IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 7, 2023

STATE OF TENNESSEE v. LUIS SANTIAGO

Appeal from the Criminal Court for Shelby County
No. 21-00433, C21-00847 Lee V. Coffee, Judge

No. W2022-01044-CCA-R3-CD

Pursuant to a plea agreement, the Appellant, Luis Santiago, entered a guilty plea to attempted aggravated rape, aggravated burglary, and aggravated stalking and received a total effective sentence of seven years and two months with the manner of service to be determined by the trial court. Following a sentencing hearing, the trial court denied the Appellant's request for probation and ordered the seven-year-two-month sentence to be served in confinement. The sole issue presented for our review is whether the trial court abused its discretion in denying alternative sentencing. Upon review, we affirm the judgment of the trial court but remand for entry of separate judgment forms reflecting dismissal of counts two, four, and five.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed and Remanded

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

Phyllis Aluko, Chief Public Defender, and Tony N. Brayton, Assistant Public Defender, for the Appellant, Luis Santiago.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Alyssa Henning, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In March 2021, the Shelby County Grand Jury indicted the Appellant for the following six counts involving the same victim: attempt to commit aggravated rape (count one), rape (count two), aggravated burglary with intent to commit assault (counts three and

four), domestic assault (count five), and aggravated stalking (count six).[1] Pursuant to a plea agreement, the Appellant received concurrent terms of seven years and two months' for the attempt to commit aggravated rape conviction in count one, three years for the aggravated burglary conviction in count three, and one year for the aggravated stalking conviction in count six. The Appellant was required to be placed on the sex offender registry and on community supervision for life. As part of the plea agreement, the State agreed to dismiss counts two, four, and five.

On April 6, 2022, a guilty plea acceptance hearing was held, and the State provided the following facts in support of the guilty plea:[2]

> [O]n [February 5, 2021], Memphis Police Department responded to a scene here in Memphis, where they met with the victim, [A.L.].
>
> She advised that the [Appellant], who was her roommate, had gotten upset with her and thrown bleach on the left side of her face and left leg.
>
> On [March 21, 2021], Memphis Police, again, responded to a call at the same address. On the scene, officers met with the same victim, who stated that the [Appellant] had entered her home through an unlocked, rear window, without her permission. She said he entered the bathroom when she was taking a shower. He took off her clothes, grabbed her upper thigh, and said he was going to have his way with her.
>
> The victim demanded he leave and was able to run out of the bathroom. The victim eventually got him to leave out of the front door, however, he came back into the victim's home.
>
> At that point, he pushed the victim to the floor and struck her in her head with his fist. There was a visible portion of the victim's forehead that police observed that looked to have been struck.
>
> The [Appellant] finally exited the victim's home. He smashed the glass on her door. There was a witness in the home who witnessed the latter portion of this incident. He did confirm what the victim had said.

[1] The indictment included a separate enhancement for the stalking count which provided that the Appellant had been convicted of stalking within the previous seven years.

[2] The Appellant's primary language is Spanish, and Lina Makarem, a certified foreign language interpreter, was present at the guilty plea acceptance hearing, the sentencing hearing, and his evaluations for the presentence report and psychosexual risk assessment to interpret the proceedings from English to Spanish and Spanish to English.

> At that time, [the Appellant] had previously been convicted of stalking on [June 9, 2020]. And the victim did identify this person -- or this [Appellant] in a six-person photo lineup.

The Appellant stipulated to the factual basis for the plea and asked the trial court to accept the negotiated plea agreement. The trial court advised the Appellant of his rights attendant to the entry of a guilty plea, and the Appellant affirmed that he understood those rights. The trial court then determined that the Appellant entered the guilty plea knowingly. The trial court also explained to the Appellant that there was no guarantee he would be granted probation at sentencing without an agreement between his attorney and the State. The trial court set the matter for sentencing at a later date, explaining that a psychosexual evaluation needed to be performed and that the State needed at least thirty days to complete the presentence report. The trial court emphasized that it would use those reports to decide whether to grant the Appellant a sentence of probation.

A sentencing hearing was held on July 26, 2022. The presentence report and psychosexual risk assessment were received as separate exhibits. Based on the presentence report, the Appellant, age thirty, attended school in Puerto Rico and stopped attending school in the seventh grade. On the other hand, the psychosexual risk assessment showed the Appellant attended school in Puerto Rico until the twelfth grade but did not earn a diploma. The Appellant was not married, had no children, and worked "odd jobs" to support himself financially. He had a great relationship with his mother and his five siblings, four of whom lived in Boston, Massachusetts. He also had a prior history of criminal convictions, including convictions for misdemeanor stalking, harassment, and aggravated burglary in 2019. The Strong-R assessment described the Appellant as moderate risk with "high or moderate needs in residential, employment, family and education."

The psychosexual risk assessment indicated the Appellant "appeared guarded when he was asked to discuss the instant offense" and that the Appellant's self-reported version of the instant offense was not consistent with the official version. The risk assessment showed that the Appellant "demonstrated a poor understanding of the problem . . . [and] denial of any sexual behavior." The risk assessment categorized the Appellant as a high level of risk to reoffend and recommended intensive outpatient or inpatient sex offender treatment with objective testing for sexual interest every six months. The Appellant elected to give the following allocution statement: "I think that I need a treatment. And I am very sorry about the situation that escalated like that. And I think I would -- I need the treatment."

The Appellant's mother and sole witness at the hearing, Mariluz Santiago, testified that she had flown between Boston and Memphis about five times to be present for the Appellant's court proceedings because she wanted to get her son back home. She advised the trial court that the Appellant could live with her in Boston if he were granted probation. She was aware that her son could not live in a home with small children because of the sex offender registry requirements and advised the trial court that she currently lived with her partner, her partner's sister, and her husband. Several other family members lived in the same apartment building, many of whom would be supportive of the Appellant. She had arranged a job for the Appellant in Boston at her son-in-law's car wash. She also would provide transportation for the Appellant if outpatient sex offender treatment was ordered. The Appellant's mother asked the trial court to consider removing the sex offender registry requirement as a condition of the Appellant's convictions because it "would really destroy his life" and prohibit any relationship with child relatives who loved him. Yet, she understood that any violation of the sex offender registry law was a criminal offense that could lead to a violation of the Appellant's potential probation and would do everything she could to ensure the Appellant's compliance.

On cross-examination, the Appellant's mother explained that she did not work outside of her home because she was disabled. She was aware that the Appellant entered a guilty plea in 2019 to harassment, stalking, and aggravated burglary. She came to Memphis after the Appellant was charged in 2019 and lived with the Appellant for "weeks." She was not present in the courtroom in 2020 when the Appellant was placed on probation for a period of three years. She could not stay in Memphis for "too long" because she had to follow medical treatment in Boston. She explained that "it's been a while" since she and the Appellant lived together "permanently." She had not noticed anything different about the Appellant before he was charged in 2019. She understood the Appellant was required to be on the sex offender registry and would ensure he would comply, but she thought he should not be on the list. She agreed that the Appellant committed the instant offenses nine months after he was placed on probation and that the Appellant was still on probation.

After considering the proof presented at the hearing and listening to arguments from the State and the Appellant, the trial court denied the Appellant's request for alternative sentencing and ordered the Appellant to serve his seven-year-two-month sentence in confinement. The Appellant filed a timely notice of appeal, and this case is now properly before this court for review.

ANALYSIS

On appeal, the Appellant asserts that the trial court abused its discretion in denying the Appellant's request for an alternative sentence of probation. Specifically, the Appellant

argues that he is "clearly eligible and suitable for probation," that he "does not have a long history of violent behavior," and that his "best chance of rehabilitation rests with a long-term intensive outpatient program." The State contends, and we agree, that the trial court properly exercised its discretion in denying alternative sentencing.

A trial court's sentencing decisions, including questions related to probation or any other alternative sentence, are reviewed under an abuse of discretion standard, with a presumption of reasonableness granted to within-range sentences that reflect a proper application of the purposes and principles of sentencing. State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012); State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). A trial court only abuses its discretion when it "applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining." State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997).

Any sentence that does not involve complete confinement is an alternative sentence. See generally State v. Fields, 40 S.W.3d 435 (Tenn. 2001). A trial court's determination of whether a defendant is entitled to an alternative sentence and whether a defendant is a suitable candidate for full probation are different inquiries with different burdens of proof. State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). Tennessee Code Annotated section 40-35-303 states, in pertinent part, that "[a] defendant shall be eligible for probation under this chapter if the sentence actually imposed upon the defendant is ten (10) years or less[.]" Tenn. Code Ann. § 40-35-303(a). Tennessee Code Annotated section 40-35-102(6)(A) states that a defendant who does not require confinement under subsection (5) and "who is an especially mitigated or standard offender convicted of a Class C, D or E Felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary[.]" However, a trial court "shall consider, but is not bound by, the advisory sentencing guideline" in section 40-35-102(6)(A). Id. § 40-35-102(6)(D). Although trial courts shall automatically consider probation for eligible defendants, a defendant has the burden of establishing that he is suitable for probation by "demonstrating that probation will 'subserve the ends of justice and the best interest of both the public and the defendant.'" State v. Carter, 254 S.W.3d 335, 347 (Tenn. 2008) (quoting State v. Housewright, 982 S.W.2d 354, 357 (Tenn. Crim. App. 1997)). The defendant also bears the burden of showing the impropriety of a sentence on appeal. Tenn. Code Ann. § 40-35-401(d), Sentencing Comm'n Comments.

When considering whether to order full probation, the trial court may consider "the circumstances of the offense, the defendant's potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes." Boggs, 932 S.W.2d at 477 (citing Tenn. Code Ann. §§ 40-35-210(b)(4), -103(5), -103(1)(B)). The trial court should also consider

whether "confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct," or whether "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]" Tenn. Code Ann. § 40-35-103(1)(A),(C). The court must impose a sentence "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." Id. § 40-35-103(2), (4). A "trial court's decision to grant or deny probation will not be invalidated unless the trial court wholly departed from the relevant statutory considerations in reaching its determination." State v. Sihapanya, 516 S.W.3d 473, 476 (Tenn. 2014).

In sentencing the Appellant to confinement, the trial court found, in pertinent part, as follows:

> [The Appellant] pled guilty to burglarizing, harassing, and stalking another woman on [June 9, 2020]. Was placed on probation for three years. Is still on or was on probation when he committed this offense in March of 2021.
>
> Less than nine months after a judge put him on probation, [the Appellant] burglarized, attempted to rape, stalked this victim when the judge had ordered him not to have any contact with this alleged victim.
>
> * * *
>
> In the psychosexual evaluation, [the Appellant] denies all of this [referring to the victim's version of the offense]. He told Dr. Mitchell that the victim was violent, that she was impulsive, that he only went there to babysit, did not get in the shower with her, did not remove his clothes, did not push her to the floor, did not choke her, did not attempt to have sex with her.
>
> Dr. Mitchell indicates that he's in denial, that he's at a high-risk level of committing another offense, that he has hostility to women, lacks concern for others, and that he has deviant sexual practices.
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> Dr. Mitchell says his prognosis for treatment are not good. And because of his lifestyle, his aggression, he has little emotional control, and it would, in fact, lead to violence or threats of violence.
>
> Attempts to rehabilitate [the Appellant] failed miserably. Judge put him on probation for stalking and harassing and burglarizing another woman.

> As indicated in the sexual -- psychosexual evaluation, [the Appellant], has shown that he is, in fact, violent towards women. Less than six months of being placed on probation, [the Appellant] harassed and stalked and beat, tried to rape, choked another woman in her home because he had been rejected.
>
> There are absolutely no mitigating factors that the Court can consider in this case. The attempts to rehabilitate [the Appellant] have failed.
>
> This offense is serious. These are several offenses committed against this young woman over a period of about six weeks. It is, in fact, violent. It is shocking. It is reprehensible. It is excessive.
>
> I don't know how we protect women in this community if we continue to tell people like [the Appellant] that it's okay to break into homes, to ignore a judge when a judge has ordered you not to have contact with a woman, to stalk that person, to harass that person, to choke that woman, to try to rape her in her own home. I don't know how we protect women from people like [the Appellant], who has conclusively shown that he would not abide by orders of a judge, not abide by conditions of probation, would not abide by restraining orders, would not abide when a judge tells him not to have contact with a person.
>
> [The Appellant] is an ongoing danger to Shelby County. He's an ongoing danger particularly to women in Shelby County or to anyone that consents to have a relationship with him.

Based on the above findings, we conclude the trial court properly denied the Appellant full probation and imposed a term of confinement. The record shows the trial court expressly considered the factors in Tennessee Code Annotated section 40-35-210(b) and the purpose and principles of sentencing in Tennessee Code Annotated sections 40-35-102 and -103. The trial court also determined confinement was necessary to avoid depreciating the seriousness of the offenses and measures less restrictive than confinement had recently been applied unsuccessfully on the Appellant. Tenn. Code Ann. § 40-35-103(1)(B), (C). The record also shows that the trial court determined the Appellant had a lack of potential for rehabilitation. As such, the Appellant has failed to establish the trial court abused its discretion in finding that the Appellant was not suitable for probation. See State v. Trotter, 201 S.W.3d 651, 653 (Tenn. 2006) (noting that the seriousness of the offense alone may justify a trial court's denial of alternative sentencing where the offense is especially violent, horrifying, or reprehensible); State v. Keen, 996 S.W.2d 842, 844 (Tenn. Crim. App. 1999) (noting that a defendant's rehabilitation potential and the risk of

repeating criminal conduct are fundamental in determining whether probation is appropriate); State v. Hill, No. W2018-01771-CCA-R3-CD, 2020 WL 473415, at *8 (Tenn. Crim. App. Jan. 29, 2020) (citing Sihapanya, 516 S.W.3d at 476). Accordingly, the Appellant is not entitled to relief.

Finally, our review of the transcript from the guilty plea colloquy as well as the special condition box in count one reflects that counts two, four, and five were to be dismissed as part of the plea agreement. However, the record does not contain separate judgment forms for these counts reflecting dismissal. Accordingly, we remand this matter for entry of separate judgment forms in counts two, four, and five reflecting dismissals of those charges consistent with the plea agreement. See Tenn. R. Crim. P. 32(e)(3) ("If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall enter judgment accordingly."); State v. Berry, 503 S.W.3d 360, 364 (Tenn. 2015) (order) ("For charges resulting in a not guilty verdict or a dismissal, the trial court should "enter judgment accordingly" as to the respective count.").

CONCLUSION

Based on the above reasoning and authority, the judgment of the trial court is affirmed, but the case is remanded for entry of judgment forms to reflect dismissals of counts two, four, and five as specified in this opinion.

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CAMILLE R. MCMULLEN, JUDGE