IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 19, 2005 Session

STATE OF TENNESSEE v. BRENDA KAY MAYHEW

Direct Appeal from the Criminal Court for Davidson County
No. 2003-C-2180 Cheryl Blackburn, Judge

No. M2004-00218-CCA-R3-CD - Filed September 7, 2005

The Defendant, Brenda Kay Mayhew, pled guilty to one count of the sale of a schedule II controlled substance, Dilaudid, and, pursuant to a plea agreement, the trial court sentenced the Defendant to a six-year sentence, as a Range II offender. The trial court ordered that the Defendant's sentence run consecutively to an eight-year sentence that she was currently serving. On appeal, the Defendant contends that the trial court erred when it ordered that the Defendant's sentences run consecutively. Finding no reversible error, 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 JOHN EVERETT WILLIAMS, and ALAN E. GLENN, JJ., joined.

Rayburn McGowan, Jr., Nashville, Tennessee, for the appellant, Brenda Kay Mayhew.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. (Torry) Johnson III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from the Defendant's arrest and conviction for the sale of a schedule II controlled substance. The only issue before us is the appropriateness of the Defendant's sentence. At the Defendant's sentencing hearing, the following evidence was presented: The Defendant testified that her parents moved to Tennessee a few years ago, and her mother is in poor health. She said that, for her eight-year sentence, she was placed on community corrections for eighteen months, during which time she had no violations. Subsequently, she was placed on probation, and, four or five months later, she violated her probation. The Defendant agreed that

the presentence report stated that she used drugs while she was a juvenile, and she clarified that she started using drugs when she was fourteen and stopped using drugs when she was seventeen. She testified that she did
not get into any trouble until her mid-thirties when she "lost [her] health and [her] job." The Defendant explained that she was working for a railroad company, but she was injured in a derailment, and, as a result of that accident, she was placed on disability. She stated that she has had four or five back operations, most recently in February 2003. The Defendant testified that, as a result of those operations, she has been on prescription medication continually. She said that the prescription medication that she takes is addictive after prolonged use.

The Defendant testified that, in her mid-thirties, she began drinking because she was depressed and unemployed. She stated that she kept getting depressed, and she tried to commit suicide on several occasions. She was treated for mental health issues, and she received electrical shock treatment. The Defendant said that, in one suicide attempt, she shot herself in the stomach, and, as a result of that injury, half of her colon and intestines were removed. She testified that she is on medication and she has gastrointestinal problems as a result of that injury.

The Defendant testified that, while incarcerated, the Tennessee Department of Correction has not helped her with her impairment and disabilities. She stated that it took over a month for her to get medication for her abdomen wound, and she is unsure how long it will take to refill her prescription. The Defendant testified that she was moved to a top bunk at the women's prison, and she had difficulty and pain getting into her bed until she was moved to a bottom bunk.

The Defendant testified that, prior to being incarcerated, she lived on Elvira Street for almost five years. She stated that she has a written purchase agreement for the home and, based on that agreement, she pays $300 per month, and she will own the home in fifteen years. The Defendant testified that her monthly disability income is approximately $2,100. The confidential informant in this case lived in the home with the Defendant. The Defendant testified that she has known the informant for about nine years, in part because the informant was married to the Defendant's son.

The Defendant testified that, about two weeks before the Defendant was arrested for this offense, she found the informant and another person smoking crack cocaine in her house, and she told them that they would have to move out of her house. She said that the informant and the other person were upset with her, and they kept asking for her prescription medication. The Defendant testified that she began to use Dilaudid because she had run out of her prescription medication, and she thought the drug helped her. The Defendant testified that she went with the informant and another friend to buy pills. She testified that she had not given the informant or the friend any of her medication before, but the three had attempted to get the Defendant's prescription medication.

The Defendant testified that addiction is a lifelong issue and she wants treatment, even though she is not addicted to Dilaudid or other drugs anymore. She testified that she could complete a treatment program and become a law-abiding citizen within eight years. The Defendant testified that she has family that could help her when she is released from prison.

On cross-examination, the Defendant testified that, after she was arrested in April of 2000 for selling Dilaudid, she made bond and was placed on community corrections. The Defendant testified that, in March of 2001, she was arrested for selling drugs while she was out on bond. She said that she was not selling drugs, but she was "copping"[1] them with a neighbor, who was another informant. The Defendant testified that, while she participated in community corrections, she continued to engage in the same unlawful behavior. The Defendant testified that her psychiatrist, neurosurgeon, and her family doctor all prescribe her medication, and she said that each physician is aware of the other physicians' prescriptions.

The Defendant testified that she kept her medications at a friend's home because she did not want them to be stolen from her home. The Defendant testified that she kept track of how much medicine she took and when she needed to take the medication. The Defendant denied that people came by her home throughout the day and night to stay for a short time, make a drug transaction, and leave. The Defendant testified that, in addition to the two drug convictions for which she received community corrections, she had two previous convictions, one for shoplifting and one for theft. She explained that, while on bond for her April 2000 arrest, but prior to the March 2001 arrest, she was arrested and convicted for shoplifting. She testified that she did not sell drugs to supplement her income. She stated that she had theft convictions in 1999, which she blamed on her drug addiction. The Defendant testified that, after she paid her monthly bills, she probably spent the rest of her money on Dilaudid. Upon questioning by the court, the Defendant clarified that she did not violate community corrections during the first eighteen months. She said that she was placed on probation, and she violated probation on two occasions after six months.

At the conclusion of the hearing, the trial court ordered the Defendant's sentence for her current conviction to run consecutively to her unexpired prior sentence.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it ordered that her sentence run consecutively to an eight-year sentence that she was currently serving. The State counters that the trial court properly imposed consecutive sentences in accordance with Tennessee law, and we agree.

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 of 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) (2003). 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) (quoting State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999)); 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); State v.

[1] This term was not explained or defined by the Defendant or any of the parties, and this Court will not speculate as to its meaning.

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: (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 statutory enhancement factors; (g) any statements made by the defendant on his or her own behalf; and (h) the defendant's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-210 (2003); 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. Tenn. Code Ann. § 40-35-401(d), Sentencing Comm'n Cmts.

In the case under submission, we conclude that there is ample evidence that the trial court considered the sentencing principles and all relevant facts and circumstances. Therefore, we review its decision de novo with a presumption of correctness. Accordingly, so long as the trial court complied with the purposes and procedures of the 1989 Sentencing Act and its findings are supported by the factual record, this Court may not disturb this sentence even if we would have preferred a different result. See Tenn. Code Ann. § 40-35-210, Sentencing Comm'n Cmts; State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). We note that the defendant bears the burden of showing that the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; Ashby, 823 S.W.2d at 169.

At the Defendant's sentencing hearing, the trial court stated:

> [The Defendant] did plead guilty in this Court, as we indicated, on November 25th to the sale of Dilaudid, which is in this case a C felony. Again, it's for me to determine today whether they are going to be running concurrently or consecutively.
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> The grounds that 40-35-115 allow me to run this consecutively would be if she was sentenced for an offen[s]e while on probation. Now, that brings up [a]n interesting point. There is clearly a case that says that community corrections is not probation, but she had graduated off community corrections onto probation. That is not the one that I would be using. It would be, she is an offender whose record of criminal activity is extensive.
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> Actually when looking through this, [the State] is correct . . . that [both] the convictions that occurred in 2001-A-47 and 2001-I-313, both of them are for B felonies, both of them for 8 year sentences. And it is crystal clear she was on bond on 2001-A-47 when she picked up 2001-I-313. And the reason it is crystal is because she was surrendered by the pretrial – there is even a notation in here. She was surrendered because of that rearrest on those new drug charges, which is signed off by the night commissioner. So that – that's obvious in the record. That's neither here nor there. She did get the benefit of that.
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> But what I find ever more disturbing about this situation is when you look at the exten[t] of reading the underlying warrants of those offenses, she is put on

> community corrections, she gets up and she testifies and she tells me that she has never been violated on community corrections; however, there is a warrant in the file signed [b]y Mr. Nutt who works with community corrections where she did violate. It was ultimately retired, but there were all[e]gations that she violated by getting arrested for a drug paraphernalia charge.
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> And then we have the information in 2001-I-313, which sworn to by a police officer says that she, on at least two different occasions sold to an undercover police officer, not to an informant, but to an undercover police officer 16 Dilaudid and other pills. And then we get right back out and here we are. I mean, this all occurred – let's see, that community corrections violation was retired in 4/26/02, these offen[s]es occur 6/23/03 and we're just right back in the same situation.
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> Clearly in looking at her record, clearly even though it may be of somewhat recent origin, it is just constant. There are major issues with regard to [the Defendant]. And I am going to find that her record of criminal activity is extensive and I'm going to run these sentences consecutive to each other. I do not need to do a Wilkerson analysis because I am not relying on the dangerous offender factor. However, I will find that this aggregate term reasonably relates to the severity of the offen[s]es and that it is necessary to protect the public from further serious conduct. Nothing that we have done has stopped this situation.

After reviewing the record, we conclude that the evidence does not preponderate against the trial court's finding that the Defendant's sentence should run consecutively. The trial court applied Tennessee Code Annotated section 40-35-115(b)(2), which states that "[t]he court may order sentences to run consecutively if the court finds by a preponderance of the evidence that: . . . (2) [t]he defendant is an offender whose record of criminal activity is extensive . . . ." The Defendant's pre-sentence report and the testimony at the Defendant's sentencing hearing indicated that the Defendant has been convicted of multiple drug and theft offenses over the past approximately eight years. The trial court determined that the Defendant's criminal activity was extensive and continuous. Because of the Defendant's four previous convictions, we find no error in the trial court's application of this factor, and we conclude that the Defendant is not entitled to relief on this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the trial court's judgment.

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ROBERT W. WEDEMEYER, JUDGE