

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 22, 2007

**STATE OF TENNESSEE v. GRADY W. LEWIS**

**Direct Appeal from the Criminal Court for Sullivan County  
No. S49,069 R. Jerry Beck, Judge**

**No. E2006-02149-CCA-R3-CD - Filed September 11, 2007**

The defendant, Grady Wayne Lewis, appeals the trial court's denial of alternative sentencing stemming from his guilty plea to one count of possession of drug paraphernalia and one count of violation of the open container law. After review, we affirm the judgments from the trial court.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ALAN E. GLENN, JJ., joined.

Stephen M. Wallace, District Public Defender, and Joseph F. Harrison, Assistant Public Defender, for the appellant, Grady W. Lewis.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Brandon Haren, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The defendant was detained by police around 12:36 a.m. on December 5, 2002. The arresting officer observed the defendant engaging in a drug transaction while the defendant's vehicle was stopped in the road, hindering the flow of traffic, in an area familiar to the officer. The defendant pled guilty to one count of possession of drug paraphernalia and one count of violation of the open container law, with his sentence to be determined at a later date.

The defendant and a friend of the defendant testified during the sentencing hearing. The defendant testified that he was applying for Social Security Disability at the time of the sentencing hearing due to several serious accidents including a broken back, the fracture of both legs, and crushed feet. He said that he worked odd jobs to earn money while he waited for disability benefits to begin. He was terminated from his most recent employer after nineteen years because he tested positive for cocaine. He blamed his former wife for his drug use and

said that, in order to protect her, he claimed the items underlying his arrest. He said he takes Xanax for his anxiety and Lortab for his foot injury but said he could pass a drug test for any other drugs. The defendant acknowledged that he had used marijuana but had not done so in a long time. He also claimed his last cocaine use was the night of his arrest. The defendant admitted that he has an alcohol problem and that he considered himself an alcoholic.

He said that he did not have any prior felonies and that most of his transgressions were related to his use of alcohol. He testified that he would be able to follow all the terms and conditions of probation if he was granted alternative sentencing, and he asked the court to give him another chance.

On cross-examination, he said he had been to substance abuse treatment but it did not work for him. He said he only used drugs socially and usually only once a month. The defendant said he had previously been on probation three times, but the court correctly stated that he had actually been on probation fifteen times. He defended the number of his prior probation sentences by claiming he was “just a kid” during many of them. The defendant acknowledged that he had three prior D.U.I. convictions.

Next, a friend of the defendant testified that she had known the defendant for approximately fifteen years. She denied ever having a romantic relationship with the defendant and maintained that they were only friends. She said that she had previously assisted people with physical and mental disabilities to find employment and that some of those people suffered from addiction problems. She testified that she talks with the defendant approximately four times a week because he needs to talk with someone who makes him feel comfortable. She assured the court that the defendant is no longer using drugs and that his alcohol use is curtailed. She opined that he would be a good candidate for alternative sentencing and stated that she would continue to be a source of help and guidance.

On cross-examination, she said that she met the defendant through friends in the community. She said that she had seen the defendant’s former wife use drugs. She said that she was not counseling the defendant in a formal manner. She testified that she had not tried to get him help with his substance abuse but that he had agreed to seek help.

Following the testimony, the court found that the defendant had been in trouble from age twenty-seven until the arrest in the underlying incident. The court found that he had numerous prior misdemeanor convictions. The court also determined that he had not been gainfully employed in six years, possibly due to his injuries. The court was bothered by his history of fifteen suspended sentences but found his support from the community to be positive. Finally, the court determined that the defendant had too many prior convictions and that he had to serve time for these offenses. The court found that the unfavorable factors outweighed the favorable factors.

## Analysis

The defendant argues that the trial court erred in denying him some form of alternative sentencing on his misdemeanor sentencing. In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the trial court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. T.C.A. § 40-35-302(a). Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. State v. Palmer, 902 S.W.2d 391, 394 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinate sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. T.C.A. § 40-35-302(d). Generally, a percentage of not greater than seventy-five percent of the sentence should be fixed for a misdemeanor offender. Palmer, 902 S.W.2d at 393-94. In determining the percentage of the sentence, the trial court must consider enhancement and mitigating factors, as well as the legislative purposes and principles related to sentencing. Id. There is no requirement for the trial court to make a finding on the record when setting the percentage of the sentence to be served. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998).

Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997). A defendant convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Humphreys, 70 S.W.3d 752, 768 (Tenn. Crim. App. 2001). When a defendant challenges the sentence, this court conducts a de novo review with a presumption that the trial court's determinations are correct. T.C.A. § 40-35-401(d). The burden is on the appealing party to show that the sentence is improper. T.C.A. § 40-35-401(d), Sentencing Commission Comments.

In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210(b), to consider the following factors in sentencing:

- (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 the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and
- (6) Any statement the defendant wishes to make in the defendant's own behalf about sentencing.

There is no mathematical equation to be utilized in determining sentencing alternatives. The sentence should not only fit the offense; it should fit the offender as well. T.C.A. § 40-35-103(2); State v. Batey, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000).

A misdemeanant is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn. Crim. App. 1994). Further, misdemeanor sentences do not contain ranges of punishments, and a misdemeanor defendant may be sentenced to the maximum term provided for the offense as long as the sentence imposed is consistent with the purposes of the Sentencing Act. State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995). Our statutory system pertaining to misdemeanor sentencing is designed to provide trial courts with continuing jurisdiction and a great deal of flexibility. State v. Boyd, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995). A criminal defendant seeking full probation bears the burden on appeal of showing the sentence actually imposed is improper and that full probation will be in the best

interest of both the defendant and the public. State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

Although not controlling of the discretion of the sentencing court, the following factors should be considered in determining the appropriateness of probation:

- (1) The nature and characteristics of the crime, under Tennessee Code Annotated section 40-35-210(b)(4) (Supp. 1996);
- (2) the defendant's potential for rehabilitation, under Tennessee Code Annotated section 40-35-103(5) (1990);
- (3) whether full probation would "unduly depreciate the seriousness of the offense," under Tennessee Code Annotated section 40-35-103(1)(B) (1990); and
- (4) whether a sentence of full probation would "provide an effective deterrent," under Tennessee Code Annotated section 40-35-103(1)(B) (1990).

State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997).

Here, the defendant admitted that he had been on probation approximately fifteen times dating back to the age of twenty-seven. The defendant was forty-four years old at the time of his last conviction. The defendant has been on probation many times and continues to commit crimes. A review of his record shows that he was convicted of driving under the influence on three occasions and of driving on a revoked license on five occasions, demonstrating a lack of regard for the conditions placed upon him. The State argues, and we agree, that the defendant has shown a propensity to continue to commit criminal offenses.

Our review of the record does not reflect that the defendant has met his burden of showing that the sentence is improper. He has previously been on probation at least fifteen times; yet, he continues to commit crimes. The trial court was especially troubled that the defendant has never served a substantial amount of time for the offenses he has committed, despite his "super lengthy record" which includes multiple drunk driving offenses, assault, theft, and shoplifting. The trial court was within its discretion to order the defendant to serve his time on these convictions. The defendant has not met his burden of showing that the sentence is improper; therefore, we are not compelled to reverse the judgments from the trial court.

### Conclusion

Based on the foregoing and the record as a whole, we affirm the judgments from the trial court.

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JUDGE

JOHN EVERETT WILLIAMS,