

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs September 26, 2023

FILED

10/03/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. GREGORY S. CLARK**

**Appeal from the Circuit Court for Rhea County**  
**Nos. 2021-CR-56, 2021-CR-76 Thomas W. Graham, Judge**

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**No. E2022-00667-CCA-R3-CD**

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The Defendant, Gregory S. Clark, appeals from his guilty pleaded convictions for aggravated assault, a Class C felony, and attempted aggravated burglary, a Class D felony. *See* TCA §§ 39-13-102 (aggravated assault) (2018) (subsequently amended), -14-403 (aggravated burglary) (2018) (subsequently repealed and replaced by T.C.A. § 39-13-1003 (Supp. 2021)). The Defendant agreed to an effective six-year sentence as a Range I offender, with the manner of service to be determined by the trial court. On appeal, the Defendant contends that the court erred by denying alternative sentencing. We affirm the judgments of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

B. Jeffery Harmon, District Public Defender; Brennan M. Wingerter (on appeal), Assistant Public Defender – Appellate Division; Mechelle Story Barbato (at plea and sentencing), Assistant Public Defender, for the Appellant, Gregory S. Clark.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; J. Michael Taylor, District Attorney General; David L. Shinn, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Defendant’s convictions relate to domestic incidents involving the Defendant and his then-wife. A Rhea County Grand Jury indicted the Defendant on charges of aggravated assault, domestic assault, aggravated kidnapping, violating an order of protection, attempted aggravated burglary, and vandalism. On February 18, 2022, the Defendant entered a guilty plea to aggravated assault and attempted aggravated burglary.

At the guilty plea hearing, the prosecutor recited the following facts relative to the aggravated assault count:

. . . [O]n September 10, 2020, [the Defendant's wife] would testify that she was married to the Defendant and while . . . at their home here in Rhea County they got into some type of verbal dispute and it escalated to the point where the Defendant began physically assaulting [the victim]. She would testify during the assault he took her to the ground in a headlock and began choking her and she was -- she would testify she was trying to tell him she couldn't breathe and at that point in time he pinched her nose and covered her mouth, and she would testify he stated, "I'll just kill you and it'll all be over with." [The victim] would testify that she went unconscious . . . . Eventually, she got a phone call . . . on a Fitbit device and . . . she managed to be able to begin screaming, "Help me," and the person on the other line apparently called the police and she was then taken to the hospital where medical personnel would testify she had several bruises and markings on her neck, which were consistent with being strangled. Also, the officer, Zach Cochran, located the Defendant and the Defendant . . . did admit to choking her.

The prosecutor recited the following facts relative to the aggravated burglary count:

Testimony from [the victim] would be on October 12, 2020, after the Defendant had committed the previous assault, he was on a bond order from general sessions court where he was prohibited from having any contact with [the victim] or being on the property where she was. On October 12, 2020, the testimony would show that the Defendant showed up at [the victim's] . . . residence. He began banging on the door. She became extremely scared and locked herself in the bathroom. She was able to contact the local police and Jesse Wilkey and Zach Cochran would testify when they arrived at the scene they found the Defendant sitting in front of the house. There was a glass storm door to the entry of the home where the glass had been shattered. Jesse Wilkey would testify he began taking pictures of the damage when the Defendant showed them a hammer that was on the ground and admitted he took that hammer and busted the glass out of the door.

At the April 8, 2022 sentencing hearing, the presentence report was received as an exhibit, which included a victim impact statement and a Strong-R Needs Report. The presentence report showed that the fifty-seven-year-old Defendant pleaded guilty to sexual battery in 2009, that the Defendant had six children, that the Defendant had previously worked twenty-three years for DuPont, and that the Defendant was now receiving disability benefits and living with his mother. The report stated that the Defendant had participated

briefly in an outpatient treatment program in 2021, that he was determined after a competency evaluation to be “adequately capable to assist in his defense,” and that he denied having any mental health diagnoses. The Defendant reported previously being prescribed Zoloft but was no longer taking it. The Defendant also reported being diagnosed with Parkinson’s disease seven years prior, for which he was prescribed carbidopa and levodopa.

The presentence report listed no mitigating factors and identified the following enhancement factors:

(1) The Defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;

(5) The Defendant treated, or allowed a victim to be treated, with exceptional cruelty during the commission of the offense;

(6) The personal injuries inflicted upon . . . the victim [were] particularly great;

(8) The Defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community;

(10) The Defendant had no hesitation about committing a crime when the risk to human life was high;

(11) The felony resulted in death or serious bodily injury, or involved the threat of death or serious bodily injury, to another person, and the Defendant has previously been convicted of a felony that resulted in death or serious bodily injury;

(12) During the commission of the felony, the Defendant intentionally inflicted serious bodily injury upon another person, or the actions of the Defendant resulted in the death of, or serious bodily injury to a victim or a person other than the intended victim;

(13) At the time the felony was committed, one (1) of the following classifications was applicable to the Defendant: (A) Released on bail or pretrial release, if the Defendant is ultimately convicted of the prior misdemeanor or felony[.]

*See* T.C.A. § 40-35-114.

The victim testified that she had been married to the Defendant for twenty years, that she was currently seeking a divorce, and that she and the Defendant had a twenty-year-old son. She stated that, “[t]he entire marriage has had violence[,]” beginning four months after they were married, when the Defendant pushed her down “some stairs,” cut her leg, and locked her out of the house. She said that she called the police after that incident, but the Defendant was not charged or arrested. She stated that other violent incidents included a time when the Defendant “headbutted” her and broke her glasses, an incident when the Defendant pulled her across the kitchen floor by her hair, and another incident when the Defendant held her down and bit her nose. She said that, “Any time he would get mad, I would pay for that.”

The victim testified that she stayed with the Defendant because he threatened to kill their child. She said, eventually, the Defendant’s frequent violent behavior “became [her] norm.” She stated that despite calling the police “several times,” the Defendant was never arrested, and, as a result, she stopped calling the police.

The victim testified that in September 2020, the Defendant, as a result of Parkinson’s-related delusions, believed the victim was engaging in online sexually-related conduct and became aggressive toward her. She said that the Defendant got onto her back, put his arms around her neck, and caused her to fall forward on her stomach on the kitchen floor. She said that she tried to crawl away but was unsuccessful. She stated that she told the Defendant that she was having trouble breathing, to which the Defendant responded, “If you’re talking to me, you’re breathing[,]” and then he squeezed her neck harder. She said that she thought she was going to die. She said that she lost consciousness for a time and that when she regained consciousness the Defendant was still strangling her. She said that the Defendant eventually allowed her to get up off the floor and sit in a chair. She said the Defendant’s mother arrived soon thereafter, and the victim was allowed to leave the house. She said she went to the hospital, where a staff member contacted the police. She said the Defendant was arrested.

The victim testified that approximately one month after the incident, the Defendant came to her house and threatened to come inside. She said that she locked the door, but the Defendant began hitting the door with a hammer in an attempt to gain entry. She stated that the Defendant shattered the screen door and tried “to hit the doorknob off.” As a result, she called the police. She stated that the Defendant was not allowed to be at her house as a condition of his bond and that the Defendant did not attempt to enter the house again, although she noticed him in a car parked along the dead-end road on which she lived.

The victim testified that she had panic attacks as a result of the Defendant’s actions and began taking prescription medication and attending therapy. She said that she had also been diagnosed with post-traumatic stress disorder, anxiety and depression and that she had suicidal thoughts. She said that she incurred costs as a result of her hospital visit and

therapy sessions and that she filed for divorce in February 2021. She admitted she served temporarily as the Defendant's conservator "because nobody else would."

On cross-examination, the victim acknowledged that the initial petition for appointment of conservator indicated that the Defendant's "delusions of paranoia have resulted in [the Defendant] becoming violent and causing physical harm to others." She said that the Defendant was diagnosed in August 2013 with Parkinson's, for which he took medication. She said the Defendant refused to take medicine to control the delusions resulting from his Parkinson's. She stated that on one occasion, the Defendant was hospitalized for mental health issues because he claimed she was poisoning his food, which was untrue.

On redirect examination, the victim testified that the Defendant was violent toward her and made false accusations about her before he was diagnosed with Parkinson's disease.

The trial court received as an exhibit the Defendant's 2009 sexual battery by an authority figure conviction. The victim was the Defendant's stepdaughter. The court also received the Defendant's statement of mitigating factors wherein the Defendant asserted: (1) substantial grounds tended to excuse or justify his criminal conduct, though they failed to establish a defense; (2) he suffered from a mental or physical condition that significantly reduced his culpability for the offense; (3) he committed the offense under such circumstances that it was unlikely that a sustained intent to violate the law motivated the criminal conduct; and (4) any other mitigating factors consistent with Tennessee Code Annotated section 40-35-113.

After hearing the proof, the trial court stated that, "this was certainly a bad set of facts as far as violence is concerned." The court noted that the presentence report reflected past violent conduct, including the incidents described by the victim and the sexual battery conviction. Regarding the Defendant's physical and mental condition and social history, the court found that the Defendant's mental condition was "not the greatest in the world," and that the Defendant's social history revealed a pattern of female abuse targeting his wife and her daughter. The court found that the aggravated assault incident "was so violent that it apparently approached a murder case" and that the victim was "very lucky" to be alive.

Regarding the Defendant's previous actions and character, the trial court determined that the Defendant had been violent during his entire twenty-year marriage. Regarding whether the Defendant might reasonably be expected to be rehabilitated and his potential or lack of potential for rehabilitation, the court found that the Defendant's past violent behavior was likely to continue into the future. Regarding whether it appeared that the Defendant would abide by the terms of probation, the court considered that the Defendant had not previously followed court orders because the Defendant was under an order of

protection when he committed the attempted burglary. Regarding whether the interests of society would be protected from the Defendant's possible future criminal conduct, the court addressed competing factors and concluded that "just because [the Defendant has] lost mobility . . . there's no indication that he doesn't still have a violent temper and everything about his past indicates that he at least as to this victim or people close to him he may strike out again if he gets a chance."

The trial court found that measures less restrictive than confinement had been applied unsuccessfully to the Defendant as he had violated the conditions of his bond and an order of protection. The court found that a probationary sentence would unduly depreciate the seriousness of the offense, though a sentence to confinement would not necessarily deter similar conduct in the future because spousal abuse related to emotion and not logic. Regarding whether "the offense was particularly enormous, gross, or heinous," the court credited the victim's testimony and found that she received an "enormous" psychological injury that continued to affect her negatively.

The trial court credited the mitigating factors but found that they were "far outweighed by all of the enhancing factors and the criminal history of the defendant in this case." The court ordered the Defendant to serve his sentence in confinement. This appeal followed.

The Defendant contends that the trial court failed to take into consideration his present physical and mental condition and erred by denying alternative sentencing. The State counters that the court considered all of the principles of sentencing and properly ordered the Defendant to serve his sentence. We agree with the State.

This court reviews challenges to the manner of service of a sentence within the appropriate sentence range "under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). A trial court must consider any evidence received at the trial and sentencing hearing, the presentence report, the principles of sentencing, counsel's arguments as to sentencing alternatives, the nature and characteristics of the criminal conduct, any mitigating or statutory enhancement factors, statistical information provided by the AOC as to sentencing practices for similar offenses in Tennessee, any statement that the defendant made on his own behalf, and the potential for rehabilitation or treatment. *State v. Ashby*, 823 S.W.2d 166, 168 (Tenn. 1991) (citing T.C.A. §§ 40-35-103 (2014), -210 (2014); *State v. Moss*, 727 S.W.2d 229, 236 (Tenn. 1986); *State v. Taylor*, 744 S.W.2d 919 (Tenn. Crim. App. 1987)); see T.C.A. § 40-35-102 (2014).

The standard of review for questions related to probation or any other alternative sentence is an abuse of discretion with a presumption of reasonableness. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). Generally, probation is available to a defendant

sentenced to ten years or less. T.C.A. § 40-35-303(a) (2014). The burden of establishing suitability for probation rests with a defendant, who must demonstrate that probation will “subserve the ends of justice and the best interest of both the public and the defendant.” *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002) (quoting *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)); see T.C.A. § 40-35-303(b); *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008).

A sentence is based upon “the nature of the offense and the totality of the circumstances,” including a defendant’s background. *State v. Ashby*, 823 S.W.2d 166, 168 (Tenn. 1991); see *State v. Trotter*, 201 S.W.3d 651, 653 (Tenn. 2006). A trial court is permitted to sentence a defendant who otherwise qualifies for probation or alternative sentencing to incarceration when:

- (A) [c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) [c]onfinement 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) [m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

T.C.A. § 40-35-103(1)(A)-(C) (2018); see *Trotter*, 201 S.W.3d at 654. A trial court must consider (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) the deterrence value to the defendant and others. See *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (concluding that the same factors used to determine whether to impose judicial diversion are applicable in determining whether to impose probation); see also *State v. Electroplating*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The record reflects, and the Defendant agrees, that the trial court considered the required purposes and principles of sentencing. We disagree with the Defendant that the trial court failed to consider the Defendant’s present physical and mental condition. The court heard testimony indicating that the Defendant has Parkinson’s disease, which can cause delusional episodes and may lead to violent behavior. The court considered the Defendant’s loss of mobility and what effect this would have on the Defendant’s future behavior. The court considered the Defendant’s mitigating factors but found the mitigating factors were “far outweighed by all of the enhancing factors” and by the Defendant’s criminal history. The court gave significant weight to the Defendant’s twenty-year history of violent behavior toward the victim, which began prior to the Defendant’s Parkinson’s

disease diagnosis, his failure to follow the court's prior orders, and the gravity of the victim's physical and psychological injuries.

We, likewise, conclude that the trial court did not abuse its discretion by ordering the Defendant to serve his sentence in confinement. The court found that the Defendant had a long history of violent behavior toward the victim and had a prior conviction for sexual battery against her daughter. The court noted that the victim almost died as a result of the Defendant's aggravated assault and that she continued to suffer severe emotional trauma from the event. The court found that measures less restrictive than confinement had recently been applied unsuccessfully to the Defendant. The record supports the court's denial of alternative sentencing. The Defendant is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE