

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. CHADWICK ALLEN JOHNSON

**Direct Appeal from the Criminal Court for Unicoi County
Nos. 5136, 5348 Robert E. Cupp, Judge**

No. E2005-02219-CCA-R3-CD - Filed April 25, 2008

The appellant, Chadwick Allen Johnson, pled guilty in the Unicoi County Criminal Court to one count of child abuse or neglect and one count of attempted child abuse. He received a total effective sentence of three years and six months. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon our review of 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.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Roger G. Day (on appeal) and Michael D. Kellum (at trial), Johnson City, Tennessee, for the appellant, Chadwick Allen Johnson.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Anthony Wade Clark, District Attorney General; and Melanie F. Gwinn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On May 1, 2003, the Unicoi County Grand Jury returned indictment 5136 charging the appellant with the child abuse and neglect of L.D.,¹ a child under six years of age, a Class D felony. On August 13, 2004, the Unicoi County Grand Jury returned indictment 5348 charging the appellant with the child abuse and neglect of C.J., a child under six years of age, also a Class D felony. The appellant entered a "best interest" guilty plea to the offense charged in indictment 5136 and to the lesser-included offense of attempted child abuse, a Class E felony, in indictment 5348. The

¹ It is the policy of this court to refer to minor victims of crime by their initials.

appellant, a standard Range I offender, was sentenced pursuant to the plea agreement to two years for the child abuse conviction and one year and six months for the attempted child abuse conviction to be served consecutively for a total effective sentence of three years and six months.

The appellant applied for alternative sentencing. At the sentencing hearing, the appellant's mother, Sandra Elliott Johnson, testified that the appellant came to live with her and her husband as a foster child when the appellant was eighteen months old. The Johnsons adopted the appellant two years later. The appellant had been a victim of child abuse before he came to live with the Johnsons. Johnson said that the appellant came to their home from the hospital where he had spent four weeks recovering from injuries inflicted by his biological mother's boyfriend.

Johnson stated that the appellant got along well with younger children; however, he had problems at school. She explained that he would not defend himself and was often humiliated by other students.

Johnson stated that she noticed early on that the appellant's language skills were delayed. Around his fourth birthday, the Johnsons had the appellant tested. The testing revealed that the appellant had an IQ of 72, just two points above the mental retardation level. Testing on the appellant also identified that he had a "processing problem." Johnson said that the appellant is easily influenced. She stated that the appellant could maintain employment if the work was very simple and the employer was lenient. Johnson recalled that the appellant "did not graduate from high school. He was given a certificate of attendance. He was taken out of the regular classroom and put into special needs for individual – like, a self-contained classroom through twelfth grade."

Johnson maintained that the appellant had no trouble with the law when he was living at home with the Johnsons in Denton, North Carolina. Johnson stated, "When he met this girl [Cara Dobbins] on the internet and came to Tennessee that's when things started." The appellant moved to Tennessee and married Dobbins. Dobbins became pregnant. Johnson warned the appellant and Dobbins that the appellant was not capable of supporting Dobbins or a child.

Johnson recalled that Dobbins already had two other children, an older daughter and a son, L. D., before the appellant's son, C.J., was born. The appellant told Johnson that he did not abuse the boys; Dobbins was the abuser. After the charges were brought against the appellant, he returned to live with his parents in North Carolina and had been in no further trouble. Dobbins' two older children were living with Dobbins' mother, and C.J. was living with Dobbins' aunt. Johnson said that the appellant loved his son and occasionally had supervised visits with him.

Johnson said that the appellant had been convicted of driving under the influence (DUI) and had successfully completed probation for that conviction; however, she did not believe that the appellant had a problem with alcohol. She also said that the appellant had completed an anger management program and had participated in child care counseling.

The appellant testified that he did not abuse the children and maintained that the abuse was

inflicted by Dobbins. He said that he entered best interest guilty pleas to the offenses “[b]ecause at the time I was scared, afraid, and stuff like that, didn’t know what was going on,” noting that “[i]n my – my understanding of what it was it would be my best way to go.”

The twenty-five-year-old appellant said that he did not recall being placed on probation for a DUI conviction. He expressed concern that he would be unable to get a job because of his instant convictions. Specifically, the appellant said that he would like to return to his job mowing lawns and working as a janitor, but he could not because of the child abuse convictions.

The appellant told the court that he did not want to return to jail “[b]ecause the last time I was in here I got sucker punched.” He did not think his confinement would serve a purpose. The appellant said that he had not been in trouble before he met Dobbins and had not been in any trouble since they had separated.

The appellant said that he liked living with his parents, particularly because he had nowhere else to go. He said that at his parents’ house, he had food, water, and clothing.

Investigator Ronnie Adkins with the Unicoi County Sheriff’s Department testified that he and Robin Williams with the Department of Children’s Services interviewed the appellant about the injuries to L.D. Investigator Adkins said he mentioned to the appellant that he had children of his own, and the appellant asked if Investigator Adkins ever got mad at his children. The appellant told Investigator Adkins that he was angry with L.D. for taking off his diaper. The appellant admitted striking L.D. on the face three or four times, causing bruises. The appellant later told Dobbins that the injuries occurred when L.D. fell. The appellant stated that L.D. was twenty-two months old when the incident occurred. The appellant maintained that prior to the incident, he had spanked L.D.’s bottom only once.

Investigator Adkins took pictures of L.D.’s injuries. He stated that L.D. had a burn on his skin in a “waffle pattern . . . [that] matched the grill that was on the stove in the home.” On the left side of the child’s neck, “there appeared to be . . . marks left from fingers around the neck where he was possibly choked.” The pictures showed additional injuries to the left side of L.D.’s face and to his left ear. The child had hand prints on the right side of his face and a bruise in front of his right ear that indicated he had been struck on the right side of his face.

Officer Luanne Powers with the Unicoi County Sheriff’s Department investigated the injuries to C.J. Officer Powers recalled that C.J. was five months old at the time of the incident. Officer Powers said that C.J.

had bruising on his left cheek just beneath his eye, which extended toward his ear. His right ear was bruised inside, and there was black bruising on his left ear. He had a yellow bruise beneath the diaper area in the front, and there was a brown bruise on his back. There was red bruising . . . on the back right side of his head. And there

were two circular yellow bruises on his elbow and also a black bruise on his belly button.

The appellant told Officer Powers that he did not know how C.J. had been injured. However, he acknowledged that he had “squeezed” C.J. and that he had caused some of the bruises on the child. Officer Powers stated that at the time of C.J.’s injuries, only the appellant and Dobbins were living in the house with the baby.

The trial court denied the appellant alternative sentencing, finding that the circumstances of the offenses were such that granting alternative sentencing would depreciate the seriousness of the offenses. On appeal, the appellant challenges the denial of alternative sentencing.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2006). 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 (2006); 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. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court’s determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Initially, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). The appellant’s sentence makes him eligible for alternative sentencing. 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 is a standard Range I offender convicted of a Class D felony and a Class E felony; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by “evidence to the contrary.” State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute “evidence to the contrary”:

(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.

Zeolia, 928 S.W.2d at 461.

As we previously noted, one of the considerations in our de novo review is the nature and characteristics of the criminal conduct involved. However, the appellant has failed to include the transcript of the guilty plea hearing in the record for our review. This court has previously noted,

For those defendants who plead guilty, the guilty plea hearing is the equivalent of trial, in that it allows the State the opportunity to present the facts underlying the offense. For this reason, a transcript of the guilty plea hearing is often (if not always) needed in order to conduct a proper review of the sentence imposed.

State v. Keen, 996 S.W.2d 842, 843 (Tenn. Crim. App. 1999) (citation omitted). Accordingly, the appellant's "failure to include the transcript of the guilty plea hearing in the record prohibits the court's conducting a full *de novo* review of the sentence under [Tennessee Code Annotated section] 40-35-210(b)." State v. Shatha Litisser Jones, No. W2002-02697-CCA-R3-CD, 2003 WL 21644345, at *3 (Tenn. Crim. App. at Jackson, July 14, 2003). Regardless, from the testimony at the sentencing hearing, we conclude that the trial court did not err in denying the appellant probation.

In the instant case, the trial court determined that the circumstances of the offense were sufficiently serious to warrant a denial of alternative sentencing. This court has previously stated that the nature and circumstances underlying the criminal conduct may alone give rise to the denial of probation. See Tenn. Code Ann. § 40-35-210(b)(4); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In denying an alternative sentence to avoid depreciating the seriousness of an offense, this court should determine if the criminal act is especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree. See Zeolia, 928 S.W.2d at 462.

The record before us reveals that the appellant was convicted of child abuse and attempted child abuse, which incidents occurred almost one year apart. Despite being indicted on May 1, 2003, for his abuse of L.D., the appellant repeated the offense by abusing C.J. on or about December 31, 2003. Both children, one twenty-two months old and one five months old, suffered extensive bruising. The trial court stated that in light of the injuries "to do anything other than make this defendant serve this sentence would be a total miscarriage of justice."

Moreover, the trial court noted that while the appellant acknowledged his culpability in the offenses to the investigators, he nevertheless denied responsibility at the sentencing hearing. The trial court believed that the appellant was not being completely truthful. An appellant's lack of

candor and credibility reflects poorly on his potential for rehabilitation. State v. Nunley, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999). Further, the trial court expressed concern that the appellant would reoffend. In light of his continued abuse despite being charged after the first offense, we conclude that this is also a valid concern regarding the appellant's potential for rehabilitation. See Tenn. Code Ann. § 40-35-103(5). In sum, based upon the record before us, we cannot conclude that the trial court erred in denying alternative sentencing.

III. Conclusion

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

NORMA McGEE OGLE, JUDGE