IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

# STATE OF TENNESSEE v. CINDY MASSENGILL

**Appeal from the Criminal Court for Union County**
**No. 2877 E. Shayne Sexton, Judge**

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**No. E2005-02536-CCA-R3-CD - Filed August 15, 2006**

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The defendant, Cindy Massengill, appeals from the Union County Criminal Court's denial of alternative sentencing. The record supports the court's order, and we affirm.

**Tenn. R. App. P. 3; Judgments of the Criminal Court are Affirmed.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON and ROBERT W. WEDEMEYER, JJ., joined.

Tom Eikenberry, Knoxville, Tennessee, for the Appellant, Cindy Massengill.

Paul G. Summers, Attorney General & Reporter; Cameron L. Hyder, Assistant Attorney General; William Paul Phillips, District Attorney General; and Amanda Cox, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

On January 28, 2005, the defendant pleaded guilty to aggravated burglary, assault, and simple possession of marijuana. The plea agreement with the state provided for an agreed sentence on the aggravated burglary of four years at 30 percent, as a Range I standard offender, and 11 months, 29 days at 75 percent on the misdemeanor assault and simple possession charges. The manner of service was reserved for the trial court's determination.

From the record, we glean that the assault offense occurred on December 12, 2004, with Steven (Shane) Coffey and Regina Hubbs-Coffey being the named victims; the marijuana possession offense occurred on December 13, 2004[1]; the aggravated burglary with intent to commit

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[1] The arrest warrant in the record lists this offense as introduction of drugs into a correctional facility. The officer-affiant's application for the warrant recites that the defendant was arrested on December 13, 2004, at approximately 2:30 a.m. and that when she was searched at the jail, two hand rolled marijuana cigarettes were discovered (continued...)

assault offense occurred on December 21, 2004, again with Steven (Shane) Coffey and Regina Hubbs-Coffey being the named victims.

The presentence investigation report includes the following statement by the defendant:

> My mother let my nephew go with his father. He dropped him off and left him at his mothers [sic] with Damion knowing how Damion was toward Isaac. Isaac was then bribed by Stevens [sic] 10 year old nephew and tried to rape him. My nephew told the family about it. He got mad. He left mad and hadn't been to see his son since. So like ediots [sic] we[2] took the matter into our own hands.

(Footnote added). From his investigation, the presentence officer provided the following summary and overview of the defendant's situation:

> Before the court stands 23 year old Cindy Massengill convicted of agg. burglary, assault and simple possession. The offender is a sporatically [sic] employed, high school dropout, in denial of a serious drinking and drug problem. She grew up in an abusive home and basically raised herself. She has deep seeded [sic] resentment and anger toward her parents and others that have hurt her in the past. She cannot cope with these feelings so she withdraws into drink and drugs to cope with her life. She is very protective of her sister and her nephew, Isaac. She took revenge on Isaac's father, Steven Shane Coffey over allowing Isaac into the home of child who is abusive to other children.

The victim-impact statements in the presentence report reveal that Regina Hubbs-Coffey was pregnant at the time of the forcible entry, and she was physically assaulted. Baby furniture and accessories were intentionally damaged during the affray. Mr. Coffey was beaten about his head and torso with some type of metal object. Both victims expressed continuing anxiety and were fearful of future attacks by the defendant.

The trial court conducted, but did not conclude, a sentencing hearing on May 27, 2005. The defendant testified, and her testimony was somewhat disjointed and rambling. She spoke of Mr. Coffey impregnating her sister when her sister was 15 years old. She said that Mr. Coffey was "sneaking us out and buying us alcohol." The defendant was emphatic that Ms. Coffey was "not

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[1](...continued)
in her possession.

[2] The defendant's sister, Jamie Massengill, Preston Werneth, and Elijah Ogle were prosecuted as co-defendants and entered guilty pleas to the aggravated burglary and assault charges.

a victim at all"; rather, Ms. Coffey was "pushing this on [the defendant's] sister out of maybe jealousy." She said the purpose in going to the Coffey's residence was "[t]o kick Steven's hind end" because the defendant believed that Mr. Coffey's 11-year-old nephew had sexually abused the defendant's four-year-old nephew. The defendant claimed that she was working two jobs and hoped to be hired by Sea Ray. She insisted that she had been sober for the past two months and had quit smoking "weed."

The trial court took the matter under advisement, and sentencing was continued until June 3, 2005, at which time the defendant and her sister were absent. The transcript reflects that a woman in the audience addressed the court and stated, "I'm [the defendant's] best friend, and I told her I'd be here at 1:00. She couldn't be here at 1:00." The court noted that co-defendant Werneth was present for sentencing, and the court remarked, "If [the defendant and her sister] don't care enough about it, conditional forfeiture and capias, motion for probation is held abandoned, and they're both going to jail as soon as they get here." Evidently, during co-defendant's Werneth's sentencing, the defendant and her sister made an appearance, and the sister spoke of having trouble securing transportation to court. The court declined to consider probation or alternative sentencing and imposed a four-year incarcerative sentence.

Thereafter, the defendant and her sister, who were in custody, filed a motion asking the court to reconsider a probationary sentence. The trial court held a hearing on July 21, 2005; it acquiesced in the defense request and scheduled a hearing for October 7, 2005. Before the July 21 hearing concluded, the trial court addressed the defendant's sister and ordered that her bail be increased to $40,000 and because of her pregnancy ordered that she "be subject to drug screens twice a week." Regarding the defendant, prosecution counsel alerted the court that the defendant had caused "significant problems" in the jail, including throwing a razor at one of the officers. The court increased the defendant's bail to $60,000 and ordered that she have no contact with Union County. The state inquired about drug screens for the defendant, and the court stated that the defendant would not be subject to screening.

On October 7, 2005, the court conducted further proceedings. The defendant had posted the increased bond and had been released shortly after the July 21 hearing. The state complained that the defendant never contacted the Union County supervisors to learn how to report to Sevier County, and the state pointed out that the defendant had "picked up a new charge." The state offered the testimony of probation officer Paul Gore. He believed that the court had ordered drug screens for both the defendant and her sister. He told the court that neither woman had reported to him for any instructions or supervision. Probation officer Lee Ann Skeens testified that she was in court when "the Judge ordered us to coordinate drug testing with the Sevier County probation officer." Neither woman ever contacted Ms. Skeens.

The trial court expressed its frustration and displeasure with both women. "It's just crystal clear that no matter if I – if I told you to do the least little thing, you wouldn't do it; you would find a reason to not do it. So, you all have – you're the author of your own predicament." The court found that efforts at rehabilitation would be useless, and it was "very concerned" about

the defendant's "propensity for violence," particularly if she were granted an alternative sentence. The court also noted she admitted use and abuse of alcohol and drugs for many years, and it pointed out the defendant's troubling criminal history, which included a bomb threat as a juvenile, possession of drug paraphernalia, possession of blue lights, disorderly conduct and contributing to the delinquency of a minor. Records faxed to the clerk's office indicated that the defendant had been arrested in Sevier County for DUI on September 14, 2005. At one point, the defendant addressed the court and complained that the court had not ordered her to submit to drug screening or to report to a probation officer. The trial court conceded, on reflection, that the defendant was correct regarding the drug testing.

The trial court concluded that although the defendant was presumptively a good candidate for alternative sentencing, the presumption had been overcome. "There's simply no . . . way," the trial judge said, "that I will allow this defendant to remain free in society, because she is a danger in my opinion."

Now on appeal, the defendant claims that the trial court should have awarded her an alternative sentence. We disagree.

When there is a challenge to the manner of service of a sentence, it is generally the duty of this court to conduct a de novo review of the record with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (2003). This presumption, however, 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). The burden of showing that the sentence is improper is upon the appellant, and in the event the record fails to demonstrate the required consideration by the trial court, review of the sentence is purely de novo. *Id*. If appellate review reflects the trial court properly considered all relevant factors and its findings of fact are adequately supported by the record, this court must affirm the sentence, "even if we would have preferred a different result." *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In making its sentencing determination, the trial court, after determining the range of sentence and the specific sentence, then determines the propriety of sentencing alternatives by considering (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors; (6) any statements the defendant wishes to make in the defendant's behalf about sentencing; and (7) the potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-210(a), (b), 40-35-103(5) (2003); *State v. Holland*, 860 S.W.2d 53, 60 (Tenn. Crim. App. 1993).

The defendant in this case is a standard Range I offender convicted of a Class C felony. *See* Tenn. Code Ann. § 39-14-403 (2003). As such, she is presumed to be a favorable candidate for alternative sentencing options, "in the absence of evidence to the contrary." Tenn.

Code Ann. § 40-35-102(6) (2003). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." *Id.* § 40-35-102(5). A defendant's presumption of favorable candidacy for alternative sentencing may be rebutted; not all offenders who enjoy the presumption receive an alternative sentence. Rather, sentencing issues are determined by the facts and circumstances presented in each case. *State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Although the defendant does not specifically mention probation on appeal, we note that she was statutorily eligible to serve a probated sentence. *See* Tenn. Code Ann. § 40-35-303(a) (2003). However, the determination of entitlement to full probation necessarily requires a separate inquiry from that of determining whether a defendant is entitled to a less beneficent alternative sentence. *See State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). A defendant is required to establish her "suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* Tenn. Code Ann. § 40-35-303(b) (2003); *Bingham*, 910 S.W.2d at 455-56. A defendant seeking full probation bears the burden of showing that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990), *overruled on other grounds by Hooper*, 29 S.W.3d at 9-10.

The trial court had no evidence before it that allowing the defendant to serve a suspended sentence would serve the ends of justice and the best interests of both the public and the defendant. Likewise, we detect no such proof in the record, and we hold that the defendant has failed to carry her burden of demonstrating suitability for full probation.

Turning to the presumption of favorable candidacy for alternative sentencing that applied to the defendant, the record supports the trial court's imposition of an incarcerative sentence. We have gone to some length in this opinion to summarize the proceedings and numerous hearings in the lower court. We have done so for two reasons. First, in fairness, the defendant is correct that she did not disregard the trial court's July 21, 2005 directives inasmuch as she was never ordered to report for drug testing. Also, the trial court did not specifically state that the defendant was required to report to Union County probation officers if she were released on bail, and because the defendant was remanded to custody at the conclusion of the July 21 hearing, the probation officers present in the courtroom evidently did not have an opportunity to speak with the defendant about such matters.

The second reason for our detailed exposition is that despite the court's initial misunderstanding about the drug testing requirement, nothing impugns the presentence officer's insightful characterization of the defendant as a sporadically employed, high school dropout, in denial of a serious drinking and drug problem. The defendant reported that her regular lifestyle included on a daily basis drinking a case of beer and smoking marijuana. She admitted drinking beer

while babysitting. Also, she said that she had been using alcohol and marijuana daily since age 15 but had never been in treatment. The defendant "expressed no desire to attend treatment or quit using[, and her] attitude is that she is tough enough to handle it and that it is not a problem for her." The defendant indicated that she had her cocaine use under control, but she occasionally took "xanax and oxy's."

With nothing to corroborate the defendant's claim of abstention from alcohol or drugs or any treatment plan in place, the defendant's admitted and chronic substance abuse undercuts any notion that she might be a good candidate for rehabilitation, and we are mindful that the trial judge is in the best position to assess a defendant's credibility and potential for rehabilitation. A defendant's potential for rehabilitation "should be considered in determining the sentence alternative." Tenn. Code Ann. § 40-35-103(5) (2003). Furthermore, it appears that the defendant's substance abuse problems act as a catalyst for impulsive behavior and inability to control anger.

Last, we note that the defendant expressed no remorse for what happened. Granted, she admitted what she had done and admitted that she exercised bad judgment, but she was not remorseful. She considered herself as protecting her nephew, and she was adamant that Ms. Coffey was "not a victim at all."

In our view and in summary, the record supports the manner of service of the sentence imposed. The defendant failed to carry her burden to show entitlement to probation, and the presumption of alternative sentencing was sufficiently rebutted in this case. The trial court thus did not err by imposing a sentence of confinement.

Accordingly, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE