IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED
December 16, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	
	*	**No. 03C01-9903-CR-00100**
Appellee,	*	
	*	**SULLIVAN COUNTY**
vs.	*	
	*	**Hon. Phyllis H. Miller, Judge**
STEPHEN CRAIG DILLARD,	*	
	*	**(Sentencing)**
Appellant.	*	

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OPINION FILED: _____

AFFIRMED

David G. Hayes, Judge

OPINION

The appellant, Stephen Craig Dillard, appeals the sentencing decision of the Sullivan County Criminal Court. In November 1998, the appellant entered *nolo contendere* pleas to vehicular homicide, vehicular assault, and driving on a revoked license. Pursuant to the plea agreement, the trial court imposed an eight year sentence for class B vehicular homicide, a two year sentence for class D vehicular assault, and a six month sentence for driving on a revoked license. The manner of service of the sentences was to be determined by the trial court. After a sentencing hearing, the trial court ordered the sentences to be served concurrently in the Tennessee Department of Correction. The appellant appeals the trial court=s denial of an alternative sentence.

After review of the record, we affirm.

Background

The proof relied upon by the State at the guilty plea hearing revealed that, on December 27, 1996, the appellant was the driver of a vehicle in which Tommy Brian Helton and Danny Lynn Jessee were passengers. The vehicle left the roadway and overturned. Jessee died as a result of injuries sustained in the car crash and Helton suffered abrasions and a fractured scapula. Helton also lost use of his arm for one month, during which time he was unable to work. The cause of the fatal crash offered by the appellant to law enforcement officers at the time of the incident was that he Aswerved@ to miss an animal that had run onto the road. The appellant later admitted that he had consumed five beers during the day. The deputy investigating the incident reported that Athe subject was not honest or cooperative with

investigators@ and that Athe subject would not submit to an interview. . . following his release from the hospital.@

The offense occurred at approximately 8:30 pm. At 9:58 pm, a blood sample was taken from the appellant as part of the medical protocol of the Holston Valley Hospital and Medical Center. The analysis of this sample revealed a serum blood alcohol content of .076 percent. The medical proof would have established that, at the time of the offenses, the appellant=s blood alcohol level was .089 percent. At 12:55 a.m., a deputy with the Sullivan County Sheriff=s Office obtained another blood sample from the appellant. This sample was sent to the Tennessee Bureau of Investigation for analysis. The analysis revealed Ameprobamate being in the system, carisoprodol . . ., diazepam, and nordiazepam.@ This laboratory analysis also revealed the presence of cocaine and marijuana metabolites in the sample, however, these could not be confirmed without either a urine sample or additional blood. A qualitative drug screen completed at the hospital as part of a general diagnostic procedure confirmed, however, the presence of tranquilizers, meprobamate, hydro-carisoprodol, and benzodiazepems in the appellant=s system.

The presentence report indicates that, at the time of the offense, the appellant was thirty-four years old, divorced, and living with his parents. The appellant=s prior criminal history consists of convictions for DUI, possession of drugs, and possession of drug paraphernalia. The appellant reported to the probation officer that, although he is in good health physically, Ahis mental health is poor@ due to Aanxiety and depression.@ He conceded that he is not currently under a doctor=s care and is not prescribed any medications. The appellant reported Amoderate use of alcohol@ and prior use of marijuana and Valium. He contends that his last use of alcohol was December 1, 1998; he quit using marijuana in 1996; and he last used Valium in 1995. The appellant denied any other drug use, although the record received from Woodridge indicated that the appellant admitted that he had used cocaine in the

past. The appellant was treated at Woodridge Hospital from December 18 through December 21, 1998. At the time of his discharge, the appellant was declared Apsychiatrically stable.@ Also introduced into evidence were records from his treatment at the Woodridge Hospital. These records confirm the information provided in the presentence report.

The presentence report also indicates that the appellant was instructed to meet with the pre-sentence officer on November 30, 1998. On December 1, he left a message for the officer that he had no way to get to the meeting. The appellant failed to leave a telephone number where he could be contacted. The appellant was eventually arrested for failing to appear. Finally, the report indicates that the appellant=s Acurrent employment is unknown.@ The appellant indicated that his last employment was at 4 Wheels Unlimited. The manager of 4 Wheels Unlimited stated that the appellant left their employment by mutual agreement after being asked to resign due to attendance problems and the appellant=s lack of Amechanical ability.@ The appellant reports that, prior to his incarceration, he was employed by Ernie=s Alignment, a business owned by his stepfather.

The trial court, in an extensive and thorough recitation of the facts and application of the sentencing law, denied the appellant any form of alternative sentencing. Specifically, the trial court concluded:

> Now, on Counts II and III, you=re presumed to be a favorable candidate for alternative sentencing. However, in Count I, you=re not. . . . . Number one . . . you have a previous history of criminal convictions and criminal behavior . . . . I think you have remorse that, that you=re here. That this report states that you report feeling guilty, hopeless and helpless. I think it=s probably brought on by the sentence that you face. . . . Especially considering the fact that you didn=t cooperate with the probation department. Now, . . . work history. It=s not an excellent . . . work history. . . It was not until that you were arrested for failing to appear in court, that you had any input at all into the presentence report. . . . [T]here=s been no expression of remorse to the victim=s family. According to the officer, he did not believe that you were honest or cooperative. . . . [A]lternative sentencing has been tried. Split confinement has been tried. . . And that didn=t deter you from going out and continuing to engage in criminal behavior. . . . . Mental

> health was probably brought on by having been convicted of these offenses. . . . [Y]ou=re not presumed to be a favorable candidate for alternative sentencing. . . . I find that these are B the vehicular homicide, the vehicular assault, are violent offenses. And ordinarily you wouldn=t even be considered for community corrections.[1] However, you could be if you had demonstrated that you have special needs . . .I find that you have not . . . . So, I=m denying all forms of alternative sentencing . . . .

Analysis

Again, the appellant contends that the trial court did not properly consider the statutory principles of sentencing in this case in its denial of any form of alternative sentence. Specifically, he argues that Ahis minimal prior criminal history and his history of substance abuse make him more amenable to imposition of some form of alternative sentence where his problems may be addressed . . . .@ Additionally, he avers that the trial court should have considered Ahis earning capacity, readily available employment with his stepfather, various job skills, and ability to pay restitution to the victims in ascertaining his amenability for some form of alternative sentencing, including split confinement with work release.@

When the sentencing court properly considers the relevant sentencing considerations, this court conducts a *de novo* review with the presumption that the

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[1]A person who commits a violent offense is not generally eligible for sentencing pursuant to the Community Corrections Act. Tenn. Code Ann. ' 40-36-106(a)(3) (1998 Supp.). This court has held that neither vehicular homicide nor vehicular assault qualify as a Anon-violent felony offense@ and thus, a person convicted of vehicular homicide or vehicular assault is not generally eligible for sentencing under the Community Corrections Act. See State v. Braden, 867 S.W.2d 750, 765 (Tenn. Crim. App. 1993); State v. Sherry Haynes, No. 01C01-9512-CC-00412 (Tenn. Crim. App. at Nashville, Sept. 13, 1996); State v. Robert Glen Grissom III, No. 02C01-9204-CC-00076 (Tenn. Crim. App. at Jackson, Mar. 10, 1993).

Although convicted of a violent offense, a defendant may be eligible for a community corrections sentence if he or she is one, who although statutorily eligible for probation, A 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 than in a correctional institution. Tenn. Code Ann. ' 40-36-106(c). The appellant alleges a history of substance abuse and mental health problems. The evidence presented at the sentencing hearing reveals that the appellant admits to prior substance abuse but now only occasionally consumes alcohol and has not used illegal drugs for several years. Moreover, the appellant received mental health treatment for approximately three days, after which time the appellant was determined to be Apsychiatrically stable.@ The evidence does not preponderate against the trial court=s conclusion that the appellant Ado[es] not have special needs that are treatable, or even that [the appellant] [has] special needs, that=s best treatable in the community.@

determination made by the trial court is correct. Tenn. Code Ann. ' 40-35-401(d) (1997); State v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991). Although the presumption favoring alternative sentencing applies to the offenses of vehicular assault and driving on a revoked license, because the appellant was convicted of a Class B felony, vehicular homicide by intoxication, the presumption of an alternative sentence is not applicable to this offense. See Tenn. Code Ann. ' 40-35-102(6) (1997). Moreover, the appellant bears the burden of showing that the sentence imposed by the trial court is improper. See Tenn. Code Ann. ' 40-35-210(b)(3) (1998 Supp.).

Alternative sentencing options may be denied if it is shown that the appellant has a history of criminal conduct, that the appellant has not been rehabilitated with less restrictive methods, or that confinement is necessary to avoid depreciating the seriousness of the offense. See Tenn. Code Ann. ' 40-35-103(1)(A)-(C) (1998 Supp.). Additionally, the potential or lack of potential for rehabilitation of a defendant should be considered in determining whether he should be granted an alternative sentence. Tenn. Code Ann. ' 40-35-103(5).

In the present case, we find that the trial court considered all relevant evidence and so stated on the record. Moreover, as the trial court found, the evidence in the presentence report preponderates against the appellant=s factual allegations in this appeal. Specifically, the record reflects (1) a prior history of criminal offenses involving substance abuse; (2) no present substance abuse or mental health problem necessitating placement in community corrections; (3) failure of previously imposed suspended sentences; (4) the appellant=s failure to appear at initial probation hearing in this matter; and (5) the appellant=s poor employment history. Additionally, the record indicates the appellant=s lack of cooperation and honesty with authorities and lack of remorse for the victims.

After review of the issues before us, we conclude that the appellant has failed to establish that the sentences imposed by the trial court were erroneous. Sentencing Commission Comments, Tenn. Code Ann. ' 40-35-401(d) (1990); Ashby, 823 S.W.2d at 169. Accordingly, the judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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ALAN E. GLENN, Judge

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JOE H. WALKER, III, Special Judge