IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. #03C01-9901-CR-00121
Appellee,	*	KNOX COUNTY
VS.	*	Hon. Ray L. Jenkins, Judge
PAUL ANTHONY ROUSE,	*	(Theft of property over $60,000)
Appellant.	*	

For Appellant:

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The defendant, Paul Anthony Rouse, pled guilty to theft of property over $60,000, a class B felony. Tenn. Code Ann. § 39-14-103, -105. Pursuant to the plea agreement, the defendant was sentenced to the minimum sentence of eight years as a standard offender. His application for probation was denied. In this appeal of right the single issue presented for review is whether the trial court abused its discretion by denying probation.

We find no error and affirm the judgment of the trial court.

DeRoyal Industries, Inc., based in Powell, Tennessee, is a manufacturer of medical equipment and related products that are produced for sale to hospitals and healthcare distributors. DeRoyal utilizes the services of motor freight carriers to transport its products. A traffic manager operates DeRoyal's transportation and freight department.

In the spring of 1994, DeRoyal executives noticed that extraordinary compensation was being paid to three freight companies: Arrowstar Transportation, Inc., Lynx Transport, Inc., and P.A.R. Enterprise. When asked to explain the unusually high rates being paid to the three companies, Douglas Jones, DeRoyal's traffic manager, was unable to offer an explanation. Upon investigation, it was discovered that all three companies were owned by the defendant and that Jones' wife worked for another of the defendant's companies. For four-and-a-half-years, Jones had accepted cash payments in order to allow the defendant to overcharge DeRoyal for transportation services. DeRoyal, which lost between one and two million dollars as a result of the scheme, sued for actual damages in the amount of $1,065,352. Also entitled to treble damages, the company received a total judgment

against the defendant and his three businesses in the amount of $3,196,056.

Pete DeBusk, chairman and majority stockholder of DeRoyal, testified that Douglas Jones had been a trusted employee of the company with authority to make important daily decisions in the selection of freight carriers. Because the company was so successful, DeBusk acknowledged that the amount taken constituted less than ten percent of the corporation's income during the four-and-a-half-year term of the thefts. DeBusk further stated that no employees were laid off nor were any business opportunities lost as a result of the scheme. He read from a transcript of a recorded conversation between the defendant and Jones in which the defendant stated the following: "I'm going to sit there and say, well, I'm not guilty. I just made a mistake. And then I'm going to plead on the leniency of the judge and hope to get probation if I lose, but I don't think I'm going to lose." DeBusk believed that these statements proved that the defendant had a plan to "beat the system."

Jones, who pled guilty to the theft, testified that the defendant proposed the scheme and paid him $48,000 for his participation. Art Knight, an attorney who prepared a victim impact statement for DeRoyal, testified that the defendant routinely wrote checks to cash in the amount of $4,000 or $5,000 over the course of the scheme.

The defendant testified that the amount he reportedly stole during the course of the scheme was highly inflated. He admitted that he lied in his deposition and in an affidavit during the course of the civil litigation. While acknowledging that he told Jones to lie about the thefts, the defendant claimed that Jones had originally proposed the scheme. The defendant conceded that he pocketed some of the stolen money, but maintained that most was used to pay legitimate expenses of his

trucking businesses. The defendant acknowledged that he had "made a mistake" and apologized to his family and the victim of the crime.

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 with a presumption that 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); see State v. Jones, 883 S.W.2d 597 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

Among the factors applicable to probation consideration are the circumstances of the offense, the defendant's criminal record, social history and present condition, and the deterrent effect upon and best interest of the defendant and the public. State v. Grear, 568 S.W.2d 285 (Tenn.1978). Especially mitigated

or standard offenders convicted of Class C, D or E felonies are presumed to be favorable candidates "for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). There is no such presumption for Class B felons. Tenn. Code Ann. § 40-35-102(6). With certain statutory exceptions, none of which apply here, probation must be automatically considered by the trial court if the sentence imposed is eight years or less. Tenn. Code Ann. § 40-35-303(a). The ultimate burden of establishing suitability for probation, however, is upon the defendant. Tenn. Code Ann. § 40-35-303(b).

The defendant, 45 years of age at the time of the sentencing hearing, is divorced and is the father of two minor children. Employed as a car salesman at the time of sentencing, he expressed a willingness to make restitution. The defendant is a high school graduate who withdrew from college only fourteen credit hours short of a degree in business management. A professional golfer from 1979-83, the defendant is in good physical condition. While admitting to experimental use of marijuana and cocaine, the defendant otherwise denied any history of drug or alcohol abuse. He has no prior criminal record.

Due to the civil judgment in favor of DeRoyal, the presentence report classified the defendant as a medium risk for probation. The report suggested that the defendant would have enough discretionary income to make payments of several hundred dollars per month toward restitution.

At the conclusion of the hearing, the trial court ruled as follows:

> [B]etween one and two million dollars were taken from the corporation. And from the perspective of a trial judge, that is a great financial loss to a corporation that is doing well. . . . It is striking to this court to understand that this scheme appeared over a four-and-a-half-year period. It was calculated. It was well planned. It was not

> an accidental shoplifting. That even the leniency of the court was planned on to begin with . . . . [T]he court thinks that confinement is necessary to protect–to avoid depreciating the seriousness of the offense and–as well as an effective deterrence to others. . . . The defendant admitted in several instances to lying; that is, in addition to admitting being a thief. The only problem that seems to exist in this record and the presentence investigation is whether the defendant is a petty thief or a master thief. I think the one to two million settled that, at least in my view. . . . [A]ll of these require the imprisonment of the defendant for his own best interest, and especially for the protection of the public.

While an eight-year sentence does not disqualify the defendant from probation, he is not presumed to be a favorable candidate for alternative sentencing because he was convicted of a Class B felony. Tenn. Code Ann. § 40-35-102(6). Confinement is often necessary to avoid depreciating the seriousness of an offense or to provide a deterrent to others likely to commit a similar offense. Tenn. Code Ann. § 40-35-103(1)(B). For the denial of an alternative sentence on that basis, "the nature of the offense must generally outweigh all factors favoring a sentence other than confinement." State v. Bingham, 910 S.W.2d 448, 454 (Tenn. Crim. App. 1995); see State v. Hartley, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991). The record here supports the trial court's conclusion that confinement is necessary to provide deterrence to others and to avoid depreciating the seriousness of the defendant's offense. The defendant orchestrated a scheme to steal over one million dollars from a corporation over a four-and-a-half-year period. The evidence showed that the defendant most likely initiated the scheme and certainly reaped an extraordinary financial benefit. The theft of over one million dollars is a "serious" offense for which confinement is appropriate.

Moreover, a lack of candor may militate against a grant of probation. State v. Bunch, 646 S.W.2d 158 (Tenn. 1983). The evidence established that

Jones received a much smaller portion of the proceeds of the theft. Yet, the defendant claimed that it was Jones' idea. Moreover, audio tapes indicated that the defendant developed a contingency plan for leniency from the courts and counseled Jones to lie about the source of the money. Finally, the defendant perjured himself throughout the course of the civil litigation. In our view, the evidence supported the trial court's finding that the defendant's conduct warranted incarceration.

Accordingly, the judgment of the trial court is affirmed.

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Gary R. Wade, Presiding Judge

CONCUR:

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David H. Welles, Judge

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David G. Hayes, Judge