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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs February 14, 2023

STATE OF TENNESSEE v. CHRISTOPHER RAY SMITH

Appeal from the Circuit Court for Lincoln County
No. 21-CR-112 Forest A. Durard, Jr., Judge

No. M2022-00646-CCA-R3-CD

The Appellant, Christopher Ray Smith, entered a guilty plea to three counts of misdemeanor failure to appear, see Tenn. Code Ann. § 39-16-609, with the length and manner of service to be determined by the trial court. Following a sentencing hearing, the trial court imposed a sentence of eleven months and twenty-nine days' imprisonment for each count, with counts two and three to be served concurrently to a consecutive term in count one. The trial court suspended the sentence to supervised probation following service of six months' imprisonment. On appeal, the Appellant argues the trial court abused its discretion by imposing an excessive sentence. Upon review, we modify the sentence in count one and remand for entry of corrected judgment form as to that count. In all other respects, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part; Modified in Part; Remanded for Entry of Corrected Judgment

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which J. ROSS DYER and TOM GREENHOLTZ, JJ., joined.

Jonathan C. Brown, Fayetteville, Tennessee, for the Appellant, Christopher Ray Smith.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Robert J. Carter, District Attorney General; and Jeffrey Ridner and Amber Sandoval, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

This case stems from the Appellant's failure to appear to serve weekend jail time based upon his entry to a plea of guilty to attempt to hunt after legal hours, a class C misdemeanor. See Tenn. Code Ann. § 70-4-102. The record shows, and the parties do not dispute, that the Appellant was sentenced to thirty days for the attempt to hunt after legal hours conviction, which was suspended to unsupervised probation after service of six days in the Lincoln County Jail. The trial court entered a mittimus, ordering the Appellant to begin to serve his six-day sentence on three consecutive weekends starting on March 5, 2021, at 7:00 p.m. Because the Lincoln County Jail suspended service of jail time on weekends due to the COVID-19 pandemic, an amended mittimus was entered on April 20, 2021, ordering the Appellant to serve his six-day sentence on three consecutive weekends beginning June 4, 2021, at 7:00 p.m. On June 17, 2021, a bench warrant was issued based on the Appellant's failure to report to the Lincoln County Jail to serve the sentence imposed for the conviction of attempting to hunt after legal hours. On October 26, 2021, the Lincoln County Grand Jury indicted the Appellant for failure to appear at the Lincoln County Jail on June 4, June 11, and June 18 of 2021, and an additional bench warrant was issued on the same day. On November 15, 2021, the October bench warrant was executed, and the Appellant was arrested for the instant offenses.

Based on the above facts, on February 22, 2022, the Appellant entered an "open" guilty plea to three counts of misdemeanor failure to appear. Upon advising the Appellant of his rights attendant to entering a plea of guilty, the trial court told the Appellant that he was charged with misdemeanor failure to appear, which "carr[ied] up to [eleven] months and [twenty-nine] days but it [was] consecutive to whatever you failed to appear on. Do you understand what you are charged with and the possible punishments?" The Appellant replied, "Yes, sir." The Appellant was also advised of and agreed to the fact that he was entering an "open" guilty plea, which meant that he would return to court later for the trial court to determine the length and manner of service of his sentence. Finally, the following facts, as provided by the State, were stipulated to by the Appellant as grounds in support of the guilty plea:

> [STATE]: In [the Appellant's] case, if this case went to trial the State's proof would be that it looks like on November 17, 2020[,] [the Appellant] entered a plea of guilty to several offenses including hunting on a revoked license for which he was to receive a sentence of 30 days to serve 6 days in the Lincoln County Jail. His jail time was to begin a period in March but that was deferred. Originally it was to begin on March 5th, but it was deferred as a result of some Covid things at the jail and so an amended mittimus was issued directing him to serve his 6 days on 3 successive weekends beginning June 4. And he did not appear on June 4th, he did not appear at the next two successive weekends. And accordingly[,] a capias or bench warrant was issued for him.

[THE COURT]: Was the 6 days ever served?

[DEFENSE COUNSEL]: Yes, Your, Honor.

[THE STATE]: I believe on his arrest for the newest offense he did serve those 6 days.

[THE COURT]: Is that what happened, [the Appellant]?

[THE APPELLANT]: Yes, Sir.

Because the offenses involved were misdemeanors, the trial court did not order a presentence report, and the matter was set for a sentencing hearing on April 19, 2022. At the sentencing hearing, the State introduced certified copies of the Appellant's prior convictions as a collective exhibit. The Appellant's criminal history included twenty-eight prior convictions consisting of eleven class C misdemeanors, four class B misdemeanors, twelve class A misdemeanors, a violation of probation, and four convictions of failure to appear. The documents applicable to the Appellant's instant convictions were also received as collective exhibit number two.

The Appellant testified that he was the sole financial support for his wife and three minor children. He was employed with K & T Home Improvements for fifteen years and did various home remodeling projects. The Appellant was also self-employed and did several side jobs. For the two years leading up to the hearing, the Appellant worked seven days a week and obtained a valid driver's license. If the Appellant was sentenced to jail time, he would lose his house, his wife's car, and be unable to pay his bills.

The Appellant explained the reason he failed to appear to serve his weekend jail time on the underlying case was an "honest mistake." He said he was set to report to the jail to serve his jail time, four or five months after his March 4th guilty plea. As instructed, he called the jail prior to reporting but was told that the jail was not accepting anyone due to COVID. The trial court interjected and explained, "in all fairness . . . we had a situation happen to a number of people so [the court] recogniz[ed] that happened[.]" The trial court further stated, "this [case] just happens to be the one we had problems with." The Appellant continued and said that he was advised of his new report date verbally by the jail staff; however, he did not receive written confirmation of the report date. When later asked why he did not report to his new, June 4 date for the required weekend jail time, the Appellant said he forgot. He did not remember that he was required to report for weekend jail time until he was served with the warrant and arrested for the instant offenses. He agreed that he did not call the jail to ask about his report date, he did not call his attorney to ask about

his report date, and he did not ask the clerk's office about his report date. Following his arrest for the instant failure to appear offenses, he served ten days in jail. The Appellant affirmed that he had paid all probation fees and court costs in the instant case.

Following argument of counsel, the trial court issued extensive oral findings of fact in sentencing the Appellant. The trial court imposed a sentence of eleven months and twenty-nine days for each of the Appellant's misdemeanor failure to appear convictions. Based on the Appellant's record of extensive criminal activity, the trial court determined that partial consecutive sentencing was appropriate and imposed a concurrent term of eleven months and twenty-nine days in counts two and three, to be served consecutively to eleven months and twenty-nine days in count one, for an effective sentence of nearly two year's imprisonment. The trial court suspended the nearly two-year sentence to supervised probation following service of six months' imprisonment. The Appellant timely filed a notice of appeal. This case is now properly before this court for review.

ANALYSIS

On appeal, the Appellant argues the trial court erred in imposing an excessive sentence. He further contends the trial court failed to apply mitigating factors and failed to apply "the least restrictive sentence" in his case. In response, the State contends the trial court properly exercised its discretion in sentencing the Appellant.

A trial court's sentencing decisions are reviewed for abuse of discretion, 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). An abuse of discretion standard, accompanied by a presumption of reasonableness, also applies to "questions related to probation or any other alternative sentence." State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). Although the Tennessee Supreme Court has not specifically held whether the Bise standard of review applies to misdemeanor sentencing, our Supreme Court has held 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)). Moreover, this court has repeatedly applied the Bise standard of review to misdemeanor sentencing cases. See e.g., State v. Hampton, No. W2018-00623-CCA-R3-CD, 2019 WL 1167807, at *12 (Tenn. Crim. App. Mar. 12, 2019). Therefore, we will do the same in this case.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302. The sentencing court is granted considerable latitude in misdemeanor sentencing. State v. Johnson, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (citing State v. Troutman, 979 S.W.2d 271, 273 (Tenn. 1998)). Although a separate sentencing hearing is not

mandatory in misdemeanor cases, the sentencing court must provide the defendant with a reasonable opportunity to be heard regarding the length and manner of the sentence. See Tenn. Code Ann. § 40-35-302(a). An individual convicted of a misdemeanor has no presumption of entitlement to a minimum sentence. Johnson, 15 S.W.3d at 518 (citing State v. Baker, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994)). "[A] misdemeanor offender must be sentenced to an authorized determinant sentence[,]" and "a percentage of that sentence, which the offender must serve before becoming eligible for consideration for rehabilitative programs, must be designated." State v. Palmer, 902 S.W.2d 391, 394 (Tenn. 1995). Typically, a percentage not greater than seventy-five percent of the sentence should be fixed for a misdemeanor offender. Id. at 393-94; Tenn. Code Ann. § 40-35-302(d). "[T]he misdemeanor sentencing statute merely requires a trial judge to consider enhancement and mitigating factors when calculating the percentage of a misdemeanor sentence to be served in confinement." Troutman, 979 S.W.2d at 274. However, there is no strict requirement that the trial court make findings on the record regarding the percentage of the defendant's sentence to be served in confinement before eligibility for rehabilitative programs. Id.

Where a defendant is convicted of one or more offenses, including misdemeanors, the trial court has discretion to decide whether the sentences shall be served concurrently or consecutively in accordance with Tennessee Code Annotated section 40-35-115. State v. Lambert, No. E2018-02298-CCA-R3-CD, 2020 WL 2027761, at *13 (Tenn. Crim. App. Apr. 28, 2020). If a trial court finds by a preponderance of the evidence that a defendant fits into at least one of seven categories enumerated in Tennessee Code Annotated section 40-35-115(b), it may order multiple offenses to be served consecutively. As relevant here, a trial court may impose a consecutive sentence if it finds that the "defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). We also apply "the abuse of discretion standard, accompanied by a presumption of reasonableness, [] to consecutive sentencing determinations." Pollard, 432 S.W.3d at 860.

The Appellant appears to make a two-fold challenge to his sentence as excessive. First, the Appellant argues, citing State v. Watkins, 972 S.W.2d 705, 706 (Tenn. Crim. App. 1998), that the trial court erred in imposing his sentence because he "was originally sentenced to six (6) days . . . [and therefore] the four (4) days were excessive." While not entirely clear, as we understand this claim, the Appellant takes issue with the sentence imposed for the underlying hunting conviction, which was six days. Because the Appellant was held in custody for ten days, the Appellant claims the additional four days of incarceration was "excessive," part of the instant sentence, should be "subtracted," and in

violation of "his Fourth Amendment right against unreasonable searches and seizures."[1] In response, the State argues there is no proof in the record beyond the Appellant's own testimony that the Appellant served ten days after he was arrested on the instant offenses. The State insists the record simply does not reflect whether the ten days referenced in the Appellant's testimony was service of the sentence for the underlying hunting conviction or pretrial incarceration for the instant failure to appear offenses.

In Watkins, a probation revocation case, the defendant was convicted of two class A misdemeanors. Id. at 704. After awarding jail credit in the amount of five months and eight days for one of the convictions, the court imposed consecutive sentences of eleven months and twenty-nine days to be served on probation. Id. The certified question of law for review was "whether the probationary term had expired prior to the commencement of the revocation proceeding." Id. Initially, this court noted that the defendant could not be sentenced to a term longer than eleven months and twenty-nine days for each of the class A misdemeanors. Id. at 705 (citing Tenn. Code Ann. § 40-35-111(e)(1)). Ultimately, this court concluded that "[b]ecause the sentence of the defendant began at the time he was placed in jail, the trial court had no authority to revoke probation after each of the two consecutive eleven-month, twenty-nine-day sentences had expired." Id. at 705-06. In a footnote, the court also noted that even if both of the consecutive sentences of eleven months and twenty-nine days had been proper, the first sentence would have expired prior to issuance of the probation violation warrant, thereby resulting in revocation of only the second of the two sentences. Id. at 706 n.1 (internal citations omitted).

While Watkins is factually inapposite, we acknowledge that it stands for the general proposition that a sentencing court may not impose a period of probation that exceeds the sentence authorized by law. Moreover, the term of probation must be no less than the minimum, nor longer than the maximum sentence allowed for the class of the conviction offense. The Appellant was convicted of three counts of misdemeanor failure to appear, a class A misdemeanor. The statutory maximum for a class A misdemeanor is "not greater than eleven (11) months, twenty-nine (29) days or a fine not to exceed two thousand five hundred dollars ($2,500), or both, unless otherwise provided by statute." Tenn. Code Ann. § 40-35-111. For count one, however, the judgment shows that the trial court imposed a sentence of supervised probation for eleven months, twenty-nine days, following service of six months' incarceration. Because the trial court ordered six months incarceration *and* eleven months twenty-nine days supervised probation, the effective sentence is one and a half years or six months beyond the eleven month twenty-nine-day statutory maximum. See State v. Connors, 924 S.W.2d 362, 365 (Tenn. Crim. App. 1996), overruled on other

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[1] The Appellant's Fourth Amendment argument is conclusory and unsupported by citation, authority, or any further argument. We thus consider it waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

grounds by State v. Troutman, 979 S.W.2d 271 (Tenn. 1998) (noting that the period of probation plus the term of incarceration may not exceed the maximum term of punishment provided for the offense). Based on the trial court's emphasis on "getting the Appellant's attention" with a sentence of incarceration, we conclude the record is sufficient for this court to modify the judgment in count one to reflect supervised probation for a period of five months and twenty-nine days. We also observe that the sentencing hearing transcript reflects that the trial court provided the Appellant with ten days of jail credit in count one. However, the judgment form in count one does not include such credit. See State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985) (noting that where there is a conflict between the judgments of conviction and the transcript, the transcript controls). Accordingly, we remand this matter for entry of a corrected judgment form in count one to reflect pretrial jail credits of ten days and modification of the supervised probation period to five months and twenty-nine days.

The Appellant next argues that the trial court "failed to apply the least restrictive sentence."[2] Specifically, the Appellant argues that the trial court abused its discretion in failing to apply mitigating factors three and seven. In response, the State asserts that the trial court was not required to make explicit findings of fact for each enhancing and mitigating factor. Because the trial court complied with the misdemeanor sentencing guidelines as set forth in Tennessee Code Annotated section 40-35-302, the State insists the trial court properly exercised its discretion and imposed an authorized sentence for each of the Appellant's failure to appear convictions. Finally, the State contends the trial court's order of partial consecutive sentencing is supported by the Appellant's extensive misdemeanor record.

Upon our review, we agree with the State, and conclude the record fully supports the determination of the trial court. The record shows the trial court, while not required by statute, engaged in extensive oral findings upon sentencing the Appellant. The trial court applied mitigating factor one, as conceded by the Appellant in his brief, because there was no risk of serious bodily injury in the instant case. At the sentencing hearing, the Appellant did not explicitly argue application of mitigating factor three (3), "substantial grounds exist tending to excuse or justify the defendant's criminal conduct, though failing to establish a

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[2] This section of the Appellant's brief cites Tenn. Code Ann. section 40-35-210(c)(1990). It also includes citation to and discussion of Blakely v. Washington, 542 U.S. 296, 309 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). In 2005, our legislature amended the Sentencing Act to statutorily require "the court shall consider, but is not bound by, the following *advisory* sentencing guidelines[.]" The advisory nature of the sentencing guidelines eliminated the Sixth Amendment concerns raised by Blakely and its progeny, upon which the Appellant relies. Moreover, the amended statute no longer imposes a presumptive sentence. Rather, the trial court is free to select any sentence within the applicable range so long as the length of the sentence is consistent with the purposes and principles of the Sentencing Act. See State v. Carter, 254 S.W.3d 335, 343 (Tenn. 2008).

defense," and it comes as no surprise that the trial court did not explicitly address it. Tenn. Code Ann. § 40-35-113(3). However, at the top of the sentencing hearing, the trial court acknowledged the issues the jail was having at the time due to COVID. The court noted that other people had been told to report at a later date, but the Appellant was the only one with whom the court had "a problem." Moreover, when asked why the Appellant did not report to jail, the Appellant simply stated he forgot. Based on this exchange, the trial court implicitly found, and we agree, that mitigating factor three did not apply. The Appellant argues further that mitigating factor seven (7), which states that "[t]he defendant was motivated by a desire to provide necessities for [his] family or [himself]" also applied and was not considered by the trial court. Tenn. Code Ann. § 40-35-113(7); see also State v. Martie Lane Williamson, No. 03C01-9210-CR-00371, 1993 WL 335433, at *2 (Tenn. Crim. App. Sept.1, 1993), perm. app. denied (Tenn. Mar. 7, 1994) (noting that this factor is more properly addressed to individuals who, because of their destitution, choose to steal bread, milk, or other basic necessities for their children or themselves due to their circumstance). Factor seven applies to individuals who *commit* their crimes based on their destitution or needs for their children. There was no such proof in this case. Moreover, defense counsel argued that the Appellant would lose his house, his car, and would be unable to support his family if he was ordered to go to jail. In response to this argument, the trial court said, "these things should be considered when [the Appellant] failed to show up for 3 weekends in jail and he just forgot from June to October." Accordingly, the trial court's determination regarding the length of sentence for each failure to appear conviction was proper.

Finally, in regard to the manner of service of his sentence, the Appellant makes multiple claims challenging the trial court's imposition of six months of confinement. Among those claims, the Appellant argues (1) he "established his suitability for probation . . . by being present" at the plea acceptance hearing and at the sentencing hearing; and (2) "he has not had a violation for probation since 2009[.]" In response, the State contends, and we agree, that the trial court considered the purposes and principles of sentencing, applied enhancement and mitigating factors, and refrained from arbitrarily imposing confinement. Accordingly, the trial court's decision to order six months of confinement and to deny full probation based upon the Appellant's extensive criminal history and inability to comply with probation in the past was proper.

The sentencing considerations generally used in determining the manner of service for both misdemeanors and felony sentences are codified in Tennessee Code Annotated sections 40-35-102 and -103. In determining whether to deny alternative sentencing and impose a sentence of total confinement, 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). 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). An individual convicted of a misdemeanor is not presumed eligible for an alternative sentence. Troutman, 979 S.W.2d at 273. 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.

In denying full probation and imposing partial confinement, the trial court properly adhered to the misdemeanor sentencing guidelines and considered the sentencing principles in Tennessee Code Annotated section 40-35-103. The trial court noted that "past practice is indicative of future performance" and observed that the Appellant "could not even show up to the jail [three] weekends in a row." In discussing whether measures less restrictive than confinement had been frequently or recently applied to the Appellant, the trial court determined that "just about every one of these 28 [prior] convictions was suspended in some capacity." The trial court's reliance upon the fact that measures less restrictive than confinement had been frequently or recently had been applied unsuccessfully to the Appellant in imposing split confinement is fully supported by the record. Because the Appellant has failed to establish that the trial court abused its discretion in imposing split confinement, he is not entitled to relief.

CONCLUSION

The judgments of the trial court are affirmed; however, we modify the sentence in count one and remand for entry of corrected judgment form as to that count.

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CAMILLE R. MCMULLEN, JUDGE