

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 19, 2006**

STATE OF TENNESSEE V. DANNY S. SWAW

**Direct Appeal from the Circuit Court of Lewis County
No. 6550, 6590 Donald P. Harris, Senior Judge**

No. M2005-02771-CCA-R3-CD - Filed October 12, 2006

Appellant Danny S. Swaw was indicted in July 2004 on one count of selling morphine, a Class C felony, and indicted on January 2005 on one count of selling methamphetamine, a Class B felony. Pursuant to a plea agreement, the appellant entered guilty pleas on both counts and received a four-year sentence and a consecutive eight-year sentence as a Range I standard offender. However, the plea agreement provided the determination of alternative sentencing would be left to the trial court. Following a sentencing hearing, the trial court denied probation and community corrections. Appellant appeals the trial court's finding that he was not a favorable candidate for alternative sentencing. We affirm the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Circuit Court is 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.

Dana M. Ausbrooks, Assistant Public Defender, (on appeal) and Larry Drolsum, Assistant Public Defender, (trial), Franklin, Tennessee; Attorney for the Appellant, Danny S. Swaw.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General, Ronald L. Davis, District Attorney General; for Appellee, State of Tennessee.

OPINION

BACKGROUND

The appellant was indicted on July 12, 2004, on one count of selling morphine, a Schedule II controlled substance, a Class C felony. On January 3, 2005, appellant was indicted on one count of selling 0.5 grams or more of methamphetamine, a Schedule II controlled

substance, a Class B felony. These charges resulted from two scheduled drug buys occurring on December 22, 2003, and October 18, 2004, respectively.

Agent Joe Ashmore of the 21st Judicial District Drug Task Force arranged these two drug buys via a confidential informant. On the December 22, 2003 drug buy, the confidential informant purchased seven Avensa capsules (morphine) from the defendant for one hundred dollars. At the October 18, 2004 arranged buy, the confidential informant purchased nine-tenths (0.9) of a gram of methamphetamine. The testimony described the established procedure for conducting the buys through the confidential informant.

Agent Ashmore testified that when he served the *capias* on the defendant, he observed 60 to 70 empty Avensa capsules in plain view. He explained that the drug dealers often keep empty Avensa capsules. Laboratory testing revealed the substance from the first drug buy tested positive as morphine while the substance from the second buy was found to be methamphetamine.

In addition to the usual discovery exchange and pre-trial filings, the State filed a notice of intent to seek enhanced punishment as a multiple offender and notice of impeachment by conviction. This notice referred to four prior offenses committed by the appellant including two convictions of sale of Schedule III drug, one conviction of sale of Schedule IV drug and one conviction of habitual motor vehicle offender.

On September 19, 2005, the appellant filed a petition to enter a guilty plea on each count pursuant to a plea agreement. In exchange for his plea of guilty to sale of a Schedule II drug (Class C felony), appellant would receive four (4) years as a Range I standard offender. Similarly, as to the sale of .5 grams or more of methamphetamine (Class B felony), appellant would receive an eight-year sentence as a Range I, standard offender to run consecutively to the four-year sentence in the other count. The plea agreement specifically noted that consideration for community corrections would be determined by the trial court after a separate sentencing hearing.

At the sentencing hearing, Agent Ashmore testified as to the specifics of the arranged drug buys. He said appellant was a known drug seller in the community. Ashmore stated that when various confidential informants were asked where they could purchase drugs directly, appellant's name was at the top of the list.

Appellant testified that at the time of the sentencing hearing he was forty-four years old, was divorced and had a son (age 19) and a pregnant daughter (age 17). He said he raised his two children on his own until he learned he had degenerative back disease and underwent back surgery. Thereafter, appellant began receiving disability.

According to appellant, prior to his back surgery he worked in construction related jobs and was addicted to marijuana and alcohol. He recalled receiving drug treatment prior to his first marriage in 1989. However, following his surgery, appellant began taking pain medications and became addicted to them. He later also contracted hepatitis C from sharing a needle. Appellant said he had used methamphetamine on occasion but was only addicted to morphine.

While incarcerated after his bond revocation, appellant enrolled in the Buffalo Valley twenty-eight day treatment program. After completing the program, appellant arranged for the sixteen-week aftercare.

On cross-examination, appellant admitted that he used TennCare to purchase his prescribed morphine. He further admitted that he sold the morphine he received via the TennCare prescriptions. Appellant agreed he had held no meaningful employment since his back surgery in 1994. Appellant conceded that his children had been present in the past when he used drugs. If released, appellant planned to work with his brother approximately two days per week and wanted to attend NA and AA meetings along with the intensive aftercare at Buffalo Valley.

Appellant's fiancée, Donna Marie Clark, testified that she had been dating the appellant for four years and knew of his drug addiction. She said she had visited with appellant during his incarceration and noticed changes in him. She explained that he thinks clearly now and has changed a lot. Ms. Clark testified that appellant is a good person and a good father. Kimberly Shaw, appellant's daughter, said her father was her hero. She wanted him to receive help for his addiction and to be present to be a grandfather to her son.

Following the sentencing hearing, the trial court concluded the appellant failed to prove he was a favorable candidate for alternative sentencing. The trial court found as follows:

In this case Mr. Swaw's activities in selling drugs goes, in the court's opinion, far beyond what it takes to support his own habit. I notice in the document that he filed with the court he suggested that was the reason, but it's pretty obvious that the State of Tennessee, through TennCare, was supporting his habit and, yet, he was still selling some of what the state provided and other things to people around him and, in effect, running a good time house here in Hohenwald.

I've seen a lot of cases where people do support their habits by selling drugs, but the normal of that is that they find a buyer and they go to some supplier and they get some drugs and they keep a little for themselves and pass the rest along to their buyer. And it's obvious in this case that Mr. Swaw kept drugs on hand for selling to other people, and that's certainly not something he can convince this court that he was just doing to support his own habit.

I'm also concerned that he does have some prior treatment when he was in prison, apparently. I think that's around the time he was in prison, anyway. He gets out and immediately goes back to selling and using drugs. The importance of that, I think, is it's going to take a very, very high level of supervision in this case to see that he doesn't use drugs; that's the reason I asked about the drug court. They are the only people I know that drug test three

times a week and provide a high enough level of supervision that if people do use they will be detected. I haven't heard anything from Buffalo Valley about the level of supervision he would be given in their program, and I'm just concerned that it would not be sufficient to keep him off of drugs.

I also notice that he has had ten years to become a contributing citizen since his back operation and, apparently, he's done nothing during that ten years to make himself employable, other than through selling drugs, and his chances of now becoming a productive citizen are, in the court's opinion, not very high.

It really comes down to - - he has made some progress and I applaud him on that, but it comes down to for C felonies and below, he's presumed to be a favorable candidate for a suspended sentence of some sort; for B felonies and above, he has the burden of proving to this court he's a favorable candidate, and he's failed to do that. So I order that he serve his sentence.

The trial court ordered the twelve-year sentence (four-year and eight-year sentences running consecutively per the plea agreement) to be served in confinement.

DISCUSSION

The appellant's sole claim is that the trial court erred by denying him probation or alternative sentencing. When a defendant challenges the length, range or the manner of service of a sentence, it is the duty of this court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). This presumption 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. Ross, 49 S.W.3d 833, 847 (Tenn. 2001); State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001).

In conducting a de novo review of a sentence, we must consider: (a) any evidence received at the trial and/or sentencing hearing; (b) the presentence report; (c) the principles of sentencing; (d) the arguments of counsel relative to sentencing alternatives; (e) the nature and characteristics of the offense; (f) any mitigating or enhancement factors; (g) any statements made by the defendant on his own behalf; and (h) the defendant's potential or lack of potential for rehabilitation and treatment. Tenn. Code Ann. § 40-35-210; State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The party challenging a sentence imposed by the trial court has the burden of establishing that the sentence is erroneous.

Tennessee Code Annotated section 40-35-103(1) provides that:

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 confinement have frequently or recently been applied unsuccessfully to the defendant

Tenn. Code Ann. § 40-35-103(1). The “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).

Pursuant to the plea agreement, the appellant entered guilty pleas to a Class C felony and a Class B felony. He agreed to accept a four-year and a consecutive eight-year sentence, respectively, as a Range I standard offender. A defendant who is a standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). Therefore, unless sufficient evidence rebuts the presumption, “the trial court must presume that a defendant sentenced to eight years or less and not an offender for whom incarceration is a priority is subject to alternative sentencing, and that a sentence other than incarceration would result in successful rehabilitation.” State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993). However, offenders convicted of Class B felonies are not presumed to be favorable candidates “for alternative sentencing options in the absence of evidence to the contrary.” Tenn. Code Ann. § 40-35-102(6).

Appellant first claims the trial court committed reversible error in denying him probation. In determining whether to grant or deny probation, the trial court must consider the nature and circumstances of the offense; the defendant’s criminal record, background and social history; the defendant’s present condition, the deterrent effect on other criminal activity; and the likelihood that probation is in the best interests of both the public and the defendant. State v. Goode, 956 S.W.2d 521, 527 (Tenn. 1997).

Appellant also claims the trial court erred in denying any type of alternative sentencing. Both the state and appellant agree that a person who does not otherwise satisfy the minimum criteria and who would usually be considered unfit for probation due to histories of chronic alcohol abuse, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community may be considered eligible for participation in a community corrections program. Tenn. Code Ann. § 40-36-106(c).

Viewing the record as a whole, in light of the arguments advanced by the appellant, this Court concludes the trial court properly denied appellant’s request for probation or other alternative sentencing. The testimony indicated appellant had a long history of using illicit substances. Appellant said he became addicted to morphine following back surgery. Although

he had used methamphetamine on occasion, he denied being addicted to it. The record reveals, as noted by the trial court, that appellant received social security disability benefits after the back surgery and never really returned to the work place. Instead, he apparently turned to selling drugs as a supplemental source of income to his monthly disability checks.

Agent Ashmore testified that the appellant was known in the community as a source of drugs. In fact, he noted that appellant's name was at the top of the list when various drug users were questioned about drug sources. Among the troubling considerations in the instant case is the appellant's admitted use of TennCare to purchase the morphine he sold.

It is not difficult to conclude from the testimony that the appellant was more than a user of such substances. Instead, he was determined to be a supplier of such drugs in the community. The testimony surrounding the two arranged drug buys bolsters this finding.

The appellant's testimony and the testimony offered by his fiancée and others leave no question that appellant is a drug addict with a serious problem. The appellant told the trial court that he wanted to overcome his addiction and contribute to society. He claims he can now be rehabilitated through treatment and desires to do so if placed on probation or other alternative sentence.

The evidence indicated appellant had been unsuccessful in the past with treatment programs, though some success had been realized with the Buffalo Valley program. Appellant testified that if granted probation he would attend a rehabilitation program and NA and AA meetings. Appellant also said he would secure employment through his brother but offered no plausible explanation as to why he had not returned to the work force since his back injury in 1994. However, upon further questioning, the appellant admitted he had no driver's license and would have to depend on others to get him to work and to the treatment programs and meetings.

The trial court concluded that the appellant was much more than a user but was instead a significant supplier of drugs in the community. The court noted that the morphine appellant sold was purchased with TennCare funds. The record also indicates the trial court was concerned that the appellant immediately began selling drugs after release from prison in the past in light of the fact that he had attended a drug treatment program in prison. Based on the appellant's past conduct, the trial court concluded the supervision, if possible, would be "very very high."

The record in this case supports those conclusions of the trial court and supports a finding on appeal that the appellant is not a suitable candidate for probation or other alternative sentence. He had the opportunity to become a productive member of society and to seek treatment for his addiction. However, he waited until his arrests to find the courage to seek both employment and treatment. Therefore, the evidence is more than sufficient to rebut the presumption that appellant is a suitable candidate, and, furthermore, the appellant has failed to meet his burden.

Accordingly, the appellant's claims are without merit. The judgment of the trial court denying probation or other alternative sentencing is affirmed.

J.S. DANIEL, SENIOR JUDGE