IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 6, 2023 Session

STATE OF TENNESSEE v. DARIUS HENDERSON

Appeal from the Circuit Court for Madison County
No. 20-441 Donald H. Allen, Judge

No. W2022-00882-CCA-R3-CD

In this appeal from a resentencing hearing, the Defendant, Darius Henderson, challenges his total effective sentence of twelve years following his convictions for theft of property and evading arrest. The Defendant argues that the trial court erred by not applying two mitigating circumstances and by aligning the sentences to run consecutively. We respectfully disagree and affirm the trial court's judgments.

Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Circuit Court Affirmed

TOM GREENHOLTZ, J., delivered the opinion of the court, in which J. ROSS DYER and JOHN W. CAMPBELL, SR., JJ., joined.

Kendall Stivers Jones, Assistant Public Defender - Appellate Division (on appeal), Jeremy B. Epperson, District Public Defender (at sentencing), for the appellant, Darius Henderson.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Matthew A. Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. TRIAL AND FIRST APPEAL

This case is back before this Court following a resentencing that this Court ordered in the first appeal. *See State v. Darius Henderson*, No. W2020-01725-CCA-R3-CD, 2022 WL 630377 (Tenn. Crim. App. Mar. 4, 2022). Although the factual background of the case

was detailed in our original opinion, we will provide a brief summary here. This case involves the theft of Anthony McCurry's car from a gas station in December 2018. Mr. McCurry left his car, a Nissan Altima, at the pump for a few minutes while he went inside the store, at which time someone stole his car. With the help of another customer, Mr. McCurry pursued the stolen car until it managed to speed away. Mr. McCurry then reported the theft to the police.

Officer John Hasz of the Jackson Police Department received the report of the theft. He spotted the stolen car and pursued it until it was blocked by traffic. Officer Hasz found the Defendant in the driver's seat of the Altima with no other passengers, and the officer placed the Defendant under arrest. Mr. McCurry's car was returned to him soon thereafter. *See id.* at *1.

Following a jury trial, the Defendant was convicted of theft of property as a Class D felony offense and evading arrest as a Class E felony offense. In relevant part, we summarized the original sentencing hearing as follows:

> At the sentencing hearing, the State's only proof was the presentence report, which was entered without objection. The presentence report reflected Defendant's four prior felony convictions in Tennessee, including: (1) theft of property over $1,000, a Class D felony at the time of the conviction in 2016; (2) theft of property over $500 but less than $1,000, a Class E felony at the time of the conviction in 2013; (3) statutory rape, a Class E felony; and (4) aggravated robbery, a Class B felony.
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> Defendant testified that he had been in jail since December 2018 and explained that he had been diagnosed as comorbid schizophrenic with social anxiety disorder. Defendant testified that he also had a drug abuse problem with methamphetamine and marijuana. According to Defendant's testimony, he was not taking his mental health medications at the time of the offense but had instead been using drugs.
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> The State argued that Defendant was a Range II offender for purposes of sentencing because he had four prior felony convictions in Tennessee. The trial court inquired about Defendant's 2016 Georgia convictions for "Criminal Damage to Property – 2nd Degree, Terroristic Threats and Simple Battery," which also appeared in the presentence report. In response, the State presented a copy of the indictments in Defendant's Georgia case, as well as a certified copy of the resulting convictions. The convictions reflected that the damage "exceeded $500" and the offenses all occurred on or about July 22, 2013. The indictment and conviction were for "criminal

damage to property in the second degree, in violation of O.C.G.A. § 16-7-23." The State then argued that Defendant's Georgia convictions would have been misdemeanors under Tennessee law, based upon the State's reading of the indictment in the matter and the elements of the Georgia statute. The trial court agreed that the convictions for terroristic threats should not be used to establish Defendant's range, but took the issue of sentencing range regarding the foreign convictions under advisement and rescheduled the sentencing hearing for September 14, 2020.

When the trial court reconvened on September 14, 2020, Defendant called Temeka Patterson to testify on his behalf. Ms. Patterson testified that she had been friends with Defendant since 2006 and that she knew that he had mental health issues. Defendant submitted into evidence, without objection, a letter from Pathways, which stated that Defendant had been diagnosed with "unspecified schizophrenia spectrum, another psychotic disorder," and had seen a nurse practitioner for medication. The letter further noted that Defendant was an active patient at the time of his sentencing hearings.

The trial court explained that it had considered the requisite sentencing criteria under Tennessee Code Annotated section 40-35-210 and found that Defendant had four prior felony convictions in Tennessee. However, the trial court announced that it would sentence Defendant as a Range III offender because it considered Defendant's foreign conviction out of Georgia for "criminal damage to property in the second degree" to qualify as a felony in Tennessee. In pertinent part, the trial court stated the following:

> According to these judgments, Defendant received a total effective sentence of four years and was placed on probation. Now, I did notice, according to these judgments, he was facing 25 years in prison for those terroristic threats and three counts of terroristic threats, criminal damage to property, which was about, I think, $2,500, which would be a felony in Tennessee. So, certainly, I find that to be a felony in Tennessee because it involved restitution. It says to pay restitution in the amount of $2,010.95 and stay away from the Cash America Pawn Shop. So, again, there's no question in my mind, it says he received a four-year sentence, to serve 60 days in jail, and was placed on probation for the balance.

The trial court ordered Defendant to serve twelve years as a Range III offender on Count 1 for theft of property valued at $2,500-$10,000, a Class D

> felony, and six years to serve on Count 2 for evading arrest in a vehicle, a Class E felony. Both sentences were maximum in-range sentences and were ordered to run consecutively to each other.

Henderson, 2022 WL 630377, at *2-3.

On appeal, this Court concluded that the trial court erred in considering a prior Georgia conviction when determining the offender range and that the Defendant should have been sentenced as a Range II, multiple offender instead. *See id.* at *4. Accordingly, we vacated the sentence and remanded the case for a new sentencing hearing. *Id.*

B. RESENTENCING HEARING

On remand, the trial court held a new sentencing hearing on June 13, 2022. At the hearing, the State asked the trial court to rely upon the proof at the original hearing, including the original presentence investigation report. In addition, it requested that the court impose the maximum sentence for each conviction and to align the sentences consecutively.

Mr. Henderson testified at the new sentencing hearing. He testified that he had been diagnosed with schizophrenia in April 2018. The Defendant said that although he was prescribed medication for the condition, he was not taking it when he committed the crimes in this case. On the contrary, he confirmed that he was "taking illegal drugs" at the time.

The Defendant also asserted that he felt unsafe in custody and had been assaulted multiple times. He testified that he had been placed in protective custody because he had been an informant in other cases, including one murder case. He said that, as a consequence, he was unable to "get jobs" or "move around with the rest of the jail population." The Defendant asked the trial court to consider his mental health issues and past cooperation as mitigating circumstances. He also complained that his previous attorneys did not investigate his competency or pursue an insanity defense.

The parties offered no further proof after the Defendant's testimony. In announcing its sentence, the trial court acknowledged that it considered the proof at the trial and both sentencing hearings. The court also noted that it was "reaffirming what [it] did in the original sentencing hearing" and that it had considered the principles of sentencing, sentencing alternatives, and the nature of the criminal conduct involved. Finally, the trial court said that it considered the Defendant's statement and his potential for rehabilitation and treatment.

After the trial court reviewed the proof, it discussed possible enhancement factors and found that three applied. First, the court observed that the Defendant's criminal history included convictions for aggravated robbery, statutory rape, domestic assault, vandalism, and other offenses from two states and three Tennessee counties. It also found that the Defendant had a history of probation violations and that he was on felony probation from three separate jurisdictions when he committed the instant offenses. Finally, the trial court found that the Defendant was released on bail in other cases at the time he committed the felonies in this case. The court found that the Defendant had at least fifteen prior misdemeanor convictions and at least six prior felony convictions. It gave this criminal history "great weight" in its sentencing decision.

As to mitigating factors, the trial court stated that it did not credit the Defendant's testimony "to any extent." Although it did not discuss specific mitigating factors, the court balanced the criminal history and probation violations and concluded, "I just don't find anything mitigating in [this] case."

The trial court found that the Defendant had no potential for rehabilitation, considering the presentence investigation report, the Defendant's physical and mental condition, and his extensive prior criminal history. The court also emphasized that measures less restrictive than confinement had been unsuccessful in the Defendant's case and that the need to protect the public is "certainly great as well."

Based on these considerations, the trial court sentenced the Defendant as a Range II, multiple offender to the maximum terms of eight years for the theft conviction and four years for the evading arrest conviction. In addition, because of the Defendant's extensive criminal history and because the Defendant was on probation when he committed the instant offenses, the court aligned the sentences consecutively for a total effective sentence of twelve years. Finally, because the Defendant was also on bail from prior cases when these crimes were committed, the court ordered that the sentences run consecutively to those prior cases as well.

The trial court entered the judgments on June 15, 2022, and the Defendant timely filed a notice of appeal on June 29, 2022. In this appeal, the Defendant argues that the trial court erred in imposing the maximum sentences because it failed to consider mitigating factors that were supported by the record. He also asserts that the trial court did not evaluate whether the total sentence imposed was the least severe measure necessary to achieve the purposes and principles of sentencing. On our review, we respectfully disagree and affirm the trial court's judgments.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). In this case, the Defendant challenges the propriety of his effective twelve-year sentence. "[W]hen a defendant challenges the length of a sentence that falls within the applicable statutory range and reflects the purposes and principles of sentencing, the appropriate standard of appellate review is abuse of discretion accompanied by a presumption of reasonableness." *State v. King*, 432 S.W.3d 316, 321 (Tenn. 2014) (citing *State v. Bise*, 380 S.W.3d 682, 706-07 (Tenn. 2012)). While trial courts need not comprehensively articulate their findings with regard to sentencing, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed [on the record]." *Bise*, 380 S.W.3d at 706. Our supreme court has also recognized that the *Bise* standard applies to the review of a trial court's determination of consecutive sentencing as well. *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) ("[T]he discretionary language as to consecutive sentencing calls for the adoption of an abuse of discretion standard with a presumption of reasonableness.").

ANALYSIS

In considering the propriety of the Defendant's sentences, we note that the Defendant was found guilty of the Class D felony offense of theft of property and the Class E felony offense of evading arrest. As a Range II, multiple offender, the appropriate sentencing range for a Class D felony offense is between four and eight years. *See* Tenn. Code Ann. § 40-35-112(b)(4). For a Class E felony offense, the appropriate sentencing range is between two and four years in Range II. *See id.* § 40-35-112(b)(5). As such, the trial court's sentences of eight years and four years, respectively, are within the appropriate sentencing ranges.

A. MITIGATING FACTORS

The Defendant first argues that the trial court erred when it did not apply two mitigating factors when imposing the sentences. More specifically, the Defendant asserts that the trial court failed to consider that the Defendant's conduct neither caused nor threatened serious bodily injury and that the Defendant's schizophrenia significantly reduced his culpability for the offenses. *See* Tenn. Code Ann. § 40-35-113(1), (8). For its part, the State argues that the trial court properly declined to find any applicable mitigating factors. We agree with the State.

1. Mitigating Factor (1)

A sentencing court may consider as a mitigating factor that "[t]he defendant's criminal conduct neither caused nor threatened serious bodily injury[.]" Tenn. Code Ann. § 40-35-113(1). The Defendant argues on appeal that the video of the Defendant's evading arrest shows that he did not endanger any other person. He argues that the short chase did not involve excessive speed or endanger others. He also argues that he used his turn signal and did not evade on foot after he stopped the car.

We agree that the Defendant fairly describes the video of the incident. However, the Defendant never made this argument, or anything like it, in the trial court. He did not provide notice of this mitigating factor as part of the presentence investigation. He did not ask the trial court to consider the factor in any briefing or in the first or second hearing. On the contrary, the Defendant has raised this issue for the *first* time in this *second* appeal. Under these circumstances, the Defendant has waived this issue. *See State v. Byron Sidney Doss*, No. M2020-00934-CCA-R3-CD, 2021 WL 2652692, at *8 (Tenn. Crim. App. June 28, 2021) ("[T]he record reflects that the defendant did not request the application of any mitigating factors during the sentencing proceedings, and he raises this argument for the first time on appeal; consequently, his issue in this regard has been waived."), *no perm. app.*

Moreover, even if the trial court erred in failing to give weight to this mitigating factor, we "cannot reverse a sentence based on the trial court's failure to adjust a sentence in 'light of applicable, but merely advisory, mitigating or enhancement factors.'" *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). Instead, "a trial court's misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005." *Bise*, 380 S.W.3d at 706. As such, "a sentence imposed by the trial court that is within the appropriate range should be upheld '[s]o long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute.'" *State v. Rickeena Hamilton*, No. E2021-00409-CCA-R3-CD, 2022 WL 4494108, at *24 (Tenn. Crim. App. Sept. 28, 2022) (quoting *Bise*, 380 S.W.3d at 706), *perm. app. denied* (Tenn. Apr. 17, 2023).

In this case, the trial court followed the proper sentencing procedures and sentenced the Defendant to a sentence within the appropriate range for each conviction. The trial court applied three enhancement factors, *see* Tenn. Code Ann. § 40-35-114(1), (8), (13), and these enhancement factors are not challenged by the Defendant on appeal. And, as we discuss in more detail below, the sentences are otherwise consistent with the purposes and principles of sentencing. As such, we conclude that any failure to apply mitigating factor (1) does not warrant relief.

2. Mitigating Factor (8)

A sentencing court may also consider as a mitigating factor that "[t]he defendant was suffering from a mental or physical condition that significantly reduced the defendant's culpability for the offense," though "the voluntary use of intoxicants does not fall within the purview of this factor[.]" Tenn. Code Ann. § 40-35-113(8). The Defendant argues that he linked his schizophrenic condition to his behavior on the night of the offenses. From this, he asserts that the trial court erred in disregarding his condition and "how this mental condition clearly manifested" that night. We respectfully disagree.

The record contains proof that the Defendant was diagnosed with "unspecified schizophrenia spectrum and other psychotic disorder, provisional." However, no proof was introduced as to what this condition is or how it manifested in the Defendant. More importantly, proof of a condition by itself is insufficient to warrant consideration of mitigating factor (8). Instead, the Defendant has the burden to show "a causal link between his ailment and the offense charged." *State v. Brian Lee Webb*, No. W2015-01809-CCA-R3-CD, 2016 WL 4060650, * 5 (Tenn. Crim. App. July 27, 2016). Indeed, a trial court need not apply this factor without expert or medical testimony or proof linking the condition to the crime. *See State v. Joshua Aaron Roush*, No. E20020-0313-CCA-R3-CD, 2003 WL 354465, at *4 (Tenn. Crim. App. Feb. 18, 2003) ("The Appellant introduced no medical proof which established a resulting cognitive disorder or mental condition that would have reduced his culpability for the crime. Accordingly, we find that the trial court was correct in not applying mitigating factor (8).").

The record in this case contains no evidence that a causal link existed between the Defendant's crimes and his "unspecified schizophrenia spectrum and other psychotic disorder, provisional." The Defendant presented no medical or expert testimony showing any causal link, and although the Defendant attempted to link the two through his own testimony in each hearing, the trial court did not credit his testimony "to any extent." Moreover, although the Defendant admitted in the second hearing that he was "supposed to take medication," he testified that he was not doing so at the time of the crimes. Instead, as he testified in both hearings, he was engaged in "heavy" illegal substance use, including the use of methamphetamine and marijuana. Accordingly, we conclude that the trial court did not err in refusing to apply mitigating factor (8).

Apart from his issues related to possible mitigating factors, the Defendant does not otherwise challenge the length of the individual sentences. Accordingly, because the trial court otherwise complied with the purposes and principles of sentencing, we respectfully affirm the trial court's judgments as to the length of the Defendant's sentences for theft of property and evading arrest.

B. CONSECUTIVE SENTENCES

The Defendant next challenges his consecutive sentences. Although he does not argue that the trial court misapplied any category for consecutive sentences, Tenn. Code Ann. § 40-35-115, the Defendant argues that the trial court failed to make a parsimony finding on the record, *i.e.*, that the aggregate length of the sentences is the least severe measure necessary to accomplish the purposes of sentencing. For its part, the State argues that the trial court made an implicit finding in this regard when it reasoned that the Defendant had no potential for rehabilitation and that the public's need for protection "is certainly great as well." Again, we agree with the State.

An important limitation on a trial court's sentencing authority is the parsimony principle found in Tennessee Code Annotated section 40-35-103(4). This statutory provision is contained among our general principles of sentencing, and it requires that "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed[.]" *Id.*

Consideration of the parsimony principle in sentencing is mandatory. *See* Tenn. Code Ann. § 40-35-210(b)(3) (requiring that the sentencing court "shall consider," among other things, "[t]he principles of sentencing and arguments as to sentencing alternatives"). The law also requires the sentencing court to place "on the record, either orally or in writing . . . the reasons for the sentence." *Id.* § 40-35-210(e)(1)(B). Beyond these requirements, though, our supreme court has never required a sentencing court to explicitly confirm on the record that it has considered each individual purpose and principle of sentencing.

Instead, the basic obligation of the sentencing court is "to articulate in the record its reasons for imposing the sentence" so that meaningful appellate review may be had. *Bise*, 380 S.W.3d at 706 n.41. This means that the sentencing court must "set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority." *State v. Perry*, 656 S.W.3d 116, 126 (Tenn. 2022) (citations and internal quotation marks omitted). In carrying out these duties, the supreme court has emphasized that it is not necessary for the trial court's reasoning to be "particularly lengthy or detailed." *Bise*, 380 S.W.3d at 706.

To this end, while the trial court must consider the parsimony principle when imposing a sentence, the supreme court has not required that the trial court make an explicit finding on the record that it did so. Indeed, we have inferred that a trial court has actually complied with the parsimony principle when the trial court acknowledged that it considered the purposes and principles of sentencing; the court discussed the specific purposes sought

to be advanced by the overall sentence, such as the need to protect the public from a defendant's future criminal conduct; and the court concluded that consecutive sentences are necessary or appropriate to accomplish the identified purposes of sentencing. *See, e.g.*, *State v. Justin Darnay Graves*, No. W2021-01476-CCA-R3-CD, 2023 WL 1989587, at *5 (Tenn. Crim. App. Feb. 14, 2023) (finding implicit compliance with the parsimony principle when the trial court reviewed the failure of previous rehabilitative efforts, continued criminal activity, and found that "the interests of society in being protected from this defendant's possible future criminal conduct [are] great."), *no perm. app.*; *State v. Colton Davon Hatchett*, No. W2020-00335-CCA-R3-CD, 2021 WL 1148899, at *5 (Tenn. Crim. App. Mar. 24, 2021) (finding implicit compliance with the parsimony principle when "the trial court stated that it considered the principles of sentencing and the circumstances of the offense, and the trial court found that consecutive sentences 'would be appropriate under these circumstances.'").

In this case, the trial court specifically stated during the second sentencing hearing that it had considered the principles of sentencing. With respect to consecutive sentences in particular, the trial court identified the purpose of sentencing in this case to be incapacitation, and it carefully identified why it believed that the public required protection from the Defendant's future criminal actions. For example, it examined the extent of the Defendant's history of criminal conduct and his previous violations of alternative sentences. From this examination, the trial court found that the Defendant "reasonably would not abide by any terms of probation or alternative sentencing." It also found that the Defendant had "no potential for rehabilitation" and that "the interests of society in being protected from this defendant's possible future criminal conduct [are] certainly great as well."

In addition, the trial court announced that it was "reaffirming what [it] did in the original sentencing hearing[.]" In that original hearing, the trial court reasoned that consecutive sentences were "probably justified under the facts of all of [the Defendant's] cases and especially based upon the facts of this case." In addition, while denying the Defendant's motion for a new trial, the court stated that "I felt like the overall total effective sentence in this case was appropriate given his prior criminal history and given the fact that he was on probation and also was out on bond when he committed all these offenses."

We agree with the Defendant that the better practice is for a trial court to make a parsimony finding on the record so that meaningful appellate review may be had. However, while the trial court here did not explicitly discuss the parsimony principle on the record, we conclude that it actually considered this principle when imposing the sentences, as it was required to do. Because the Defendant does not challenge his consecutive sentences on any other grounds, we respectfully affirm the trial court's judgments.

CONCLUSION

In summary, we hold that the trial court acted within its discretion in setting the length of the Defendant's respective sentences and that it did not err in failing to apply mitigating factors (1) or (8) to either sentence. We also hold that the trial court acted within its discretion in imposing consecutive sentences. Accordingly, we respectfully affirm the judgments of the trial court.

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TOM GREENHOLTZ, JUDGE