IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1999 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. #M1998 00413 CCAR3CD**
Appellee,	)	
	)	**SUMNER COUNTY**
v.	)	
	)	**HON. JANE W. WHEATCRAFT,**
JEREMY WHITSON,	)	**JUDGE**
	)	
Appellant.	)	**(ATTEMPT TO COMMIT RAPE)**
	)	

FOR THE APPELLANT:

DAVID A. DOYLE
District Public Defender
117 West Main Street
Gallatin, Tennessee 37066

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH B. MARNEY
Assistant Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243

SALLIE WADE BROWN
Assistant District Attorney General
113 East Main Street
Gallatin, Tennessee 37066

AFFIRMED

L. T. LAFFERTY, SENIOR JUDGE

OPINION

The appellant, Jeremy Whitson, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from a judgment of the Sumner County Circuit Court denying the appellant an alternative sentence in lieu of incarceration. The appellant presents one appellate issue:

> Whether the trial court erred in sentencing the appellant in accordance with the Criminal Sentencing Reform Act of 1989 by denying the appellant an alternative sentence?

After a review of the record, briefs of the parties, and applicable law, we AFFIRM the trial court's judgment.

FACTUAL BACKGROUND

The Sumner County Grand Jury indicted the appellant for the rape of a child, in violation of Tennessee Code Annotated § 39-13-522, on January 9, 1998, by causing KG, age twelve (12), to perform oral sex on the appellant. On August 10, 1998, the appellant entered a negotiated plea of guilty to attempted rape, received a sentence of six (6) years in the Department of Correction, and requested a sentencing hearing for alternative sentencing. The State advised the trial court on January 9, 1998, that the appellant was visiting the home of a friend. The victim was at this home. The victim went to the bedroom with the appellant and performed oral sex on the appellant, who was 18 years old at the time and on a pass from the Department of Children's Services' (DCS) custody.

SENTENCING HEARING

Jacky Bradley, a detective with Portland, Tennessee, Police Department, testified that she received a complaint of a rape of a child on January 14, 1998. On January 16, 1998, Detective Bradley interviewed the victim, KG, age 12, who advised Detective Bradley that, while babysitting, she performed oral sex on the appellant voluntarily. This occurred in the bedroom, and the victim advised Detective Bradley that they did not have sexual intercourse, as she was on her period. Detective Bradley testified that she and Phyllis Smith from the DCS talked to Eva Hailey, mother of a second alleged victim. This victim was 13, but no charges were pending due to the fact that the mother of the child showed no interest in prosecution. Detective Bradley testified that she learned the appellant was home on a pass from Woodland Hills Youth Development Center and was to remain at his

father's home when the sexual encounter occurred. The sexual event with KG occurred about nine miles from the appellant's home. Detective Bradley testified that she talked to the appellant at Woodland Hills, who admitted the girl performed oral sex on him. In cross examination, Detective Bradley testified that KG gave several different accounts as to what happened in the bedroom with the appellant.

KG testified at the time of the sentencing hearing that she was 13 years of age and in the eighth (8th) grade at Portland Middle School. The victim testified that she did not recall that she had given different stories as to what happened. The victim testified that everybody at school hated her because of what she did with the appellant, but she was only able to name one girl, LG, who had threatened to "whoop" her. KG advised the trial court that she did not care or does not know how she feels about the incident.

Keith Gayton, father of the victim, testified that he learned about the incident from the mother of one of the kids from school. Mr. Gayton talked to his daughter and then contacted the police department. Since the incident, Mr. Gayton testified that KG has been getting "out of hand," cries easily, and gets upset with her brother and sister over insignificant things. Mr. Gayton testified that his daughter was a lot more emotional, angrier, and more violent than before the incident with the appellant, and that she had not gone to counseling. Mr. Gayton works sixteen to seventeen hours per day and cannot take his daughter to counseling, although she needs it. Mr. Gayton testified that relatives of the appellant had threatened his daughter at school. The father advised the trial court that he wanted the maximum sentence. He admitted that KG gave him several conflicting accounts of what happened with the appellant, including saying that nothing happened.

Jenny Cole, with the Tennessee Department of Children's Services, testified that she assumed the role of case manager of the appellant in February, 1998. In testifying from the appellant's juvenile court record, Ms. Cole advised the trial court that the appellant first, appeared before the Juvenile Court in June, 1994, on a charge of domestic assault. The appellant was placed in the custody of his grandparents with home counseling. The appellant's second appearance in Juvenile Court was in August, 1995, for attempted suicide. The appellant was referred to CMC and Vanderbilt for counseling and therapy. This recommendation was due to the appellant's behavior, truancy, arguing with his father

and stepmother, bouncing back and forth between different family members' homes, school fights, and some drug and alcohol use. On the appellant's third visit to Juvenile Court, the appellant was charged with unruly behavior, truancy, and vandalism in September, 1995. The appellant was placed in the Natchez Group Home for counseling and behavior modification. Due to the appellant's behavior, he was moved to a more secure facility at Trace Group Home for intensive counseling. In March, 1996, the appellant was released to his father.

In April, 1996, the appellant was brought back to Juvenile Court for prior pending charges, and the Juvenile Court committed the appellant to the custody of the Department of Children's Services, but he was permitted to live at home with his father. The appellant continued to get into trouble, and the Juvenile Court committed him to the Tennessee Preparatory School in June, 1996. The appellant was to undergo supervision and counseling, but he ran away in September, 1996. The appellant was returned in October, 1996, and was eventually placed on probation in December, 1996, and released to live with his father. In April, 1997, the appellant was returned to Juvenile Court for violation of probation but was permitted to remain at home with his father. On May 8, 1997, the appellant was returned to Juvenile Court for possession of marijuana and violation of probation. The appellant was committed to the Department of Children's Services and eventually placed in Woodland Hills. Ms. Cole testified that while in Woodland Hills, the appellant wrote to several females in custody and made some harassing phone calls to some of the parents. In cross-examination, Ms. Cole advised the trial court that she had seen the appellant once in six and a half months and, as to the counseling afforded to the appellant, her testimony was based upon institution records.

Mr. Ronnie G. Stout, a licensed clinical psychologist, examined the appellant to determine his suitability for placement in the community corrections program. In his report, Mr. Stout wrote "As a practitioner, I would not be optimistic that Mr. Whitson's behavior could be held within acceptable limits solely with the aid of outpatient counseling at this time." Mr. Stout testified that the appellant was in need of individual and group counseling and "a great deal of environmental structure," meaning a great deal of supervision. As explained to Mr. Stout, a community correction program could provide such structure. Mr.

Stout found no sexual deviancy in the defendant. In cross-examination, Mr. Stout agreed that the appellant has poor impulse control. When asked about the appellant's chances of successfully completing probation, Mr. Stout responded, "In response to that, I might make the observation that the transgression with which he is currently accused evidently occurred within hours of being released on a pass from a detention facility, so I think that does tell us something about what can happen."

Donna Woodson, with the Public Defender's Office, talked to the appellant about drug and alcohol treatment and counseling. The appellant told her that he had learned about Anchor House in Nashville and expressed an interest in being admitted into their program. Ms. Woodson testified that she had received a letter from Anchor House, and they agreed to accept the appellant for a six (6) month in-house program. The program has some drug and alcohol counseling but is primarily a Bible-based recovery program.

Jerry Whitson, father of the appellant, testified that he is hopeful his son will have a job at Wackenhut, where the father works a third shift. Mr. Whitson admitted that he had trouble with his son and had turned him into the Juvenile Court system before. When Mr. Whitson picked up his son on the Woodland pass, the son was to stay at the father's home, but the son talked him into letting him stay at the home of Ruth Hodges, a family friend. Mr. Whitson believes his son has learned his lesson since being in jail. He testified that he was aware that Michael Hodges, a potential employer for his son, had a history of criminal charges.

The appellant testified that he is 18 years old and has been in State custody since age 15. When asked about his counseling at Natchez and Trace, the appellant described it as "inappropriate." After his release from Trace, the appellant got into more trouble for truancy and running away and was sent to Tennessee Preparatory School in July, 1996. The appellant received counseling about three times at the Prep School. The appellant testified that he was released in December, 1996, and got into trouble in May, 1997. The appellant was charged with possession of drug paraphernalia and stolen property. The appellant was sent to Woodland Hills, where he obtained a GED and took a 10-week course for alcohol and drug counseling. During the fall of 1997, the appellant received two passes home, which he exercised without getting into trouble. The appellant advised the

trial court that he got a pass in January, 1998, and "got in some real trouble."

As to the night of January 9, 1998, the appellant testified:

> I asked my dad to let me out uptown. I was supposed to stay with Ruth Hodges, which is a real good friend of the family. I was supposed to stay all night. Instead, I got out with some friends that I used to hang around with, and they suggested we go get some alcohol. So we went and got some alcoholic beverages. We rode around and drunk for a while. We finally ran out around 10:00 o'clock. We went to Hope Calvert's house. We were going to see if she would buy us some more liquor. She was 21 years old."
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> ****
>
> Hope Calvert. We went to Hope's house to see if she would buy some more alcohol, but she was not home at that time. We asked her sister if it would be okay to wait there. I was there and already drunk at the time. Then I met Kim.
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> ****
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> I talked to her briefly. In fact, we were first listening to the radio, me and two of my friends. I was supposed to have kissed her then. They said she performed oral sex on me, which I do not know, but it is more than likely true.

In cross-examination, the appellant identified a letter that he had written to a counselor at the Natchez Trace Home, which was less than flattering. The appellant admitted that he had written a letter to an ex-girlfriend in October about his being a member of a gang known as the Latin Kings, a step below the Vice-Lords. The appellant acknowledged telling the girl when he got out he could make some money by selling "weed." Also, the appellant admitted selling various drugs in the past.

SENTENCING CONSIDERATIONS

The appellant asserts that the trial court erred by failing to sentence the appellant to either community corrections or probation based on the facts in the record. The State contends that the trial court fully complied with the sentencing guidelines of the Tennessee Criminal Sentencing Reform Act of 1989 and that the appellant should serve his six-year sentence in the Department of Correction.

When an appellant complains of the imposition of his or her sentence, we must conduct a *de novo* review with a presumption of correctness. Tenn. Code Ann. § 40-35-410(d). Therefore, the burden of showing that the sentence is improper is upon the appealing party. *Id*. The presumption that determinations made by the trial court is correct 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). Our review of the record establishes that the trial court fully complied with the sentencing principles of the Criminal Sentencing Reform Act of 1989.

PART A.

FULL PROBATION

Since the appellant contends that he is entitled to full probation, the appellant has the burden of establishing that he is suitable for full probation, even if the appellant is entitled to the statutory presumption of an alternative sentence. Tenn. Code Ann. § 40-35-303(b). 40-35-303 (b); *State v. Grisham,* 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997); *State v. Bingham,* 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). Therefore, the appellant must demonstrate that probation will "subserve the ends of justice and the best interests of both the public and the defendant." *Grisham*, 956 S.W.2d at 502 (citing *State v. Dykes,* 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

The court in *State v. Grisham* stated:

> When determining suitability for probation, the sentencing court considers the following factors: (1) the nature and circumstances of the criminal conduct involved; (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation, the defendant will commit another crime; (3) whether the sentence of full probation would unduly depreciate the seriousness of the offense; and (4) whether a sentence other than full probation would provide an effective deterrent to others, likely to commit similar crimes. Tenn. Code Ann. §§ 40-35-210 (b)(4),-103(5), 103(1)(B) (1990). *Bingham,* 910 S.W.2d at 456. (citations omitted).

In considering probation, the trial court may inquire into the facts and circumstances which surround the criminal conduct. Denial of probation may be based solely upon the circumstances of the offense when they outweigh all other factors favoring probation. *State v. Fletcher,* 805 S.W.2d 785, 788 (Tenn. Crim. App. 1991).

In lieu of probation, the trial court found the appellant with a long history of criminal behavior, a history of alcohol and drug abuse, a history of being defiant of authority of any kind, and he committed the current offense while on a pass from the Department of Children's Services. Thus, the appellant should be incarcerated for the seriousness of the offense, his long history of criminal conduct and as general deterrence, and because measures less restrictive that confinements have frequently or recently been applied unsuccessfully.

Tennessee Code Annotated § 40-35-103(1)(A)-(C) provides:

> (1) Sentences involving confinement should be based on 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 confinements have frequently or recently been applied unsuccessfully to the defendant.

The record overwhelmingly supports the trial court's judgment to deny the appellant full probation and confinement in the Department of Correction. He has a long history of juvenile offenses and commitment to various juvenile institutions for rehabilitation and counseling. These attempts have failed. The appellant has admitted to selling drugs in the past, and there is in his letters, an indication to resume drug selling upon release from Woodland Hills. He was on a pass from Woodland Hills with the restriction to his father's home when the incident with KG occurred, but the appellant had convinced his father to allow him to stay at a friend's home. The appellant and some friends, who had brushes with the authorities, bought liquor and got drunk. The appellant then involved himself in sexual activity with a 12-year-old girl. The trial court's denial of full probation is affirmed.

PART B.

COMMUNITY CORRECTIONS

The appellant contends that he will be able to learn to live productively in a community, in lieu of confinement in an institution, and thus, should be placed in a community correction program. The State totally disagrees.

First, we recognize that the appellant is not eligible for punishment pursuant to community corrections. Tennessee Code Annotated § 40-36-106 (a) provides the following minimum criteria for eligibility for participation in community corrections:

> (2) Persons who are convicted of property-related, or drug/alcohol-related felony offenses or other felony offenses not involving crimes against the person as provided in title 39, chapter 13, parts 1-5.

In denying community corrections, the trial court held:

> I'm not convinced that he is suitable for a community-based program. Based on his record, based on the fact that he was out on a pass when he committed a Class A felony, based on the psychological report of Dr. Stout

> where he talks about his lack of impulse control and his pessimistic outlook, really, for this defendant to succeed in anything other than a structured environment, I don't see that we have any appropriate community-based program to which I could sentence this defendant.

Since the appellant entered a plea of guilty to attempted rape, a crime against a person, he does not meet the minimum requirement of § 40-36-106(a)(2) and is not eligible for a community correction's program. Even, if he were, we agree with the trial court's judgment not to place him there. There is no merit to this issue.

The trial court's judgment is affirmed.

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L. T. LAFFERTY, SENIOR JUDGE

CONCUR:

_____
JOE G. RILEY, JUDGE

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DAVID G. HAYES, JUDGE