

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs September 1, 2020

FILED

11/30/2020

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. KEVIN GRAMMER**

**Appeal from the Circuit Court for Madison County  
No. 19-300 Donald H. Allen, Judge**

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**No. W2019-02270-CCA-R3-CD**

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A Madison County jury convicted the defendant, Kevin Grammer, of aggravated robbery, theft of property over \$1000, felony evading arrest, speeding, reckless driving, felony reckless endangerment, failure to exercise due care, disobeying a stop sign, and driving on a suspended license. The trial court imposed partial consecutive sentences for an effective sentence of fourteen years' confinement. On appeal, the defendant contends the trial court erred in imposing consecutive terms. Upon our review of the record and the applicable law, we affirm the judgments of the trial court.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Gregory D. Gookin, Assistant Public Defender, Jackson, Tennessee, for the appellant, Kevin Grammer.

Herbert H. Slatery III, Attorney General and Reporter; Katherine K. Decker, Assistant Attorney General; Jody S. Pickens, District Attorney General; and Matt Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

*Factual and Procedural Background*

A. Trial

On December 14, 2018, William Maxwell and Austen Commander were working the evening shift at the Maverick Gas Station. Just before 10:00 p.m., as Mr. Maxwell and Mr. Commander were preparing to close for the evening, the defendant and his co-

defendant entered the store wearing bandanas covering their faces. The defendant was armed, pointed a revolver at Mr. Maxwell's head, and demanded, "Give me everything, or I'll shoot you." As the defendant held Mr. Maxwell at gunpoint, his co-defendant proceeded to the cash register and removed the cash drawer. The defendants then fled the store with the cash drawer. Upon seeing the defendants entering the store, Mr. Commander went to the back of the store and called 911.

Deputy Cory Chance with the Madison County Sheriff's Department was the first officer to respond to the call concerning an armed robbery at the Maverick Gas Station. As Deputy Chance neared the gas station, he noticed a white Impala parked behind a nearby vacant bank building. The vehicle had just turned on its lights and was beginning to drive away as Deputy Chance arrived on the scene. Finding the location of the car and the fact it was leaving as he was responding to the armed robbery call suspicious, Deputy Chance followed the vehicle. By the time Deputy Chance was able to catch up with and get behind the vehicle, it was traveling in excess of 60 miles per hour in a 40 miles per hour zone. When Deputy Chance activated his blue lights, the vehicle accelerated and attempted to evade Deputy Chance and the other officers who had been called to the scene and joined the pursuit. During the pursuit, the vehicle swerved in and out of traffic, passed other cars using the shoulder of the road, ignored at least one stop sign while crossing highway traffic, and reached speeds of 120 mile per hour. When the vehicle eventually wrecked in a nearby neighborhood, the defendant exited from the driver's side of the vehicle and his co-defendant exited from the passenger's side. Rather than surrendering at that point, both the defendant and his co-defendant fled on foot but were eventually captured in the yard of a nearby home. The robbery and the car chase were both captured on video. The videos were introduced into evidence and played for the jury.

A subsequent search of the defendant's vehicle produced the cash drawer from the Maverick Gas Station, two bandanas, two pairs of gloves, a pellet gun, and a revolver. The cash drawer contained \$1,096.02.

Following deliberations, the jury found the defendant guilty of aggravated robbery, theft of property over \$1000, felony evading arrest, speeding, reckless driving, felony reckless endangerment, failure to exercise due care, disobeying a stop sign, and driving on a suspended license.

## B. Sentencing Hearing

The only proof presented at the defendant's sentencing hearing was a copy of the defendant's presentence report. After reviewing the presentence report, considering the arguments of counsel, the evidence presented at trial, the nature and characteristics of the criminal conduct involved, and the statistical information provided by the administrative

office of the courts, the trial court found three enhancement factors applicable to the defendant's sentence – (1) the defendant had a previous history of criminal convictions or criminal behavior in addition to what is necessary to establish the appropriate range; (2) the defendant was the leader in the commission of the offense involving two or more criminal actors; and (13) the defendant, before trial or sentencing in this case, failed to comply with the conditions of a sentence involving release into the community. Tenn. Code Ann. § 40-35-114(1), (2), (13). The trial court found no mitigating factors applicable to the defendant's case. As a result, the trial court imposed the following sentences: Count 1, aggravated robbery – twelve years; Count 2, theft of property greater than \$1,000 – two years; Count 3, felony evading arrest – two years; Count 4, speeding – thirty days; Count 5, reckless driving – six months; Count 6, felony reckless endangerment – two years; Count 7, failure to exercise due care – \$50 fine; Count 8, disobeying a stop sign – \$50 fine; and Count 9, driving on a suspended license – six months. The trial court also merged Count 2 into Count 1 and Counts 4 and 5 into Count 3.

The trial court then considered whether consecutive terms were appropriate. In ordering partial consecutive terms, the trial court stated,

Now, again, you know, based upon the criminal history I've talked about, the [c]ourt finds that some consecutive sentencing would be appropriate in this case and part of the reason I'm running some of these sentences consecutive is because he was actually on probation in I believe at least three different cases when he committed these offenses. So, for that reason, I feel that some consecutive sentencing is appropriate.

Also, I find that the defendant is an offender whose record of criminal activity is extensive, especially not only the prior misdemeanor convictions, but also the number of felony convictions and the number of misdemeanor convictions that he committed in this case. And when you -- when you look at this [case], I mean, you're really talking about, you know, two or three separate criminal episodes. I mean, you're talking about the aggravated robbery and the theft taking place and then when the deputy observed them leaving the scene in a vehicle, the deputy attempted to stop the vehicle, which this defendant was driving. Instead of pulling the vehicle over and stopping, the defendant fled from law enforcement officers, committed, you know, speeding and reckless driving.

He certainly engaged in reckless endangerment by the use of his motor vehicle. I know there were law enforcement officers attempting to stop the vehicle on numerous occasions. I think the -- the police pursuit lasted not only through Madison County but over in Gibson County. I think finally the

defendant wrecked the vehicle, and the officers had then, you know, arrest them after they attempted to flee from the vehicle.

Based on these findings, the trial court ordered Counts 3 through 9 to be served concurrently to each other but consecutive to the defendant's sentences on counts 1 and 2 for an effective sentence of fourteen years in the Tennessee Department of Correction. This timely appeal followed.

### *Analysis*

On appeal, the defendant contends the trial court erred in imposing consecutive terms. He argues his criminal record, which mainly consists of misdemeanor convictions, is not extensive and insists his twelve-year sentence for aggravated robbery is sufficient. The State submits the trial court properly found that the defendant 1) was on probation at the time he committed the offenses in the instant matter and 2) had an extensive criminal history; therefore, the trial court properly imposed consecutive sentences. After our review of the record and the applicable law, we affirm the judgments of the trial court.

The trial court has the sound discretion to determine whether a sentence should be served concurrently or consecutively. *State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013). A trial court's decision to impose consecutive sentencing is reviewed under an abuse of discretion standard with a presumption of reasonableness. *Id.* A trial court abuses its discretion when it "applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). This Court will affirm a sentence "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *State v. Bise*, 380 S.W.3d 682, 709-10 (Tenn. 2012).

A trial court is permitted to impose consecutive sentences when it provides reasons on the record that establish one of the seven factors enumerated in Tennessee Code Annotated section 40-35-115(b). Here, the trial court applied two of these factors in imposing partially consecutive sentences. The trial court found the defendant to be "an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). The trial court also found the defendant committed the offenses in the instant matter while he was on probation. Tenn. Code Ann. § 40-35-115(b)(6) ("The court may order sentences run consecutively if the court finds by a preponderance of the evidence that . . . [t]he defendant is sentenced for an offense committed while on probation."). It is clear from the record the trial court thoroughly discussed the defendant's prior criminal history, including his prior five misdemeanor convictions, his current four felony and five misdemeanor convictions, his pending charges for violating the bad check law and failure

to appear, and the fact that the defendant was on probation when he committed the current felonies. Accordingly, we conclude the trial court did not err in imposing partial consecutive sentences.

While the defendant contends his record should not be considered extensive because it consists mainly of misdemeanor convictions, his history indicates a consistent pattern of operating outside the confines of lawful behavior. Trial courts can consider prior misdemeanors in determining whether a defendant has an extensive record of criminal activity. Tennessee Code Annotated § 40-35-115(b)(2) does not distinguish between felonies and misdemeanors. See *State v. Brian Roger Neu*, No. W2007-02166-CCA-R3-CD, 2008 WL 2510588, at \*3 (Tenn. Crim. App. June 24, 2008); *State v. Edyson Rafael Arias*, No. E2005-01700-CCA-R3-CD, 2006 WL 2277667, at \*22 (Tenn. Crim. App. Aug. 9, 2006). Furthermore, current “offenses may be used in determining criminal history for the purposes of consecutive sentencing.” *State v. Richard Hanke, Sr.*, No. W2011-01830-CCA-R3-CD, 2012 WL 4470964, at \*4 (Tenn. Crim. App. Sept. 27, 2012). Consecutive sentencing based on an offender’s extensive record of criminal activity is appropriate to protect society from those who “resort to criminal activity in furtherance of their anti-societal lifestyle.” *Gray v. State*, 538 S.W.2d 391, 393 (Tenn. 1976).

Finally, though the defendant does not challenge the trial court’s conclusion that he was on probation at the time he committed the crimes in the instant matter, the trial court’s finding is supported by the record, and therefore, a proper basis for consecutive terms. According to the defendant’s presentence report and the discussion during his sentencing hearing, the defendant was sentenced to eleven months and twenty-nine days on probation on July 2, 2018, for simple assault. Then, on August 16, 2018, the defendant was again sentenced to eleven months and twenty-nine days on probation for criminal trespass. The defendant committed the instant offenses on December 14, 2018. Accordingly, the record supports the trial court’s finding that the defendant was on probation at the time he committed the crimes in this matter, and therefore, the imposition of consecutive terms.

### *Conclusion*

Based on the foregoing authorities and reasoning, we affirm the judgments of the trial court.

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J. ROSS DYER, JUDGE