IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 18, 2008

STATE OF TENNESSEE v. JIMMY DARRELL JOHNSTON

Direct Appeal from the Criminal Court for Greene County
No. 07-CR-420 John F. Dugger, Jr., Judge

No. E2008-01457-CCA-R3-CD - Filed August 31, 2009

Following a jury trial, Defendant, Jimmy Darrell Johnston, was found guilty of violation of the Motor Vehicle Habitual Offender's Act, a Class E felony, and the trial court sentenced Defendant to two years of incarceration. On appeal, Defendant argues that (1) the trial court erred in permitting Billy Cutshaw to testify for the State; (2) the evidence was insufficient to support his conviction; (3) the prosecutor committed prosecutorial misconduct during closing argument; and (4) the trial court erred in its sentencing determinations. After a thorough review, we affirm the judgment of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Greg W. Eichelman, District Public Defender; and Anita B. Leger, Greeneville, Tennessee, for the appellant, Jimmy Darrell Johnston.

Robert E. Cooper, Jr., Attorney General and Reporter; Frank Borger-Gilligan, Assistant Attorney General; C. Berkeley Bell, Jr., District Attorney General; and Haley Johnson, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Background

It was stipulated at trial that Defendant had been declared a motor vehicle habitual offender on June 2, 2006, in the Greene County Criminal Court. Officer David Love, with the Greene County Sheriff's Department, investigated a motor vehicle accident on Lick Hollow Road on September 4, 2007. Officer Love testified that he arrived at the accident scene at approximately 1:10 p.m. Officer Love spoke with Billy Cutshaw who had reported the accident. Mr. Cutshaw informed Officer Love that the driver of the motor vehicle had left the scene of the accident on foot. Officer Love stated

that a 1970 Chevrolet truck had been driven down an embankment and was lying on its passenger side wedged between some trees. Officer Love verified that there was no one in the truck and then proceeded down Lick Hollow Road in his patrol car. Officer Love said that he located Defendant approximately one mile from the accident scene. Officer Love asked Defendant if he had been involved in the accident, and Defendant responded affirmatively. Defendant told Officer Love that he was on his way to retrieve a tractor to pull the truck back on to the road. Defendant stated that his wife, Teresa Johnston, had been driving the truck, and she had walked ahead of Defendant to find help. Officer Love said that Officer Ronnie Babb transported Defendant back to the accident scene while Officer Love continued to search for Ms. Johnston for approximately thirty minutes until the dispatcher informed him that Ms. Johnston was not in the area.

Officer Love returned to the accident scene. Officer Love told Defendant that if he continued to maintain that Ms. Johnston was driving the truck, he would have to arrest her for leaving the scene of an accident. Officer Love stated that Defendant then admitted that he had been driving the truck at the time of the accident.

Billy Cutshaw testified that he was driving down Lick Hollow Road on September 4, 2007, when he spotted a pick-up truck in the woods. Mr. Cutshaw rolled down his window and yelled, but no one answered, and Mr. Cutshaw did not see anyone in the vicinity of the accident. Mr. Cutshaw called 911 to report the accident.

Mr. Cutshaw stated that he drove past the accident and saw a man walking down the road. Mr. Cutshaw did not have a present recollection of the man's appearance other than he was a Caucasian in his forties. Mr. Cutshaw stopped his vehicle and asked the man if he was involved in the accident. The man said that he was and that he was going to get a tractor so that he could pull his truck out of the ravine. The man told Mr. Cutshaw that no one had been hurt in the accident. Mr. Cutshaw told the man that he had called 911, and the man continued walking down the road.

On cross-examination, Mr. Cutshaw acknowledged that the man did not tell Mr. Cutshaw that he was driving the truck. Mr. Cutshaw said that he estimated that he ran into the man approximately one thousand to fifteen hundred feet from the accident scene. Mr. Cutshaw acknowledged that he did not know when the accident occurred.

Officer Ronnie Babb, with the Greene County Sheriff's Department, also responded to the dispatcher's call concerning the accident on Lick Hollow Road. Officer Babb said that he approached the accident scene from the south and spotted Defendant walking in the middle of Lick Hollow Road approximately one-half mile from the accident scene. Officer Babb checked Defendant for injuries. Officer Babb stated that he smelled alcohol on Defendant's person, and Defendant was "somewhat unsteady on his feet," although Officer Babb acknowledged that Defendant's unsteadiness could have been due to a leg injury.

Defendant told Officer Babb that Ms. Johnston had been driving the truck and that she had walked ahead of Defendant to find help. Officer Babb said that he did not see Ms. Johnston when

he drove southbound on Lick Hollow Road. Officer Babb transported Defendant back to the accident scene. Defendant remained in the patrol car while Officer Babb searched for Ms. Johnston in the area around the truck. Defendant asked Officer Babb if he thought the truck's frame was bent. Officer Babb told Defendant that he was looking for Ms. Johnston, and Defendant responded, "F___ the b____." On cross-examination, Officer Babb stated that he did not check a nearby barn to see if anyone was there. Officer Babb acknowledged that he did not see anyone driving the pickup truck.

Teresa Johnston, Defendant's wife, testified that she was at her aunt's house on September 4, 2007. One of her aunt's neighbors heard on a police scanner about the accident on Lick Hollow Road , and Ms. Johnston learned that the sheriff's department was looking for her. Ms. Johnston said that she was not in Defendant's truck when it wrecked.

On cross-examination, Ms. Johnston stated that approximately twenty-five people were camping out on her aunt's property over the Labor Day weekend. Ms. Johnston said that she had driven Defendant to the camping site in Defendant's truck. Ms. Johnston stated that she left the keys in the truck and went into her aunt's house. She discovered that the truck was missing between 10:00 a.m. and 10:30 a.m. Ms. Johnston said that she always drove the truck when she and Defendant went somewhere.

On redirect examination, Ms. Johnston said that she was upset when Defendant left the campsite in her truck. Ms. Johnston then stated that she was angry because someone else was driving her truck. Ms. Johnston acknowledged that she did not see who was in her truck when it was driven out of the campsite.

The State rested its case-in-chief, and Defendant presented his defense. Boyd Johnson testified he was driving to the Labor Day camp out on Shelton Mission Road on September 4, 2007, when he passed Defendant's truck. Mr. Johnson said that Defendant was riding in the passenger seat and that a woman with brown hair was driving. Mr. Johnson said that he later saw Defendant at the camp site between 11:00 a.m. and noon. Mr. Johnson stated that he did not understand the importance of this encounter until he had a conversation with Defendant after Defendant's arrest. On cross-examination, Mr. Johnson acknowledged that he had been convicted of passing a worthless check in 2006 in Greene County.

Virginia Lynn McIntosh testified that she was camping out on Shelton Mission Road on September 4, 2007. Ms. McIntosh said that she left the campsite at approximately 12:00 p.m. and followed a pickup truck off the property and down Shelton Mission Road. Ms. McIntosh said that a woman was driving the truck, and Defendant was in the passenger seat. Ms. McIntosh turned on to the Asheville Highway, and the truck continued to travel down Shelton Mission Road. Ms. McIntosh stated that she did not know the woman who was driving Defendant's truck but said that she had "strawberry red hair" and had been at the camp site the night before. On cross-examination, Ms. McIntosh stated that she heard Defendant and others at the campsite call the woman, "Rose."

Officer Love was recalled as a witness. Officer Love said that he had seen a woman walking on the Newport Highway while he was investigating the accident. Officer Love believed that the woman was one of the residents on the highway who often walked in the area. Officer Love stated that he "was sure that's who it was but [he] wanted to go back just to be sure." Officer Love did not provide any further testimony concerning the woman's identity.

II. Admission of Testimony

Defendant argues that the trial court erred in allowing Mr. Cutshaw to testify when he could not identify Defendant at trial as the man Mr. Cutshaw met on the day of the accident on Lick Hollow Road. Relying on Rule 602 of the Tennessee Rules of Evidence, Defendant contends that Mr. Cutshaw did not have "personal knowledge" of the vehicle accident because he could not identify Defendant at trial as the man with whom he spoke on September 4, 2007.

As the State notes in its brief, Defendant did not object to Mr. Cutshaw's testimony at trial. Thus, Defendant has waived this issue by not making a contemporaneous objecction. See Tenn. R. Evid. 103(a)(1); State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000); see also Tenn. R. App. P. 36(a) (stating that a court is not required to grant relief to a party who did not take "reasonably available" curative action). Moreover, waiver aside, Defendant's reliance on Rule 602 of the Tennessee Rules of Evidence in support of his argument is misplaced. Rule 602 provides in relevant part that:

> [a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.

Mr. Cutshaw testified that he was driving on Lick Hollow Road on September 4, 2007, when he spotted a truck down an embankment. Mr. Cutshaw called 911 to report the accident. Mr. Cutshaw drove on and spotted a man walking down the road. The man acknowledged that he had been involved in the wreck of the pick-up truck and was going to retrieve a tractor in order to pull the truck up the embankment. There is no dispute that Mr. Cutshaw had personal knowledge of these facts. Accordingly, Mr. Cutshaw's testimony was consistent with Rule 602 of the Tennessee Rules of Evidence. See State v. Coulter, 67 S.W.3d 3, 50-51 (Tenn. Crim. App. 2001) (concluding that although the witness could not identify the male voice she heard during a telephone conversation with the defendant's wife as the defendant's voice, the witness had personal knowledge of the substance and circumstances of the telephone conversation within the parameters of Rule 602). Defendant is not entitled to relief on this issue.

III. Sufficiency of the Evidence

The State introduced a certified copy of the order adjudicating Defendant a motor vehicle habitual offender without objection, and Defendant does not contest his status as a motor vehicle

habitual offender. Defendant argues, however, that the State failed to prove that he was driving his truck when the vehicle ran off the road.

When a defendant challenges the sufficiency of the convicting evidence, we must review the evidence in a light most favorable to the prosecution in determining whether a rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). Once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced on appeal with a presumption of guilt. State v. Black, 815 S.W.2d 166, 175 (Tenn. 1991). The defendant has the burden of overcoming this presumption, and the State is entitled to the strongest legitimate view of the evidence along with all reasonable inferences which may be drawn from that evidence. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). The jury is presumed to have resolved all conflicts and drawn any reasonable inferences in favor of the State. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Questions concerning the credibility of witnesses, the weight and value to be given the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). These rules are applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

Tennessee Code Annotated section 55-10-603 defines certain repeat motor vehicle offenders as "habitual offender[s]." Upon a finding that an individual is a habitual offender, a trial court must enter an order declaring the individual as such and directing the Department of Safety to revoke the individual's driver's license. T .C.A. § 55-10-613. Tennessee Code Annotated section 55-10-616(b) provides that it is a Class E felony for an individual to operate a motor vehicle while an order declaring him/her to be a habitual offender is in effect.

As Defendant submits in his brief, it is well-settled that the identification of a defendant as the perpetrator of the crime is a question of fact for the jury to determine. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993). Officer Love testified that he responded to the dispatcher's call about a wreck on Lick Hollow Road. Officer Love confirmed there was no one in the truck and then drove down the road. Officer Love spotted Defendant walking down the road approximately one mile from the accident scene. Defendant told Officer Love that he was involved in the accident, and he initially said that Ms. Johnston had been driving the vehicle at the time of the wreck. Neither Officer Love nor Officer Babb could locate anyone else in the vicinity of the accident who might have been in the truck. Ms. Johnston testified that she had not been driving the pick-up truck, and she was not with Defendant when the vehicle was driven down the embankment. Defendant later admitted to Officer Love that he was driving the pick-up truck at the time of the accident.

Defendant offered testimony at trial that suggested that a woman had been driving the pick-up truck, with Defendant as a passenger, around 12:00 p.m. on September 4, 2007. The jury viewed the witnesses, heard their testimony, and observed their demeanor on the stand. It was the jury's prerogative to weigh the credibility of the witnesses and to resolve any conflicts in their testimony.

Viewing the evidence in a light most favorable to the State, the evidence was sufficient to conclude beyond a reasonable doubt that Defendant was driving the pick-up truck at the time of the accident. The State introduced a certified copy of the order adjudicating Defendant a motor vehicle habitual offender without objection. Accordingly, we conclude that the evidence is sufficient to support Defendant's conviction of driving in Tennessee while declared a habitual offender. Defendant is not entitled to relief on this issue.

IV. Prosecutorial Misconduct

Defendant argues that the prosecutor's improper remarks during closing argument constituted prosecutorial misconduct. Defendant acknowledges that he did not contemporaneously object to any portion of the prosecutor's argument but asks this Court to review his issue for plain error.

Generally, when a prosecutor's statements were not the subject of a contemporaneous objection, the issue is waived. Tenn. R. Crim. P. 33 and Tenn. R. App. P. 36(a); see also State v. Thornton, 10 S.W.3d 229, 234 (Tenn. Crim. App. 1999); State v. Green, 947 S.W.2d 186, 188 (Tenn. Crim. App. 1997). This Court, however, has in its discretion periodically reviewed allegations of prosecutorial misconduct even in the absence of a contemporaneous objection through the process of "plain error" review set forth in Rule 52 of the Tennessee Rules of Criminal Procedure. State v. Armstrong, 256 S.W.3d 243, 249 (Tenn. Crim. App. 2008) (citations omitted). Rule 36(b) provides that:

> [w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.

Tenn. R. Crim. P. 36(b).

To recognize the existence of plain error, this court must find each of the following five factors applicable: (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (adopting the factors first articulated in State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)); see also Tenn. R. Crim. P. 52(b). "[A] complete consideration of all five of the factors is not necessary when it is clear from the record that at least one of them cannot be satisfied." State v. Bledsoe, 226 S.W.3d 349, 355 (Tenn. 2007) (citing Smith, 24 S.W.3d at 283).

For a "substantial right" of the defendant to have been effected, the error must have prejudiced the defendant. "In other words, it must have affected the outcome of the trial court proceedings." Armstrong, 226 S.W.3d at 250 (citing United States v. Olano, 507 U.S. 725, 732-37, 113 S. Ct. 1770 (1993) (analyzing the substantially similar Fed. R. Crim. P. 52(b)); Adkisson, 899 S.W.2d at 642.

During closing argument, the prosecutor asked the jury, "Most of all, you know, where is Rose?" The prosecutor pointed out that "[s]he comes to parties but nobody can find her," and stated that "[s]he's not here to testify today." The prosecutor later commented:

> [y]ou know, I would also ask that you consider where did Rose go? Nobody saw anybody walking, you know. If you believe there was a lady named Rose, nobody saw anybody walking. The officers arrive at the – apparently fairly close in time to the accident happening. I'm not sure how a grown woman could disappear so quickly.

We disagree with Defendant's assessment that the remarks impermissibly shifted the State's burden of proof to Defendant to prove his innocence. The prosecutor's comments were in response to Ms. McIntosh's testimony that she saw a woman driving Defendant's pickup truck, with Defendant as a passenger, at approximately 12:00 p.m. on the day of the accident. Ms. McIntosh did not personally know the woman but thought her name was Rose.

Generally, counsel for both the prosecution and the defense should be permitted wide latitude in arguing their cases to the jury. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). However, argument must be temperate, "predicated on evidence introduced during the trial," and relevant to the issues being tried. State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994).

Based on our review and given the facts and circumstances of the case, we conclude that the prosecutor's comments did not shift the burden of proof to Defendant and did not affect the outcome of the trial. Defendant is not entitled to relief on this issue.

V. Sentencing Issues

Defendant argues that the trial court erred in denying his request for probation and that his sentence of two years is excessive. Defendant contends that he has held the same job for ten years, is married and is the sole provider for the household. Defendant submits that like the defendant in State v. Martin, 146 S.W.3d 64 (Tenn. Crim. App. 2004), he "has changed his lifestyle" since the accident.

At the sentencing hearing, Defendant testified that he had worked "off and on" for Simple Country Log Homes for approximately ten years. Defendant stated that he made twelve dollars an hour and was the sole support of his family which included his wife and grandchild. Defendant said that his wife received disability benefits.

According to the presentence report which was introduced as an exhibit without objection, Defendant was forty-one years old at the time of trial. Defendant left school after completing the ninth grade and reported that he had obtained his G.E.D. Defendant stated in the report that he currently was employed by Woods Construction as a laborer. Defendant said that he has worked for

the company for approximately one year and earned eight dollars an hour. Defendant noted in the report that he has a history of alcohol abuse.

Defendant was convicted of three counts of vehicular homicide in 1984 and was sentenced to ten years for each conviction to be served concurrently. In 1986, Defendant was convicted of escape and sentenced to three years to be served consecutively to his vehicular homicide convictions. In 1990, Defendant was convicted of driving under the influence, public intoxication, and resisting arrest. He was found in violation of his parole on October 20, 1990. Beginning in 1997, Defendant has numerous misdemeanor convictions for driving with a revoked license, leaving the scene of an accident, and reckless driving. Defendant has six convictions of driving under the influence. On June 2, 2006, Defendant was sentenced for his sixth driving under the influence conviction to one year, six months. It appears from the record that Defendant served a portion of his sentence in confinement and then was placed on probation. Defendant committed the current offense on September 4, 2007, while he was on probation. Defendant has also been found in violation of the terms of a probationary sentence on several occasions.

As a Range I, standard offender, convicted of a Class E felony, Defendant is subject to a sentence of between one and two years. The trial court considered Defendant's lengthy criminal history, his prior unwillingness to comply with the terms of a probationary sentence, and the fact that he was on probation when he committed the current offense as enhancement factors in determining the length of Defendant's sentence. See T.C.A. § 40-35-114 (1), (8), and (13). The trial court found no mitigating factors and sentenced Defendant to two years. The trial court denied Defendant's request for alternative sentencing based on his extensive criminal history and his numerous violations of the terms of a probated sentence for various convictions which reflected unfavorably on his amenability to rehabilitation.

When a defendant challenges the length and manner of service of a sentence, this court conducts a de novo review of the record with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). This presumption of correctness 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). However, if the record shows 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). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentencing decision was improper. T.C.A. § 40-35-401, Sentencing Commission Comments. We will uphold the sentence imposed by the trial court if: (1) the sentence complies with our sentencing statutes, and (2) the trial court's findings are adequately supported by the record. See State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001); see also T.C.A. § 40-35-210.

The trial court is free to select any sentence within the applicable sentencing range as long as the sentence is "consistent with the purposes and principles of [the Sentencing Act]." Id. § 40-35-210(d); State v. Carter, 254 S.W.3d 335, 343 (Tenn. 2008). However, the trial court is required to

place on the record "what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, to ensure fair and consistent sentencing." T.C.A. § 40-35-210(d). Once applied, the chosen enhancement factor becomes a sentencing consideration subject to review under Tennessee Code Annotated section 40-35-401(c)(2). Thus, while the court can weigh enhancement factors as it chooses, the court may only apply the factors if they are "appropriate for the offense" and "not already an essential element of the offense." Id. § 40-35-114.

In conducting a de novo review of a sentence, this court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancement factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-103, -210; State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

A. Length of Sentence

Relying on State v. Martin, Defendant argues that the trial court erred in sentencing him to the maximum sentence within the range, or two years, based on Defendant's work history, the need to support his family, and his change of lifestyle. In Martin, the defendant entered a plea of guilty to violating a motor vehicle habitual offender order after he was involved in a traffic accident while driving a float in a parade. The trial court sentenced the defendant as a Range II, multiple offender, to four years, the maximum sentence within the sentencing range, based primarily on his thirteen prior convictions for driving-related offenses. Martin, 146 S.W.3d at 67-68. The trial court declined to considered the defendant's work history as a mitigating factor. Id. at 68.

In reviewing the defendant's challenge to the length of his sentence, this Court observed that "work ethic and family contribution are entitled to favorable consideration under T.C.A. § 40-35-113." Id. at 70 (citing State v. Kelly, 34 S.W.3d 471, 482-83 (Tenn. Crim. App. 2000); State v. McKnight, 900 S.W.2d 36, 55 (Tenn. Crim. App. 1994)). We concluded that:

> [t]he record reflects that the defendant had an excellent employment history. His employer testified that the defendant had been his shop manager for five years, that the defendant had never arrived late for work or missed work without calling first, and that he would not be able to continue his business without the defendant. We conclude that the trial court erred by not considering the defendant's work history as a mitigating factor. We note, though, that the defendant did not ask the trial court to apply mitigating factor (11) regarding his lack of a sustained intent to violate the law. Nevertheless, the uncontroverted evidence indicates that the defendant had made great strides in straightening his life and that his offense arose from aberrant conduct. These mitigating factors are entitled to substantial weight. However, in light of the defendant's extensive criminal history, we hold that even with applying mitigating factors (11) and (13), the defendant should receive a three-year sentence.

Martin, 146 S.W.3d at 70.

Unlike the situation presented in Martin, however, Defendant did not offer any evidence at the sentencing hearing other than his own brief testimony and the presentence report. We note that although Defendant testified that he had worked for Country Log Homes "off and on" for ten years, he reported in the presentence report that he had worked for Woods Construction for approximately one year at a lesser rate of pay. Defendant did not offer any evidence as to his change in lifestyle other than his testimony that after he was released from the jail, he had been working "ever since." Defendant also does not suggest what factors might serve to mitigate his sentence as was the case in Martin. Sentencing must be determined on a case-by-case basis, with each sentence tailored to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986). Based on our review, we conclude that the trial court did not err in sentencing Defendant to two years for his Class E felony conviction. Defendant is not entitled to relief on this issue.

B. Denial of Alternative Sentencing

Again relying on State v. Martin, Defendant argues that the trial court erred in denying his request for probation in light of his work history, his family commitments, and his changed lifestyle. At the conclusion of the sentencing hearing, the trial court denied Defendant's request for alternative sentencing based on Defendant's lengthy criminal history and his past demonstration of his unwillingness to comply with the terms of a probated sentence on numerous occasions.

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a defendant who does not possess a criminal history showing a clear disregard for society's laws and morals, who has not failed past rehabilitation efforts, and who "is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." T.C.A. § 40-35-102(5), (6). Additionally, a trial court is "not bound" by the advisory sentencing guidelines; rather it "shall consider" them. Id. § 40-35-102(6).

"No longer is any defendant entitled to a presumption that he or she is a favorable candidate for probation." Carter, 254 S.W.3d at 347. If a defendant seeks probation, then he or she bears the burden of "establishing suitability." T.C.A. § 40-35-303(b). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." Id. § 40-35-303, Sentencing Comm'n Cmts.

The following considerations provide guidance regarding what constitutes "evidence to the contrary":

(A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;

(B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to 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.

T.C.A. § 40-35-103(1); see also Carter, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. Id. § 40-35-103(5).

In Martin, the trial court ordered the defendant to serve his sentence in confinement based, in part, on the defendant's prior criminal record. We concluded that the trial court erred in not devising "an alternative sentence involving some confinement but in such a manner as to allow the defendant to maintain his employment and support his family." Martin, 146 S.W.3d at 77. However, once again the facts and circumstances present in Martin are distinguishable from those presented in the case sub judice. Although the defendant in Martin had an extensive criminal record, the defendant's change of lifestyle since his marriage and his amenability to rehabilitation was readily shown by the record. Id. at 76.

Defendant has a long history of felony and misdemeanor convictions, including numerous convictions for driving under the influence. Defendant has been extended repeated sentences involving no or minimal periods of confinement which have failed to deter Defendant from engaging in criminal conduct. See T.C.A. § 40-35-103(1)(A) and (C). Moreover, even when extended a probated sentence, Defendant has repeatedly failed to abide by the terms of his probation demonstrating little potential for rehabilitation. Based on the foregoing, we conclude that Defendant has failed to meet his burden of demonstrating that probation "will subserve the ends of justice and the best interest of both the public and the defendant." State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), overruled on other grounds by State v. Hooper, 29 S.W.3d 1 (Tenn. 2000). Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE