

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 21, 2009

STATE OF TENNESSEE v. CALVIN JAMES BOLES

**Direct Appeal from the Criminal Court for Davidson County
No. 2008-I-969 Steve Dozier, Judge**

No. M2008-02448-CCA-R3-CD - Filed September 22, 2009

The Defendant pled guilty to burglary, a Class D felony, agreed to an eight-year sentence as a persistent offender, with the trial court to determine the manner of service of the sentence. The trial court ordered that the eight-year sentence be served in prison, and it is from this judgment that the Defendant now appeals, asserting that an alternative sentence should have been imposed by the trial court. After a thorough review of the record and relevant authorities, we conclude the trial court did not err when it denied the Defendant's request for alternative sentencing. As such, we affirm the judgment of the trial court.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Jason Gichner (at trial), Nashville, Tennessee, and Emma Rae Tennent (on appeal), Nashville, Tennessee, for the Appellant, Calvin James Boles.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel E. Willis, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Pamela Anderson, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

During the Defendant's plea submission hearing, the State gave the following version of the conduct underlying the Defendant's burglary conviction:

[T]he State's proof in this case would be that on June 13th of 2008, Sergeant Sands

of the Berryhill [sic] Police Department observed the [D]efendant on the property of Envirotest. The [D]efendant was fleeing from the scene where a burglary had occurred. The [D]efendant was in possession of bank deposit bags that were identified as having been removed from the interior office of the closed business. Upon being approached by Sergeant Sands, the [D]efendant attempted to evade arrest and was ultimately apprehended. There was a white sock that was located with the bank deposit bags. And it was determined that the way the [D]efendant made entry into the building was by destroying a glass window. All this occurred here in Nashville, Davidson County.

The following evidence was presented at the Defendant's sentencing hearing: the State introduced the Defendant's presentence report, which described the Defendant's education, employment, and criminal history and included letters from several of the Defendant's friends and family members. According to a letter written by the Defendant's sister, the Defendant's father abandoned their family when the Defendant was twelve years old. His father began living with a woman whose son attended school and church with the Defendant and regularly teased the Defendant about "having his father." Shortly thereafter, between ages thirteen and fourteen, the Defendant began using alcohol, marijuana, and crack cocaine. He stated in his presentence report that, since his early teens, he has been unable to maintain sobriety for more than eighteen months. At age eighteen, the Defendant dropped out of high school, but he obtained his GED in 2001, at age forty-four.

Between the ages of twenty-one and fifty-one, the Defendant's age as of sentencing, the Defendant amassed at least thirty-three criminal convictions in Ohio and Tennessee. These convictions included seven counts of breaking and entering, five counts of burglary, five counts of theft, five counts of resisting or evading arrest, two counts of possessing burglary tools, two counts of possessing narcotic equipment, two counts of receiving stolen property, and one count each of forgery, selling drugs, assault, reckless operation of a vehicle, and criminal trespass. The Defendant committed many of his offenses while serving a sentence of probation from previous convictions. The report also indicated that the investigating officer could not determine the final disposition of several additional charges against the Defendant in both Tennessee and Ohio.

According to the presentence report, the Defendant was convicted on March 3, 2001, of burglary based on conduct that occurred on November 17, 1999. He was sentenced to twelve years at sixty percent in the Tennessee Department of Correction. According to the Defendant's testimony, he received jail credit for time served before his conviction, and he was released in December 2007 into a work-release program. He testified that, by participating in the work-release program, he "flattened" his sentence and, thus, was not on probation when he committed the crime in this case.

The letters written by the Defendant's sister, brother, and mother described the Defendant's drug abuse and his history of criminal conduct, but they emphasized that the Defendant's behavior revolved around supporting his drug habit, for which he had never received comprehensive, in-

patient treatment. The letters urged the trial court to grant alternative sentencing in order for the Defendant to complete an in-patient drug rehabilitation program.

The presentence report also included letters from several rehabilitation and reintegration programs. Dennis Dilbeck, program director for City Mission Ministries in Nashville, wrote that the Defendant would benefit by completing his ministry's "Fresh Start" program. Lisa Bell, program director of the Nashville Area Recovery Alliance ("NARA"), wrote that NARA had accepted the Defendant and would provide twelve weeks of addiction counseling at no cost. Bell recommended the Defendant complete an in-patient drug rehabilitation program, in addition to the drug counseling NARA would provide. Finally, the presentence report included a letter from Buffalo Valley, an alcohol and drug rehabilitation center, stating that the center had interviewed and accepted the Defendant into its twenty-eight day in-patient drug treatment program.

Pete Volpitta, a former narcotics officer and present chaplain for a company that previously employed the Defendant, testified he built a fairly good relationship with the Defendant over the time his company employed the Defendant. Describing the Defendant, Volpitta said, "He's a good worker, on time. As a matter of fact, his job is available as soon as he [completes his sentence]." Volpitta elaborated, saying the Defendant had a "genuine goodness" that his addictions and mental health issues suppressed. Volpitta did not believe the Defendant had ever had a mental health examination. He testified he would "absolutely" be a part of the Defendant's life after his release, and he reiterated the Defendant needed a mental health assessment and in-patient drug treatment. He said the Defendant "realizes now that it is up to him and he is desperately and earnestly and honestly seeking professional help. I don't think he's gotten real professional help in the past."

The Defendant testified at his sentencing hearing and read a statement wherein he expressed his regret that he had "allowed drugs, crime, and just plain old fashioned sin to destroy [his] life." He also expressed his frustration that he had disappointed his family. After saying he was "truly sorry" for having burglarized the store, he asked the court for the opportunity to seek drug treatment and "obtain professional help in finding the core or root issues" that caused him to commit "mental, spiritual, and physical suicide." The Defendant said he had never been arrested or in serious trouble while sober.

The Defendant described his frustration with and failure to understand his recurrent relapses. He said that during his last term of incarceration, he earned several vocational degrees, participated in a work-release program, and regularly attended narcotics anonymous meetings, Christian worship, and self-help courses. He said he had promised himself he would never use again. Having gone to these lengths to overcome his addictions, the Defendant did not understand why he relapsed. The Defendant asked the Court to allow him to complete drug counseling, intensive drug treatment, and long-term after care. He believed that, with such treatment, he would learn to get his life "back on track."

Charles R. Payne, Envirotest's assistant manager, testified that, although the Defendant stole at least \$150 when he broke through Envirotest's window, police returned the entire amount stolen after apprehending the Defendant. He estimated that repairing the broken window cost \$800.

At the conclusion of the hearing, the trial court took the matter under advisement. The trial court later issued a written order denying alternative sentencing and explaining its denial.

II. Analysis

The Defendant contends the trial court erred when it denied alternative sentencing, arguing that his recurrent relapses following incarceration indicate incarceration is an inadequate remedy for his addiction and, by extension, his criminal conduct. The Defendant acknowledges his lengthy criminal record but emphasizes his efforts and willingness to rehabilitate himself. He requests a sentence of probation or community corrections with mandatory in-patient drug treatment and extended counseling, which he argues would better serve the purposes of sentencing, promote the ends of justice, and serve the best interest of both the public and the Defendant.

The State acknowledges that the trial court erred when it applied one enhancement to the Defendant's sentence. The State argues, however, that the remaining enhancement factors, the failure of past measures less restrictive than confinement, the little weight due the Defendant's addiction as a mitigating factor, the Defendant's lack of potential for rehabilitation, and the need to protect the public from the Defendant's conduct justify the denial of alternative sentencing.

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); *State v. Mencer*, 798 S.W.2d 543, 549 (Tenn.Crim.App.1990) (finding community corrections to be a form of alternative sentencing and therefore holding the de novo standard of review of T.C.A. § 40-35-402(d) to apply to community corrections). 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. section 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).

Due to the 2005 sentencing amendments, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (citing T.C.A. § 40-35-102(6) (2006)). 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." *Id.* (footnote omitted). T.C.A. § 40-35-102(6); 2007 Tenn. Pub. Acts 512. Additionally, we note that a trial court is "not bound" by the advisory sentencing guidelines; rather, it "shall consider" them. T.C.A. § 40-35-102(6) (emphasis added).

In conducting a de novo review of a sentence, we must consider: (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 mitigating and enhancement factors set out in Tennessee Code Annotated sections 4-35-113 and -114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; and (7) any statement the defendant made in the defendant's own behalf about sentencing. *See* T.C.A. § 40-35-210 (2009); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). We must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. T.C.A. § 40-35-103 (2009).

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(A)-(C) (2006).

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

The Tennessee Community Corrections Act was enacted in 1985. One of the purposes of the Act was “to establish a policy within the state to punish selected, nonviolent felony offenders in front-end community based alternatives to incarceration, thereby reserving secure confinement facilities for violent felony offenders.” Tenn. Code Ann. § 40-36-103(1) (2006); *see State v. Samuels*, 44 S.W.3d 489, 492 (Tenn. 2001). Under the Act, a court is authorized to sentence an eligible defendant, as defined in Tennessee Code Annotated section 40-36-106, to “any appropriate community-based alternative to incarceration provided in accordance with the terms of this chapter, and under such additional terms and conditions as the court may prescribe, in lieu of incarceration in a state penal institution or local jail or workhouse.” T.C.A. § 40-36-106(e)(1) (2006).

A defendant must meet the following factors to be eligible to serve his sentence within a community corrections program:

- (B) Persons who are convicted of property-related, or drug-or 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

T.C.A. § 40-36-106(a)(1) (2006). A trial court retains discretion to deny community corrections if it finds the sentencing principles to require confinement. *State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999).

In this case, the trial court sentenced the Defendant to the agreed-upon sentence of eight years at forty-five percent, and it issued a written order denying alternative sentencing. In the order, the trial court listed the enhancement and mitigating factors it found to apply, described its weighing of those factors, and stated that, in making its determination, it had considered the principles of sentencing, the nature and characteristics of the criminal conduct involved, and the Defendant's potential for rehabilitation. The following are the enhancement factors the trial court found to apply: enhancement factor (1), that the Defendant had a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; enhancement factor (8), that the Defendant, before trial or sentencing, failed to comply with conditions of a sentence involving release into the community; and enhancement factor (13), that, at the time the felony was committed, the Defendant was on probation. *See* T.C.A. § 40-35-114 (1), (8), and (13). The trial court recognized the Defendant's history of addiction as a mitigating factor. *See* T.C.A. § 40-35-113.

The trial court explained its weighing of enhancement and mitigating factors and its consideration of relevant sentencing principles, explaining first that it placed minimal weight on the Defendant's addiction because the Defendant "had many years to correct his drug issues, many courts and probation to help facilitate him, but he has failed to adhere to the requirements of law[abiding citizenship]." The court then said it placed great weight on the Defendant's "horrendous" criminal record, explaining it could not "risk victimization of other citizens," and it denied alternative sentencing.

We agree that the trial court erred when it applied enhancement factor (13) to the Defendant's sentence. The Defendant was sentenced to serve twelve years at sixty percent in March 2001, and he received jail credit for time served before his conviction. The Defendant was released from the Tennessee Department of Correction in December 2007 into a work-release program, which he testified "flattened out" his twelve-year sentence. He committed the offense in this case in June 2008. Neither the presentence report nor the testimony presented at sentencing indicate that the Defendant's sentence from his 2001 conviction was in effect when the Defendant committed the

June 2008 burglary. Therefore, the record preponderates against the trial court's finding that the Defendant was on probation when he committed the burglary at issue. *Ross*, 49 S.W.3d at 847. As such, the trial court erred when it applied enhancement factor (13), and we, therefore, do not presume its denial of alternative sentencing to be correct. T.C.A. § 40-35-402(d); *Mencer*, 798 S.W.2d at 549. We review the trial court's denial of alternative sentencing de novo. *Id.*

The Defendant is a persistent offender, and his conviction in this case is a Class D felony. Therefore, he is not a "favorable candidate for alternative sentencing. *See Carter*, 254 S.W.3d at 347. In conducting our de novo review of the record to determine whether the Defendant, nevertheless, is an appropriate candidate for alternative sentencing, we have considered the Defendant's presentence report, the evidence presented at sentencing, the nature and circumstances of the burglary, the Defendant's statement at sentencing, enhancement factors (1) and (8), and the relevant sentencing principles. *See* T.C.A. § 40-35-210 (2006).

In reviewing the Defendant's manner of service de novo, we have also considered the Defendant's express remorse and sincere desire to rehabilitate himself from his addictions. *See* T.C.A. § 40-35-103. The Defendant presented ample evidence that, if given a chance, he would undergo psychotherapy and intensive drug treatment and thereby rehabilitate himself. Alongside this evidence, however, was the Defendant's honest acknowledgment, which his presentence report bears out, that for the past three decades he cyclically abuses drugs, rehabilitates himself, relapses, and commits crimes to support his drug use.

Tennessee Code Annotated section 40-35-103(1)(A) authorizes a court to deny alternative sentencing if "confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct." The Defendant has well over thirty criminal convictions, including multiple counts of breaking and entering, burglary, theft, resisting arrest, possessing narcotics equipment, and at least one count each of forgery, selling drugs, assault, reckless operation of a vehicle, and criminal trespass. The record, therefore, demonstrates that the Defendant has a long history of criminal conduct. In our view, the Defendant's long criminal record and his pattern of relapsing and engaging in destructive, criminal conduct indicates his confinement is "necessary in order to protect society." *See* T.C.A. § 40-35-103(1)(A).

The fact that measures less restrictive than confinement have recently been applied to the Defendant without success also indicates confinement is necessary. *See* T.C.A. § 40-35-103(1)(C). The record shows that the Defendant committed many of his prior convictions while serving a sentence of probation from a previous conviction. Thus, the Defendant has violated sentences of probation in the past. The Defendant's failure to comply with previous measures less restrictive than confinement further supports our conclusion that his confinement is necessary. *See* T.C.A. § 40-35-103(1)(C).

The Defendant has failed to carry his burden of proving his suitability for probation. T.C.A. § 40-35-303(b) (2006). After a de novo review, we conclude that the Defendant's lengthy history of criminal conduct and past failures to comply with measures less restrictive than confinement

require his confinement for the burglary offense in this case. *See* T.C.A. § 40-35-103(1)(A), (C); *Kendrick*, 10 S.W.3d at 656. The Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the trial court properly denied alternative sentencing. As such, we affirm the trial court's judgment.

ROBERT W. WEDEMEYER, JUDGE