IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1995

FILED

March 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9504-CR-00119
Appellee	)	
	)	BLOUNT COUNTY
vs.	)	
	)	Hon. D. Kelly Thomas, Jr., Judge
KARI FINCHUM,	)	
	)	(Fac. of delivery of less than
Appellant	)	one-half gram of cocaine)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Kari Finchum, appeals from a two year sentence imposed by the Circuit Court of Blount County following her guilty plea to one count of facilitating the delivery of less than one-half gram of cocaine.[1] The trial court ordered the appellant to serve fifteen days of her sentence in the Blount County Jail with the remainder of the sentence to be served on supervised probation. The appellant contends that the trial court erred by denying her a sentence of total probation.

After a review of the record, we affirm the judgment of the trial court.

I. Factual Background

The evidence at the sentencing hearing revealed that the appellant was a twenty year old single parent of a two year old child. Although she has no convictions as an adult, she was adjudicated unruly as a juvenile and placed on probation. Within three months of this adjudication, the appellant was found to be in violation of her probation and was sent to Johnson Girls Group Home. Additionally, the appellant has a lengthy history of involvement with controlled substances. The appellant began smoking marijuana and using cocaine at the age of fifteen when she became involved with John Russell, the father of her child.[2] At age sixteen, the appellant entered a substance abuse program. While

[1]The indictment charged the appellant with three drug offenses: Count (1) possession of under twenty-six grams of cocaine with intent to sell or deliver; Count (2) sale of under twenty-six grams of cocaine; and Count (3) delivery of under twenty-six grams of cocaine. On November 8, 1994, she entered a guilty plea to facilitating the delivery of less than one-half gram of cocaine, a lesser included offense of Count (3) of the indictment.

[2]The record indicates that John Russell introduced the appellant to drugs and continued to supply her with drugs following her conviction in the instant

in treatment, she remained sober. However, once released, she refused to attend the meetings recommended as a part of her rehabilitation and within months, returned to her former habits involving marijuana and cocaine abuse. The appellant admitted that, since her arrest on the instant charges, she has smoked marijuana approximately "six or seven times," although she denies using cocaine. Moreover, by her own admission, the appellant has a history of associating with those involved in the unlawful use and delivery of controlled substances. This is evidenced by her relationship with John Russell, her two co-defendants in this case,[3] and Kevin Chaney, her most recent boyfriend.[4] The record indicates that Chaney has a history of both marijuana and cocaine involvement and has been convicted in the Circuit Court of Blount County. The appellant maintained that she no longer intends to associate with this crowd.

The appellant testified that, since November 21, 1994, she has been employed full-time with Sew Fine where she earns five dollars an hour. She also stated that she is involved in various substance abuse programs. Specifically, she claimed that she attends the REBOS program three days a week, Alcoholics Anonymous two days a week, and meetings at the University of Tennessee Hospital one day a week.

In denying total probation, the trial court simply stated, "You would be an excellent candidate for immediate probation were it not for the fact that you persisted in using a controlled substance even after you were arrested and charged with violating the law involving controlled substances. And that can't be approved, that kind of behavior." The trial court, pursuant to the plea agreement,

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case.

[3]The appellant's two co-defendants also entered guilty pleas.

[4]The appellant stated that, at the time of the hearing, she was no longer involved with Chaney.

sentenced the appellant to two years as a range I offender of a class D felony. Regarding the manner of service, the court ordered that the appellant serve fifteen days of periodic confinement with the remainder of the sentence on supervised probation.[5]

II. Denial of Probation

The appellant contends that the trial court erred by not imposing a sentence of total probation. When a challenge is made to the manner of service of a sentence, it is the duty of this court to conduct a *de novo* review with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d)(1990). This presumption only applies, however, if the record demonstrates that the trial court properly considered relevant sentencing principles. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The trial court denied total probation because of the appellant's continued use of marijuana after her arrest. The trial judge's findings are insufficient to establish that he considered all relevant sentencing principles. Therefore, we are unable to afford the presumption of correctness to the court's determination.

A defendant is presumed to be a favorable candidate for alternative sentencing if three conditions are met. First, the defendant must be an especially mitigated or standard offender. Tenn. Code Ann. § 40-35-102(6)(1994 Supp.). Second, the defendant must be convicted of a class C, D, or E felony. Id. Finally, the defendant must not fall within the parameters of Tenn. Code Ann. § 40-35-102(5)(1994 Supp.). This means that the defendant cannot have a criminal history evincing either "clear disregard for the laws and

[5]The trial court permitted the "fifteen days" to be served on weekends so as not to interfere with the appellant's employment.

morals of society" or "failure of past efforts at rehabilitation." Id. The appellant, a first time offender, was convicted of a class D felony. Thus, the presumption applies. Moreover, an appellant is eligible for probation if the sentence imposed is eight years or less and is not statutorily prohibited. Tenn. Code Ann. § 40-35-303(a) (1994 Supp.). Because the appellant was sentenced to a term of two years and because she was not convicted of a crime enumerated in Tenn. Code Ann. § 40-35-303(a), the appellant is statutorily eligible for total probation.

The appellant's argument that "there is [a] presumption in favor of probation" is misplaced. While the appellant is entitled to the statutory presumption of alternative sentencing, the appellant has the burden of establishing her suitability for total probation. Tenn. Code Ann. § 40-35-303(b) (1994 Supp.); State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995) (emphasis added). To meet this burden, the appellant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." Bingham, 910 S.W.2d at 456.

The following factors shall be accorded weight when deciding the defendant's suitability for probation: (1) "the nature and [circumstances] of the criminal conduct involved," Tenn. Code Ann. §40-35-210(b)(4) (1990); (2) the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime, Tenn. Code Ann. § 40-35-103(5)(1990); (3) whether a sentence of full probation would unduly depreciate the seriousness of the offense, Tenn. Code Ann. § 40-35-103(1)(B) (1990); and (4) whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes, Tenn. Code Ann. § 40-35-103(1)(B) (1990). See Bingham, 910 S.W.2d at 456.

Upon *de novo* review, we conclude that, the appellant has failed to

establish her suitability for total probation. Considering the evidence presented at the sentencing hearing, we conclude that previous efforts to rehabilitate the appellant have failed. This finding alone is sufficient to deny total probation. See State v. Jeffrey Dana York, No. 01C01-9412-CC-00410 (Tenn. Crim. App. at Nashville, June 28, 1995). Given the failure of past efforts at rehabilitation, the appellant's continued drug use, and her association with known drug users, the appellant's suitability for total probation is questionable. However, although not suited for total probation, the appellant remains a favorable candidate for some form of alternative sentencing. The trial court imposed a two year sentence of split confinement requiring that the appellant only serve fifteen days on weekends in the county jail. Under the facts presented, this sentence is most lenient. We conclude that the appellant would benefit from such sentence. Accordingly, the judgment of the trial court is affirmed.

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David G. Hayes, Judge

CONCUR:

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William M. Barker, Judge

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Jerry L. Smith, Judge