

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2023

FILED

08/03/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. WILLIAM TIMOTHY KIRK

**Appeal from the Circuit Court for Rutherford County
No. 83989 Barry R. Tidwell, Judge**

No. M2022-01334-CCA-R3-CD

Defendant, William Timothy Kirk, pleaded guilty to driving under the influence (DUI), first offense. The trial court sentenced Defendant to a term of eleven months, twenty-nine days in confinement, to be served at seventy-five percent. The trial court ordered the DUI sentence to be served consecutively to the life sentence for which Defendant was on parole at the time of the offense. On appeal, Defendant argues the trial court abused its discretion by imposing consecutive sentences. After review, we affirm the judgment of the trial court.

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

MATTHEW J. WILSON, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and KYLE A. HIXSON, J., joined.

Jon D. Slager, Murfreesboro, Tennessee, for the appellant, William Timothy Kirk.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Jennings Jones, District Attorney General; and Matthew Westmoreland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Guilty Plea and Sentencing

On August 25, 2022, the trial court held a hearing at which Defendant pleaded guilty, pursuant to a plea agreement, to one count of driving under the influence, first offense, a Class A misdemeanor. In the written plea agreement, the parties agreed to a sentence of eleven months and twenty-nine days incarceration, but the trial court would

“determine [the] manner of service” and whether the sentence would be imposed concurrently or consecutively to a sentence Defendant was serving at the time of the plea hearing. Defendant’s trial counsel confirmed this in the following exchange with the trial court:

The Court: Okay, so \$350 fine, everything else reserved to a sentencing hearing?

Defense Counsel: That would be correct, Judge. I think the issue is the manner of service and if it’s concurrent/consecutive to his charges he’s currently sentenced on.

At the plea hearing, Defendant “stipulate[d] to the initial facts” as provided in the affidavit of complaint filed by Trooper Chris Langley of the Tennessee Highway Patrol. The trooper’s affidavit reads,

Affiant makes oath that on August 7, 2019[,] he responded to I-24 in reference to a motor vehicle crash. Upon arrival, affiant made contact with one of the drivers who was identified as [Defendant]. While speaking with [Defendant] his speech was slurred, constricted pupils and was unable to follow directions. [Defendant] did admit to taking Oxycodone, however could not remember if he took one on this date. [Defendant] was given the field sobriety tests, which he failed to satisfy. When asked for the Implied Consent he refused. Therefore, [Defendant] was charged with DRIVING UNDER THE INFLUENCE. (Emphasis in original)

After accepting Defendant’s guilty plea, the trial court considered Defendant’s sentencing. The parties and trial court first reviewed Defendant’s criminal history and parole status. The evidence introduced at the hearing established that in 1978, a Shelby County jury convicted Defendant of robbery with a deadly weapon and concealing stolen property. The jury sentenced him to sixty-five years in the Department of Correction for the armed robbery conviction and six to ten years for the concealing stolen property conviction.¹ The trial court ordered these terms to be served concurrently. In February 1982, while Defendant was incarcerated, Defendant became involved in a violent incident at Brushy Mountain State Prison that left two inmates dead. Following a Morgan County jury trial, the jury convicted Defendant of two counts of voluntary manslaughter, two counts of assault with intent to commit voluntary manslaughter, and aggravated

¹ Juries set sentences for all felony offenses committed before the Sentencing Reform Act of 1982 became effective on July 1, 1982.

kidnapping. The jury imposed sentences for these offenses, including a life sentence for the aggravated kidnapping conviction. The trial court ordered those sentences to be served concurrently with each other and consecutively to the sixty-five-year sentence. *See State v. Kirk*, 699 S.W.2d 814, 815 (Tenn. Crim. App. 1985). Defense counsel advised the trial court at the plea hearing that Defendant's sixty-five-year sentence "is now expired or terminated," but counsel candidly admitted the only evidence of the sentence's expiration was Defendant's claim to him. There is no other proof in the record to substantiate this assertion.

The parties then discussed the events which led to the current case. At some point before Defendant's August 2019 arrest in this case, Defendant was granted parole. Apparently, Defendant made bond on the DUI charge shortly after his arrest. Defendant was arrested for another, unspecified offense in February 2020. The charge led to the filing of a parole violation on February 15, 2020, but the charge which led to the parole violation was dismissed.

On April 2, 2020, Defendant agreed to have his bond in the DUI case revoked, apparently in an attempt to gain pretrial jail credit. Somewhat confusingly, the parties also stated that the General Sessions Court set bond at \$100, with bond being "suspended until further order of the court." Counsel for the State suggested that Defendant was served with an additional parole violation at that court appearance. Defendant remained in custody between that appearance date and the plea hearing in this case.

Defense counsel stated that as of the plea hearing, Defendant had not had a hearing on the parole violation warrants. Defense counsel stated, "[R]egardless of what we do today, he still has to satisfy the parole board, before he would ever be released, or potentially be released." The results of the hearing on the parole violation, if such a hearing occurred, are not apparent from the record.

The State argued Defendant should be sentenced to eleven months, twenty-nine days, with the sentence imposed consecutively to his life sentence, based on the considerations set forth in Tennessee Code Annotated Section 40-35-103, subsections (1)(A) ("confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct") and (1)(C) ("measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant"). The State also argued the trial court should apply the sentence enhancement factors found in Tennessee Code Annotated section 40-35-114(1) ("the defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range"), -114(8) ("the defendant, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community"), and -114(13)(b) (the defendant was released upon parole during this offense).

Defense counsel argued the facts of the case were such that Defendant was not “worthy of anything more than a standard minimum punishment that the typical person that comes before a court on a DUI first would get.” Counsel emphasized that Defendant’s initial convictions were from 1977— “well over [forty] years ago,” as counsel put it—and that two of the charges from that case did not result in convictions, as one count was dismissed and one conviction was reversed on appeal. Defense counsel also asserted that under the current sentencing act, Defendant’s sentences for his role in the prison uprising would have resulted in lesser sentences. Defense counsel also noted that there was no proof before the trial court regarding the extent of Defendant’s role in the offenses for which he was convicted.

Defense counsel argued several mitigating factors weighed in favor of a minimum sentence in this case. Counsel argued Defendant’s actions did not cause or threaten serious bodily injury, that Defendant’s intoxication resulted from the use of prescription drugs properly prescribed to him (thus excusing or justifying Defendant’s conduct), and that the offense was committed under unusual circumstances because it was “unlikely that a sustained intent to violate the law motivated [Defendant’s] criminal conduct.” *See* Tenn. Code Ann. § 40-35-113(1), (3), (11). Counsel also argued for the “catch-all” provision under Code section 40-35-113(13), asserting that the facts of this case did not involve guns, gangs, violence, cruelty to victims, or other egregious factors. Defense counsel argued that the trial court also had several sentencing alternatives to the maximum sentence, including an alcohol and drug assessment, a restricted license, inpatient or outpatient rehabilitation, and community service.

Regarding manner of service, Defense counsel urged the trial court to impose the DUI sentence concurrently based on the fact that Defendant had already been in custody for 922 days before pleading guilty to this offense. If the trial court were to impose consecutive sentences, defense counsel argued the sentence for DUI should be the minimum sentence, based on Defendant’s lengthy incarceration before his guilty plea. Finally, defense counsel asserted that were the trial court to impose a concurrent sentence or a minimum consecutive sentence, Defendant “still would not be released. He would have to go before the parole board. . . . he still has to meet that fate.”

The trial court sentenced Defendant to eleven months, twenty-nine days, with a seventy-five percent service percentage. The trial court applied the sentence enhancement factors regarding Defendant’s prior criminal behavior and the fact that Defendant was on parole at the time of the offense. The trial court announced it considered the mitigating factors proposed by Defendant, but it concluded none applied. The trial court specifically cited to the fact that Defendant’s offense involved a crash and the use of Oxycodone in imposing the maximum sentence for the offense.

The trial court ordered the DUI sentence to be served consecutively to the life sentence for which Defendant was on parole at the time of the offense. In so doing, the court stated:

In looking at the discretionary consecutive sentencing factors, the State has cited that [Defendant] is an offender whose record of criminal activity is extensive. I guess extensive being the operative word here. [Defendant] had a sentence out of Shelby County of 65 years, back from 1997. I have nothing before me not to give credit to [Defendant], that that sentence has expired. So I don't know, one way or another. However, certainly, it is a sentence that I can take into account when determining whether consecutive sentencing is warranted.

The 1983 sentence out of Morgan County, is a life sentence. And I do note that, in that case, he was found guilty of voluntary manslaughter. That was a rather, well, it was a smaller sentence, shorter sentence, 4-to-10 years. Guilty in Count 3 of assault with intent to commit voluntary manslaughter.

And, I guess, the conviction that really comes in to play here is, in Count 6. And that is aggravated kidnapping at the time was a life sentence, and that's what he received in this case.

And, so, [Defendant] is on parole from a life sentence. The stakes extremely high. I certainly don't place myself in [Defendant's] shoes as to what I would do if I had -- was on parole for a life sentence. However, taking Oxycodone and driving, and causing a crash on I-24, in Rutherford County, is probably not, would not be on my list of things I would do.

And while extensive is not found in the sense of the number of convictions, I do find that criminal activity extensive, in this case, would apply. And that the convictions [Defendant] received were very serious and, again, called for a life sentence.

Perhaps, Mr. Slater—well I know you're right—if there was a conviction for that these days that would not be the sentence. However, that's probably more for the parole board to take up than this Court.

I don't find any of the other factors, particularly apply to this case under discretionary consecutive sentences. Mandatory consecutive

sentencing has been pointed out by the State, does not apply. But, I simply, so the record's clear, I go back to the prior criminal activity resulting in a life sentence, I think, warrants a finding that this DUI should run consecutive to the Morgan County case. And, so, that's what I'll order.

This timely appeal followed.

II. Analysis

On appeal, Defendant only challenges the consecutive imposition of his sentence, arguing that the trial court abused its discretion by ordering the Defendant's DUI sentence to be served consecutively to the life sentence for which he was on parole at the time of his arrest. Defendant asserts the imposition of consecutive sentences resulted in greater punishment than he deserved for his first-offense DUI conviction and did not relate to the relative seriousness of an offense which "did not bear injury or damage to a person or society." Defendant argues his sentence was "the most restrictive measure that was available to the trial court," and in his view, the principles of sentencing are such that "the risk of recidivism for the charge of DUI for the Defendant could simply be reduced by alternate means, such as restricting his driving privilege." The State contends the trial court did not abuse its discretion and properly imposed consecutive sentences based on Defendant's criminal history. We agree with the State.

Our supreme court has recognized that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). A reviewing court should uphold the sentence "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." *Id.* at 709-10.

Driving under the influence, first offense, is a Class A misdemeanor, carrying a maximum sentence of eleven months and twenty-nine days imprisonment, with a mandatory minimum sentence of forty-eight hours. Tenn. Code Ann. § 55-10-402(a)(1)(A). As this court recently recognized, "[O]ur supreme court has not specifically considered whether the *Bise* standard applies to misdemeanor sentencing determinations[.]" *State v. Jones*, No. W2022-01270-CCA-R3-CD, 2023 WL 3451553, at *2 (Tenn. Crim. App. May 2, 2023). Our supreme court has, however, stated that "the abuse of discretion standard of appellate review accompanied by a presumption of reasonableness applies to all sentencing decisions." *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014) (citing *State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013)). Specifically, our supreme court has stated this standard also applies to "questions related to probation

or any other alternative sentence.” *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). Accordingly, this panel will apply the *Bise* standard to its review of Defendant’s sentence.²

In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received 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 mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and -114; (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made on the defendant’s own behalf about sentencing; and (8) results of the validated risk and needs assessment conducted by the Department of Correction and contained in the presentence report. *See* Tenn. Code Ann. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the sentence alternative or length of a term to be imposed. Tenn. Code Ann. § 40-35-103.

A sentence imposed for a misdemeanor offense must be specific and in accordance with the principles, purposes, and goals of the Sentencing Act. Tenn. Code Ann. §§ 40-35-104, -302(b); *State v. Cooper*, 336 S.W.3d 522, 524 (Tenn. 2011) (per curiam); *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995). For misdemeanor sentences, the trial court designates “a percentage of that sentence, which the offender must serve before becoming eligible for consideration of rehabilitative programs,” usually not to exceed seventy-five percent. *Palmer*, 902 S.W.2d at 394; *see* Tenn. Code Ann. § 40-35-302(d). However, “the legislature has specifically excluded DUI offenders from the provisions of the Act when the application of the Act would serve to either alter, amend, or decrease the specific penalties provided for DUI offenders.” *Palmer*, 902 S.W.2d at 394. “A trial judge may designate a service percentage in a DUI case . . . but that percentage may not operate to reduce the mandatory minimum sentencing provisions of the DUI statute.” *Id.*

“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.’” *Jones*, 2023 WL 3451553, at *3 (quoting Tenn. Code Ann. §§ 40-35-103(2), (4)). However, a person convicted of a misdemeanor offense has no presumption of entitlement to a minimum

² Other panels of this court have also applied *Bise* in reviewing misdemeanor sentencing. *See State v. Crode*, No. M2021-01371-CCA-R3-CD, 2023 WL 3736157, at *6 (Tenn. Crim. App. May 31, 2023); *Jones*, 2023 WL 3451553, at *2; *State v. Hampton*, No. W2018-00623-CCA-R3-CD, 2019 WL 1167807, at *12 (Tenn. Crim. App. Mar. 12, 2019) (citing to four other cases from this court applying *Bise* to misdemeanor sentencing).

sentence. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (citations omitted). Furthermore, “a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute.” *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998). In sum, “the trial court has more flexibility in misdemeanor sentencing than in felony sentencing.” *Johnson*, 15 S.W.3d at 518.

The abuse of discretion standard adopted in *Bise* also applies to the imposition of consecutive sentences, “giving deference to the trial court’s exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b).” *State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013); *see also* Tenn. R. Crim. P. 32(c)(1) (stating that the trial court, in ordering consecutive sentencing, “shall specify the reasons for this decision”). The trial court must find by a preponderance of the evidence that one of the statutory classifications for consecutive sentencing exists. *See* Tenn. Code Ann. § 40-35-115(b).

In this case, the trial court’s citing to Defendant’s history of criminal convictions makes clear that it imposed consecutive sentences based on Tennessee Code Annotated section 40-35-115(b)(2), under which consecutive sentences may be imposed if “[t]he defendant is an offender whose record of criminal activity is extensive[.]” Defendant acknowledges the trial court’s “finding is sufficient for a ruling and order of the consecutive sentence in this case,” and we agree that the record of Defendant’s convictions in the Shelby County and Morgan County cases sufficed for the trial court to impose consecutive sentences under section 40-35-115(b)(2). Nevertheless, Defendant argues the facts of this case and the principles of sentencing are such that the trial court’s imposition of consecutive sentences constituted an abuse of discretion.

In support of his contention, Defendant cites to this court’s opinion in *State v. Biggs*, 482 S.W.3d 923 (Tenn. Crim. App. 2015). In that case, a defendant pleaded guilty to four counts of aggravated robbery, two counts of theft, and one count of attempted aggravated robbery. *Id.* at 924-25. The trial court sentenced the defendant to two consecutive terms of twenty-two years for two of the convictions and imposed concurrent terms for the other convictions, resulting in an effective sentence of forty-four years. *Id.* at 926. On appeal, this court reversed the trial court’s imposition of partial consecutive sentences. *Id.* at 927-28. Although the defendant qualified for consecutive sentencing under section 40-35-115(b)(2) given his “very long criminal history,” this court concluded the trial court abused its discretion imposing consecutive sentences, stating:

Considering the circumstances of the offenses—that the robberies were committed with a toy gun, no one was injured, and two of the victims knew

the gun was plastic—and also considering the [d]efendant’s age of forty-nine and complete lack of previous violent offenses, we conclude that the trial court erred by imposing partial consecutive sentences. Although the trial court considered the applicable principles before sentencing the [d]efendant, we conclude that it violated those principles in two respects: (1) a sentence of forty-four years to be served at eighty-five percent is in effect a sentence of life imprisonment and is not “justly deserved in relation to the seriousness of the offense,” *see* Tenn. Code Ann. § 40–35–102; and (2) a total effective sentence of forty-four years is not the “least severe measure necessary to achieve the purposes for which the sentence is imposed,” *see* Tenn. Code Ann. § 40–35–103. It appears from the record that the [d]efendant was already serving a twelve-year sentence at the time of sentencing for these convictions. Imposition of a sentence that will confine the [d]efendant until age seventy will certainly protect the public from the [d]efendant and serve to appropriately punish him for his crimes.

Id. at 927-28.

Conversely, in this case, Defendant’s prior convictions, armed robbery and particularly those related to the 1982 Brushy Mountain Prison uprising, were for violent offenses. And while Defendant’s DUI offense did not injure or kill other drivers, it could have. Defendant’s driving while under the influence of opiates on the interstate did create a legitimate threat to other drivers the day of Defendant’s arrest. Therefore, the trial court’s ordering consecutive sentences relates to the seriousness of Defendant’s offense in this case. Given these circumstances and the fact that sufficient evidence existed for the trial court to find the existence of one of the statutory consecutive sentencing factors by a preponderance of the evidence, we give deference to the trial court’s sentencing decision. We conclude that the trial court did not abuse its discretion in ordering Defendant’s sentence for the DUI conviction to be served consecutively to the life sentence for which he was on parole at the time of his arrest. Defendant is not entitled to relief on this issue.

III. Conclusion

For the above-stated reasons, we affirm the trial court’s imposition of consecutive sentences.

MATTHEW J. WILSON, JUDGE