IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9512-CC-00412**
	)	
Appellant,	)	
	)	
	)	**GILES COUNTY**
VS.	)	
	)	**HON. WILLIAM B. CAIN**
SHERRY HAYNES,	)	**JUDGE**
	)	
Appellee.	)	(Sentencing)

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

FOR THE APPELLEE:

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OPINION FILED _____

REVERSED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The State of Tennessee appeals from a judgment of the trial court which allowed the Defendant to serve her four-year sentence for vehicular homicide and vehicular assault in the Community Corrections Program. We reverse the trial court's judgment and remand this case for further sentencing proceedings.

The Defendant was indicted for one count of vehicular homicide as a result of intoxication[1] and two counts of vehicular assault.[2] Pursuant to a plea agreement, she entered pleas of nolo contendere to one count of vehicular homicide and one count of vehicular assault in exchange for the State's recommendation that she be sentenced as a Range I standard offender to a term of four years for the vehicular homicide and a concurrent term of two years for the vehicular assault. The manner of service of the sentence was left to the discretion of the trial court, although the plea agreement specifically included the understanding that the State would oppose probation. The trial court accepted and approved the plea agreement and, after conducting a sentencing hearing, ordered the Defendant's sentence to be served in community corrections. It is from this judgment of the trial court that the State appeals.

When the State 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. § 40-35-402(d). This presumption is "conditioned upon the affirmative showing in the

[1]Tenn. Code Ann. § 39-13-213.

[2]Tenn. Code Ann. § 39-13-106.

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).

On May 17, 1994, the Defendant was driving an automobile which ran off the road and struck a tree. One passenger was killed and at least two passengers were seriously injured. The Defendant, who was also seriously injured in the accident, had a blood alcohol level of .18 percent. The victim who was killed was the Defendant's former step-father. The Defendant's husband and her minor child were seriously injured.

At the time of sentencing, the Defendant was thirty-two years old, married and had two minor children. Her formal education ended with the seventh grade and her employment history was sporadic. The presentence report reflects approximately five previous convictions for public intoxication, three convictions for disorderly conduct, three convictions for DUI, one driving on a revoked license and one registration violation.

At the sentencing hearing, the Defendant admitted that she had had a problem with alcohol, which is obvious from her record. She apparently completed a thirty-day

in-patient rehabilitation program in 1992, but admitted that she continued to drink thereafter. She testified that she no longer drinks, although she admitted to consuming alcoholic beverages a few times since the accident which precipitated the charges in the case sub judice. She testified that she believes she needs further treatment for her alcoholism. Although the Defendant testified that she had attended some Alcoholics Anonymous meetings, she was unable to convey to the judge much information about the AA program of treatment.

Although this issue was not argued by the State at the sentencing hearing or addressed by the trial court, we first note that a person who commits a violent crime is not generally eligible for sentencing pursuant to the Community Corrections Act. Tenn. Code Ann. § 40-36-106(a)(3); State v. Birge, 792 S.W.2d 723, 725 (Tenn. Crim. App. 1990). As the state argues, this court has held that vehicular homicide does not qualify as a "non-violent felony offense" and thus, a person convicted of vehicular homicide is not generally eligible for sentencing under the Community Corrections Act. State v. Robert Glen Grissom, III, No. 02-C-01-9204-CC-00076, Henderson County, slip op. at 6 (Tenn. Crim. App., Jackson, Mar. 10, 1993). This court has come to the same conclusion regarding the offense of vehicular assault. State v. Vickie C. Evans, No. 03-C-01-9112-CR-00411, Jefferson County, slip op. at 2, (Tenn. Crim. App. Knoxville, Apr. 22, 1992).

Even though a defendant may have been convicted of a "violent" offense, that person may be eligible for a community correction sentence if he or she is one "who would be usually considered unfit for probation due to histories of chronic alcohol, drug abuse, or mental health problems, but whose special needs are treatable and could be served best in the community rather in a correctional institution." Tenn. Code Ann. §

40-36-106(c).[3] Because the trial judge made no findings on the record concerning his determination in this regard, we cannot determine if the court found her to be eligible because of her history of chronic alcohol abuse and that her special needs could be best treated and served in the community rather than in a correctional institution.

The trial court clearly found the Defendant was not a suitable candidate for probation when he stated to her counsel "you can forget ordinary probation." The trial judge noted that attempts at rehabilitation had failed the Defendant in the past and stated "I'm not going to order anybody into a rehabilitation program. . . if she didn't pick that up the first time, I have grave doubts that she is going to pick it up now and she will probably be back up here. If she is, she is going to the penitentiary. She has not made the first effort to get to the source of her real problem, which is alcoholism. Until she does nobody else can do anything at all for her." After ordering that the Defendant's sentence would be served in the community corrections program, the trial judge stated "that's probably a mistake, General. I have made them before."

The Defendant is eligible for a community corrections sentence only if her "special needs are treatable and could be served best in the community rather than in a correctional institution." Tenn. Code Ann. § 40-36-106(c). The trial judge appears to have determined that he did not believe the Defendant was susceptible to treatment for her alcohol abuse. This finding is inconsistent with his decision to place her in community corrections. Simply stated, if this Defendant's "special needs" are not "treatable" then she is not eligible for community corrections.

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[3]Before an offender may be sentenced to Community Corrections pursuant to Tenn. Code. Ann. § 40-36-106(c), the offender must be eligible for probation. State v. Staten, 787 S.W.2d 934, 936 (Tenn. Crim. App. 1989). A defendant is eligible for probation if not convicted of a few excluded offenses and if sentenced to eight (8) years or less. Tenn. Code Ann. § 40-35-303(a).

The Criminal Sentencing Reform Act of 1989 provides that the record of the sentencing hearing must include specific findings of fact upon which application of the sentencing principles is based. Tenn. Code Ann. § 40-35-209(c). The purposes of the sentencing laws and certain sentencing considerations are set forth in statute. Tenn. Code Ann. § 40-35-102,-103. The purposes and goals of the community corrections program are also set forth in statute. Tenn. Code Ann. § 40-36-103,-104.

Because the trial judge did not make any such findings of fact, because the record does not demonstrate that the trial court considered the applicable sentencing laws and principles, and because the trial judge did not make findings relative to the Defendant's eligibility for a community corrections sentence, we reverse the judgment of the trial court and remand this case for resentencing.

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DAVID H. WELLES, JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

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JERRY L. SMITH, JUDGE