IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

FILED

December 6, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9503-CR-00066**
Appellee,	)	
	)	**BLOUNT COUNTY**
VS.	)	
	)	**HON. D. KELLY THOMAS, JR. ,**
MARILYN J. NUCHOLS,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant pled guilty to jail escape, a Class A misdemeanor, and a sentencing hearing was held. The trial court sentenced the defendant to 11 months, 29 days with eligibility to apply for supervised probation after she served 40% of her sentence. The defendant appeals, claiming the trial court erred in not granting her immediate probation.

The only evidence offered at the sentencing hearing was the presentence report and the defendant's testimony. The presentence report filed in this matter reflects that the defendant has an extensive prior record of various misdemeanor offenses plus one felony. She was convicted twice of contributing to the delinquency of a minor; eight times of alcohol related crimes; once of petit larceny; twice of driving on a revoked license; and one other traffic offense. She escaped from jail while on work release during her concurrent sentences for a DUI conviction and one of the convictions for contributing to the delinquency of a minor, and remained at large for approximately three months. The defendant violated previous periods of probation five times. The defendant testified that, about three years prior to this sentencing hearing, she had entered a 28 day drug-alcohol treatment program at a hospital and left after two weeks. She testified that the longest period of time she had gone without drinking was "two or three months." The defendant testified that she had been "drunk" three weeks prior to the sentencing hearing, but that she had not had anything to drink since. In response to the State's question of why the court should place her on probation, the defendant stated, "I don't know. I just wish he would trust me. . . . I'm trying my best to quit drinking. I am."

The trial court sentenced the defendant to 11 months, 29 days with release

eligibility at 40%. The trial court further ordered that the defendant would not be eligible for work release during the period of incarceration unless she first received in-patient treatment. If the defendant elected to do so, she was eligible to serve up to 30 days of her sentence in an inpatient alcohol treatment unit after serving 90 days in jail. After serving 40% of her sentence, probation would be available only upon the defendant's application and the court's approval.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

"The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence." State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, the sentence must be specific and consistent with the purpose and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(b). A percentage of not greater than 75% of the sentence should be fixed for service, after which the defendant becomes eligible for "work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d). In determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

The Act further provides that "[w]henever the court imposes a sentence, it shall place on the record either orally or in writing, what enhancement or mitigating factors it found, if any, as well as findings of fact as required by § 40-35-209." T.C.A. § 40-35-210(f) (emphasis added). Because of the importance of enhancing and mitigating factors under the sentencing guidelines, even the absence of these factors must be recorded if none are found. T.C.A. § 40-35-210 comment. These findings by the trial judge must be recorded in order to allow an adequate review on appeal.

The defendant alleges that the trial court should have placed her on probation immediately. However, the trial court expressly refused to do so, citing her history of violating probation in the past as "one major consideration." The trial court also cited the defendant's recent intoxication as another consideration. Additionally, the court found that "when somebody escapes from jail . . . they ought to be punished."

Although T.C.A. § 40-35-303 requires the trial court to automatically consider probation as a sentencing alternative for eligible defendants, it does not require that immediate probation be granted in any particular case, much less one where the defendant has repeatedly violated her probation in the past and escaped from her work release program as has the defendant in this case. The trial court here did consider probation as required and did make provision for its eventual availability to the defendant. The trial court expressly refused to commence probation immediately, citing the defendant's past history of probation violations and the need to punish those who escape from prison. Both of these factors are appropriate to consider: one of the statutory sentencing principles is that confinement is appropriate where "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103. Confinement is also appropriate where it is "necessary

to avoid depreciating the seriousness of the offense." Id. The trial court's concern over the defendant's recent intoxication is also appropriate because of the light it sheds on the defendant's "potential or lack of potential for . . . rehabilitation," another of the sentencing principles. T.C.A. § 40-35-103.

Although the State asked that the defendant be required to serve the maximum 75% of her sentence, the trial court set her release eligibility at 40%. This is a mid-range sentence for misdemeanors. Consistent with the Sentencing Act's requirement that any mitigating factors be considered, the court noted that it believed the defendant when she said she was doing the very best she could to quit drinking. In light of all the facts and circumstances before the court, this sentence was proper.

The record affirmatively shows that the trial court in this case properly considered the sentencing principles and all relevant facts and circumstances. Our review is therefore de novo with a presumption of correctness. The defendant has failed to carry her burden of showing that the sentence is improper. The defendant's contention is without merit and her sentence is accordingly affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

_____
DAVID G. HAYES, Judge