IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 28, 2009

STATE OF TENNESSEE v. BRETT T. GAMMON

Appeal from the Criminal Court for Sullivan County
No. S53,172 R. Jerry Beck, Judge

No. E2009-00052-CCA-R3-CD - Filed August 14, 2009

A Sullivan County Criminal Court jury convicted the defendant, Brett T. Gammon, of three counts of burglary of an automobile, *see* T.C.A. § 39-14-402 (2006), and three counts of theft of property valued at $500 or less, *see id.* § 39-14-103, -105. On appeal, he challenges only the trial court's denial of his request for probation and alternative sentencing. Because the appellate record does not contain all relevant transcripts, we presume the trial court's rulings are correct and affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSPEH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Nat H. Thomas, Kingsport, Tennessee, for the appellant, Brett T. Gammon.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Janine M. Myatt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On March 14, 2007, a Sullivan County grand jury returned a presentment charging the defendant[1] with three counts of burglary of an automobile, a Class E felony, and three counts of theft of property valued at $500 or less, a Class A misdemeanor. The indictment alleged that all offenses occurred on July 30, 2006. After a July 23, 2008 trial, a Sullivan County jury convicted the defendant as charged on all counts.[2] On September 23, 2008, the defendant filed a motion to be

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[1] The indictment listed a co-defendant; however, the co-defendant pleaded guilty prior to trial.

[2] The judgments of conviction represent that the jury found the defendant guilty on July 23, 2008, but other representations in the record suggest the trial occurred on July 22, 2008. The appellate record contains no transcript of the trial, and we will abide by the date set forth on the judgments.

considered for judicial diversion and a motion to consider several mitigating factors in determining his sentence. On December 19, 2008, the trial court sentenced the defendant to one year of incarceration as a Range I, standard offender for the defendant's Class E felony convictions and to 11 months, 29 days in the county jail for his Class A misdemeanor convictions. The court ordered that all the sentences be served concurrently for an effective one-year sentence. The trial court held a hearing on the defendant's timely motion for new trial on January 8, 2009, and denied the motion by minute entry that same day. The defendant filed a timely notice of appeal.

At the defendant's sentencing hearing, the trial court denied judicial diversion because the defendant had acquired additional criminal charges while on bond for the present case. The State exhibited the defendant's presentence report, which reflected that on July 30, 2006, the defendant and his cousin entered three different vehicles and stole items from the vehicles without the owners' consent. The report reflected that the defendant, who was born September 17, 1987, dropped out of high school in the eleventh grade and had not maintained steady employment since March 2008. The presentence report listed as a mitigating factor that the defendant's criminal conduct did not cause or threaten serious bodily injury, and it listed no enhancement factors.

Defense counsel argued as mitigating factors that the defendant lacked substantial judgment because of his youth, that the property taken from the vehicles was eventually recovered by the victims, that his criminal conduct did not threaten serious bodily injury, and that the defendant had no prior convictions as an adult.

The court found as a mitigating factor that the defendant's crimes did not involve violent harm to the public. It further found that the defendant had no adult criminal record and only a "minor record as a juvenile" which the court gave "little weight." The court determined that the factors "even[ed] out" and ordered the defendant to serve the minimum sentence for his Class E felony convictions. The court ordered that the defendant's three Class E felony convictions and his three Class A misdemeanor convictions be served concurrently.

In considering probation and alternative sentencing, the court noted the defendant's multiple, pending charges involving the sale of cocaine.[3] The court stated that "[the defendant] was . . . on bond when these evidently occurred." The court denied the defendant's request for alternative sentencing and ordered that he serve his effective one-year sentence in confinement.

The defendant appeals from the trial court's denial of alternative sentencing. When there is a challenge to the manner of service of a sentence, it is the duty of this court to conduct a de novo review of the record with a presumption that the trial court's determinations are correct. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). 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." *Id.* In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id.*

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[3]The district attorney general explained during the defendant's new trial hearing that the defendant "has eight different counts. It's alternative counts of sale and delivery [of cocaine], and so there were four different events."

The defendant urges us to conduct a pure de novo review in light of the trial court's brief consideration of probation and alternative sentencing on the record. However, we note that the defendant failed to include the trial transcript in the record. Because the trial court's sentencing consideration is based in part upon "[t]he evidence . . . received at the trial . . . ," *see* T.C.A. § 40-35-210(b)(1), we cannot conduct a de novo review without the trial transcript, *see State v. Hayes*, 894 S.W.2d 298, 300 (Tenn. Crim. App. 1994). In this situation, we must presume the correctness of the trial court's ruling. *See State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991); *see also State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998); Tenn. R. App. P. 24(a).

We note that, after the trial court orally denied the defendant's motion for new trial, defense counsel expressed his intent to appeal on the basis of the court's denial of alternative sentencing. Defense counsel stated, "I don't want to shoot myself in the foot here, but I don't know that we need the whole transcript. I think we might just need the sentencing [hearing]." The court then informed the defense counsel that, although "the law doesn't require all the transcript be prepared," the defendant should obtain "those things [that he] intends to rely upon on appeal." The trial court then informed defense counsel that, because the defendant was indigent, it would approve "as much transcript as [defense counsel] think[s] is necessary." Despite this assurance, defense counsel determined that the trial transcript was not necessary on his sentencing appeal. Our statutory scheme, however, explicitly requires a trial court [to] consider trial evidence in sentencing, *see* T.C.A. § 40-35-210(b)(1), and the failure to include such transcript in the appellate record when challenging a sentence on appeal creates a presumption of correctness of the trial court's determinations, *see Oody*, 823 S.W.2d at 559.

Upon our review, we presume that the trial court correctly sentenced the defendant, and we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE