IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 18, 2008

STATE OF TENNESSEE v. RICHARD EDMUND BINNEY

Direct Appeal from the Circuit Court for Sequatchie County
No. 4597 Buddy D. Perry, Judge

No. M2007-02378-CCA-R3-CD - Filed June 25, 2008

The Defendant pled guilty to driving after being declared a motor vehicle habitual offender ("MVHO") and to his fourth driving under the influence ("DUI") offense. The trial court sentenced him to an effective sentence of four years. On appeal, the Defendant claims: (1) the trial court erred when it did not grant him alternative sentencing; and (2) the trial court erred by ordering consecutive sentences. After a thorough review of the record and the applicable law, we affirm the trial court's judgments.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Howard L. Upchurch, Pikeville, Tennessee, for the Appellant, Richard Edmund Binney.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; J. Michael Taylor, District Attorney General; Steven H. Strain, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Plea Hearing

At the plea hearing, the State presented what would have been its case against the Defendant:

> [I]n this case the State would call Gary Craft as its primary witness. He would be testifying that on the 11th day of August, 2005, he was dispatched about a vehicle

> driving erraticially. The State would be calling several members of the Sequatchie County Ambulance Service. They would testify that they had gotten behind a vehicle driven by Richard Binney in Sequatchie County, that he was driving in an erratic manner that they were sufficiently concerned, that they contacted the sheriff's department to have a deputy stop him.
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> Deputy Craft would testify that when he approached the vehicle Mr. Binney smelled strongly of alcoholic beverage, that he believed he was under the influence of an intoxicant, that he took him to the hospital and they drew blood. Blood was submitted to the [Tennessee Bureau of Investigation] Crime Lab. Special Agent [] Jeff Crews would testify after his qualifications et cetera, that he tested Mr. Binney's blood and that he was, I believe, a .25, Your Honor.
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> Also, Your Honor, the State would be . . . showing that on the particular day in question that he had been declared to be a habitual traffic offender by the court in Hamilton County, Tennessee, and that had happened prior to these events.

When the court asked the Defendant if he was guilty of the offense, he responded, "Oh, yes, I'm guilty of the offense." The trial court entered the Defendant's guilty pleas and allowed the Defendant until 6:00 p.m. that night, September 6, 2006, to report to jail.

B. Sentencing Hearing

At the sentencing hearing, held June 20, 2007, the following evidence was presented: the Defendant disappeared for six months after his guilty plea hearing. He was later apprehended by the Rhea County Sheriff's Department. The Defendant's presentence report listed his many crimes and probation violations. Reviewing the presentence report and hearing the arguments, the trial court sentenced the Defendant to two years for the driving after being declared a MVHO and two years for the DUI conviction. It denied any alternative sentencing and ordered the Defendant's sentences to run consecutively, for an effective sentence of four years. When so finding, the trial court stated:

> [B]ut for the record his prior history is such, in fact, . . . this actually it's 4th offense here today, but this could have been 6th offense. He has a 5th offense in Chattanooga in 2000. I think that this is the situation where the risk to human life was great. The amount of alcohol that was in his blood and the continuous driving is such [that] both of those enhancing factor[s] are available. There are no mitigating factors. I'm going to sentence him to two years on each. I'm going to impose the minimum fine of $3,000 on the DUI. .
>
> . . . .
>
> I'm going to impose a fine of $2,500 on [the MVHO offense]. I am going to require the sentences be served consecutively. I think his record demonstrates that he is

dangerous, that his driving record is such that he's put himself and others at risk and he's done it continuously. It is a pattern that has not stopped for — started in 1995 and has continued almost on a regular basis either — and it hasn't been simply just alcohol, it's been marijuana, it's been cocaine, and apparently it's been alcohol. I'm going to require him to serve the sentences consecutively.

It is from this sentence that the Defendant now appeals.

II. Analysis

The Defendant raises the following two claims on appeal: (1) the trial court erred when it did not grant him alternative sentencing; and (2) the trial court erred by ordering consecutive sentences.

When a defendant challenges the length, range or manner of service of a sentence, this Court must 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." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record, and gave due consideration and proper weight to the factors and principles relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. *State v. Ross*, 49 S.W.3d 833, 847 (Tenn. 2001). 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); *State v. Butler*, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); *State v. Smith*, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4) the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. *See* T.C.A. § 40-35-210 (2006); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

A. Alternative Sentencing

The Defendant argues that the trial court should have ordered alternative sentencing. The Tennessee Supreme Court noted recently that due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. Instead, a defendant not within "the parameters of subdivision (5) [of T.C.A. §40-35-102], and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary."

State v. Carter, — S.W.3d — , 2008 WL 2081247, at *10 (Tenn. 2008) (citing T.C.A.§ 40-35-102(6) (2006)) (footnote deleted). Moreover, a trial court is "not bound" by that advisory sentencing guideline. T.C.A.§ 40-35-102(6). If a defendant seeks probation, then that defendant bears the burden of "establishing [his] suitability." T.C.A. § 40-35-303(b) (2006). As the Sentencing Commission points out, "even though probation must be automatically considered as a sentencing option for eligible defendants, the defendant is not automatically entitled to probation as a matter of law." T.C.A. § 40-35-303 (2006), Sentencing Comm'n Cmts.

When sentencing the defendant to confinement, a trial court should consider whether:

> (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.

T.C.A. § 40-35-103 (2006).

According to the Defendant's presentence report, he has a sufficient number of convictions to satisfy the requirement that he has a "long history of criminal conduct." The Defendant's convictions include: possession of marijuana; possession of handgun while under the influence; reckless endangerment; possession of cocaine; carrying a dangerous weapon; MVHO; theft of property between $1,000 and $10,000; felonious use of vehicle; four driving on a revoked license; and five DUIs.

The Defendant, whose license was revoked and who had been declared a MVHO, drove again while under the influence with a blood alcohol content level of .25, which is more than three times the legal limit. T.C.A. § 55-10-401 (2006). He has not been deterred from engaging in such illegal activity by his previous sentences, and he does not appear to appreciate the danger he puts himself and others in when he drives under the influence. Moreover, the Defendant has violated his probation several times. He also disappeared for six months when the trial court awarded him several hours to say goodbye to his family before reporting to the jail. Measures less restrictive than confinement have frequently and recently been unsuccessful when applied to the Defendant. We conclude the trial court properly sentenced the Defendant to confinement. The Defendant is not entitled to relief on this issue.

B. Consecutive Sentencing

The Defendant also claims the trial court erred when it ran his sentences consecutively. A trial court may impose consecutive sentences if the State proves by a preponderance of the evidence that the offender meets at least one of the criteria listed in Multiple Convictions statute. T.C.A. §

40-35-115 (2006). In the case under submission, the trial court found criteria (4), that the Defendant was a "dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high." *Id*.

The trial court's finding the Defendant to be a "dangerous offender" by itself is insufficient to support consecutive sentences. In *State v. Wilkerson*, 905 S.W.2d 933 (Tenn. 1995), our Supreme Court set forth additional requirements for consecutive sentences when the defendant is a "dangerous offender." The requirement of additional findings when the defendant is a "dangerous offender" "arises from the fact that of all of the categories for consecutive sentencing, the dangerous offender category is the most subjective and most difficult to apply." *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999). The other categories for consecutive sentencing have "self-contained limits"; thus, the additional findings are limited to cases involving consecutive sentencing of "dangerous offenders." *Id.* The trial court must also find: (1) "that an extended sentence is necessary to protect the public against further criminal conduct by the defendant;" (2) "that the consecutive sentences . . . reasonably relate to the severity of the offenses committed;" and (3) that the consecutive sentences are congruent with the general principles of sentencing. *Id.* at 939.

We conclude the Defendant is a dangerous offender and the trial court properly sentenced him to consecutive sentences. The Defendant's presentence report evidences his plethora of driving convictions and infractions. The Defendant has been convicted at least four times of DUI. He has also been convicted of theft of property valued at $1,000 to $10,000, carrying a dangerous weapon, and drug possessions. The Defendant not only puts himself at risk with this activity, but he also puts the public at great risk for harm. The extended sentence is necessary to protect the public from further criminal activity by the Defendant. The consecutive running of his sentences reasonably relates to the severity of the offenses. Finally, consecutive sentencing in this case is congruent with general sentencing principles. We conclude the trial court did not err by running the Defendant's sentences consecutively, and the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude: (1) the trial court properly incarcerated the Defendant, as opposed to assigning him alternative sentencing; and (2) the trial court properly sentenced the Defendant to consecutive sentences. As such, we affirm the trial court's judgments.

ROBERT W. WEDEMEYER, JUDGE