

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT
NASHVILLE

Assigned on Briefs July 19, 2006

STATE OF TENNESSEE v. MELVIN WOODROW SANDIDGE

Direct Appeal from the Criminal Court for Davidson County

Nos. 2005-A-56, 2005-A-539 Cheryl A. Blackburn, Judge

No. M2005-02256-CCA-R3-CD - Filed November 9, 2006 _____

The appellant, Melvin Woodrow Sandidge, pled guilty in the Davidson County Criminal Court to five counts of theft of property valued between \$1,000 and \$10,000 and one count of theft of property valued between \$500 and \$1,000. Pursuant to a plea agreement, the appellant received a total effective sentence of sixteen years. On appeal, the appellant challenges the trial court's denial of alternative sentencing, specifically community corrections. After reviewing the record and the parties' briefs, we affirm the judgments of the trial court.

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

J. S. DANIEL, Sr. J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J., joined.

Richard D. Dumas, Jr., Nashville, Tennessee, for the appellant, Melvin Woodrow Sandidge.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On July 14, 2005, the appellant pled guilty to multiple theft offenses. As a factual basis for the pleas, the State asserted:

[A]ll of these cases involving [the appellant] involved activity where he went to various businesses in town, rental businesses or places to buy [construction]

equipment, represented that he worked for other companies and signed for those items as a representative of those companies. He didn't. He kept the items or sold them. And when the businesses that he had obtained the equipment from learned that – that he was not an employee of those other companies and had not been authorized to make these purchases, they got in touch with the police.

....

Detective Maxwell of the Metro Police Department would testify that she talked to [the appellant]. [The appellant] told her that he had committed these offenses, named the places where he had done it, said that he was on drugs and sold these items for money for drugs, that he had been in the [construction] business before, so he knew how these places worked, that the – that he would sometimes pick the items up or he would send people to pick the items up that he was obtaining.

In case number 2005-A-56, the appellant pled guilty to two counts of theft of property valued between \$1,000 and \$10,000, a Class D felony, and one count of theft of property valued between \$500 and \$1,000, a Class E felony. Pursuant to the plea agreement, the appellant was sentenced as a Range III persistent offender to eight years for each Class D felony conviction and five years for the Class E felony conviction. The trial court ordered that the sentences be served concurrently with each other. In case number 2005-A-539, the appellant pled guilty to three counts of theft of property valued between \$1,000 and \$10,000, and he was sentenced as a Range III persistent offender to eight years for each conviction. The sentences in case number 2005-A-539 were to be served concurrently with each other but consecutively to the sentences in case number 2005-A-56 for a total effective sentence of sixteen years. The plea agreement further provided that the trial court would determine the manner of service of the sentence. The appellant requested placement on community corrections with drug court as a condition.

At the sentencing hearing, the fifty-one-year-old appellant testified on his own behalf. The appellant stated that he entered the Army at the age of nineteen and at that time began

smoking marijuana. The appellant said that since that time, he had tried probably every drug on an experimental basis. After leaving the Army, the appellant worked for a railroad for thirteen years. While working for the railroad, the appellant saved money and began a construction business on the side. When his construction business became successful, the appellant left the railroad to concentrate on construction full-time. The appellant also married and had two sons.

The appellant testified that he and his wife divorced fifteen years before the sentencing hearing. He explained, "Once she left, I mean, I figured once – then I could drug and do what I wanted to, which I did, which has ended me up here." The appellant said that around that time, when he was thirty-five, he began experimenting with cocaine and crack cocaine. The appellant's crack cocaine use ultimately led to him committing thefts to support his drug habit. The appellant stated that the thefts he committed were similar in nature to those in the instant case. The appellant maintained that he had never committed a violent crime, averring, "There's no violence in me." The appellant said that when he began using crack cocaine, the drug took control of his life. He claimed that it was as if he became another person. The appellant said that because of his addiction to crack cocaine, he lost his marriage and his business. The appellant stated that he had previously undergone "detox" programs at the Veterans Administration ("VA") and "outside treatment." He said that six months was the longest amount of time that he had been sober, other than when he was incarcerated.

The appellant stated that he had spent most of the past ten years incarcerated and was incarcerated at the time of the sentencing hearing, serving a previously imposed sentence. The appellant said that he had been off drugs for approximately one year. The appellant maintained that being incarcerated usually kept him off drugs. He explained, "I say 'usually.' Now, when I first started going in, I was just the same party as everybody else that was in there. Nowadays it's the only time I get a break off the drugs is when I'm locked up." However, the appellant asserted that the type of treatment he received was not effective; therefore, he returned to drug use when he was released from confinement.

The appellant said that he had been interviewed by drug court personnel. The appellant provided a letter from Diane Sanders, a case developer from the Davidson County Community Drug Court Program. Sanders reported that the appellant was "an excellent candidate for residential treatment." The appellant stated that he would "love" to get treatment for his drug addiction. Additionally, the appellant said that he could help young people by telling them about his experiences with drugs.

The appellant acknowledged that he had previously been on parole for another offense in 2002 or 2003. While the appellant was on parole, he was off drugs, went to Narcotics Anonymous meetings, and worked in construction. The appellant said he stayed off drugs for about a year then resumed his drug use. He committed thefts to support his drug habit. The appellant said that he knew how to steal from companies because he had been in the construction business and knew how the companies operated. He claimed that he stole only to support his drug habit and believed that if he could stop using drugs he could stop stealing.

Upon questioning by the trial court, the appellant admitted that he was a "good con." He further admitted that he committed the thefts by "conning" businesses out of merchandise. He stated that drugs taught him to manipulate and lie. The appellant conceded that he had been before the trial court on a prior case, and probation violation warrants had been sworn out against him. The appellant acknowledged that his incarceration for the sentence he was serving at the time of the sentencing hearing was the result of a parole violation.

Matthew Sandidge, the appellant's nineteen-year-old son, testified that he was a sophomore in college. He had stayed close to his father after his parents' divorce. He maintained that the appellant was a good person when he was not on drugs. He believed that the appellant's attitude toward drugs had changed.

Benjamin Sandidge, the appellant's fifteen-year-old son, testified that he was a sophomore in high school. He stated that he believed it would be a "good change" if his father received drug treatment. He believed that he would be a sophomore in college before the appellant would be finished with drug court.

At the end of the sentencing hearing, the trial court noted that drug court was in existence at the time the appellant's prior sentence was imposed, but the appellant had not asked to participate in the program. The court noted that drug court was a unique program with benefits, and the appellant "is exactly who the drug court was made for." However, the court stated that it must consider the limited judicial resources available to the court. The court considered that the appellant was serving another previously imposed sentence that would not expire for at least a year. The court observed, "We have a lot of people who are coming through the system who are at that point that they need to be intervened with right now, and we've got to do the beds and we've got to make that available. [The appellant is] way down the line." The court opined that the drug court was not an appropriate program for the appellant at this point in his life. After finding that drug court was not an appropriate sentencing alternative under the facts and circumstances of the instant case, the trial court denied alternative sentencing and imposed a sentence of confinement. On appeal, the appellant challenges this ruling.

II. Analysis

On appeal, the appellant argues three issues. First, the appellant claims that the trial court erred in failing to consider the mitigating factors he proposed to the court. Second, the appellant argues that the trial court failed to correctly apply sentencing principles. Finally, the appellant contends that the trial court "erred in sentencing the [appellant] based on 'judicial economy' alone." All of the foregoing issues relate to the trial court's denial of alternative sentencing, specifically community corrections with drug court as a condition.

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers

the following factors: (1) the evidence, if any, received at the trial and the 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 involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Because the record before us fails to indicate that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will review the trial court's determinations without a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Because the lengths of the appellant's sentences were determined as part of the plea agreement, the sentencing hearing was solely to determine the manner of service of the sentences. Specifically, the appellant did not request probation. However, the appellant requested that he be granted community corrections with drug court as a condition of his sentences.

We recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is eight years or less. See Tenn. Code Ann. § 40-35-303(a) (2003).¹ Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant was sentenced as a Range III persistent offender; therefore, he is not presumed to be a favorable candidate for alternative sentencing. Regardless, because the individual sentences imposed were eight years or less, the appellant is still eligible for alternative sentencing.

The Community Corrections Act of 1985 was enacted to provide an alternative means of punishment for "selected, nonviolent felony offenders in front-end community based alternatives to incarceration." Tenn. Code Ann. § 40-36-103(1) (2003). Tennessee Code Annotated section 40-36-106(a)(1) (2003) provides that an offender who meets all of the following minimum criteria shall be considered eligible for community corrections:

(A) Persons who, without this option, would be incarcerated in a correctional institution;

1

In 2005, Tennessee Code Annotated section 40-35-303(a) was amended to provide that an offender is eligible for alternative sentencing if the sentence imposed is ten years or less. The amendment "shall apply to sentencing for criminal offenses committed on or after June 7, 2005." Id., Coompiler's Notes.

(B) 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;

(C) Persons who are convicted of nonviolent felony offenses;

(D) Persons who are convicted of felony offenses in which the use or possession of a weapon was not involved;

(E) Persons who do not demonstrate a present or past pattern of behavior indicating violence;

(F) Persons who do not demonstrate a pattern of committing violent offenses.

An offender is not automatically entitled to community corrections upon meeting the minimum requirements for eligibility. State v. Ball, 973 S.W.2d 288, 294 (Tenn. Crim. App. 1998). We note that "[p]ersons who are sentenced to incarceration . . . at the time of consideration will not be eligible for punishment in the community." Tenn. Code Ann. § 40-36-106(a)(2). Because the petitioner, by his own admission, was incarcerated at the time of sentencing, he was not eligible for community corrections.

For offenders not eligible for community corrections under subsection (a), Tennessee Code Annotated section 40-36-106(c) creates a "special needs" category of eligibility. Subsection (c) provides that

[f]elony offenders not otherwise eligible under subsection (a), and who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather than in a correctional institution, may be considered eligible for punishment in the community under the provisions of this chapter.

Tenn. Code Ann. § 40-36-106(c).

When determining a defendant's suitability for alternative sentencing, courts should consider whether the following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), are applicable:

(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.

Additionally, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." Tenn. Code Ann. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5).

The appellant complains that in making its sentencing determination the trial court did not consider the mitigating factors that he proposed to the court. Prior to trial, the appellant filed a statement of mitigating factors. In the statement, the appellant argued that the following mitigating factors applied:

1. Factor (1) [The appellant's] conduct neither caused nor threatened serious bodily injury.

2. Factor (13) [The appellant] has no violent offenses on his record at all. Most of his prior convictions are for thefts from businesses.

3. Factor (13) [The appellant] developed a drug problem while serving in the military during the Vietnam War. As a result of his nearly lifelong drug problem, [the appellant] began stealing from businesses to support his drug habit in schemes similar to the cases at bar. [The appellant], while understanding that it is not an excuse, has always stolen from corporations who he believed were likely insured and has never stolen from individuals. He sought to do as little damage as possible even while addicted to drugs.

4. Factor (13) The amount of property taken from each victim was not particularly great. All of [the appellant's] offenses were D and E felony thefts from large corporations.

5. Factor (13) There is nothing in the record indicating that [the appellant] has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community.

See Tenn. Code Ann. § 40-35-113(1) and (13) (2003).

At the sentencing hearing, the trial court acknowledged that the appellant filed a statement of mitigating factors; however, the court did not affirmatively state that it was considering or rejecting the mitigating factors. We note that the consideration of enhancement and mitigating factors is relevant to a determination of the manner of service. State v. Bolling, 75 S.W.3d 418, 421 (Tenn. Crim. App. 2001). The only mitigating factor suggested by the appellant which, in our view, could have been applicable was mitigating factor (1). Of course, theft offenses frequently do not involve the causing or threatening of serious bodily injury. See State v. Grissom, 956 S.W.2d 514, 519 (Tenn. Crim. App. 1997). Therefore, we give this factor very little weight. The remainder of the mitigating factors suggested by the appellant are not supported by the facts adduced at the guilty plea hearing or at the sentencing hearing.

The appellant's next two issues concern the trial court's basis for denying alternative sentencing, specifically community corrections with drug court as a condition. The appellant contends that the trial court did not consider sentencing principles, arguing that consideration of the facts and circumstances of the offense would support his argument that community corrections with drug court as a condition would be the most appropriate sentencing alternative. The appellant complains that the trial court "thought that since he was serving a sentence with nearly a year left, it would be a bad use of judicial resources to send him to Drug Court."

In denying alternative sentencing, the trial court acknowledged that drug court is a unique and beneficial program. The court noted that the appellant "is exactly who the drug court was made for." However, the court questioned whether "somebody who has to serve another year in prison [before serving the instant sentence] is the appropriate candidate for drug court." The court stated that the appellant's treatment through drug court would be far in the future. The court found, "I just don't think, with due respect to everybody, that this is an appropriate program for you at this point in your life [I]t's just not . . . an appropriate alternative for you under the facts and circumstances of this case."

At the sentencing hearing, the appellant told the court that it had been a year since he last used drugs. He acknowledged that he still had to serve at least one year on a previously imposed sentence before he could begin service of the instant sentences. The appellant conceded that he had a history of stopping the use of drugs while in prison then resuming his usage once he was released. Because he needed money to purchase his drugs, the appellant would steal items in the fashion used in the instant offenses.

The appellant's presentence report reflects that the appellant has three previous theft convictions from Georgia. The appellant's Tennessee criminal history began in 1996 when he was convicted of theft of property valued at between \$10,000 and \$60,000. The appellant received a sentence of five years, suspended. In 1999, the appellant was convicted of possession of drug paraphernalia and forgery between \$10,000 and \$60,000, for which he received a five-year sentence. In 2001, the appellant received a six-month sentence for driving on a revoked license, two years for felony evading arrest, two years for each of two counts of forgery up to \$1,000, two years for each of three counts of theft of property valued between \$500 and \$1,000, and eleven months and twenty- nine days for theft of property less than \$500. At the sentencing hearing, the appellant admitted that he was incarcerated at the time of the sentencing hearing because of a parole violation.

In our de novo review of the appellant's sentence, we note that the appellant has an extensive criminal history and admittedly falls into a pattern of doing drugs and stealing once he is released from confinement. The appellant also has repeatedly or recently been unable to successfully comply with measures less restrictive than confinement. The appellant had a five-year suspended sentence imposed in 1996, then he began committing crimes again in 1999. See State v. Cherie Mae Phillips, No. E2003-01897-CCA-R3-CD, 2004 WL 746294, at *3 (Tenn. Crim. App. at Knoxville, Apr. 8, 2004). The appellant also admits that he recently violated parole and is currently serving a sentence in confinement because of that violation. See State v. Dave Long, No. M2004-01721-CCA-R3-CD, 2005 WL 1330793, at *5 (Tenn. Crim. App. at Nashville, June 6, 2005). The appellant has been off of drugs for a year and would have to wait another year before acceptance into the drug court program. Taking all of the foregoing into consideration, we conclude that the trial court did not err in denying alternative sentencing.

III. Conclusion

Finding no reversible error, we affirm the judgments of the trial court.

J. S. DANIEL, SENIOR JUDGE