IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

Assigned on Briefs August 1, 2023

STATE OF TENNESSEE v. CHRISTOPHER DAVID PACE

Appeal from the Circuit Court for Henderson County
No. 21-096-3 Kyle C. Atkins, Judge

No. W2022-01092-CCA-R3-CD

Defendant, Christopher David Pace, entered a partially open plea in which the length of his sentence was agreed upon. The trial court would determine the manner of service at a separate sentencing hearing. On appeal, Defendant argues that the trial court erred because it relied only upon a "Specific Data Report" in sentencing Defendant. Alternatively, Defendant argues that the trial court abused its discretion in denying Defendant's request for alternative sentencing. The State concedes that it was reversible error for the trial court to sentence Defendant without a presentence report. We find that the trial court erred in failing to consider the validated risk and needs assessment as required by Tennessee Code Annotated section 40-35-210(b)(8). However, we conclude that the issue is waived. We further conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing. We accordingly affirm the judgment of the trial court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and MATTHEW J. WILSON, JJ., joined.

Brennan M. Wingerter, Assistant Public Defender – Appellate Director, Franklin, Tennessee (on appeal); Jeremy Epperson, District Public Defender; and Hayley Johnson, Assistant Public Defender, Jackson, Tennessee (at plea), for the appellant, Christopher David Pace.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Jody S. Pickens, District Attorney General; and Chadwick R. Wood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

Defendant was indicted by the Henderson County Grand Jury on March 31, 2021 for one count of sale of 0.5 grams or more of methamphetamine and one count of delivery of 0.5 grams or more of methamphetamine, both Class B felonies. These charges stemmed from a controlled drug buy with a confidential informant. Defendant entered a partially open plea to one amended charge of facilitation of sale and delivery of methamphetamine, a Class C felony, on May 16, 2022. The parties agreed that Defendant's sentence should be six years at 35% but left the manner of service of the sentence to the trial court. The trial court accepted Defendant's plea, ordered a presentence report be prepared, and scheduled a sentencing hearing for July 18, 2022.

At the sentencing hearing, the State offered into evidence a "Presentence Report" which was made an exhibit to the hearing. The record shows that the "Presentence Report" is actually a "Specific Data Report" prepared by the Tennessee Department of Corrections. The specific data report lists Defendant's criminal history and various biographical information, as well as information about Defendant's family members and health history. The specific data report contains a written statement from Defendant in which he states that he committed these crimes to get money because his ailing mother's Social Security check had been stolen.

The State requested that the trial court sentence Defendant to incarceration based on his prior criminal history and its previously filed Notice of Intent to Seek Enhanced Punishment. The State's Notice of Intent argued that Defendant's criminal history was extensive and that he committed the offense while on bond or probation, though it did not rely on any specific enhancement factors at the hearing. Defendant urged the trial court "to impose a period of shock incarceration followed by . . . intensive probation and treatment." Defendant argued that the principles of the Sentencing Act would not be served by imposing a sentence of incarceration in light of Defendant's drug addiction.

The trial court ordered that Defendant serve his six-year sentence in incarceration with a release eligibility of 35%, relying chiefly on his criminal history as shown in the specific data report and his past failures at probation.

Defendant appeals.

Analysis

Defendant and the State agree: (1) that the specific data report is not a presentence report for sentencing purposes; (2) that the trial court committed reversible error by failing

to consider a presentence report with a validated risk and needs assessment; and (3) that this Court should remand this matter for a new sentencing hearing in which a presentence report containing the assessment will be prepared or produced and considered. We agree that it was error for the trial court not to consider a validated risk and needs assessment, but we conclude that that issue is waived. We further find that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing.

Validated Risk and Needs Assessment

Trial courts are required to order a presentence report when a defendant is convicted of a felony. T.C.A. § 40-35-205(a). Tennessee Code Annotated section 40-35-210(b), in relevant part, requires a trial court to consider the presentence report in making sentencing decisions, and Tennessee Code Annotated section 40-35-207(a) mandates the contents of the report. Because presentence reports are a mandatory component of sentencing, this Court has previously held that the failure to prepare a presentence report constitutes reversible error. *See State v. Rice*, 973 S.W.2d 639, 642 (Tenn. Crim. App. 1997).

Both Defendant and the State cite *State v. Anderson*, No. E2019-02256-CCA-R3-CD, 2021 WL 98914 (Tenn. Crim. App. Jan. 12, 2021), *no perm. app. filed*, for the proposition that a trial court errs by relying on a specific data report in lieu of a presentence report in sentencing. *Anderson* does not support that proposition. In *Anderson*, a panel of this Court held that "the trial court erred by sentencing the defendant in the absence of the presentence report." *Id*. at *4. *Anderson* makes no mention of a specific data report—it is inapposite here.

The "validated risk and needs assessment" is a mandatory component of a presentence report. T.C.A. § 40-35-207(a)(10). The assessment is "a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool designated by the department that assesses the dynamic and static factors that drive criminal behavior." *Id.* § 40-35-207(d). Though the trial court is required to consider the results of the validated risk and needs assessment in sentencing a defendant, *see id.* § 40-35-210(b)(8), "the statute does not mandate that any particular weight be given to the risk and needs assessment, and . . . the weight to be assigned to the assessment falls within the trial court's broad discretionary authority in the imposition of sentences." *State v. Solomon*, No. M2018-00456-CCA-R3-CD, 2018 WL 5279369, at *7 (Tenn. Crim. App. Oct. 23, 2018), *no perm. app. filed* (citing *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012)).

The specific data report used here is similar to a presentence report. It contains biographical information about Defendant, some information about Defendant's physical

history, a record of Defendant's prior convictions, and information relating to the enhancement factors in the notice filed by the State. *Cf.* T.C.A. § 40-35-207(a).

Significally here, Defendant did not object at the sentencing hearing to the lack of a validated risk and needs assessment. Referencing the specific data report, which was admitted as an exhibit without objection, defense counsel urged the trial court "to take into consideration [Defendant]'s written statement included in the investigation report in light of mitigating number . . . 7 . . . , which is he frankly acknowledged a motivation -- that he was motivated by the desire to provide necessities for his family." Defense counsel made no mention that the report did not contain a Strong-R assessment.

It is well-settled that "[t]he failure to make a contemporaneous objection constitute[s] waiver of the issue on appeal." *State v. Gilley*, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008). This Court has determined that the issue of lack of the validated risk and needs assessment is waived when no objection was made at the sentencing hearing. *State v. Ailey*, No. E2017-02359-CCA-R3-CD, 2019 WL 3917557, at *31 (Tenn. Crim. App. Aug. 19, 2019), *no perm. app. filed* (citing *Gilley*, 297 S.W.3d at 762). Although the trial court failed to consider the validated risk and needs assessment, this issue is waived for our consideration. *See* Tenn. R. App. P. 36(a).

Denial of Alternative Sentencing

Defendant argues that even if even if the failure to consider the validated risk and needs assessment was not reversible error, the trial court abused its discretion in denying his request for alternative sentencing. The State concedes on the first issue, so it makes no argument as to this issue. For the following reasons, we conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing.

"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 trial court's decision regarding probation or other alternative sentencing is reviewed likewise. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (citing *Bise*, 380 S.W.3d at 708).

Tennessee Code Annotated section 40-35-103 states that trial courts should look to the following considerations in deciding whether a sentence of confinement is appropriate:

> (A) Confinement is necessary to protect society by restraining an individual 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.

T.C.A. § 40-35-103(1). Additionally, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed," and "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." *Id*. § 40-35-103(4), (5).

As to alternative sentencing, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative[.]" *Id.* § 40-35-103(5). In deciding whether probation is suitable, the trial court should 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) special and general deterrence value." *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (citing *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998)). "[T]he burden of establishing suitability for probation rests with the defendant." T.C.A. § 40-35-303(b). Our supreme court has "emphasize[d] that there are no 'magic words' that trial judges must pronounce on the record, [but] it is also critical that, in their process of imposing sentence, trial judges articulate fully and coherently the various aspects of their decision as required by our statutes and case law." *Trent*, 533 S.W.3d at 292. Additionally, "a defendant's criminal history is a critical factor in evaluating his or her amenability to correction[.]" *State v. Thompson*, 189 S.W.3d 260, 267 (Tenn. Crim. App. 2005).

Here, the trial court sentenced Defendant to confinement after making several findings on the record. First, the trial court found that the interests of society would be protected by confinement. The trial court, examining the specific data report, found that Defendant had been committing crimes "since he was 25 on a pretty regular basis." The trial court also found that measures less restrictive than confinement had been applied unsuccessfully to Defendant. The trial court noted that Defendant had previously been on probation at least twice and had been revoked both times. These findings were sufficient to support sentencing Defendant to confinement. *See* T.C.A. § 40-35-103(1).

As to alternative sentencing, the trial court examined the information contained in the specific data report and concluded that Defendant's criminal history in particular weighed against granting probation. The trial court found that the circumstances of the offense "probably" weighed in favor of probation. The trial court also found that "whether

or not [Defendant] might reasonably be expected to be rehabilitated and the chance that he's going to commit another crime" weighed against probation. After examining these factors, the trial court found that alternative sentencing was not appropriate for Defendant and denied his request. Though the trial court's findings did not perfectly track the language of the *Electroplating* factors, we conclude that the trial court's findings were sufficient to deny Defendant's request for alternative sentencing. *See Trent*, 533 S.W.3d at 291. The trial court did not abuse its discretion in denying Defendant's request for alternative sentencing and ordering Defendant to incarceration.

Defendant contends that the trial court "did not account for [Defendant's] history of drug use and apparent lack of treatment over the years." But the trial court was entitled to find that incarceration was appropriate given Defendant's lengthy criminal history. It may be that Defendant requires treatment for a drug problem. We trust our trial courts to make these decisions after weighing the appropriate factors, which the trial court did here. That Defendant is unhappy with the trial court's decision and would have preferred drug treatment, does not mean that the trial court abused its discretion. Indeed, the specific data report states that Defendant had been to a drug treatment facility at some point in the past. The facility's efforts were evidently unfruitful. Defendant is not entitled to relief.

CONCLUSION

Though the trial court erred in sentencing Defendant without the validated risk and needs assessment, we conclude that this issue was waived and that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing. We therefore affirm the judgment of the trial court.

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TIMOTHY L. EASTER, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

STATE OF TENNESSEE v. CHRISTOPHER DAVID PACE

Circuit Court for Henderson County
No. 21-096-3

No. W2022-01092-CCA-R3-CD

ORDER DENYING PETITION FOR REHEARING

Defendant, Christopher David Pace, filed a petition for rehearing in accordance with Tennessee Rule of Appellate Procedure 39 on September 11, 2023, after the release of the opinion of this Court on September 1, 2023. In the opinion, we agreed with the parties that the trial court erred in failing to consider a validated risk and needs assessment in sentencing Defendant. However, we concluded that the issue was waived because Defendant made no objection in the trial court.

The grant or denial of a petition to rehear remains solely in the discretion of this Court. That said, Tennessee Rule of Appellate Procedure 39 provides guidance as to the "character of reasons that will be considered" by the Court in making its determination. Such circumstances include the following: "(1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's opinion is in conflict with a statute, prior decision, or other principle of law; (3) the court's opinion overlooks or misapprehends a material fact or proposition of law; and (4) the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute." Tenn. R. App. P. 39(a); *see also* Advisory Comm'n Cmts., Tenn. R. App. P. 39. A petition to rehear is intended to "call attention of the Court to matters overlooked, not things which [Defendant] supposes were improperly decided after full consideration." *Clover Bottom Hosp. and Sch. v. Townsend*, 513 S.W.2d 505, 508 (Tenn. 1974).

In the petition to rehear, Defendant contends that this Court's opinion "is in conflict with prior decisions and principles of law, overlooks a material fact or proposition of law,

and is based on a waiver analysis that neither party raised or addressed." *See* Tenn. R. App. P. 39(a). In keeping with our supreme court's holding in *State v. Bristol*, 654 S.W.3d 917 (Tenn. 2022), we ordered supplemental briefing on the issue: "Is the lack of a presentence report with a validated risk and needs assessment a waivable issue? If so, does Defendant's failure to object to the lack of the validated risk and needs assessment at the sentencing hearing result in waiver of the issue on appeal?" Defendant and the State have briefed this issue, and we now deny Defendant's petition to rehear for the following reasons.

Waiver of Validated Risk and Needs Assessment

Defendant takes issue in his petition to rehear with our interpretation of several cases cited in the parties' principal briefs and in this Court's opinion. Defendant contends that the lack of a validated risk and needs assessment is not a waivable issue. Though the State initially conceded on this issue, the State now agrees with this Court that the lack of a validated risk and needs assessment is a waivable issue, and Defendant waived it here by failing to object at the sentencing hearing.

As noted in this Court's opinion, both parties cited in their principal briefs *State v. Anderson*, No. E2019-01156-CCA-R3-CD, 2021 WL 98914 (Tenn. Crim. App. Jan. 12, 2021), *no perm. app. filed*, "for the proposition that a trial court errs by relying on a specific data report in lieu of a presentence report in sentencing." *State v. Pace*, No. W2022-01092-CCA-R3-CD, 2023 WL 5658850, at *2 (Tenn. Crim. App. Sept. 1, 2023). Defendant contends in his petition that "the error in *Anderson* is the same error in this case—the trial court sentenced the defendant using a specific data report rather than a presentence report." Based on this, Defendant argues that *Anderson* precludes our conclusion here and this Court's analysis is thus flawed.

We disagree that *Anderson* forecloses our opinion in this case. This Court agreed with the parties here that the trial court erred in failing to consider the validated risk and needs assessment as required by Tennessee Code Annotated section 40-35-207(a)(10). However, nothing in *Anderson* precludes this Court's determination here that Defendant waived the issue by failing to object during the sentencing hearing. The bare-bones report at issue in *Anderson* was brought up at the sentencing hearing, thereby preserving the issue for appellate review.[1] *See* Tenn. R. App. P. 36(a). Additionally, *Anderson* does not hold that specific data reports are per se invalid. Defendant's reliance on *Anderson* is misplaced.

[1] We take judicial notice of the record from *Anderson*. *See Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010) (noting that an appellate court may take judicial notice of its own records).

This brings us to Defendant's argument that "this Court's opinion is in conflict with prior decisions and principles of law regarding waiver of sentencing issues." Defendant relies on this Court's decisions in *State v. Rice*, 973 S.W.2d 639 (Tenn. Crim. App. 1997), and *State v. Marshall*, No. W2012-01011-CCA-R3-CD, 2013 WL 257050 (Tenn. Crim. App. Jan. 23, 2013), to support his position.

We turn first to *Rice*. In *Rice*, a panel of this Court remanded a case for resentencing where "no presentence report was filed as the trial judge stated that he had received no report and no such report appear[ed] in the appellate record." *Rice*, 973 S.W.2d at 642. The defendant in *Rice* was sentenced immediately after the jury's verdict, and the sentencing was rife with issues: the State sought increased punishment despite failing to provide pretrial notice, no presentence report of any sort was prepared or filed, and the prosecutor merely listed off the defendant's prior convictions without any sort of proof thereof. *Id.* To be sure, *Rice* focused on the lack of a presentence report, but *Rice* simply does not say that the lack of a presentence report with a validated risk and needs assessment is not waivable.

We turn next to *Marshall*. Defendant relies on dictum in *Marshall* to support his contention that the lack of a presentence report with a validated risk and needs assessment is not waivable. *See Marshall*, 2013 WL 257050, at *3-4. Defendant's petition intimates that this Court is either unaware of *Marshall* or that we outright ignored it because we did not cite the case in our opinion. We are indeed aware of *Marshall*—we simply disagree with Defendant's contention that it controls here. *Marshall*'s result did not turn on the lack of a presentence report, but rather because the trial court "relied upon information not contained in the record in denying judicial diversion." *Id.* at *4. Nor does it stand for the proposition that the lack of a presentence report with the validated risk and needs assessment is not waivable.

Contrary to Defendant's assertion that our opinion in this matter is "in conflict with a statute, prior decision, or other principle of law," our opinion here is consistent with the holding in *State v. Ailey*, No. E2017-02359-CCA-R3-CD, 2019 WL 3917557, at *31 (Tenn. Crim. App. Aug. 19, 2019), *no perm. app. filed* (citing *State v. Gilley*, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008)), which held that the issue of the validated risk and needs assessment is waived by failing to object to its absence at the sentencing hearing. And we decline to accept Defendant's invitation to elevate form over function and hold that specific data reports are categorically invalid. The only component of a presentence report that the specific data report at issue here lacks is the validated risk and needs assessment. The specific data report used here is functionally identical to a presentence report.

Defendant also turns to Tennessee Rule of Appellate Procedure 3(e) in an attempt

to support his contention that this issue is not waivable. Defendant argues that because sentencing issues need not be included in the motion for new trial, sentencing issues generally are not waivable. As the State points out, Defendant's argument misses the mark. Defendant did not waive this issue by failing to include it in his motion for new trial. Indeed, there was no motion for new trial filed in this guilty-pleaded case. Defendant's waiver here is grounded in his failure to contemporaneously object at the sentencing hearing. *See* Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

Defendant finally argues that "this Court's opinion rests on a waiver analysis that was not raised, briefed, or otherwise addressed at any time by the parties," and that this "deprived the parties of an opportunity to be heard" on the issue. We are satisfied that our order for supplemental briefing, and the parties' subsequent compliance with the order, puts an end to this concern.

Plain Error

Neither is Defendant entitled to plain error relief. Plain error relief is appropriate when:

> (a) the record clearly establishes what occurred in the trial court; (b) a clear and unequivocal rule of law has been breached; (c) a substantial right of the accused has been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is "necessary to do substantial justice."

State v. Martin, 505 S.W.3d 492, 504 (Tenn. 2016) (citations omitted); *see also* Tenn. R. App. P. 36(b). "[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Martin*, 505 S.W.3d at 504 (quoting *State v. Smith*, 24 S.W.3d 274, 283 (Tenn. 2000)). "If any one of these factors is not satisfied, we need not consider the remaining factors." *Martin*, 505 S.W.3d at 505 (quoting *State v. Smith*, 492 S.W.3d 224, 232-33 (Tenn. 2016)).

We find that consideration of the lack of the validated risk and needs assessment is not "necessary to do substantial justice." To be sure, the validated risk and needs assessment is required by statute. T.C.A. § 40-35-210(b)(8). But as discussed in this

Court's opinion in this matter (and contrary to Defendant's assertions), the issue is waivable by failing to object, and trial courts need not afford the assessment any particular weight. *State v. Solomon*, No. M2018-00456-CCA-R3-CD, 2018 WL 5279369, at *7 (Tenn. Crim. App. Oct. 23, 2018), *no perm. app. filed* (citing *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012)).

This Court finds it a stretch to hold that remanding this case for consideration of the validated risk and needs assessment is necessary to do substantial justice where the trial court need not have afforded the results of the assessment any weight in sentencing. This is particularly true of Defendant, in light of his significant criminal history and past failures at probation, as shown in the specific data report. *Pace*, 2023 WL 5658850, at *2. Because this prong of plain error is not satisfied, we need not address any other factor. *See Martin*, 505 S.W.3d at 505 (citations omitted). Defendant is not entitled to plain error relief.

CONCLUSION

After careful consideration of the parties' arguments, the authorities cited above, and this Court's opinion in this matter, we are content that our opinion neither "is in conflict with prior decisions and principles of law, overlooks a material fact or proposition of law, [nor] is based on a waiver analysis that neither party raised or addressed." *See* Tenn. R. App. P. 39(a). Defendant's petition to rehear is accordingly DENIED. This Court's opinion shall remain in full force and effect. A copy of this order shall be attached to the opinion for purposes of citation.

PER CURIAM