

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 30, 2008

STATE OF TENNESSEE V. ROBERT LEE JOHNSON, JR.

**Appeal from the Criminal Court for Sullivan County
Nos. S51,804 – S51,808 R. Jerry Beck, Judge**

No. E2007-00722-CCA-R3-CD - Filed June 9, 2008

The defendant, Robert Lee Johnson, Jr., appeals as of right the Sullivan County Criminal Court's denial of his request for alternative sentencing. The defendant pled guilty to seven counts of automobile burglary, six counts of theft of property valued at less than \$500, one count of theft of property valued at over \$500, and one count of public intoxication.¹ By agreement, he received an effective sentence of four and one-half years with the last eighteen months to be served on probation and a determination regarding full probation to be made by the trial court. After a hearing regarding the defendant's suitability for probation, the trial court denied any further alternative sentencing. On appeal, the defendant asserts that the trial court erred in denying him full probation. Following our review, we affirm the judgment of the trial court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Stephen Wallace, District Public Defender; and Joseph F. Harrison, Assistant District Public Defender, attorney for appellant, Robert Lee Johnson, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

At the defendant's guilty plea submission hearing on October 24, 2006, the trial court reserved determination of the defendant's suitability for full probation until preparation of the

¹ We note that, although six separate indictments were the subject of the guilty plea, the judgments in case number S51,809 were not included in the technical record on appeal because the defendant received probation from the convictions arising from that case number as part of the plea agreement; therefore, the defendant did not appeal any issues related to those convictions. However, we can discern from the guilty plea submission transcript and alternative sentencing hearing transcript the trial court's sentencing determinations regarding all of the convictions.

presentence report was completed and submitted to the court. On March 29, 2007, the trial court considered the defendant's request for full probation. The trial court noted that, although the victims had not suffered extraordinary economic loss, there was some economic loss suffered by the victims and that many of the victims had submitted victim impact statements asking the court to deny further alternative sentencing in excess of the already agreed upon suspension of sentence after the service of three years. Additionally, the trial court noted that the defendant admitted to prior substance abuse that may have qualified him for community corrections pursuant to the special needs provision. See Tenn. Code Ann. § 40-36-106(c). However, the trial court ultimately determined that the defendant should not receive further alternative sentencing because he had re-offended on March 9, 2007, while on bond pending the final sentencing determination in this case. Significant to the trial court was the new offense's stark similarity to the offenses for which he now stands convicted – another automobile burglary and theft. In denying further alternative sentencing the trial court stated:

The Court is of the opinion that the special needs provision of community corrections would not be beneficial to the public or the Defendant. And to make it easy, the tilting on the scale is the new charge. And that will make it easy for the appellate [c]ourt.

ANALYSIS

The defendant contends that the trial court improperly denied full probation. As stated above, the trial court sentenced the defendant as a Range I, standard offender to four and one-half years with the defendant to serve three years in custody with the balance of the sentence on probation. The defendant argues that he should have received full probation. We disagree.

An appellate court's review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d) (2003). As the Sentencing Commission Comments to this section note, on appeal the burden is on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, the court may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action 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). In this respect, for the purpose of meaningful appellate review:

[T]he trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the

mitigating and enhancement factors have been evaluated and balanced in determining the sentence. Tenn. Code Ann. § 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994).

In conducting its de novo review, the appellate court must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210 (2006); see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229, 236-37 (Tenn.1986).

In determining whether incarceration or an alternative sentence is most appropriate, a trial court should consider whether (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is needed to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses, or (3) less restrictive measures than confinement have frequently or recently been applied unsuccessfully to the defendant. Ashby, 823 S.W.2d at 169 (citing Tenn. Code Ann. § 40-35-103(1)(A)-(C)). The trial court shall also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114. Tenn. Code Ann. § 40-35-210(b)(5) (2006); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). In addition, a trial court should consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code. Ann. § 40-35-103(5); Boston, 938 S.W.2d at 438. A defendant convicted of a Class C, D, or E felony and sentenced as an especially mitigated or standard offender “should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6) (2006). However, under the revised Sentencing Act, “[a] court shall consider, but is not bound by, this advisory sentencing guideline.” Id. Furthermore, although probation must be considered, “the defendant is not automatically entitled to probation as a matter of law.” Tenn. Code Ann. § 40-35-303(b) (2006), Sentencing Comm’n Comments; State v. Hartley, 818 S.W.2d 370, 373 (Tenn. Crim. App. 1991).

The trial court correctly considered evidence of the defendant’s prior criminal history and the defendant’s testimony that much of his criminal behavior stemmed from his abuse of alcohol and illegal drugs, including marijuana, cocaine and prescription drugs. The record reflects that the defendant failed to report his recent arrest for automobile burglary to his probation officer in preparation of the presentence report and that the defendant also failed to report information regarding his cocaine use. The defendant’s lack of candor is an appropriate consideration for the trial court in determining a defendant’s suitability for full probation. Furthermore, the defendant’s arrest

for a subsequent automobile burglary reflects negatively on the defendant's potential for rehabilitation as it relates to the grant of full probation. In light of this evidence, we conclude that the trial court properly denied full probation in this case.

CONCLUSION

In consideration of the foregoing, the judgments of the trial court are affirmed.

D. KELLY THOMAS, JR., JUDGE