

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. Pursuant to plea agreements, the Defendants each entered a plea of guilty to one count of perjury, a Class A misdemeanor.¹ The agreed sentence for each Defendant was eleven months and twenty-nine days in the local workhouse and a fine in the amount of one thousand dollars. Whether any part of either jail sentence was to be suspended was left to the discretion of the trial court. After conducting a sentencing hearing, the trial court declined to suspend either sentence. For each sentence, the court set the program eligibility percentage at the maximum of seventy-five percent.² The court set the release from confinement eligibility at the maximum of one hundred percent.³ It is from the sentence ordered by the trial court that the Defendants appeal.

The Davidson County grand jury returned an indictment charging the Defendant, Betty Joan Stuart, with three counts and the Defendant, Tammy Lynn Stuart, with two counts of aggravated perjury, a Class D felony.⁴

The Defendants had been called to testify before the Davidson County grand jury concerning the involvement of Page Stuart in a large scale drug operation. The Defendant, Betty Joan Stuart, is the former wife of Page Stuart and the Defendant, Tammy Lynn Stuart, is the daughter of Page Stuart. Testifying before the grand jury, both Defendants gave false statements under oath concerning the ownership and

¹Tenn. Code Ann. § 39-16-702.

²Tenn. Code Ann. § 40-35-302(d).

³Tenn. Code Ann. § 41-21-236(f)(4).

⁴Tenn. Code Ann. § 39-16-703.

circumstances surrounding the purchase and titling of a pickup truck. The pickup truck was titled in Alabama in the name of the Defendant, Betty Joan Stuart. Page Stuart was driving the truck in Texas when, pursuant to a drug investigation, the truck and some three hundred and sixteen thousand dollars in cash was seized. The questions which the Defendants falsely answered concerned how and when Betty Joan Stuart came into possession of the truck, why it was titled in her name, and why it was titled in Alabama instead of Tennessee, which was Ms. Stuart's permanent residence. Both the Defendant, Betty Joan Stuart and the Defendant, Tammy Lynn Stuart, told the grand jury the identical false story.

Pursuant to plea agreements with the State, each Defendant petitioned the trial court to accept their plea of guilty to one count of perjury in exchange for a sentence of eleven months and twenty-nine days and a one thousand dollar fine. Each Defendant requested a sentencing hearing concerning the manner in which the jail sentence would be served. The trial court accepted their guilty plea, conducted a sentencing hearing and sentenced each Defendant as previously indicated. It is from the sentence ordered by the trial court that each Defendant appeals.

When there is a challenge to the length, range or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The Sentencing Commission Comments provide that the burden is on the appellant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103 and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987) .

In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the Defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). The sentence must be specific and consistent with the purposes and principles of the Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-302(b). The trial court retains the authority to place the Defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994).

The Defendants argue on appeal that the trial court erred in denying their request for probation. Among the factors applicable to the Defendants' application for probation are the circumstances of the offense, the Defendants' criminal record, social history and present condition, and the deterrent effect upon and best interest of the Defendant and the public. State v. Gennoe, 851 S.W.2d 833, 837 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1992); State v. Grear, 568 S.W.2d 285 (Tenn. 1978), cert. denied, 439 U.S. 1077 (1979). In determining the actual period of confinement for a misdemeanor sentence, the enhancement and mitigating factors may, in addition

to the purposes and principles of the sentencing, be considered. Because especially mitigated or standard offenders convicted of Class C, D, or E felonies are presumed to be favorable candidates for alternative sentencing, the same presumption would logically apply to misdemeanors. Gennoe, 851 S.W.2d at 837; see Tenn. Code Ann. § 40-35-102(6). The ultimate burden for establishing an entitlement to probation, however, remains upon the applicant. See Tenn. Code Ann. § 40-35-303(b).

The only information in this record relevant to the sentencing issues presented is contained in the transcript of the sentencing hearing. The Defendant, Betty Joan Stuart, testified that she was fifty-one years old and had never been convicted of any offense. She is the former wife of Page Stuart. At the sentencing hearing, she was confined to a wheel chair due to recent hip surgery, and she expected to be confined to the wheel chair or need a walker for three to six months. She was taking medication for hypertension and depression. There is nothing in the record concerning her educational background or employment history. She was being financially supported by her family members. She stated that the reason she lied to the grand jury was to protect her family, including Page Stuart, "my sons, everybody that was involved." She said that even though she and Page Stuart were divorced, he "still helped out, you know, sometimes." Even though she acknowledged that she had been aware that there were fifteen or twenty boxes of gallon zip-lock bags at her house, she did not know that her former husband or any of her family members were involved in drug trafficking. She said she thought that they got their money through "betting."

Tammy Lynn Stuart testified that she was twenty-six years old and had two children. She is the daughter of Page Stuart. A few days before the sentencing hearing, she married the man that she had been dating for about four years and had lived with for about two years. She was charged with DUI in 1988, and that charge led to a conviction for reckless driving. This was her only prior conviction. We know

nothing about her educational background or employment history, except that she said that she had been unable to work for about a year because of an injury to her arm.

On cross-examination, she stated that her father, her mother and she got together and decided that they would lie to the grand jury about the ownership and possession of the truck in order to try to get the truck back. She stated that she knew that what they were planning to do was against the law. She also denied any knowledge that her father and her brother were involved in the distribution of marijuana. At the sentencing hearing, she exercised her Fifth Amendment rights not to answer questions concerning income she may have received and not reported in connection with her receipt of AFDC benefits.

At the conclusion of the sentencing hearing, the trial judge stated "this wasn't somebody just testifying under pressure who had to answer a question in a split second. This was premeditated. I mean, they thought about it. This thing was planned out. That's pretty serious. . . . and I think I would take a completely different attitude if they acted under the heat of the moment in a situation where they felt they just had to act responsibly or to protect a family member. But this premeditated perjury I consider extremely serious . . . and it is true this is a misdemeanor -- but in my mind this sort of premeditated perjury is as serious as it gets."

We point out that both Defendants had entered into a plea agreement which set the length of their sentence at eleven months and twenty-nine days, the maximum for a Class A misdemeanor. Therefore, there was no reason for the judge to elaborate concerning the overall length of the sentence.

In refusing to suspend any of the Defendant's sentences and ordering the maximum period of confinement, the trial court stated, "I certainly take no pleasure in

imposition of those maximum sentences, but I feel this is the most serious crime as relates to the integrity of the court system, especially when it's done in a premeditated fashion as it was done here. That's the judgment, my judgment."

It is clear from this record that the Defendants herein got together and discussed the false testimony that they would give when they appeared before the Davidson County grand jury. They planned the commission of perjury. We agree with the trial court's observation that these offenses, even though misdemeanors, were quite serious.

As we have stated, the ultimate burden for establishing entitlement to probation was upon these Defendants. Because the trial court emphasized its perception of the seriousness of the offense, it is obvious the court determined that confinement was necessary to avoid depreciating the seriousness of the offense and was particularly suited to provide an effective deterrence to others likely to commit similar offenses. Tenn. Code Ann. § 40-35-103(1)(B). The overall flavor of the Defendants' testimony at their sentencing hearing did little to demonstrate a great deal of potential for rehabilitation. Tenn. Code Ann. § 40-35-103(5).

Based upon our review of the record we are unable to conclude that the trial judge erred or abused his discretion in sentencing these Defendants.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOHN H. PEAY, JUDGE