IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 4, 2023 Session

STATE OF TENNESSEE v. JUSTIN DARNAY GRAVES

Appeal from the Circuit Court for Madison County
Nos. 20-330, 20-331, 20-332 Donald H. Allen, Judge

No. W2021-01476-CCA-R3-CD

In this consolidated appeal, the defendant, Justin Darnay Graves, argues the trial court erred in imposing partial consecutive sentences and ordering restitution in his three cases. After our review, we discern no reversible error in the trial court's imposition of consecutive sentences, but we determine the order of restitution was in error. Therefore, we affirm the sentences imposed by the trial court, vacate the orders of restitution and remand for entry of corrected judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part, Vacated in Part and Remanded.

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JOHN W. CAMPBELL, SR., JJ., joined.

M. Todd Ridley, Assistant Public Defender, Tennessee Public Defenders Conference, Franklin, Tennessee (on appeal); Joshua L. Phillips, Assistant Public Defender, Jackson, Tennessee (in lower court proceedings), for the appellant, Justin Darnay Graves.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Bradley F. Champhine, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

This case is the consolidated appeal of three closely-related cases against the defendant, stemming from controlled drug buys that took place in Jackson, Tennessee, in July and August 2019. In case number 20-330, the defendant was charged in a two-count

indictment with the unlawful sale and delivery of heroin on July 25, 2019.[1] In case numbers 20-331 and 20-332, the defendant was charged in separate four-count indictments with the unlawful sale and delivery of heroin and methamphetamine. The first set of offenses stemmed from a controlled drug buy that took place on August 1, 2019, and the second set of offenses stemmed from a controlled drug buy that took place on August 7, 2019.[2]

On September 15, 2021, the defendant entered a request to plead guilty in case numbers 20-331 and 20-332. The request indicated the plea was a "blind plea" but that the sentences in the two cases would run concurrently. There were also notations that the August 1st sale was for $2,100 and involved 27.95 grams of methamphetamine and 24.94 grams of heroin, and the August 7th sale was for $2,200 and involved 22.24 grams of methamphetamine and 13.99 grams of heroin. A question mark was written in the "Restitution" section of the plea request form.

At a guilty plea hearing held that same day, the State recited that had case number 20-331 gone to trial, the evidence would have shown that on August 1, 2019, Tennessee Bureau of Investigation ("TBI") agents executed an undercover controlled purchase of heroin and methamphetamine from the defendant by utilizing a confidential informant to make the purchase. Prior to the sell, the informant made a phone call to the defendant to arrange the transaction, which was recorded, and the defendant told the informant to meet at a specified location. The informant was searched for drugs and weapons, equipped with a wire, and given $2,100 to make the purchase. The informant ultimately purchased 24.94 grams of confirmed heroin and 27.95 grams of confirmed methamphetamine from the defendant for $2,100.

With regard to case number 20-332, the State recited that the evidence would have shown that on August 7, 2019, TBI agents executed another undercover controlled purchase of heroin and methamphetamine from the defendant by utilizing a confidential informant to make the purchase. Prior to the sell, the informant made a phone call to the defendant to arrange the transaction, which was recorded, and the defendant told the informant to meet at a specified location. The informant was searched for drugs and weapons, equipped with a wire, and given $2,200 to make the purchase. The informant ultimately purchased 22.24 grams of confirmed heroin and 13.99 grams of confirmed methamphetamine from the defendant for $2,200. After hearing the factual basis and advising the defendant of his rights, the trial court accepted the defendant's plea in the two cases.

[1] The appeal of this case was originally classified W2021-01476-CCA-R3-CD.

[2] The appeal of these cases was originally classified W2021-01477-CCA-R3-CD.

On September 16, 2021, the defendant entered a request to plead guilty in case number 20-330. The request indicated the plea was a "blind plea" with sentencing set for the following month, as well as a notation that the offense involved $900 worth of heroin. At a guilty plea hearing held that same day, the State recited that had the matter gone to trial, the evidence would have shown that on July 25, 2019, TBI agents executed an undercover controlled purchase of heroin from the defendant by utilizing a confidential informant to make the purchase. The State explained that prior to the sell, TBI agents "conducted a . . . recorded phone call where [the defendant] agreed to sell [the informant] some heroin[]" at a specified address. The informant was searched for drugs and weapons, equipped with a wire, and given $1,005 to make the purchase. The informant ultimately purchased 10.12 grams of confirmed heroin from the defendant for $900. After hearing the factual basis and advising the defendant of his rights, the trial court accepted the defendant's plea.

Prior to sentencing, the State filed a notice of enhancing factors and request for consecutive sentencing. With regard to enhancement factors, the State asserted that the defendant had a history of criminal convictions or criminal behavior in addition to that necessary to establish his range, and that the defendant had previously failed to comply with the conditions of a sentence involving release into the community and had committed offenses while released on bail. With regard to its request for consecutive sentencing, the State asserted that the defendant was a professional criminal who had knowingly devoted his life to criminal acts as a major source of livelihood. The defendant filed a notice of mitigating factors, asserting his "criminal conduct neither caused nor threatened serious bodily injury."

The trial court conducted a sentencing hearing for all three cases on November 23, 2021. At the hearing, the presentence report was entered into evidence, and the State also offered certified copies of the judgments against the defendant in case number 20-167, as he had not been sentenced in that case at the time the presentence report was prepared. Thereafter, the parties presented their arguments to the court regarding the sentences the court should impose. The State asked the court "to order restitution to the Tennessee Bureau of Investigation in these three cases in the amounts that they spent on these controlled buys where they paid [the defendant] money." The defendant asserted "[i]t is clear from [the defendant's] being incarcerated that he will not be able to pay fines and restitution in these matters. . . . [The defendant] will not be able to pay these fines and restitution because he will be incarcerated for the next 14 years at least under previous sentencing."

In determining the defendant's sentences, the trial court first noted that the sale and delivery convictions would merge, effectively leaving five Class B felonies for sentencing. The court observed that the defendant qualified as a Range I offender but enhanced within

the range to twelve years on each conviction based on the defendant's history of criminal convictions and criminal behavior in addition to those necessary to establish his range. Turning to the State's request for consecutive sentencing, the trial court addressed the statutory factors for consecutive sentencing and found that the defendant was: (1) an offender whose record of criminal activity is extensive and (2) a professional criminal who has knowingly devoted his life to criminal acts as a major source of livelihood. In discussing the defendant's criminal history, the court pointed out that the defendant served almost six years in prison and then committed the present offenses within a few months of his release. The court summarized that "the defendant back during that July/August of 2019 time period certainly appeared to be involved in drug trafficking, large amounts of drugs being sold by him and also possessed by him[.]" The court noted that "this is kind of a perfect example of someone who is a professional drug dealer. . . . [W]hen you look at his criminal history and . . . the offenses for which he's pled guilty and been convicted. I mean, he is a professional drug dealer within our community." The court also pointed out that in the presentence report, the defendant "'reported that he has never been employed[,]' . . . but yet he's posting various bonds and getting released from custody. . . . [I]t makes me even more convinced that he's a major drug dealer within our community."

Accordingly, the court ordered that the defendant's twelve-year sentence in case number 20-330 run consecutively to the effective twelve-year sentence in cases 20-331 and 20-332, for a total effective sentence of twenty-four years on the present cases. The court also ordered that the effective twenty-four-year sentence be served consecutively to other cases on which the defendant had already been sentenced. Namely, a six-year sentence in case 20-334(A), a one-year sentence in case 20-335, and a six year and eleven months and twenty-nine-day sentence in case 20-167. The court imposed the mandatory minimum fine in each case and ordered the defendant to pay a total of $5,200 in restitution to the TBI to compensate the agency for the costs of the controlled drug purchases. With regard to restitution, the court pointed out "that is the money that he received for his illegal drug trafficking," and "I think he has the ability to pay it because he's apparently been pretty good at selling drugs over the years up until the time he got caught in these cases, but certainly he had the ability to post some significant bonds and get released." The defendant appealed in both cases. The two appeals were consolidated and the matter is properly before this Court.

Analysis

On appeal, the defendant challenges the trial court's imposition of partial consecutive sentences and ordering restitution in his three cases. The State submits the trial court properly exercised its discretion. We discern no reversible error in the trial court's imposition of consecutive sentences but determine the trial court's order of restitution was in error.

I. Consecutive Sentencing

The defendant individually contests each of the bases the trial court used for imposing consecutive sentences and also argues that the trial court erred in imposing "an effective sentence of nearly 40 years without ever finding that such a sentence was justly deserved for non-violent drug offenses."

This Court reviews consecutive sentences imposed by the trial court under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W. 3d 682, 707 (Tenn. 2012); *State v. Pollard*, 432 S.W.3d 851, 859-60 (Tenn. 2013). The party appealing a sentence bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts. A trial court may impose consecutive sentencing if it finds by a preponderance of the evidence that one criterion is satisfied in Tennessee Code Annotated section 40-35-115(b)(1)-(7). In determining whether to impose consecutive sentences, though, a trial court must ensure the sentence is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4); *see State v. Desirey*, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995).

Tennessee Code Annotated section 40-35-115 "creates several limited classifications for the imposition of consecutive sentences." *State v. Moore*, 942 S.W.2d 570, 571 (Tenn. Crim. App. 1996). A trial court "may order sentences to run consecutively if it finds by a preponderance of the evidence that one or more of the statutory criteria exists." *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995). Pursuant to statute, consecutive sentencing is warranted when "[t]he defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood," "[t]he defendant is an offender whose record of criminal activity is extensive," or "[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high." Tenn. Code Ann. § 40-35-115(b)(1), (2), (4). In imposing consecutive sentences based upon a dangerous offender status, it is necessary that "the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." *State v. Wilkerson*, 905 S.W.2d 933, 938 (Tenn. 1995); *see also State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999) (stating that the *Wilkerson* findings that the sentences are necessary to protect the public and reasonably relate to the severity of the offenses apply only to consecutive sentences involving dangerous offenders).

As detailed above, in imposing consecutive sentences, the trial court did so based on a determination that the defendant was "a professional criminal who has knowingly

devoted [his] life to criminal acts as a major source of livelihood" and "an offender whose record of criminal activity is extensive[.]" Tenn. Code Ann. § 40-35-115(1), (2). In addition, however, after it imposed the sentence, the trial court stated:

> I do consider [the defendant] to be a dangerous offender as well. I know it's noted in the presentence investigation report he is a confirmed gang member with the Vice Lords. Apparently, he has been confirmed since 2014. I guess that's when he was in prison it was confirmed that he is a Vice Lord. So, I do consider him a dangerous offender in addition to being a professional drug dealer.

The trial court's mention of the defendant being a dangerous offender appears to be an after-thought and, given that it was not accompanied by the requisite additional *Wilkerson* findings, was not an appropriate basis for consecutive sentencing in this case. However, the two factors upon which the trial court originally relied were proper and supported by the record.

The presentence report shows that in addition to the ten convictions in the instant matter (before merger for sentencing), the defendant's record contains five other felony convictions and at least nine misdemeanor convictions. This Court has previously held that the "[c]urrent offenses may be used in determining criminal history for the purposes of consecutive sentencing." *State v. Carolyn J. Nobles*, No. M2006-00695-CCA-R3-CD, 2007 WL 677861, at *12 (Tenn. Crim. App. Mar. 7, 2007) (citing *State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992)); *see also State v. Darius Jones*, No. W2010-01080-CCA-R3-CD, 2011 WL 2162986, at *3 (Tenn. Crim. App. May 26, 2011), *perm. app. denied* (Tenn. Sept. 21, 2011). Moreover, according to the presentence report, the defendant admitted to long-term and regular use of drugs, including marijuana, cocaine, heroin, and methamphetamine. This certainly qualifies as criminal behavior. *See State v. Koffman*, 207 S.W.3d 309, 324 (Tenn. Crim. App. 2006) (holding that "an extensive record of criminal activity may include criminal behavior, such as illegal drug use, which does not result in a conviction"). The trial court's determination that the defendant is an offender whose record of criminal activity is extensive is supported by the record and entitled to a presumption of correctness.

The defendant suggests that because many of his other convictions stemmed from a single incident, his record is not indicative of "a lifetime of crime." However, our supreme court has rejected the argument that "in determining whether to sentence a defendant to consecutive sentences, the trial judge is required to take into consideration the fact that all of the offenses arose out of one single criminal episode or were inspired by the same general intent and minutely limited in both time and space" and held that "the single criminal episode concept . . . is irrelevant to a determination of whether to impose

consecutive sentencing."). *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976); *see Darius Jones*, 2011 WL 2162986, at *4.

The defendant also cites to two unpublished opinions from this Court, *State v. Victor Wise*, No. W2018-01343-CCA-R3-CD, 2019 WL 4492910 (Tenn. Crim. App. Sept. 18, 2019), and *State v. Willie Hardy, Jr.*, No. M2016-01748-CCA-R3-CD, 2017 WL 2984280 (Tenn. Crim. App. July 13, 2017), in support of his assertion that his record "is not substantial enough to justify a finding of extensive criminal behavior." However, those two cases are readily distinguishable from the present matter, as the defendant here has a lengthier record of more serious offenses than in the cases cited by the defendant.

In addition, the trial court did not abuse its discretion in determining that the defendant was "a professional criminal who has knowingly devoted his life to criminal acts as a major source of livelihood." The defendant reported in his presentence report that he had never been employed. He was first charged with selling drugs in September 2012 for which he then spent almost six years in prison. Within months of his release from prison, the defendant sold large quantities of drugs at least three times in a three-week time period. As observed by the trial court, the defendant "made thousand[s] and thousands of dollars from selling heroin[] and methamphetamine" and had "posted several bonds and got released from jail . . . [despite] report[ing] to the presentence writer that he's never had a job." The trial court did not abuse its discretion in finding the defendant to be a "professional criminal." In any event, we need not belabor the matter because even if the trial court's finding was somehow error, the existence of a single factor is sufficient to support the imposition of consecutive sentences.

The defendant lastly asserts that the trial court "made no findings suggesting that a 38-year sentence was commensurate with the offenses" or "make any findings suggesting that a sentence of nearly four decades' incarceration for non-violent drug offenses was the 'least severe measure necessary' or 'justly deserved in relation to the seriousness of the offense.'" We initially clarify that the defendant received an effective sentence of twenty-four years for his convictions in the instant case. The "38-year sentence" the defendant points to is the result of the present sentences running consecutively to the sentences in other cases for other crimes the defendant committed since his release from prison.

Although the trial court did not use the specific terminology noted by the defendant, it is implicit in the trial court's findings that the court determined that extended incarceration was the "least severe measure necessary" and the sentence was "justly deserved in relation to the seriousness of the offense." The trial court was clearly concerned about the large quantities of drugs sold by the defendant "immediately after he got out of prison" and after having participated in rehabilitation programs. The court summarized that "the interests of society in being protected from this defendant's possible

future criminal conduct is great. There's no question in my mind that if [the defendant] was not incarcerated that he would still be out here probably selling drugs and selling poison among our community members."

II. Restitution

The defendant argues that the trial court erred in ordering him to pay restitution to the TBI to compensate it for some of the expenses of its investigation. He specifically asserts that the TBI "is not a 'victim' eligible for restitution" under the statute, the presentence reports stated that restitution was not applicable, and the defendant does not have the ability to pay restitution.

Restitution may be ordered as a component of sentencing pursuant to Tennessee Code sections 40-35-104(c)(2) and 40-35-304. This Court reviews challenges to the amount of restitution ordered by the trial court under an abuse of discretion standard, affording a presumption of reasonableness to the trial court's ruling. *State v. David Allan Bohanon*, No. M2012-02366-CCA-R3-CD, 2013 WL 5777254, at *5 (Tenn. Crim. App. Oct. 25, 2013). "[T]he burden of showing that the sentence is improper is upon the appealing party." Tenn. Code Ann. § 40-35-401 (2014), Sentencing Comm'n Cmts.; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

The purpose of ordering restitution is to compensate the victim and to punish and rehabilitate the defendant. *State v. Johnson*, 968 S.W.2d 883, 885 (Tenn. Crim. App. 1997). "In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform."[3] Tenn. Code Ann. § 40-35-304(d). Therefore, "the amount of restitution a defendant is ordered to pay must be based upon the victim's pecuniary loss and the financial condition and obligations of the defendant; and the amount ordered to be paid does not have to equal or mirror the victim's precise pecuniary loss." *State v. Smith*, 898 S.W.2d 742, 747 (Tenn. Crim. App. 1994). "Pecuniary loss," in the context of this section, means "[a]ll special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant" and "[r]easonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense[.]" Tenn. Code Ann. § 40-35-304(e)(1)-(2). "An order of restitution which obviously cannot be fulfilled serves no purpose for the appellant or the victim." *Johnson*, 968 S.W.2d at 886.

[3] A new version of the statute went into effect after the sentencing hearing providing that courts "may," rather than "shall," consider financial resources and future ability of the defendant to pay.

The trial court ordered that the defendant pay a total of $5,200 in restitution to the TBI to compensate the agency for the costs of the controlled drug purchases. With regard to restitution, the trial court stated:

> I have to consider his ability to pay. I do find, again, that he does have the ability to pay and the reason I say that is because he's posted bonds in the past. He's been very profitable as a drug dealer. No question about that. I mean, on those three occasions as I said earlier, he made over $5000 selling drugs within a matter of about two weeks which is a pretty successful drug dealer. If you're making $5000 every two weeks selling drugs, it sounds like you've got some money.

The trial court gave only cursory consideration to the defendant's ability to pay, essentially surmising the defendant could pay the amount because he had "been very profitable as a drug dealer." However, there was no proof of income presented, and the trial court did not take into account the fact that the defendant was about to begin a fourteen-year sentence of incarceration (before the addition of his sentences in the present cases). Also, of note, the defendant had been deemed indigent and appointed legal counsel. As this Court has stated, "An order of restitution which obviously cannot be fulfilled serves no purpose for the appellant or the victim." *Johnson*, 968 S.W.2d at 886. Given the trial court's lack of findings, we would typically remand for the trial court to make further findings regarding the defendant's ability to pay. However, as we will address below, we determine that the TBI is not a "victim" within the meaning of the restitution statute; therefore, we vacate the trial court's order of restitution.

In *State v. Alford*, 970 S.W.2d 944 (Tenn. 1998), our supreme court addressed whether an assault victim's medical insurance carrier can be a "victim" and receive restitution from a defendant pursuant to Tennessee Code Annotated section 40-35-304. *Id.* at 945. The court concluded that insurers did not fall within the narrow definition of "victim," which it defined as "the individual or individuals against whom the offense was actually committed." *Id.* at 946. The court applied the rules of statutory construction and considered the legislative history in reaching its decision. *Id.* at 946-47. With regard to the victim's insurer, the court noted that the insurer's liability is contractual, and the risk of claims is assumed pursuant to the contract. *Id.* at 946.

In *State v. Cross*, 93 S.W.3d 891 (Tenn. Crim. App. 2002), this Court considered whether a homeowner's insurance carrier was a "victim" within the meaning of the restitution statute where the defendant pled guilty to presenting a false insurance claim and arson. *Id.* at 892. This Court distinguished *Alford*, holding that the residential insurance company was the actual victim of the crime and that, while the company accepted the risk

of loss relative to the defendant's residence, it did not accept the risk of fraud by its insured. *Id.* at 895-896.

In *State v. Poole*, 279 S.W.3d 602 (Tenn. 2008), this Court considered whether a bank was a "victim" within the meaning of the restitution statute where the defendant pled guilty to misdemeanor theft for fraudulently withdrawing funds from the bank. *Id.* at 603. This Court distinguished *Alford* and also analyzed opinions from other jurisdictions in reaching the conclusion that the bank was a "victim." *Id.* at 606-607. This Court summarized that the defendant

> committed these offenses by entering the bank premises and deceiving bank employees. The bank was specifically referenced in the indictment. The object of the [d]efendant's crime was to enter the bank and make fraudulent withdrawals from funds managed by the bank. The bank did not accept this risk of fraud.

Id. at 607 (internal citations omitted).

In *State v. Stanley A. Gagne*, No. E2007-02071-CCA-R3-CD, 2009 WL 331327 (Tenn. Crim. App. Feb. 11, 2009), a panel of this Court considered whether a cemetery and church, entities that provided a gravestone and held a funeral for an individual who died as the result of the defendant's reckless endangerment with a motor vehicle, were "victims" within the meaning of the restitution statute. After analyzing *Alford* and other restitution cases involving non-persons or entities, this Court concluded that "it is clear that the two entities that are to be the recipients of the restitution are not 'the individual or individuals against whom the offense was actually committed' as stated in *Alford*." *Id.* at *2-*3.

In *State v. Douglas Edward Mackie*, No. E2008-00816-CCA-R3-CD, 2009 WL 400645 (Tenn. Crim. App. Feb. 18, 2009), *perm. app. denied* (Tenn. June 22, 2009), a panel of this Court considered whether the person who purchased a storage shed that the defendant had stolen from another person was a "victim" within the meaning of the restitution statute. This Court determined that the purchaser was not a "victim" within the meaning of the statute because "[a]lthough [the purchaser] suffered a pecuniary loss at the hands of the defendant, her loss was not the direct result of his theft of the shed from the named victims." *Id.* at *5.

Considering these cases and other relevant precedent, we conclude the TBI is not a "victim" within the meaning of the restitution statute. The TBI was not referenced in the indictments, was not the direct object of the defendant's crimes or the entity against whom the offenses were actually committed, nor did the TBI suffer any unexpected harm. In addition, presumably a portion of the fines imposed by the trial court go to pay the expenses

of TBI/law enforcement, so recompense is already provided. *See* Tenn. Code Ann. § 39-17-428(c)(1). The trial court did not have statutory authority to impose the restitution as ordered.

Conclusion

Based on the foregoing authorities and reasoning, we affirm the sentences imposed by the trial court, but we vacate the trial court's orders of restitution to the TBI and remand for entry of corrected judgments reflecting its deletion.

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J. ROSS DYER, JUDGE