

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 25, 2006 Session

STATE OF TENNESSEE v. KATHERINE ANNETTE OWENS

**Direct Appeal from the Criminal Court for Sullivan County
No. S49, 567 R. Jerry Beck, Judge**

No. E2005-02419-CCA-R3-CD - Filed October 13, 2006

The defendant, Katherine Annette Owens, pled guilty to forgery, identity theft, and theft under \$500. As a result, she received an effective sentence of two years and six months to be served in the Department of Correction. On appeal, the defendant argues that the trial court erred by denying her alternative sentencing. Following our review of the parties' briefs and applicable law, we affirm the trial court's judgments.

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

J.C. MCLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and ROBERT W. WEDEMEYER, JJ., joined.

Joseph F. Harrison, Assistant Public Defender, for the appellant, Katherine Annette Owens.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Todd Martin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

Pursuant to a plea agreement, the defendant pled guilty to forgery, identity theft, and theft under \$500 and received an effective sentence of two years and six months with the manner of service to be determined by the court. The defendant also pled guilty to leaving the scene of an accident, assault, and criminal impersonation and received an effective sentence of eleven months, twenty-nine days to be served on supervised probation but consecutive to her other effective sentence. At the plea acceptance hearing, the state and the defendant stipulated to the incriminating proof, which established the following:

[O]n November the 21st, 2003, in Sullivan County, Tennessee, Officer Tim Monroe . . . was dispatched to . . . [a] Wal-Mart . . . to investigate a vehicle leaving the scene of an accident involving property damage.

Upon arrival, he was advised that a Chevrolet Camaro, white in color, bearing Tennessee registration MSS-536 had left the scene. That vehicle was located on the Volunteer Parkway a short time later. A traffic stop was initiated and the driver found to be the Defendant, Katherine Owens. She did admit that she was at the Wal-Mart, but stated that she was not involved in a collision. There was fresh damage to her vehicle. She stated that she probably did not hear the accident occur. She was released on the State's Citation for leaving the scene of an accident involving property damage.

. . . [O]n or about August the 11th, 2004, . . . Officer Brad Tate . . . was dispatched to that same Wal-Mart . . . to investigate a forgery in progress. Upon arrival, the Store Manager advised him that there was a subject in the Electronics Department of the store, who was identified as Katherine Owens attempting to pay for . . . [\$926.40] worth of merchandise with a check that was titled to belong to Freeda Belle Jones, bearing her unique account number on that check.

. . . [Two] clerks for Wal-Mart, stated that Ms. Owens produced the check, and it had already been torn out of a checkbook and she completed [the] check and passed it to pay for the items. She was asked for identification. She produced a Tennessee Driver's License, which did not match the check's identifying information. She had, in her possession, two C.D.s that were valued under . . . [\$500] that were bearing Wal-Mart price tags. Ms. Owens admitted to using pliers to remove the hard plastic cases from the two C.D.s.

She further stated that a friend of her's, Sabrina Ann Owens, had met her at the Wal-Mart and given her a check . . . already signed. Ms. Owens was supposedly . . . waiting outside in the parking lot. A subsequent check revealed that Ms. Sabrina Owens was in detention at the Washington County, Virginia, Sheriff's Office at that time and could not have been outside.

. . . [O]n or about July the 18th, 2004, . . . the Defendant was at the residence of 384 Carter Street, Lot No. 3, when an altercation broke out between other people. The Defendant struck Mason Banks in the back of the head with a bottle causing injury to him. They left the scene and were encountered by law enforcement. When they were encountered, the Defendant gave the name of Sherry Annette Hinkle as her identity, and she was subsequently released on her own recognizance for that. She did fail to show up for her arraignment . . . and an Arrest Warrant was issued for that incident. . . .

Following the entry of the defendant's guilty pleas, a sentencing hearing was held to determine how the defendant would serve her effective two-year, six month sentence. At the sentencing hearing the defendant was the only witness to testify. She testified that she was

twenty-four-years old and had a six-year old son. She was currently living with her mother. She was currently employed as a shift supervisor for Snack Alliance and carried insurance for herself and son. She stated that she had a GED and had attended college to be an X-ray Technician but quit after six months because she got hooked on drugs. She became addicted to cocaine, morphine, marijuana, and Xanax. As an addict, she had to be admitted to a drug treatment facility on two occasions. However, she claimed that she had been drug free for about seven months. The defendant asserted that she only drank alcohol on limited occasions and never had a DUI. The defendant also noted that she was currently taking Klonopin for her bipolar and anxiety disorder, Percocet for her endometriosis, Fioricet for her migraines, and Protonix for her ulcers. She further noted that she was being treated for a tumor and cervical cancer. The defendant recognized that she had a significant prior criminal record but attributed it to her prior drug abuse. She expressed desire to get “residential drug treatment.”

On cross-examination, the defendant admitted that after entering her pleas in the instant case, she was caught driving on a suspended license. She also admitted that she still had to go to court on charges of drug fraud but insisted that the charges stemmed from some mixup regarding her prescriptions. With regard to the facts underlying her guilty pleas, the defendant denied telling Officer Tate that Ms. Sabrina Owens was waiting on her in the Wal-Mart parking lot. As she explained, she had Sabrina Owens’ driver’s license and presented it to Officer Tate and told him that someone was waiting for her in the Wal-Mart parking lot. The defendant also acknowledged that she failed to reply to a questionnaire mailed to her and used by the probation and parole office for the presentence report. She further acknowledged that she had failed to show up for an interview with her probation officer.

On cross-examination, the defendant admitted to pleading guilty to assault and criminal impersonation and receiving suspended sentences. According to the presentence report, the defendant had prior convictions for failure to appear, possession of marijuana, possession of drug paraphernalia, and theft – to which she had received suspended sentences. She also admitted that when she left the scene of the accident on November 21, 2003, she had no insurance and was under the influence of “pain pills.”

At the conclusion of the sentencing hearing, the trial court found the following:

The Defendant in this case . . . is 23 years of age. She has a basic sentence of two years, six months, as a Range I offender. The Defendant, in her initial testimony and it appears to be true, [stated that] . . . she has gone to work with a snack company, has reached a point where she can almost draw benefits, and, although still a probationary employee, can probably become a full-time employee. That’s probably the most impressive bit of proof that I heard, but practically everything else is negative.

While this case was pending, she has evidently just . . . the amazing thing about it [is] she could commit so many offenses at Age 23. Her date of birth is 05/26/81 and to be convicted of so many varied and different types of offenses in that short period of time. They’re generally property type offenses, but it just seems like it’s one after another, trouble after trouble. Then her past has been a

situation of prior probations, one after another, going back for years in her short life that she's lived so far.

The Sessions Judges have certainly been lenient with her, and even though she's having all these failures and relapses and falling back into the problems, I don't think there's any question[] she does have a drug problem, probably of some long standing degree, but ten prior probations for a person that's 23 years of age, and this would be the eleventh probation, if I gave it to her, as an adult, but she had probations also as a juvenile, which weren't all that successful either

. . . .

Her problems are so lengthy . . . I just can't put her on probation or alternative sentencing and I've carefully considered the special needs provisions of community corrections.

The court then ordered the defendant to serve her sentence in confinement.

ANALYSIS

The defendant's sole issue on appeal is whether the trial court erred in denying alternative sentencing and imposing full confinement. When an accused 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 sentence is erroneous. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

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. Tenn. Code Ann. § 40-35-102(6). 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). Also, the presumption in favor of alternative sentencing may be rebutted by facts contained in the presentence report, evidence presented by the state, the testimony of the accused or a defense

witness, or any other source, provided it is made a part of the record. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Pursuant to Tennessee Code Annotated section 40-35-103, a trial court may determine if incarceration rather than alternative sentencing is appropriate if the evidence shows that:

(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(1)(A)-(C). 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). Additionally, the defendant's lack of truthfulness or candor is an appropriate consideration as it relates to the defendant's potential for rehabilitation. *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *State v. Dowdy*, 894 S.W.2d 301, 306 (Tenn. Crim. App. 1994).

In the instant case, the record reflects that the defendant was twenty-three years old yet had a history of criminal convictions and drug problems. The record further reflects that measures less restrictive than confinement had frequently and recently been applied unsuccessfully to the defendant. In sum, the record supports the trial court's denial of alternative sentencing. Therefore, the defendant is not entitled to relief on this issue.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the judgments of the trial court.

J.C. McLIN, JUDGE