IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 26, 2008

STATE OF TENNESSEE v. KEVIN ALFRED TESTON

Direct Appeal from the Circuit Court for Sullivan County
No. S48, 773 R. Jerry Beck, Judge

No. E2007-02745-CCA-R3-CD - Filed November 10, 2008

The defendant, Kevin Alfred Teston, pleaded guilty to one count of resisting arrest, one count of attempted child neglect, and one count of attempt to obtain a controlled substance, Hydrocodone, by fraud. In exchange for his guilty pleas, the defendant received concurrent sentences of six months for each misdemeanor conviction and three years for the felony conviction for a total effective sentence of three years. On appeal, the defendant argues that the trial court erred by denying any form of alternative sentencing and imposing confinement. Following our review of the record and the parties' briefs, we affirm the trial court's sentencing decision.

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

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, J. joined and JOHN EVERETT WILLIAMS, J., concurred in results only.

Donald E. Spurrell (on appeal), Johnson City, Tennessee, and Joe Harrison (at trial), Blountville, Tennessee, for the appellant, Kevin Alfred Teston.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and James F. Goodwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On January 12, 2007, the defendant pleaded guilty to one count of resisting arrest (a misdemeanor), one count of attempted child neglect (a misdemeanor), and one count of attempt to obtain a controlled substance, Hydrocodone, by fraud (a felony). Though the guilty plea hearing is not contained in the record, some facts giving rise to these convictions can be gleaned from the presentence report.

> On November 8, 2003, the affiant responded to 2000 Brookside [Drive,] Indian Path Emergency Room in reference to [the defendant] attempting to make a report of lost Hydrocodone. During routine questioning it was determined [the defendant] was not being truthful and he decided he did not want to make any type of report. A female juvenile was with [the defendant] in the lobby. Affiant stepped away from [the defendant] who took his daughter and left the area before being released. Affiant received a call from McDonald's at 1620 E. Stone Dr[ive] about a female juvenile that was left alone. Affiant located two witnesses . . . who stated that they located a Kimberly Teston . . . who was alone. Kimberly would not answer any questions about the possible whereabouts of her father. [Officer] Summey located [the defendant] who fled on foot . . . .

At the sentencing hearing, the presentence investigative report was entered into evidence as an exhibit. The defendant requested that he be placed on some form of alternative sentencing. He testified that he had spent 120 days in jail last year. He stated that he was thirty-five and currently lived in Georgia where he was employed by his parent's roofing business. He had two children with his girlfriend, a fourteen-year-old daughter and a five-month-old son. According to the defendant, his parents were in poor health and relied on his help with the family business.

The defendant noted that he was addicted to drugs but said he had been clean for a few months. He also claimed he would do better now that his parents needed more help with the roofing business. The defendant admitted that he had "been in and out of rehab." On cross-examination, the defendant admitted that he had a prior felony burglary conviction in Florida and some misdemeanor convictions in Georgia and Tennessee. The defendant also admitted that he had been granted probation "quite a few times." The defendant further admitted that he had an "alcohol and drug problem." The defendant recalled that he had used cocaine, marijuana, and prescription drugs in the past. The defendant acknowledged that he had resumed taking drugs after completing certain rehabilitation programs.

In imposing confinement, the trial court found that the defendant had a recent prior record and a history of prior failures at drug rehabilitation programs. The court stated the following:

> Considering his overall prior record, reviewing the presentence report, testimony in court, as well as arguments of counsel, [this] Court [is] of the opinion he just has too much baggage to place him . . . on probation or alternative sentencing.
>
> The Court has considered the special needs provisions of Community Corrections. But considering [the Defendant's] own testimony that prior efforts of non-incarceration treatment programs have not been successful, the Court does not think the State would profit or the Defendant profit from further non-incarcerated drug treatment programs, looking at the overall picture.

The court then imposed a sentence of confinement with credit for time already served. The defendant appealed.

ANALYSIS

The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. 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. Tenn. Code Ann. § 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. *Id.* § 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* Tenn. Code Ann. § 40-35-210.

Generally, considerations relevant to determining a defendant's eligibility for alternative sentencing are relevant to determining suitability for probation. *See Ashby*, 823 S.W.2d at 169. A defendant is eligible for probation if the actual sentence imposed is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. Tenn. Code Ann. § 40-35-303(a). Also, a defendant is presumed to be a favorable candidate for alternative sentencing if the defendant is an especially mitigated or standard offender convicted of a Class C, D, or E felony and there exists no evidence to the contrary. *Id.* § 40-35-102(6), Sentencing Commission Comments. However, this presumption is unavailable to a defendant who commits the most severe offenses, has a criminal history showing clear disregard for the laws and morals of society, and has failed past efforts at rehabilitation. *Id.* § 40-35-102(5); *State v. Fields*, 40 S.W.3d 435, 440 (Tenn. 2001). Furthermore, the defendant bears the burden of proving suitability for probation. Tenn. Code Ann. § 40-35-303(b). Among the factors applicable to a probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, the deterrent effect upon the defendant, and the best interests of the defendant and the public. *See State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978).

Guidance as to whether the trial court should grant alternative sentencing or incarcerate is found in Tenn. Code Ann. § 40-35-103. Sentences involving confinement should be based upon the following considerations:

> (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. . . .

Tenn. Code Ann. § 40-35-103. As part of its determination, the trial court may also consider the defendant's potential or lack of potential for rehabilitation. *Id.* § 40-35-103(5). There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. *Id.* § 40-35-103(2); *State v. Boggs*, 932 S.W.2d 467, 476-77 (Tenn. Crim. App. 1996).

From the record, we glean that the trial court based its denial of alternative sentencing primarily on the finding that the defendant had a criminal history and the defendant had been granted measures less restrictive than confinement on a few occasions. *See* Tenn. Code Ann. § 40-35-103(1)(A), (C). The defendant's Tennessee presentence report reflects that he committed several traffic offenses. The defendant admitted to the presentence investigator that he had "multiple felony and misdemeanor convictions in Florida and Georgia," including burglary, theft, shoplifting, criminal trespass, various traffic offenses, and a probation violation. At the sentencing hearing, the defendant admitted that he had a prior felony burglary conviction in Florida and some misdemeanor convictions in Georgia and Tennessee. The defendant also admitted that he had been granted probation "quite a few times." The defendant further admitted that he was addicted to drugs. Given that the court's findings are adequately supported by the record, and the defendant's sentence complies with our sentencing statutes, we discern no abuse of discretion in the court's sentence of confinement. Accordingly, the defendant is without relief as to this issue.

CONCLUSION

In accordance with the aforementioned reasoning and authorities, we affirm the judgment of the trial court.

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J.C. McLIN, JUDGE