

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 13, 2010

STATE OF TENNESSEE v. DARRIN MOSBY

**Direct Appeal from the Criminal Court for Shelby County
No. 08-04742 John T. Fowlkes, Jr., Judge**

No. W2009-02575-CCA-R3-CD - Filed January 24, 2011

THOMAS T. WOODALL, J., concurring in part and dissenting in part.

In this case, I agree with the majority opinion to the extent that it remands the case for reconsideration of the length of the sentences. However, I disagree that the case, upon remand, should include any analysis concerning a possible alternative sentence.

On appeal, the defendant argues that the trial court should have suspended his sentence and placed him on probation. I have thoroughly reviewed both the defendant's testimony and the arguments of his counsel at the sentencing hearing. There is nothing in either to indicate that the defendant sought any alternative sentencing at the trial court level. The entire emphasis was upon the length of the proposed sentences. The petition for acceptance of the plea of guilty implies to me that the defendant understood that whatever sentence was imposed would be served at "TDOC." There is nothing in the record to indicate that the defendant expected a sentence other than incarceration when he pled guilty. "Probation shall be automatically considered by the [trial] court as a sentencing alternative for eligible defendants . . . [but] the burden of establishing suitability for probation rests with the defendant." From what I can discern from the record, defendant not only did not put on any proof to meet this burden, he did not even request probation in the trial court.

Accordingly, I would hold that the defendant has waived on appeal any consideration that the trial court erred by not granting probation.

THOMAS T. WOODALL, JUDGE