IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 15, 2023

STATE OF TENNESSEE v. JOHNATHAN ISSAC GRADELL ALLEN

Appeal from the Circuit Court for Lincoln County
No. 22-CR-18 Forest A. Durard, Jr., Judge

No. M2022-01400-CCA-R3-CD

Johnathan Issac Gradell Allen, Defendant, pleaded guilty to arson and was sentenced to four-and-one-half years' incarceration. Defendant claims that the trial court erred by not sentencing him to an alternative sentence and by imposing an excessive sentence. Defendant also claims that the State's negligent handling of certain sentencing documents caused an unreasonable delay in his transfer from the jail to prison thereby delaying the date of his parole hearing. After a thorough review of the record, applicable law, and the briefs, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Jonathan C. Brown, Fayetteville, Tennessee, for the appellant, Johnathan Issac Gradell Allen.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Robert J. Carter, District Attorney General; and Amber Sandoval, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On February 22, 2022, the Lincoln County Grand Jury issued a ten-count indictment charging Defendant with attempted aggravated arson, aggravated burglary, assault, and seven counts of reckless endangerment with a deadly weapon. On June 3, 2022, Defendant pleaded guilty as a Range I Standard Offender to arson, a Class C felony, with the sentence and manner of service to be determined following a hearing. The remaining nine counts were dismissed.

Plea Submission Hearing

At the plea submission hearing, the State announced the following factual basis for the plea:

> On the 4th of November [] 2021[,] at approximately 6:06 a.m.[,] officers with the Fayetteville Police Department were dispatched to a call of arson at 36 Park Avenue in Fayetteville, Tennessee.
>
> When officers arrived at the scene there was a fire on the porch that had been extinguished by the resident. The female caller was a resident of 36 Park Avenue, that being Brandy Oden. She talked with [o]fficers there at the scene. She stated that a male pulled up to the apartment in a grey SUV and parked in the yard. He came up to the door and started knocking. When she answered the door she knew who he was but knew him by the name of Red. He started demanding to see a female that was inside the house. Ms. Oden would not let him in. He threatened to burn the apartment down unless he could see this female. She still would not allow him in. He poured gas with a plastic jug on the porch and still was demanding to come in[]to the house. He did set the porch on fire, and then forced his way in and assaulted a male inside the house by the name of Deante Scott. These males fought in the kitchen. He then fled out the back door. Multiple witnesses were there and identified [D]efendant. Deonte Jones specifically said she knew him as Red but his first name was Jo[h]nathan.
>
> A photo lineup was done and [D]efendant was picked out of that photo lineup. Substances from inside that vehicle and the porch w[ere] sent to the TBI Crime Lab and both were found to be accelerants that included ethyl alcohol.

After the State provided the above factual basis, the trial court asked Defendant if this was what happened. After speaking with Defendant, counsel stated that Defendant did not agree with all of the facts, but Defendant "respects the fact he could be convicted of arson based upon the facts that were read" by the State. The court advised Defendant that he did not have to agree "with every minute detail, [but] he would have to agree to the facts which constitute the elements of arson in this case." Defendant responded:

> [E]verything she read is like it is facts of all of these other charges that has been dismissed and I thought she was going to be only presenting the facts related to the arson, was going to be pleading to arson but it seems like by saying I agree to all of this it is going to be used later to enhance my sentence

> or something. Everything she is saying is like a lot of it is the stuff with arson could be true, a lot of the other stuff that is not relevant to the arson in my opinion is false because it has already been contradicted by evidence, that's why they agreed to drop it. And then the State has to present them as facts.

The trial court then explained the elements of arson and asked Defendant if he agreed "there [are] sufficient facts to demonstrate the elements of arson?" Defendant responded, "I do, but all I'm trying to figure out on the facts she listed am I agreeing to all of those[?]" The trial court stated, "It was a yes or no question. I'm not worried about the rest of the facts." Defendant again stated that he wanted to plead guilty. After advising Defendant of his rights, the trial court accepted the guilty plea and stated that the length of the sentence and manner of service would be determined at a later sentencing hearing and dismissed the remaining counts of the indictment. The court set a sentencing hearing for June 19, 2022. By agreement, the sentencing hearing was reset to August 16, 2022.

Sentencing Hearing

At the beginning of the August 16, 2022 hearing, the Presentence Report was entered without objection as Exhibit 1. Emily Williams, Manager of the Tennessee Department of Correction ("TDOC") Murfreesboro Probation and Parole Office, testified that she authored the Presentence Report based, in part, on an interview of Defendant conducted by Vickie Farrar, one of the probation officers in her office. Ms. Williams also ran a "National Criminal History Check" and obtained information from the Federal Bureau of Prisons. Based on the information she obtained and the Presentence Report, Ms. Williams testified that, in November 2011, Defendant pleaded guilty in the United States District Court for the Eastern District of Tennessee to armed robbery of a bank, Count 1, and to employing a firearm during commission of a dangerous felony, Count 2. The judgments, which were entered as Exhibit 2 to the Presentence Report, show that Defendant was sentenced to sixty-six months in Count 1 and to a consecutive term of eighty-four months in Count 2, for an effective sentence of one hundred and fifty months to be served in the United States Bureau of Prisons, followed by five years' federal supervised release. The report showed that Defendant was on federal supervised release at the time of the offense in this case and that a violation of his release was pending at the time of the writing of the Presentence Report. Defendant also had a 2004 Alabama misdemeanor conviction for possession of less than one-half ounce of marijuana. Ms. Williams noted that the Strong R Assessment showed that Defendant's "overall score was low with high and moderate needs in mental health, residential[,] and aggression." She formulated a plan in the event Defendant was placed on probation or sentenced to split confinement.

Vickie Farrar testified that she was employed by TDOC as a court specialist for four counties. She interviewed Defendant at the jail and prepared a Strong R Assessment. She

said Defendant graduated from high school in 2004, and while incarcerated in federal prison, he obtained training certificates from the National Occupation Certified Training Institute ("NOCTI") as a heavy equipment operator, in horticulture, in landscaping, in textiles, and in building trades. She said Defendant stated that he had "a lot of stress disorders, anxiety, [and] depression" and was trying to get into Place of Hope for alcohol and drug treatment. On cross-examination, Ms. Farrar said Defendant stated that his mother was not well and that he was concerned for her health.

Detective Deon Shockley with the Fayetteville Police Department ("FPD") testified that he had worked in law enforcement for a total of twenty-two years, including working as a detective with FPD for the last sixteen years during which time he had "investigated various cases from simple assaults to homicides." Detective Shockley stated that, based on his investigation, he believed that Defendant was jealous because his girlfriend was at the house with another man and that Defendant "wanted to get her out of there." According to Detective Shockley, Defendant told the people in the house that he "was going to set the porch on fire." Detective Shockley said that Defendant poured an accelerant on the porch and that, during his investigation, he discovered a clear plastic jug of liquid in Defendant's vehicle. He sent samples from the jug and the porch to the Tennessee Bureau of Investigation ("TBI"). He said the TBI lab reported that the sample from the jug matched the accelerant used on the porch. Detective Shockley said there were seven individuals, including children, inside the house when the fire was ignited. Based on his experience and training and what he was "seeing here in Lincoln County," he stated that there was "a need to deter this type of crime in our county" and that incarceration is an effective deterrent. On cross-examination, Detective Shockley agreed that the Defendant's girlfriend testified at the preliminary hearing that she was using cocaine and marijuana that night. He also agreed that the accelerant was liquor or alcohol.

Defendant testified that he graduated from high school in 2004 and earned a GED in prison because his high school "was no longer around." He said he fell off a building when he was thirteen years old and "broke both of my feet and compressed my spine and everything." He also said that, while in prison, he spent hundreds of hours in classroom training, hands-on training, and studying to earn the NOCTI certificates that Ms. Farrar testified about. He also took courses to learn about computers and about becoming a paralegal. He said he suffered from post-traumatic stress disorder and anxiety and that he was treated by a psychologist while he was in prison. He signed up for the Place of Hope in an effort to get help for anxiety and depression. He stated that he cared for his mother, who suffers from COPD, diabetes, and high blood pressure. At the time of his arrest, he was planning to get married to his girlfriend, Shavante Jones, one of the occupants in the house when he started the fire. He said that he was working as a forklift operator at Frito-Lay to support Ms. Jones, her son, and his mother. During his interview, he told Ms. Farrar

that Ms. Jones was his common-law wife, but he listed his marital status on the report as engaged.

Defendant said that he did not feel he started the fire out of jealousy because Ms. Jones was ready to come home. He said that he thought Ms. Jones was in a bad situation because she was with Deonte Scott, against whom she had an order of protection. He said that it had "happened before" and that "she would call me[,] and I would pick her up." He described what occurred as a "family matter for the most part." He said that the next morning Ms. Jones and her son came to his house and ate breakfast with him. He said he gave her some money and some alcohol.

On cross-examination, Defendant said his drug use started about sixty days before he was arrested in this case "because of the stress of my moms [sic] and I was thinking she was going to pass away and stuff." The trial court asked Defendant, "What prompted you to light the porch on fire?" Defendant answered:

> To be honest, Your Honor, I don't remember the full events of that nature. I know I poured liquor and stuff all over the porch but the young lady said I lit her porch, I don't remember lighting that lady's porch right there. I know there was a fire out there and I came in the house[,] and they all ran out the back of the house. When I came to the front of the house, I didn't even see a fire no more. That fire was very short lived, maybe a minute or so if that. But I know I'm responsible for the fire because I caused the events that led up to it.

The trial court also questioned Defendant about "duster," "an aerosol spray to clean computers or keyboards," that Defendant used to get high. Defendant said he could "buy it at the store" and "never knew it to be illegal at the time."

Ms. Jones testified that Defendant was her boyfriend. She said he was a "great father figure" to her child. She said that Defendant's mother was in really bad condition and that Defendant took care of her when she lived with them. On cross-examination, Ms. Jones agreed that Defendant's mother was in the hospital at the time of the arson. She said she did not know why she sought an order of protection against Mr. Scott.

Argument of counsel began near the conclusion of the August 16, 2022 hearing. The State asked the trial court to apply enhancement factor (1) because Defendant has a previous history or previous criminal convictions or behavior in addition to those necessary to establish the range, enhancement factor (3) because the offense involved more than one victim, enhancement factor (7) because the offense was committed to satisfy Defendant's

desire for pleasure or excitement, and enhancement factor (8) before sentencing failed to comply with the conditions of a sentence involving release in to the community.

Trial counsel argued that mitigating factor (2) applied because Defendant acted under strong provocation by trying to remove his girlfriend from a potentially hostile situation, mitigating factor (8) applied based on Defendant's mental and physical condition, mitigating factor (11) applied because Defendant was "unlikely to sustain the intent to violate the law," and mitigating factor (13) applied because Defendant was the primary caregiver for his mother.

The sentencing hearing was continued until September 6, 2022, to allow counsel to complete their arguments. The trial court observed that the sentencing range for a Range I offender convicted of Class C felony arson was three to six years. The court noted that Defendant was convicted of simple possession of marijuana in 2004 and of robbery and a weapon offense in 2010, and that Defendant was on federal supervised release at the time of the arson. The court stated that it did "not put a great deal of emphasis" on the marijuana conviction.

Concerning enhancement factors, the court found that factor (1) applied because Defendant had a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range, which for Defendant was Range I. *See* Tenn. Code Ann. § 40-35-114(1) (2022). The court also found that enhancement factor (3) applied because there were multiple victims in the house and that enhancement factor (13) applied because Defendant was on supervised release from his federal sentence when he committed arson. *See* Tenn. Code Ann. § 40-35-114(3), (13) (2022). The court stated that it put the greatest weight on enhancement factors (1) and (13). The court specifically determined that the proof did not support enhancement factors (7) and (8). The court also specifically rejected mitigating factors (2) and (11). In describing the arson, the court stated that "Defendant poured some type of accelerant on a concrete front porch and lit it on fire and spooked the people in the house. The fire was quickly extinguished by somebody there and that was kind of the end of it." In setting the sentence length, the court announced:

> Given the totality of this case and we are looking, when you have enhancement factors and particularly (1) and (13) are what the Court would put the greatest emphasis on, you are moving up the ladder from the bottom at [three years] to the top at [six years] and each enhancing factor you have, you are a little further up the ladder. Mitigating factors bring you back down the ladder a little bit. But I have to look at the entirety of this case. I think a four-and-a-half-year sentence is appropriate in this matter.

Concerning alternative sentencing, the court stated that it had considered the Presentence Report, the testimony, the facts and circumstances surrounding the offense, and the previous actions and character of Defendant. The court found that a sentence less restrictive than confinement had recently been applied unsuccessfully to Defendant based on proof that Defendant was on supervised release after serving a lengthy federal prison sentence when he committed arson. The court denied an alternative sentence and ordered the sentence to be served in TDOC.

The judgment of conviction was entered on September 6, 2022. Defendant timely filed a notice of appeal.

ANALYSIS

Defendant claims that the trial court erred by sentencing him to an excessive sentence and by denying Defendant an alternative sentence. Defendant also claims that the State's negligence in the handling of Defendant's sentencing documents prejudiced Defendant by causing an undue delay in Defendant's transfer to TDOC. The State responds that the sentence was not excessive and that an above-minimum sentence was justified by the applicable enhancement factors. The State argues that Defendant is not entitled to relief concerning the State's handling of sentencing documents. We agree with the State.

In determining an appropriate sentence, a trial court must consider the following factors: (1) the evidence received at the trial, if any, and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the arguments as to sentencing alternatives, (4) nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on mitigating and enhancement factors; (6) the statistical information provided by the administrative office, (7) any statement made by the defendant on his own behalf; and (8) the validated risk and needs assessment. Tenn. Code Ann. §§ 40-35-210(b)(2022).

Length of Sentence

A trial court's within-range sentencing decisions, if based upon the purposes and principles of sentencing, are reviewed under an abuse of discretion standard, accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012).

The 2005 amendments to the Tennessee Criminal Sentencing Reform Act of 1989 [the Sentencing Act] eliminated a presumptive sentence and made enhancement and mitigating factors advisory. *Id. at* 698. Although advisory, trial courts are required to "place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and

consistent sentencing." *Id*. at 698-99. Misapplication of an enhancement or mitigating factor does not remove the presumption of reasonableness so long as the sentence is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles set forth in Tennessee Code Annotated § 40-35-102, -103. *Id*. at 709–10. "The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Id. § 40-35-103(4)(2022).

The trial court found that Defendant had prior criminal convictions for simple possession of marijuana, bank robbery, and employing a firearm during commission of a dangerous felony and that Defendant was "still on some form of [f]ederal release" at the time he committed the arson.[1] The court also found there were multiple people, including children, inside the residence when Defendant ignited a flammable liquid on the front porch. Based on those findings, the trial court found the following three enhancement factors applied:

> (1) The defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;
> . . . .
> (3) The offense involved more than one (1) victim;
> . . . .
> (13) At the time the felony was committed, one (1) of the following classifications was applicable to the defendant:
> . . . .
> (F) On some form of judicially ordered release[.]

Tenn. Code Ann. § 40-35-114 (1), (3), (13)(F) (2022). The trial court assigned the greatest weight to enhancement factors (1) and (13).

Defendant claims that the trial court misapplied enhancement factor (3). We agree. The word "victim" as used in enhancement factor (3) is limited in scope to a "a person or entity that is injured, killed, had property stolen, or had property destroyed by the perpetrator of the crime." *State v. Raines*, 882 S.W.2d 376, 384 (Tenn. Crim. App. 1994); see also *State v. Calles*, No. M2017-01552-CCA-R3-CD, 2018 WL 5307891, at *6 (Tenn. Crim. App. Oct. 25, 2018) and *State v. Cowan*, 46 S.W.3d 227, 235 (Tenn. Crim. App. 2000). Our examination of the record does not show that the other individuals inside the

[1] Even though federal supervised release is not analogous to parole, *State v. Sweeney*, No. E2018-00685-CCA-R3-CD, 2019 WL 5092413, at *11 (Tenn. Crim. App. Oct. 11, 2019), *perm. app. denied* (Tenn. Feb. 19, 2020), it is "some form of judicially ordered release" under Tennessee Code Annotated section 40-35-114 (13)(F) (2022). *See State v. Williams-Bey*, No. M2002-00950-CCA-R3-CD, 2003 WL 21997741, at *12 (Tenn. Crim. App. Aug. 21, 2003), *perm. app. denied* (Tenn. Dec. 22, 2003).

house were injured or had property destroyed by the fire and therefore enhancement factor (3) did not apply. Even so, the misapplication of an enhancement 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. Defendant does not contest the trial court's application of enhancement factor (1) and only argues that the trial court "applied too much weight" to enhancement factor (13). The weight applied by the trial court to enhancement factors is "left to the trial court's sound discretion." *State v. Carter*, 254 S.W.3d 335, 345 (Tenn. 2008).

Defendant claims that the trial court erred by not applying any of the mitigating factors set out in Tennessee Code Annotated section 40-35-113. Although the trial court did not designate a mitigating factor by number, the trial court did, at minimum, apply mitigating factor: (13) "Any other factor consistent with the purposes of this chapter," as evidenced by the court's statement while pronouncing the sentence:

> "So[,] what I have done is [Defendant] would well deserve a six[-]year sentence on that -- on this particular case given the enhance[ment] factors versus mitigating factors. I mitigated that somewhat because I was considering the totality of the case as far as what actually did happen in the matter. But I do believe that sentence should be to serve, which he would be probably eligible for [p]arole in not[-]too[-]distant future.

Although the court could have made more specific findings regarding mitigating factors, any error in failing to do so was harmless in light of enhancement factors (1) and (13). *See Bise*, 380 S.W.3d at 608; *Carter*, 254 S.W.3d at 346. Because enhancement and mitigating factors are advisory only, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *Id.* at 343. "[Appellate courts are] bound by a trial court's decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act." *Id.* at 346.

The trial court's imposition of an above-minimum, in-range sentence is supported by the record and is consistent with the purposes and principles of the Sentencing Act. The trial court did not abuse its discretion by imposing a four-and-one-half-year sentence.

Alternative Sentence

The abuse of discretion with a presumption of reasonableness standard of review set by our supreme court in *Bise* also applies to a trial court's decision to grant or deny an alternative sentence, including probation. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn.

2012) (citing *Bise*, 380 S.W. 3d at 708). A defendant is no longer presumed to be a favorable candidate for alternative sentencing. *Carter*, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-102(6)). Instead, the "advisory" sentencing guidelines of Tennessee Code Annotated section 40-35-102(6) provide that a defendant "who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (2022).

Defendant was eligible for probation because the sentence imposed by the trial court was less than ten years and because arson is not an offense made statutorily ineligible for probation. Tenn. Code Ann. § 40-35-303(a) (2022). Even though eligible, Defendant had the burden of establishing that he was suitable for probation and "demonstrating that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" *Carter*, 254 S.W.3d at 347 (quoting *State v. Housewright*, 982 S.W.2d 354, 357 (Tenn. Crim. App. 1997)).

> Sentences involving confinement should be based on the following principles:
>
> (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) (2022).

The trial court found that the proof did not support confinement based on the principles set forth in section 40-35-103(1)(A)and (B). However, the court did find that section 40-35-103(1)(C) applied because "measures less restrictive than confinement" had "recently been applied unsuccessfully" to Defendant based on proof that Defendant was on federal supervised release when he committed arson. After "considering the totality of the case," the court rejected an alternative sentence and ordered the sentence to be served.

We agree that federal supervised release is a measure less restrictive than confinement. The trial court did not abuse its discretion by ordering Defendant to serve his sentence in confinement.

Negligent Handling of Documentation

Defendant claims that the State's negligence in the handling of his sentencing documents prejudiced him by causing undue delay of his parole hearing. Defendant raised this issue for the first time on appeal; accordingly, the issue is waived. "A party may not raise an issue for the first time in the appellate court." *State v. Turner*, 919 S.W.2d 346, 356-57 (Tenn. Crim. App. 1995). Waiver notwithstanding, there is no proof in the record to support Defendant's claim. Defendant is not entitled to relief on this issue.

CONCLUSION

The trial court did not abuse its discretion in sentencing Defendant. The judgment of the trial court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE