IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs January 13, 2010

STATE OF TENNESSEE v. RONALD LESLIE MCKNIGHT

Direct Appeal from the Criminal Court for Davidson County
Nos. 2008-B-897, 2008-B-1304, 2008-B-1626, & 2008-B-1839
J. Randall Wyatt, Jr., Judge

No. M2009-00578-CCA-R3-CD - Filed February 8, 2010

The Defendant, Ronald Leslie McKnight, pled guilty to one count of selling less than 0.5 grams of a Schedule II controlled substance and to three counts of aggravated burglary. The parties agreed to a six-year sentence for the drug sale conviction and a four-year sentence for each of the aggravated robbery convictions, with the trial court to determine the manner of service and alignment of the sentences. The trial court imposed partial consecutive sentencing, for a total effective sentence of ten years in the Tennessee Department of Correction. On appeal, the Defendant contends the trial court erred when it denied him an alternative sentence. After a thorough review of the record and relevant authorities, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Ashley Preston, Nashville, Tennessee, for the Appellant, Ronald Leslie McKnight.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Amy Eisenbeck, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

In its written order setting the Defendant's sentence, the trial court set forth the

following account of the conduct underlying this case and the Defendant's corresponding guilty pleas and agreed sentences:

> In case number 2008-B-1626, on May 7, 2007, the Defendant stole an air conditioning unit from a residence and sold it at a pawn shop for $250.00, for which he pled guilty to one count of Aggravated Burglary and received a four year sentence as a Range I offender. In case number 2008-B-1839, on September 26, 2007, the Defendant entered a residence through the hole created by an external air conditioning unit and attempted to steal several items before being interrupted by the tenant and running away. For these acts he pled guilty to one count of Aggravated Burglary and received a sentence of four years as a Range I offender. In case number 2008-B-1304, on November 26, 2007, the Defendant broke into a home and stole numerous items and damaged property inside the residence. For these acts he pled guilty to one count of Aggravated Burglary and was sentenced to four years as a Range I offender. In case number 2008-B-897, on January 11, 2008, the Defendant assisted in arranging the sale of a "forty" ($40 worth of crack cocaine) to a confidential informant. For these acts he pled guilty to the Sale of Under 0.5 Grams of a Schedule II Drug and was sentenced to six years as a Range I Offender.

After it accepted the Defendant's guilty pleas, the trial court conducted a sentencing hearing to determine the manner in which the Defendant would serve his sentences. At this hearing, the Defendant's pre-sentence report was introduced, and the Defendant testified.

According to the pre-sentence report, the Defendant, twenty-seven at the time of sentencing, dropped out of high school but was pursuing his G.E.D. Starting at age eighteen, the Defendant committed numerous crimes, totaling at least twenty-two criminal convictions. These convictions included ten misdemeanor driving with a suspended license convictions, five criminal impersonation convictions, one aggravated burglary conviction, one theft of property between $1000 and $10,000 conviction, one use of stolen plates conviction, one possession of cocaine conviction, one sale of a Schedule II controlled substance conviction, one filing a false report conviction, and one weapons offense conviction. The report referred to a bevy of other arrests and charges that were either dismissed or the disposition was unclear. At the time of sentencing, the Defendant was incarcerated, serving the remainder of a six-year sentence he received for the prior aggravated burglary conviction after he violated the probation he originally received in that case.

According to the pre-sentence report, the Defendant started using marijuana at age seventeen, alcohol at age twenty, and other illicit drugs as an adult. At the time of

sentencing, the Defendant was completing an alcohol and drug abuse treatment program called "New Avenues." The Defendant has four daughters and three sons. The report included a statement in which the Defendant said, "I love my family. I take care of them. I am going to change my life and get myself together."

The Defendant testified at the sentencing hearing, first apologizing to his victims and to the Court. He acknowledged his conduct was "wrong," but he explained that he was "trying to take care of [his] family." He reiterated, however, that he knew the fact that he was trying to care for his family did not "give [him] any reason to do what [he did]." Emphasizing that, at the time of his conduct, he was using drugs and that he had completed six programs since being arrested for his conduct in this case, he asked the Court to grant him an alternative sentence. The Defendant testified that he voluntarily completed the following programs in order to "better [him]self": Steps to Responsible Thinking, Defensive Driving, Pre-release, Vocational Life Skills, New Avenues Alcohol and Drug Treatment, and Narcotics Anonymous. The Defendant had also partially completed a Lifelines G.E.D. course at the time of sentencing. At the conclusion of the hearing, the trial court continued the hearing several weeks in order to allow the Defendant to complete the Lifelines G.E.D. course.

The trial court later issued a written order denying alternative sentencing. It is from this judgment that the Defendant now appeals.

II. Analysis

The Defendant contends the trial court erred when it denied him an alternative sentence, arguing that his amenability to rehabilitation justifies an alternative sentence and that the court failed to make the findings necessary to support its order of total confinement. The State responds that the trial court did make such findings and that, in ordering confinement, the trial court properly relied on the Defendant's criminal history as well as his past failures to comply with measures less restrictive than confinement.

When a defendant challenges the length, range or manner of service of a sentence, this Court must 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." T.C.A. § 40-35-401(d); *State v. Mencer*, 798 S.W.2d 543, 549 (Tenn. Crim. App. 1990). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989

Sentencing Act, Tennessee Code Annotated section 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001).

Due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (citing T.C.A. § 40-35-102(6) (2006)). Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. § 40-35-102], 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." *Id*. (footnote omitted). T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall consider" them. T.C.A. § 40-35-102(6) (emphasis added).

A defendant seeking probation bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). 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." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

When sentencing the defendant to confinement, a trial court should consider whether:

> (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(A)-(C) (2006). In choosing among possible sentencing alternatives, the trial court should also consider "[t]he potential or lack of potential for the rehabilitation or treatment." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

In this case, the trial court sentenced the Defendant to the agreed-upon sentence of ten years, and it denied the Defendant's request for an alternative sentence, requiring the Defendant to serve his entire sentence in confinement. The trial court explained its consideration of sentencing principles that led to its denial of alternative sentencing:

> The Court finds that the Defendant has an extensive history of criminal activities and that he has committed a number of robbery and drug offenses that are the subject of the sentencing hearing. The Court also finds that placing the Defendant on probation and community corrections has not proven successful in the past and that the Defendant has incurred numerous violations when his sentences have been suspended. However, the Court also recognizes and commends the Defendant on his desire to set a new course for his life and provide for his family in a legitimate manner. In light of these facts, the Court sentences the Defendant to serve his effective ten year sentence in confinement but that the sentence should run concurrent with the six year sentence he is currently serving . . . . The Court finds that this sentence is the minimum sentence necessary to protect society and is the least severe measure necessary to appropriately punish the Defendant for the offenses committed. T.C.A. § 40-35-103.

The Defendant is a standard offender, and his present convictions are Class C felonies. Therefore, the Defendant should be considered a "favorable candidate" for alternative sentencing. *See Carter*, 254 S.W.3d at 347. The trial court based its denial of alternative sentencing on the Defendant's long history of criminal conduct and his past failures to comply with measures less restrictive than confinement. As to the Defendant's rehabilitative potential, the trial court acknowledged the strides the Defendant took to educate and rehabilitate himself, but it ultimately found his extensive criminal past overshadowed these strides. Also, the trial court specifically complied with its obligation to impose the "least severe measure necessary to achieve the purposes for which the sentence is imposed" when it found that confinement was the "minimum sentence necessary to protect society" and the "least severe measure necessary to appropriately punish the Defendant." *See* T.C.A. § 40-35-103(4).

We conclude the record does not preponderate against the trial court's findings. The Defendant admitted to illicit drug use, and he has a long history of criminal conduct, including several felonies. Also, the Defendant committed the crimes in this case while on probation. Thus, the record adequately supports the trial court's findings. *Ross*, 49 S.W.3d at 847. We conclude that, in ordering confinement, the trial court considered the pertinent facts of this case and the sentencing principles of Tennessee Code Annotated section 40-35-103(A)-(C). As such, its denial of alternative sentencing is presumptively correct. *See*

T.C.A. § 40-35-401(d); *Mencer*, 798 S.W.2d at 549.

The Defendant has failed to carry his burden of proving his suitability for probation. T.C.A. § 40-35-303(b) (2006). We conclude that the Defendant's lengthy history of criminal conduct and his past failures to comply with measures less restrictive than confinement require his confinement in this case. *See* T.C.A. § 40-35-103(1), (5); *Kendrick*, 10 S.W.3d at 656; *Dowdy*, 894 S.W.2d at 305. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and applicable authorities, we conclude the trial court properly denied alternative sentencing. As such, we affirm the trial court's judgments.

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ROBERT W. WEDEMEYER, JUDGE