

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 1996

**FILED**

July 5, 1996

Cecil W. Crowson

Appellate Court Clerk

STATE OF TENNESSEE, )

C.C.A. NO. 01C01-9506-CC-0017

Appellee, )

MAURY COUNTY

VS. )

HON. JIM T. HAMILTON  
JUDGE

MICHAEL PARKS,  
a/k/a PAC MAN, )

(Sentencing)

Appellant. )

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF MAURY COUNTY

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant, Michael D. Parks, was granted this delayed appeal by the trial court to seek review of the denial of his request for a community corrections sentence. The Defendant was indicted on four counts of the sale of cocaine, was convicted by jury trial in one count, and pleaded guilty to the remaining three counts. At the sentencing hearing, he asked to be considered as a candidate for community corrections. The trial court denied this request, and the Defendant now brings this delayed appeal. We affirm the judgment of the trial court.

We will briefly address the facts of this case. The Defendant owned and operated a night club called "Sweet Daddy's," in Columbia, Tennessee for about one year. During this time, specifically from June through September of 1991, the local drug task force ran an undercover drug operation in the area where Sweet Daddy's was located.

At the trial in this matter, Trooper Quinn Erving Hall<sup>1</sup>, an undercover officer with the narcotics division, testified that he bought cocaine from several individuals inside the club and that he bought cocaine from the Defendant four times. Hall testified that because of the competitiveness among the cocaine dealers, the Defendant instructed him not to buy from any other dealer.

Two other law enforcement officers, Officer Bill Doley and Trooper John Albertson, also worked the areas surrounding the bar, generally the corners of

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<sup>1</sup>At the sentencing hearing, this witness was listed as Trooper "Orvin" Hall.

Ninth and Glade and Eighth and Woodside. Officer Doley testified that the drug task force made thirty arrests for drugs in the area, sixteen of which were made in front of Sweet Daddy's.

Trooper Albertson, as a member of the narcotics division of the Tennessee Highway Patrol, testified that he worked the Defendant's night club. He said that he usually worked with an informant. The informant would go into the night club, find a dealer, and return to where the trooper was waiting in the car. Albertson would then drive the dealer around the block and buy cocaine from him. He also testified that he saw other drug deals taking place outside of the club in a parking lot across the street. Although he never purchased drugs from the Defendant, Officer Albertson's undercover work resulted in the arrest of eight people charged with fifteen crimes.

On April 21, 1992, the Defendant was indicted by the Maury County Grand Jury on four counts of selling cocaine. A misdemeanor theft charge was later dismissed by the prosecution when the Defendant agreed to forfeit the weapon involved. The Defendant was tried on August 26, 1992 for one count of the sale of cocaine. The jury found him guilty on this charge and fined him \$50,000. The Defendant subsequently pleaded guilty to the remaining three counts. In exchange for his guilty pleas, the State agreed to recommend the length of the sentences to be served.

On February 12, 1993, the court held a sentencing hearing and sentenced the Defendant to the following terms recommended by the State: For case number 7317, the jury trial conviction, the Defendant was ordered to serve eleven

years imprisonment. In case number 7315, he was ordered to serve five years imprisonment and fined \$2,000. In case number 7316, he was ordered to serve eight years imprisonment and fined \$2,000. For case number 7318, he was ordered to serve eight years imprisonment and fined \$2,000. The court ordered the eight-year sentence and the eleven-year sentence to be served consecutively, for an effective term of nineteen years. The other two sentences were to be concurrently served with the eleven-year sentence. The Defendant agreed to the recommended sentences.

At the sentencing hearing, the Defendant requested that he be considered for community corrections. The prosecution called the three law enforcement officers mentioned above as witnesses at the hearing. The Defendant was the sole witness for the defense.

The Defendant testified that he knew that cocaine was being sold in and around his night club, but that he could do nothing to stop it. At trial, the Defendant denied ever having sold cocaine to Trooper Hall; however, at the sentencing hearing, he admitted that he sold cocaine to the officer, gave the officer his beeper number, and told the officer to buy only from him. The Defendant further admitted to having used and sold cocaine on other occasions.

The Defendant testified that he wanted to serve his sentence in community corrections because he had two children that he wanted to support. He said that he wanted to get a college education and start a career in the concrete business and eventually learn blueprinting.

The trial court denied the Defendant's request for community corrections. As a basis for his denial, the court stated that the Defendant was a role model for many of the black youths in the area who subsequently were serving time in jail for drug charges. The trial court also noted the need for deterrence, stating that it could not grant community corrections because of the large volume of cocaine sales going on in the vicinity of the Defendant's club. The court did allow the Defendant to be placed in a facility that had resources from which he could pursue a higher education. The Defendant now appeals the trial court's denial of a community corrections sentence.

Although the Defendant's sole issue for our review is the denial of community corrections, the State also argues that this appeal was not timely filed and is not properly before this court. We are persuaded to disagree.

The Defendant was sentenced on the four drug convictions on February 12, 1993, and the judgment in the case was filed on February 16, 1993. Apparently, the Defendant did not attempt to file any direct appeal after the judgment was entered. On September 7, 1994, more than a year and a half later, the Defendant filed a pro se "Motion to Correct Judgment."

However, the Defendant had also filed a post-conviction relief petition on May 13, 1993, alleging that his pleas were not voluntarily given, that he was unconstitutionally denied an appeal of his conviction and sentence from the jury verdict, and that he received ineffective assistance of counsel. The Defendant and the district attorney then entered into an agreement wherein the Defendant would dismiss the post-conviction petition with prejudice, and in return, the district

attorney would allow the Defendant to pursue a delayed appeal in the case sub  
judice for the sole purpose of challenging the trial court's denial of community  
corrections. The Agreed Order between the district attorney and the Defendant  
was approved by the Maury County Circuit Court on March 3, 1995. On March  
31, 1995, the Defendant filed a Notice of Appeal. On June 7, 1995, the trial court  
issued a final order dismissing the Defendant's Motion to Correct Judgment and  
granted the Defendant a delayed appeal.

We must conclude that the delayed appeal was incorrectly obtained by the  
Defendant through the Agreed Order. A delayed appeal is authorized by  
Tennessee Code Annotated section 40-30-120<sup>2</sup> if the petitioner was improperly  
denied the right to appeal his original conviction in violation of the United States  
or Tennessee Constitutions. However, to obtain a delayed appeal, the petitioner  
must comply with the procedures of the Post-conviction Procedure Act. Handley  
v. State, 889 S.W.2d 223, 224 (Tenn. Crim. App.), perm to appeal denied, id.  
(Tenn. 1994). Moreover, while the right to a delayed appeal may be brought by  
post-conviction proceedings in appropriate cases, "a post-conviction petition is  
not a vehicle to review errors as a substitute for direct appeal." French v. State,  
824 S.W.2d 161, 163 (Tenn. 1992).

The Defendant agreed to dismiss the post-conviction proceeding if the  
district attorney would agree to a delayed appeal in this case. The statute does  
not in any way suggest that this action is permissible. Thus, the delayed appeal  
was improperly granted because of procedural errors.

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<sup>2</sup>Tennessee Code Annotated section 40-30-120 was repealed, effective May 10, 1995, and  
is now found at section 40-30-213.

The State argues that the delayed appeal was improper and the case should be dismissed because the Defendant did not comply with filing requirements. The State contends that the Motion to Correct Judgment was not filed with the 120 day filing requirement and could not toll the time within which to appeal from the trial court's judgment.

The record does not reflect that the Defendant at any time tried to appeal his sentence through a direct appeal; rather he sought relief through the post-conviction petition and the Motion to Correct Judgment. Rule 35 of the Rules of Criminal Procedure allows a motion to correct or reduce a defendant's sentence only if such a motion is filed within 120 days after the date the sentence is imposed. The rule specifically states that no extensions shall be allowed on the time limitation, nor can other actions toll the running of the time limitation. Tenn. R. Crim. P. 35(b). Thus, the Defendant's motion, filed more than a year and a half after the sentence was imposed, was not timely. Moreover, a Rule 35 motion is intended only to allow the trial court to modify a sentence when the interests of justice demand; the rule is not intended to be a substitute for direct appeal. Thus, the State is correct in its assertion that the motion under Rule 35 was not timely.

The State also argues that the case should be dismissed because only the appellate court, not the trial court, had jurisdiction to grant a delayed appeal. The State argues that the trial court's final order dismissing the Defendant's Motion to Correct Judgment and granting the delayed appeal was error and that an appeal is not timely filed when a trial court waives the thirty-day filing requirement

under Tennessee Rule of Appellate Procedure 4(a). We cannot entirely agree with the State's assertion.

The Defendant's proper avenue of relief was to file a petition for post-conviction relief, which he did. The trial court should then have held an evidentiary hearing to determine if the Defendant was unconstitutionally denied his right to appeal his sentence or conviction. If the evidence had warranted, the trial court could have then granted a delayed appeal. The Defendant would subsequently have been free to enter into the agreement with the State in which he agreed to drop any remaining grounds in his post-conviction relief petition in exchange for pursuing the delayed appeal.<sup>3</sup>

Although the delayed appeal appears to have been improperly granted, fairness dictates that we consider the merits of the appeal. The Defendant's original post-conviction petition was dismissed with prejudice, thereby precluding him from seeking a remedy under the post-conviction act. Moreover, the statute of limitations has now expired, and the Defendant would apparently be time-barred from proceeding with another post-conviction relief petition. Thus, the Defendant could be left without a remedy.

The State agreed to allow the Defendant to have a delayed appeal, if he would dismiss the post-conviction petition. The post-conviction petition, if successful, was the only avenue to obtain a delayed appeal. For the State to

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<sup>3</sup>The Agreed Order in this case is problematic and procedurally flawed. We note that although the Defendant may have been free to enter into such an agreement with the State, the correct route for the Defendant would have been to follow the procedures outlined in section 40-30-120 to bring the direct appeal.



now cry that the delayed appeal is improper and preclude the Defendant from bringing his claim on the merits is simply unfair.

We are not concluding that delayed appeals should normally be granted when a petitioner does not comply with the procedures clearly outlined in the post-conviction act. However, in the case sub judice, the Defendant has suffered prejudice because of the State's change of position. The State specifically agreed to allow the Defendant to pursue a delayed appeal; it cannot now seek to rescind that agreement by arguing that the delayed appeal is not properly before this court and asking for a dismissal.

The Agreed Order allowing the Defendant to appeal was filed on March 3, 1995. The granting of a delayed appeal by the trial court triggers the thirty-day period for filing a Notice of Appeal. State v. Cordell, 645 S.W.2d 763, 765 (Tenn. Crim. App. 1982). The Defendant filed a Notice of Appeal within the thirty-day time limit, on March 31, 1995. Thus, notwithstanding the fact that the delayed appeal came about through a technical and procedural oddity, we will address this Defendant's claim on the merits.

The Defendant requested that the trial court sentence him to community corrections, which the trial court denied. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). 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).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In denying the request for community corrections, the trial court cited the need for a deterrent effect upon the rampant drug activity in and around the Defendant's business. The court also noted that the Defendant had held a place of high esteem among the youths in his community, served as a role model for them, and since had become a negative influence. Because of his role as a leader in the community and the need for establishing a deterrent to others in an

area where drug sales are frequent, the court concluded that a sentence of confinement was necessary and appropriate in the Defendant's case.

The Community Corrections Act allows certain eligible offenders to participate in community-based alternatives to incarceration. Tenn. Code Ann. § 40-36-103. A defendant is eligible for participation in a community corrections program if he satisfies several minimum eligibility criteria set forth at Tennessee Code Annotated section 40-36-106(a).

However, even though an offender might meet the requirements of eligibility, the Act does not provide that the offender is automatically entitled to such relief. State v. Grandberry, 803 S.W.2d 706, 707 (Tenn. Crim. App. 1990); State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Rather, the statute provides that the criteria shall be interpreted as minimum standards to guide a trial court's determination of whether that offender is eligible for community corrections. Tenn. Code Ann. § 40-36-106(d).

A trial court's determinations must also be guided by the sentencing considerations set forth in Tennessee Code Annotated section 40-35-103. These considerations include the need to protect society by restraining a defendant having a long history of criminal conduct, whether confinement is particularly appropriate to effectively deter others likely to commit a similar offense, the need to avoid depreciating the seriousness of the offense, and cases in which less restrictive measures have often or recently been unsuccessfully applied to the Defendant.

In reviewing the sentence with a presumption of correctness, we conclude that the trial judge did not abuse his discretion in denying the Defendant's request for community corrections. The trial court's determination that the Defendant was not entitled to alternative sentencing is supported by several factors. First, the Defendant was convicted of a Class B felony in the jury trial. Thus, he is not entitled to the statutory presumption that he is a favorable candidate for alternative sentencing. Tenn. Code Ann. § 40-35-102(6).

Additionally, the Defendant was not candid with the court and admittedly lied while under oath at trial, saying that he was not a drug dealer. He claimed that he did not sell drugs and that he was entrapped by the police. He made the same type of statement for the presentence report, claiming that he was entrapped and that he was operating a sports bar which kept the people of the community off the streets. At the sentencing hearing, the Defendant recanted his earlier claims of entrapment and appeared to accept responsibility for his actions. He stated that he sold drugs because his job did not provide enough money to buy nice things like the other people in the community had.

Finally, the Defendant did not enter into a blind plea, but rather agreed to each of the recommended sentences for the four convictions. He understood that the effective sentence was nineteen years. He does not contest the length of the sentence or the imposition of consecutive terms. Thus, he realized the length of the sentences which he was being ordered to serve and consented to same.

A trial judge has a certain amount of discretion in setting an appropriate sentence, and when the trial court complies with the sentencing guidelines, the presumption of correctness accompanies his determination. We conclude that the trial court did not err in sentencing the Defendant to serve a term of confinement. This court should not place trial judges in a judicial straight-jacket in the area of sentencing, and we should exercise restraint in interfering with their traditional discretionary powers. State v. Ashby, 823 S.W.2d 166, 171 (Tenn. 1991). Although the Defendant apparently meets the minimum criteria for eligibility in the community corrections program, as we have previously stated, eligibility for the program does not mean that the Defendant is automatically entitled to a sentencing alternative to incarceration. The burden is on the Defendant to show that the sentence was improper. Tenn. Code Ann. § 40-35-401(d) (Sentencing Commission Comments). We do not believe that the Defendant has met that burden.

Therefore, the judgment of the trial court denying community corrections and ordering the Defendant to serve a term of confinement is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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JOSEPH M. TIPTON, JUDGE