IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 1, 2023

STATE OF TENNESSEE v. CARL PAIGE

Appeal from the Criminal Court for Shelby County
No. W2201095 Jennifer Fitzgerald, Judge

No. W2022-01792-CCA-R3-CD

Defendant, Carl Paige, pleaded guilty to attempted second degree murder and agreed to an eight-year sentence with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court sentenced him to a term of eight years to be served in confinement. On appeal, Defendant argues the trial court erred in denying his request to suspend his sentence to probation. After review, we affirm the judgment of the trial court.

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

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

Tony N. Brayton, Assistant Public Defender (on appeal); Phyllis Aluko, District Public Defender, and Phoebe Gille, Assistant District Public Defender (at hearing), for the appellant, Carl Paige.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Steven J. Mulroy, District Attorney General, and Julie Cardillo, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural History

On the evening of January 20, 2021, Charles Buring, his wife, and their two minor sons, five and ten years old, were at their home in a residential neighborhood. At the same time, Defendant was getting high on "[p]ills and liquor." Defendant and an accomplice

then went out, with Defendant dressed in "dark clothing and a black ski mask" and both armed with firearms, to burglarize automobiles "by pulling on car doors" and taking whatever was inside.

Around 10:00 p.m., Mr. Buring heard noises from his driveway and went outside to investigate. He saw that the door to his car was open and the inside was "ransacked." He then noticed Defendant standing next to his wife's car with the passenger-side door opened. Mr. Buring yelled at Defendant and Defendant immediately responded by firing "seven shots at [Mr. Buring] with a handgun, causing [Mr. Buring] to be shot in the right arm." Defendant's shots also struck Mr. Buring's "cars, fences, [inside his] living room where [his] children . . . were watching TV" and one of the shots ricocheted "on [his] leg." Mr. Buring, trying to defend himself, threw a "stone garden gnome" at Defendant. Immediately after, the accomplice fired eight shots at Mr. Buring. Mr. Buring then saw Defendant and the accomplice get into a "white Honda Civic with tinted windows and a drive-out tag[1]" and flee the scene.

Mr. Buring decided against going to the hospital that night because he feared that Defendant would come back later that night to kill him and his family. Mr. Buring received treatment the next morning from his primary care physician and a trauma nurse. Mr. Buring was able to describe the car to officers because a week earlier, he had seen the same vehicle driving around slowly, appearing to case his neighborhood.

Roughly two weeks later, police officers pulled over a 2003 white Honda Civic with tinted windows and a drive-out tag. Defendant was driving the car and provided police with paperwork showing that he was the owner. His accomplice, the other shooter, was also in the car[2]. Defendant had a loaded Taurus 9mm handgun on his hip, which a Memphis Police ballistics report matched as the same gun used to shoot Mr. Buring. Officers also found a black ski mask matching the one Mr. Buring described as worn during the burglary inside the car, as well as other items which Mr. Buring later identified as some of his stolen property, valued around $300.

Defendant was arrested and charged in general sessions court with three counts of aggravated assault, possession of a firearm during the commission of a dangerous felony, and two counts of burglary of an automobile. Defendant waived his right to indictment by a grand jury, and was charged by criminal information with one count of attempted second degree murder, a Class B felony. Defendant pleaded guilty pursuant to a plea agreement to the charge, as a Range I offender with an agreed-upon sentence of eight years at a rate of thirty percent service, with the manner of service to be determined by the trial court. The State entered dispositions of nolle prosequi on the general sessions charges.

[1] Drive-out tags are Temporary Operation Plates issued by motor-vehicle dealers.

[2] The record reflects that the accomplice was a juvenile, but the Assistant District Attorney General informed the trial court that no one other than Defendant was prosecuted for this crime.

Defendant, who had been in custody for four months, testified at his sentencing hearing. Defendant admitted, "I just about had pulled like three cars and then the third one[,] somebody came out and scared, like, scared me 'cause I was under the influence, I didn't know who it was." Defendant also testified that he "didn't mean to scare [Mr. Buring and his family] like [he] did and all that[,]" but that "when [he] shot, [he] was trying to scare him off." Defendant testified that he did not intend to kill Mr. Buring.

Defendant told the trial court that if he were granted probation, he would live with his mother in Memphis. He admitted to previously pleading guilty to assault and disorderly conduct, but said he successfully completed diversion for those offenses. Defendant said that he was a union lineman prior to his arrest, and since his arrest, had worked in the jail's kitchen. A letter of recommendation from a supervisor at the jail's kitchen was exhibited to the hearing. Defendant further expressed his willingness to join a special program called Blight Patrol, an intensive reentry program, and another program called LifeLine, to obtain a GED and to receive cognitive-based intervention. He agreed to participate in the program "every day." He also agreed that he needed to participate in a drug and alcohol rehabilitation program, and to take daily drug tests.

On cross-examination, Defendant admitted he was "drunk" and "on something" when he committed the instant offense. He said he shot seven times "just 'cause [he] was under the influence and . . . wasn't thinking." When the prosecutor asked Defendant if he thought being under the influence excused his actions, Defendant responded, "Yes ma'am. Because normally, I wouldn't act out in that type of manner. I don't do things like that." Defendant asked the trial court for "a second chance," because "[s]ometimes people mess up and they - - sometimes they don't know what they doing."

Defendant then admitted to having consumed "[p]ills and liquor." While Defendant also admitted to having a black ski mask in his car, he claimed no one else was with him, despite Mr. Buring's having seen two shooters, and a juvenile suspect was arrested with Defendant.

The trial court also received Defendant's presentence report (PSR), which it had previously ordered in anticipation of Defendant's guilty plea. It contained Defendant's prior dispositions of diversion, including the assault and disorderly conduct charges that Defendant had acknowledged. The PSR indicated a "risk score of moderate" for Defendant.

Mr. Buring chose not to testify at the sentencing hearing, but he did write the trial court a victim-impact letter about how Defendant's actions affected him and his family. Mr. Buring described that he was "unable to use [his] arm for weeks and [he] feel[s] the pain everyday [sic]." Mr. Buring wrote that he was "afraid for [his] life," that his family was still dealing with the "stress and anxiety" resulting from Defendant's actions, that his

wife and children were "absolutely terrified," and "[t]he sound of Memphis gunfire still makes the family . . . jump and run." Mr. Buring also described his financial losses: (1) a bullet hole in his home; (2) damage to his wife's car that resulted in a $500 insurance deductible; (3) damage to his car that needed between $4,000 and $6,000 in repair; and (4) his medical bills. Mr. Buring felt even an eight-year sentence at a thirty-percent service was "a complete miscarriage of justice."

Defendant, through counsel, advocated that the trial court should suspend the eight-year sentence and impose probation. While counsel acknowledged this was "a very serious case," counsel argued that Defendant's crime was "aberrant behavior," and noted this was Defendant's "first felony conviction." Counsel listed Defendant's successful completion of diversion as evidence of his potential for rehabilitation, and asked the court to order Defendant to complete the Blight Patrol and LifeLine programs to further his rehabilitation. Counsel also cited Defendant's history of drug and alcohol abuse and asked the court to impose substance-abuse treatment, and cited Defendant's work history as evidence of his candidacy for probation. The State asked the trial court to consider the seriousness of Defendant's offense, to consider Mr. Buring's victim impact statement, and sentence Defendant to eight years imprisonment at thirty-percent service.

The trial court, in determining Defendant's sentence, considered:

> The evidence presented at the sentencing hearing, the [PSR], the principles of sentencing and arguments made as the sentencing alternatives, the nature and characteristics of the criminal conduct involved, the evidence and information offered by the parties, any mitigating and enhancement factors, any statistical information provided by the Administrative Office of the Court as to sentencing practices for similar offenses, and the statement made by the defendant and the defendant's potential for rehabilitation.

In considering whether to sentence Defendant to confinement or probation, the trial court found confinement was necessary "to avoid depreciating the seriousness of this offense" and as a "deterrence to [Defendant] and . . . others." As to the seriousness of this offense, the trial court noted that Defendant was high on drugs, going around pulling on doors, and when someone saw him, "he started shooting." He "shot seven times" and "there were gunshots that went within [Mr. Buring's] residence and also [Mr. Buring] was hit in his shoulder." The court found that "based off these facts, placing [Defendant] on probation would depreciate the seriousness of this." The trial court also addressed deterrence, and found that placing Defendant "on probation would not deter others . . . . [Defendant] does have some arrests."

The trial court did find that Defendant had "some employment history" and that "LifeLine for success . . . is a good program," but found that Defendant was not "an appropriate candidate for probation." The court found "that [Defendant] was not truthful,"

that being "high on drugs" was not an excuse for Defendant's actions, and that "someone could have died because he shot seven times." The court also noted Defendant was originally charged with multiple counts of aggravated assault, two counts of burglary of an automobile, possession of a firearm during the commission of a dangerous felony, and misdemeanor theft.

After considering all these factors, the trial court denied Defendant's request for probation, and sentenced Defendant to eight years' imprisonment, to be served at a rate of thirty percent. This timely appeal follows.

II. Analysis

Defendant's sole argument on appeal is that the trial court erred and abused its discretion by denying Defendant probation. Defendant argues that he is entitled to probation because "[t]here is simply no evidence to show that incarceration in this case is particularly suited as an effective deterrence to others." Defendant also argues that the "facts in this case are not especially [violent], horrifying, shocking[,] or reprehensible" when compared to any other attempted second degree murder. The State contends that Defendant's attempted second degree murder was especially egregious and that confinement is, in fact, necessary to provide effective deterrence. After review, we agree with the State.

We review the length and manner of service of within-range sentences imposed by trial court under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). Our supreme court has 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).

However, to be afforded deference on appeal, the trial court must "place on the record any reason for a particular sentence." *Bise*, 380 S.W.3d at 705. There is no presumption of reasonableness when the trial court fails to consider and weigh the applicable common law factors. *King*, 432 S.W.3d at 327-28; *Caudle*, 388 S.W.3d at 29. But as this court has observed:

> [T]rial courts need not comprehensively articulate their findings concerning sentencing, nor must their reasoning be "particularly lengthy or detailed." *Bise*, 380 S.W.3d at 706. Instead, the trial court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and

> has a reasoned basis for exercising [its] own legal decision[-]making authority." *Id.*

State v. Sheets, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *4 (Tenn. Crim. App. Apr. 12, 2023) (alterations in original), *no perm. app. filed*.

In short, the trial court's sentencing decision will be upheld on appeal "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. A defendant bears the burden of proving the sentence is improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts; *see also State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

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 PSR; (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) the result of the validated risk and needs assessment conducted by the Department of Correction and contained in the presentence report. Tenn. Code Ann. § 40-35-210(b); *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. The sentence imposed should be "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4). "Appellate courts may not disturb the sentence even if we had preferred a different result." *State v. Burns*, No. W2021-00939-CCA-R3-CD, 2023 WL 334659 at *7 (Tenn. Crim. App. Jan. 20, 2023) (citing *State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2007).

Generally, probation is available to a defendant whose actual sentence imposed is ten years or less, and his or her underlying offense is not excluded by law. Tenn. Code Ann. § 40-35-303(a). However, no criminal defendant is entitled to a presumption of probation, and no defendant is automatically entitled to probation as a matter of law. *Carter*, 254 S.W.3d at 347; *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). The defendant must prove his suitability of alternative sentencing options. *Carter*, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-303(b)).

In determining whether incarceration is an appropriate sentence, the trial court should consider whether:

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

Tenn. Code Ann. § 40-35-103(1)(A)-(C).

In *State v. Hooper*, 29 S.W.3d 1, 10 (Tenn. 2000), the Tennessee Supreme Court stated, "the trial courts should be given considerable latitude in determining whether a need for deterrence exists and whether incarceration appropriately addresses that need." The court added:

> Accordingly, we will presume that a trial court's decision to incarcerate a defendant based on a need for deterrence is correct so long as any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular community, jurisdiction, or in the state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

Id. However, the Tennessee Supreme Court has observed that *Hooper* addresses the issue of whether deterrence *alone* may support a denial of alternative sentencing and articulates the criteria for such circumstances. *State v. Trotter*, 201 S.W.3d 651, 656 (Tenn. 2006). If a probation decision is based in whole or in part on a factor other than deterrence, the trial court need not consider *Hooper*. *Id.*; *see also State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014) (explaining that in a probation decision based on both deterrence and avoiding depreciating the seriousness of the offense, the heightened *Hooper* standard does not apply).

In *Trotter*, our supreme court recognized that "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *Id.* (internal citations omitted). Our supreme court, refining this standard, noted "the circumstances of the particular crime committed by the defendant must be evaluated" only "when the seriousness of a defendant's crime is the *sole reason* for ordering incarceration." *State v. Trent*, 533 S.W.3d 282, 292 (Tenn. 2017) (emphasis added).

Here, the trial court properly denied Defendant probation for the reasons it stated on the record. The trial court found that, based on Tennessee Code Annotated section 40-35-103(1)(B), "confinement is necessary to avoid depreciating the seriousness of this offense" and for deterrence. The trial court noted that Defendant "was high on drugs and he was going around pulling on doors and someone saw him . . . and he started shooting. He shot seven times according to the facts." The trial court further noted that "there were gunshots that went within the residence and also [Mr. Buring] was hit in his shoulder." The trial court found that "placing [Defendant] on probation would depreciate the seriousness of this." Defendant also concedes in his brief that attempted second degree murder "is always a horrible and shocking crime," but this one was not especially violent, "horrifying, shocking[,] or reprehensible." As explained above, the trial court properly found that the nature of Defendant's actions was particularly egregious. We note that the trial court found Defendant's actions met the heightened *Trotter* standard even though the court was not required to.

Defendant references *Hooper* and argues that because there was not "any publicity outside of the courtroom" and that "there is no proof in the record that [Defendant] has previously engaged in criminal conduct of the same type as the offense at issue here[,]" that his punishment cannot "reasonably serve as a deterrent to others." The trial court did, however, find Defendant's conduct satisfied *Hooper* on other grounds. First, the trial court noted that crimes like Defendant's are prevalent in the area because there was a second shooter who shot at Mr. Buring eight times that same night. Mr. Buring's statement emphasizes that "Memphis gunfire" causes his family to "jump and run," indicating that the threat of violence is a problem in Memphis. Second, the trial court noted that Defendant's conduct was intentional and refuted Defendant's belief that being intoxicated was somehow an excuse for his conduct. Third, the trial court noted that Defendant was previously arrested for assault. The trial court also noted that Defendant was not truthful. All the same, the trial court was not required to show that Defendant's crime satisfied the heightened *Hooper* standard because it was not the sole justification for confinement. *See Sihapanya*, 516 S.W.3d at 476.

We conclude that the proof in the record was enough for a reasonable person to conclude that confining Defendant would serve to deter others in Shelby County from committing similar offenses. We also conclude that the record shows that Defendant's confinement is necessary to avoid depreciating the seriousness of his offense. Therefore, the trial court did not abuse its discretion in sentencing Defendant to confinement rather than probation.

III. Conclusion

For the reasons stated above, we affirm the judgment of the trial court.

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MATTHEW J. WILSON, JUDGE