FILED
02/03/2023
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

STATE OF TENNESSEE v. JONATHAN HOWELL

Appeal from the Criminal Court for Shelby County
No. 21-00302 Paula Skahan, Judge

No. W2022-00337-CCA-R3-CD

Jonathan Howell, the Defendant, appeals as of right from the Shelby County Criminal Court's denial of probation following his plea of guilty to theft of property valued at $60,000 or more. The Defendant contends that the trial court erred by denying an alternative sentence and by basing its denial solely on deterrence. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Phyllis L. Aluko, District Public Defender; Barry W. Kuhn (on appeal) and Amy Mayne (at guilty plea), Assistant District Public Defenders, for the appellant, Jonathan Howell.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; Danielle McCollum and Tanisha Johnson, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

The Defendant was indicted by a Shelby County grand jury in case number 21-00302 for one count of theft of property valued at $60,000 or more, one count of forgery valued at $60,000 or more, and one count of identity theft. On February 10, 2022, the Defendant pleaded guilty to the theft of property offense, a class B felony, *see* Tennessee Code Annotated sections 39-14-103(a), -105(a)(5), in exchange for a recommended sentence of eight years. The Defendant also pleaded guilty to attempted identity theft in

case number 21-03324 and received a time-served sentence of one day, which the Defendant does not challenge on appeal. As part of his agreement with the State, the remaining counts of these indictments were dismissed, as were case numbers 21-00303 and 21-03325.

At the guilty plea hearing, the State indicated that had case number 21-00302 proceeded to trial, the proof would have shown the following:

> [O]n September 14th, 2020[,] Matthew McKeen reported that the [D]efendant came into the Sunrise Buick GMC located on Covington Pike in Shelby County, on September 12th and again on September 13th and purchased two vehicles. A Dodge Challenger valued at $35,404.76 and a 2018 GMC Serra [*sic*] valued at $60,006.03.
>
> He used a false driver's license that had the name Christian Alexander,[1] but [the Defendant's] picture on it. They later received a call from Christian Alexander stating she was advised by the credit bureau that someone had fraudulently used her personal information to obtain two vehicles.
>
> They discovered that the purchaser was the [D]efendant. The [D]efendant represented himself as Christian Alexander and signed that name to all the contracts.
>
> The [D]efendant came in, was picked out of a lineup[, and] also gave an admission. The total loss was $95,410.79.

(Footnote added). The prosecutor informed the trial court that the vehicles were retrieved but that the restitution amount was $500 because they had to be rekeyed.

The State informed the trial court that had case number 21-03324[2] proceeded to trial, the proof would have shown the following:

> [O]n December 9th, 2020[,] at approximately 2:30 p.m.[,] officers responded to Auto Nation Ford located on Highway 64 . . . in Shelby County.

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[1] In the indictment, Mr. Alexander's first name is spelled as "Kristian".

[2] Although this case is not the subject of this appeal, we have included the factual stipulation in order to provide context to the Defendant's testimony at the sentencing hearing.

> Mr. Montgomery advised that while he was looking over the [D]efendant's credit application for purchases of some vehicles, he discovered some discrepancies. Mr. Montgomery decided to call the owner of the identification that was being used, Andrew Kisley[,] and asked if he was attempting to purchase a vehicle in Memphis.
>
> The victim[,] Mr. Kisley[,] said he was not attempting to purchase any vehicles at this time. He further advised that his identity had been compromised approximately four days prior.
>
> Mr. Montgomery then called the police. Officers made the scene and took the [D]efendant into custody and contacted the victim by phone.
>
> The responding officer was advised that the [D]efendant was attempting to purchase two 2020 Ford Mustangs[, one] valued at $49,755 and the other at $51,755. The total lost would have been $101,510.

The trial court accepted the Defendant's guilty pleas. A sentencing hearing was scheduled to determine the manner of service.

The sentencing hearing ensued on February 24, 2022. The Defendant testified that when he committed this offense, he was having money problems, was homeless, and had no place to stay. He stated that he was not living with his parents during this time because his father was "going through some things" and his mother was teaching in Africa. The Defendant said that he needed a place to stay and that a room would cost approximately $100 per week. He stated he then met "somebody" online who told him he could "make a couple hundred bucks."

The Defendant testified he had not heard from "the guy" he met online since the day of his arrest. He stated that the car dealership had retrieved its cars and that the only things taken were the victims' identities, which he was "truly sorry about." The trial court commented, "You're quite the con artist, aren't you?" When the Defendant replied, "No, ma'am," the trial court stated, "Yeah, you are. That's the way con men are. You're real nice to everybody and just suck them in. That's the way you come across. People believe everything you say because you come across as just a regular guy, right? That's how you work."

The Defendant further testified that he attended Harding Academy and that he had some college credit. The Defendant stated that his plan was to go back to the University

of Memphis and obtain a physical therapy degree, which he believed he could earn in three years. The Defendant said that he had the support of both his parents and that he did not "want to be a disappointment anymore." The Defendant acknowledged that he did not use drugs, that he barely drank, and that he believed he would be able to comply with probation while in school.

The Defendant stated that, to his knowledge, his parents had never been in trouble. He had two brothers: one who was a mechanic and the other who was a recent graduate from the University of Arkansas. The Defendant stated that he was "trying to start back over and go down a good path" and that it was his time to "straighten out." The trial court, addressing defense counsel, commented, "He's 28 years old. . . . He's been in trouble before[.] . . . Who do you think is going to hire him as a physical therapist with all these thefts and everything on his record? . . . Who is going to license him as a physical therapist?" The Defendant interjected that he knew "therapists" who could "pull some strings" to get him a job. The trial court stated, "Sure they could[,]" and stated that the Defendant's "friends" were the people who had "helped [him] learn" how to purchase vehicles with forged identifications. The trial court said, "That's what we need, people doing identity theft for patients coming in there to get physical therapy, right?"

On further direct examination, the Defendant stated that if he could not pursue a career in physical therapy, he could pursue employment in real estate, construction, and his cologne and clothing line, Chosen. The Defendant stated he had arranged employment with both Amazon delivery and a construction company if he was granted probation. The Defendant acknowledged that he would be on a "short leash" with probation and that he would work hard, go to school, and stay out of trouble. The Defendant stated that he was "truly sorry" for his actions and that he had "learned his lessons."

On cross examination, the Defendant stated that his family was supporting him while he was incarcerated. The Defendant acknowledged that his family had supported him his whole life and that he had only started to engage in criminal activity when he "fell on hard times." The Defendant reiterated, "It will never happen again though, trust me."

The Defendant testified that he was granted diversion in 2013 for stealing money from his high school to pay for a senior trip. The Defendant stated he committed that offense because he lacked money. The Defendant stated he did not remember a theft charge he acquired in 2015 and for which he ultimately received probation for 11 months and 29 days. Later, the Defendant explained that he had fallen on hard times when he acquired that conviction.

The Defendant acknowledged that he used false identities to purchase vehicles on two separate occasions. The Defendant stated that "the guy" he met online had provided him with a fake identity with the Defendant's picture on it. The Defendant stated that he had met this man through Instagram, that this man had picked him up and taken him to the car dealership in September 2020, and that this man had told him what to do to earn the money. The Defendant said that the same thing happened in December of 2020. The Defendant said, "After that—the first time I didn't even see them actually. After that, they ran off. So I basically was a playboy. They used me basically." The trial court commented, "Doesn't sound true to me. [The Defendant] would be more of the master mind."

The Defendant testified that the presentence report was incorrect in stating that he was fired from his job at Taco Bell in 2019. The Defendant said that he quit that job due to a transportation issue, which was no longer a problem because his father would provide transportation. The Defendant stated he could successfully complete the eight years of probation and that there would be no more "hard times" in his life.

At the conclusion of the hearing, the trial court denied the Defendant's petition for probation stating,

> I think we have to . . . keep in mind this is a Class B felony. There is no presumption for probation for [the Defendant]. . . . At this point he just doesn't get it. He really doesn't. So I think it's sending the wrong message to [the Defendant] at this point. I think he needs to go serve some time. I'm sorry. Efforts at rehabilitation have failed. He needs to get this through his head now.

The trial court declined to consider a split confinement sentence. This timely appeal followed.

II. ANALYSIS

The Defendant contends that the trial court abused its discretion in denying his petition for probation because it based its denial solely on deterrence. The State contends that no abuse of discretion occurred. We agree with the State.

Before a trial court imposes a sentence upon a defendant, it must consider: (1) the evidence adduced 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 set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the Administrative Office of the Courts ("AOC") as to Tennessee sentencing practices for similar offenses; (7) any statement the defendant wishes to make in the defendant's own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report. Tenn. Code Ann. § 40-35-210(b).

Tennessee Code Annotated section 40-35-102(5) states 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 sentencing involving incarceration." As such, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. Tenn. Code Ann. § 40-35-102(6)(A).

A trial court should consider the following when determining a defendant's suitability for alternative sentencing:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1). A defendant is not entitled to any presumption of being a favorable candidate for alternative sentencing. *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). "A court shall consider, but is not bound by, the advisory sentencing guideline in" section 40-35-102(6). Tenn. Code Ann. § 40-35-102(6)(D).

Relative to probation specifically, a defendant who receives a sentence of ten years or less, except for certain specified offenses, is eligible for probation. Tenn. Code Ann. § 40-35-303(a). While the trial court is required to automatically consider probation as a sentencing option, *see* Tennessee Code Annotated section 40-35-303(b), no criminal defendant is automatically entitled to probation as a matter of law, *see State*

v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). "[T]he burden of establishing suitability for probation rests with the defendant[,]" including the defendant's showing that probation will serve the ends of justice and the best interests of the public and the defendant. *Carter*, 254 S.W.3d at 347 (quoting Tenn. Code Ann. § 40-35-303(b), *State v. Housewright*, 982 S.W.2d 354, 357 (Tenn. Crim. App. 1997)). Additionally, among the factors applicable to probation consideration are: "(1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) special and general deterrence value." *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017). In assessing a defendant's potential for rehabilitation, candor is a relevant factor, and "the lack of candor militates against the grant of probation." *State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002); *see State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983).

When an accused challenges the length of a sentence or manner of service, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012); *see also State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (applying the *Bise* standard to "questions related to probation or any other alternative sentence"). The party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001).

This court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See Carter*, 254 S.W.3d at 346. Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," Tennessee Code Annotated section 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," Tennessee Code Annotated section 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," Tennessee Code Annotated section 40-35-103(5). *See id.* at 344. Ultimately, in sentencing a defendant, a trial court should impose a sentence that 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).

To facilitate meaningful appellate review, the trial court must state on the record the sentencing principles it considered and the reasons for the sentence imposed. Tenn.

Code Ann. § 40-35-210(e)(1)(B); *Bise*, 380 S.W.3d at 705. Mere inadequacy in the articulation of the reasons, however, should not negate the presumption [of reasonableness]." *Bise*, 380 S.W.3d at 705. A sentence should be upheld if the trial court provided "enough to satisfy the appellate court that [it] has considered the parties' arguments and [that it] has a reasoned basis for exercising [its] . . . legal decision making." *Id*. (quoting *Rita v. United States*, 551 U.S. 338, 356-57 (2007)).

The Defendant was sentenced to serve an eight-year sentence and was, therefore, eligible for probation. Tenn. Code Ann. § 40-35-303(a). However, the trial court correctly noted that the Defendant was convicted of a class B felony and was not presumed to be a favorable candidate for probation. *Carter*, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-102(6)). The trial court made findings on the sentencing principle found in Tennessee Code Annotated section 40-35-103(1)(C), determining that measures less restrictive than confinement had been applied unsuccessfully to the Defendant. Specifically, the trial court noted that "[e]fforts at rehabilitation have failed[,]" referring to the Defendant's previous theft charges in 2013, for which he was granted diversion, and in 2015, for which he was granted probation. The trial court noted that confinement was necessary for the Defendant to "get this through his head now." Additionally, these findings show that the trial court considered the Defendant's criminal history, his amenability to correction, and the special deterrence value of the sentence and found that these circumstances weighed against granting probation, well within its discretion. *See Trent*, 533 S.W.3d at 291. We are satisfied that the trial court provided a sufficient basis for its reasoning that comply with the sentencing statutory purposes and principles. *See Bise*, 380 S.W.3d at 705 (citing *Rita*, 551 U.S. at 356-57).

Moreover, the trial court repeatedly noted the Defendant's lack of candor, a relevant factor in determining a defendant's potential for probation. *See Souder*, 105 S.W.3d at 608; *Bunch*, 646 S.W.2d at 160. The trial court stated that it did not believe the Defendant's remorse was credible, that the Defendant came across as a "con man," and that he was likely the "mastermind" of the offense.

The record shows the trial court made sufficient findings supporting its denial of the Defendant's request for probation. Therefore, we conclude that the trial court did not abuse its discretion and that it properly considered the relevant statutory criteria, facts, and circumstances in its sentencing decision.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgment of the trial court.

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KYLE A. HIXSON, JUDGE