing the Defendant, the trial court stated, "Ma'am, I've got to keep you off the road. You're a danger to the public." We agree. The record reflects that confinement of this Defendant is necessary to protect society by retaining this Defendant who has a long history of criminal conduct. See Tenn. Code Ann. § 40-35-103(1)(A). The sentence ordered by the trial court is consistent with the purposes and principles of our sentencing laws.

The judgment of the trial court is accordingly affirmed.

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DAVID H. WELLES, JUDGE