

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 28, 2005

STATE OF TENNESSEE v. JERRY LYNN MONROE

**Appeal from the Criminal Court for Knox County
No. 75950 Ray L. Jenkins, Judge**

No. E2004-02262-CCA-R3-CD - Filed August 18, 2005

The defendant, Jerry Lynn Monroe, appeals his Knox County effective incarcerative sentence of seven years on his guilty-pleaded convictions for attempted aggravated robbery, Class D theft, and misdemeanor evading arrest. The defendant had sought a probationary sentence or some form of alternative sentencing, which the trial court rejected. Our review of the record discloses no basis to disturb the trial court's sentencing decision, and we affirm the judgments.

Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Mark E. Stephens, District Public Defender; and John Halstead, Assistant District Public Defender, for the Appellant, Jerry Lynn Monroe.

Paul G. Summers, Attorney General & Reporter; Rachel E. Willis, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Jo Helm, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The sole issue on appeal is whether the trial court erred in denying probation or alternative sentencing to the defendant.

On October 30, 2002, the Knox County Grand Jury returned a presentment, case number 75950, charging the defendant with two counts of attempted aggravated robbery, two counts of aggravated assault, and one count of misdemeanor theft of property not exceeding \$500. The defendant entered into a plea agreement with the state whereby he pleaded guilty to one count of attempted aggravated robbery for which he would receive a five-year sentence. The manner of service of the sentence was reserved for the trial court's determination.

By agreement between the defendant and the state, on July 15, 2004, an information was filed, case number 80029, charging one count of Class D theft and one count of misdemeanor evading arrest. The defendant pleaded guilty to both offenses that same day in exchange for a two-year sentence for the theft offense and a concurrent 11 months 29 days sentence for evading arrest. Also, by agreement those sentences were to be served consecutively to the sentence imposed in case number 75950, for an effective sentence of seven years. The manner of service of the seven-year sentence was reserved for the trial court's determination.

The transcript of the plea submission hearing reflects the following factual underpinning for the defendant's plea to Class C attempted aggravated robbery in case number 75950:

[I]n this case the proof would show that on February 15th, 2002, the victim was shopping at the Food City on Asheville Highway and as she walked out of Food City on Asheville Highway . . . the defendant grabbed her purse as he drove by. He dragged her several hundred feet. Witnesses got the tag number. Police began an investigation and found that the tag on the car was stolen, which is the subject of another count of this indictment. But they found it near where the owner of the tag lived. They took the defendant into custody and took him to the hospital where the defendant – where the victim was for a show up. As they walked toward the victim's hospital [room] the defendant began to confess that he had in fact been the one who had grabbed the woman's purse and dragged her.

There would be some evidence that he ran over her with the car. She had track marks on her body from tires. And the defendant also admitted taking the tag. Defendant would further admit, Your Honor, as part of this plea that the victim suffered serious bodily injury, and that he has sufficient criminal history to enhance him within the range.

The record before us does not contain a transcript of the plea submission in case number 80029, in which the defendant pleaded guilty to Class D theft and to misdemeanor Class A evading arrest. The presentence investigation report in the record, however, provides the following information about those charges:

Count One: On or about the 9th day of April 2003, and on divers and diverse days between that date and the 12th day of May, 2003, in Knox County, Tennessee, the defendant did unlawfully and knowingly obtain and exercise control over property, to-wit: various tools and a pressure washer, of the value of at least \$1,000 but less than \$10,000 of Mary Blackburn without her effective consent, with intent to deprive the said Mary Blackburn thereof, in

violation of TCA 39-14-103, and against the peace and dignity of the state of Tennessee.

Count Two: On or about the 15th day of May, 2003, in Knox County, Tennessee, the defendant did intentionally flee from Tim Keck, who was known to the said defendant to be a law enforcement officer, while said defendant knew that Tim Heck had made a lawful arrest of said defendant, in violation of TCA 39-16-603, and against the peace and dignity of the state of Tennessee.

The sentencing hearing was conducted on August 20, 2004, and the transcript before us reveals that the state filed and relied upon the presentence investigation report and a lengthy victim-impact statement. The victim in case number 75950 briefly addressed the trial court and asked the court to “hold [the defendant] responsible for what he did, because he wasn’t a teenager out there making a silly mistake. He was a grown man. He’s just one year younger than I am.”

The defendant did not testify. He had given to the presentence officer a detailed statement, which was included in the presentence report. In his statement, the defendant admitted his addiction to crack cocaine, which he traced back to depression from the death of his brother in 2001. He attributed his criminal actions to his addiction and need to obtain money for drugs. He related that he attempted suicide while at the Knox County Detention Center; he jumped off a balcony and broke both ankles and his left arm, for which he underwent multiple surgeries. From the hospital, the defendant was transferred to the Sunbridge Nursing Home in LaFollette and placed on pretrial release. At the time he gave his statement, the defendant resided in an assisted living apartment in LaFollette, and he was undergoing psychiatric and medical treatment and was participating in a methadone program to overcome his addiction to cocaine.

According to the presentence report, the defendant was 49 years old and had completed high school. His employment history included three years as a maintenance supervisor and ten months as a carpenter’s helper. His injuries led to his current unemployment. He had 17 prior misdemeanor arrests for passing worthless checks; each case was dismissed upon payment of costs.

At sentencing, counsel for the defendant expressed that the defendant was very remorseful and asked the trial court to take into consideration the defendant’s physical condition and suffering and to grant probation to allow the defendant to continue with his rehabilitation and drug treatment program.

The trial judge patiently listened to the parties and, afterwards, denied probation and alternative sentencing. The court announced its ruling,

In Causes 75950 and 80029, the defendant seek[s] probation.

The Court has had the benefit of the presentence investigation and the victim-impact statement.

The Court has considered the defendant's interest; behavioral record; employment history; social history; his present condition, including physical and mental; the interest of the public; the need of deterrence of the kind of offense for which the defendant has committed, not only once but twice; the defendant's addiction to controlled substances; the failure to make restitution to his victim; his demonstrated lack of self-discipline, all require the imprisonment of the defendant for his own best interest and especially for the protection of the public.

Probation is denied.

[Defense Counsel]: Your Honor, would the Court consider a split-confinement sentence, or does the Court wish for [the defendant] to serve the entire sentence?

The Court: No, I think he needs the full impact of this sentence.

On appeal, the defendant complains that the trial court failed to consider that his convictions "were the [defendant's] first serious encounter with the criminal justice system and his first effort at rehabilitation," failed to consider that the defendant's voluntary entry into a treatment program enhanced "his potential for rehabilitation and improve[d] the likelihood of success in treatment and in probation generally," and failed to analyze the factors set forth in Code section 40-35-102. *See* Tenn. Code Ann. § 40-35-102 (2003).

We begin with our familiar standard of review. When there is a challenge to the length, range, or 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 trial court 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. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991); *see State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000). "The burden of showing that the sentence is improper is upon the appellant." *Ashby*, 823 S.W.2d at 169. In the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely *de novo*. *Id.* If appellate review, however, reflects that the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

We first note that there is sufficient affirmative evidence in the record to conclude "that the trial court considered the sentencing principles and all relevant facts and

circumstances”; thus, we will conduct our *de novo* review with a presumption that the trial court’s determinations are correct. *See Ashby*, 823 S.W.2d at 169.

The mechanics of arriving at an appropriate sentence are spelled out in the Criminal Sentencing Reform Act of 1989. At the conclusion of the sentencing hearing, the trial court determines the specific sentence and the propriety of sentencing alternatives by considering (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, (6) any statements the defendant wishes to make in the defendant’s behalf about sentencing, and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), -35-103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The defendant merges somewhat his arguments relating to probation and alternative sentencing. To be sure, the defendant was eligible for probation, having received a seven-year sentence. *See* Tenn. Code Ann. § 40-35-303(a) (2003). However, as we have pointed out on numerous occasions, the determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). A defendant is required to establish his “suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general.” *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000).

Regarding considerations relevant to probation, the trial court is directed to consider the nature and circumstances of the offense, the defendant’s criminal record, the defendant’s background and social history, his or her present condition, including physical and mental condition, and the deterrent effect on the defendant. *See State v. Kendrick*, 10 S.W.3d 650, 656 (Tenn. Crim. App. 1999). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the appropriate sentence. *See* Tenn. Code Ann. § 40-35-103(5) (2003).

In addition to eligibility for probation, the defendant, as a standard offender convicted of Class C and D felonies and a Class A misdemeanor, was entitled to the presumption of favorable candidacy for alternative sentencing in the absence of evidence to the contrary. *See* Tenn. Code Ann. § 40-35-102(6) (2003) (presumption extended to an offender who is “an especially mitigated or standard offender convicted of a Class C, D or E felony”). Even so, favorable candidacy does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. *State v. Bolling*, 75 S.W.3d 418, 420 (Tenn. Crim. App. 2001). The presumption of favorable candidacy for alternative sentencing may be rebutted, for instance, by a showing that confinement may be necessary to “protect society by restraining a defendant who

has a long history of criminal conduct” or that “measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.” *See* Tenn. Code Ann. § 40-35-103(1)(A), (C) (2003).

Turning first to the matter of probation, the record reveals that the defendant failed to meet his burden of demonstrating that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *See Dykes*, 803 S.W.2d at 259. On appeal, the defendant merely argues that the trial court’s failure to suspend his sentence is erroneous because the court failed to consider certain applicable factors, such as lack of prior criminal record and entry into a treatment program. These allegations do not amount to an effective demonstration that the defendant is indeed a suitable candidate for probation, nor are they sufficient to rebut the presumption of correctness applied to the trial court’s findings. The trial court, we note, specifically referred to the defendant’s reoffending behavior after the attempted aggravated robbery, his addiction to controlled substances, his failure to make restitution, and his “demonstrated lack of self-discipline.” Accordingly, we decline to disturb the trial court’s rejection of probation in this case.

Regarding a less beneficent alternative sentence, we likewise conclude that the trial court did not err in finding sufficient evidence existed to rebut the presumption of favorable candidacy for alternative sentencing. Discounting the defendant’s prior arrests for worthless check charges, the presentence report reflects that the defendant admitted to a lengthy history of criminal conduct involving alcohol, marijuana, powder cocaine, and crack cocaine. *See State v. Tony Dean Morgan*, No. E2001-02924-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Knoxville, Oct. 23, 2002). The defendant’s chronic substance abuse undercuts the notion that he is a good candidate for rehabilitation. Furthermore, it is difficult to sympathize or attribute much positive weight to the defendant’s physical disabilities. The defendant’s injuries are the result of his own impulsive conduct. Accordingly, we also decline to disturb the trial court’s rejection of an alternative sentence in this case.

On appeal, the defendant for the first time asserts that he should have been considered for placement in a community corrections program. The defendant fails, however, to meet the standard eligibility requirements for consideration of a community corrections sentence; he pleaded guilty to attempted aggravated robbery, a violent felony offense and an offense involving a crime against a person. *See* Tenn. Code Ann. § 40-36-106(a)(1)(B), (C) (2003) (defining eligible offenders and excluding persons convicted of felony offenses involving crimes against the person and persons convicted of violent felony offenses). Furthermore, he does not attempt to argue that he otherwise qualifies for the “special needs” category of offenders suitable for community corrections placement. *See id.* § 40-36-106(c).

In our view, the record supports the manner of service of the sentence imposed. The defendant failed to carry his burden to show entitlement to probation, and the presumption of alternative sentencing was sufficiently rebutted in this case. The trial court thus did not err by imposing a sentence of confinement.

Accordingly, we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE