

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 27, 2018 Session

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Appellate Courts

STATE OF TENNESSEE v. KENNETH MICHAEL MCINTOSH

Appeal from the Criminal Court for Knox County
No. 102586A Bobby R. McGee, Judge

No. E2017-01353-CCA-R3-CD

The defendant, Kenneth Michael McIntosh, pled guilty to sixteen counts of aggravated child abuse and a single count of child abuse. The trial court sentenced the defendant to eight years for each aggravated child abuse conviction and eleven months and twenty-nine days for the single child abuse conviction and ordered two of the sentences for aggravated child abuse to be served consecutively for an effective sentence of sixteen years. On appeal, the defendant argues the trial court erred in ordering two of his eight-year sentences to be served consecutively. Upon review, we affirm the findings of the trial court.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT L. HOLLOWAY, JR., JJ., joined.

Susan A. Shipley, Knoxville, Tennessee, for the appellant, Kenneth Michael McIntosh.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Counsel; Charme P. Allen, District Attorney General; and Ashley McDermott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On November 5, 2013, a Knox County grand jury issued a presentment charging the defendant with sixteen counts of aggravated child abuse (Counts 1-6, 11-20) and two counts of child abuse (Counts 30-31). The charges stemmed from a series of incidents in which the defendant subjected the victims to physical abuse, prolonged periods of confinement, and restraint with handcuffs. The presentment also charged the defendant's

wife, Jessica Cox (“co-defendant”), with twenty-nine counts of aggravated child abuse. There were additional counts in the presentment that applied only to the actions of the co-defendant (Counts 7-10, 21-29).

The defendant pled guilty on January 29, 2015, to sixteen counts of aggravated child abuse (Counts 1-6, 11-20) and a single count of child abuse (Count 30). He also agreed to testify truthfully against his co-defendant. In return, the State dismissed the remaining count of child abuse (Count 31) and agreed to inform the court of the defendant’s cooperation for consideration at the sentencing hearing.

1. Guilty Plea Hearing

The prosecutor set out the factual basis for the defendant’s guilty pleas, stating that on May 28, 2013, custodians at Farragut High School called 9-1-1 after discovering the defendant’s sons, J.M. and A.M., handcuffed together.¹ J.M. was fourteen years old at the time, and A.M. was sixteen years old. Both were dirty, hungry, and injured. The victims explained they escaped from their home on Canton Hollow Road in Knox County after the defendant and co-defendant handcuffed J.M. and A.M. together through a cabinet.

After interviewing the victims, family members, neighbors, and teachers, the Knox County Sheriff’s Office discovered that between January and May of 2013, the defendant and the co-defendant handcuffed the victims for prolonged periods and physically abused them. At times, the abuse was punishment for acts the defendant and the co-defendant deemed to be bad behavior, which included the victims taking food from the cabinets when they were hungry. During other times, the abuse appeared to take place “at the whim” of the co-defendant.

In support of the aggravated child abuse covered by counts one through three, the State recounted an incident that occurred on May 27, 2013. The defendant and co-defendant left the home and handcuffed A.M. and instructed J.M. to “babysit.” When they returned, A.M. was no longer handcuffed. As punishment, both victims were handcuffed together through a cabinet. After the defendant and the co-defendant went to sleep, the victims managed to escape and made their way to Farragut High School where a custodian discovered them and contacted the police.

The basis for the aggravated child abuse referenced by counts four through six also occurred in May of 2013. The defendant and the co-defendant handcuffed A.M. and

¹ It is the policy of this Court to refer to minor victims of abuse by their initials.

forced him to kneel on grains of uncooked rice, causing a sharp burning sensation. J.M. was instructed to assist in punishing A.M. by making sure A.M. did not attempt to lean forward. When A.M. began leaning forward, which he had been ordered not to do, the co-defendant burned him on the chin with a lit incense stick.

As for the aggravated child abuse encompassed in count eleven, again occurring in May of 2013, A.M. was handcuffed with his hands over his head. He complained to J.M. that he had been standing in that position all night and he was hungry. J.M. gave A.M. some saltine crackers and then left for school. A.M. was still handcuffed in the same position when J.M. returned. As punishment for feeding A.M., the co-defendant struck J.M. over the head with a rolling pin, causing his head to bleed “profusely.”

The co-defendant then forced J.M. into the shower to interrogate him about whether he “un-cuffed” A.M., threatening to burn him with a cigarette. The co-defendant then placed A.M., with his hands handcuffed behind his back, into a bathtub full of cold water and ice cubes and forced his head under the water. A.M. struggled to get free so the co-defendant intentionally burned A.M.’s penis with a cigarette. During this incident, the co-defendant phoned the defendant and informed him of the situation and later told the defendant what had happened when he returned home.

After the defendant returned home, he told the co-defendant he would “take control of the situation” and forced J.M. to wear heavy clothing. The defendant ordered this because it was very hot in the home, which lacked air conditioning, so the heavy clothing caused J.M. a “great deal of discomfort.”

As to the abuse covered by counts twelve and thirteen, in February or March of 2013, J.M. returned from school to find A.M. forced to kneel on uncooked rice. The defendant was supervising A.M. and periodically adjusted his handcuffs and repositioned the dried rice.

The aggravated child abuse of counts fourteen and fifteen related to an incident in February of 2013 when the co-defendant suspected the victims ate without her permission. Both the defendant and co-defendant interrogated the victims and then filled the bathtub with ice water. The defendant handcuffed A.M. and forced his head under the water while the co-defendant searched for the missing food. A.M. struggled and was unable to breathe.

The aggravated child abuse encompassed by count sixteen was based on a similar incident in January of 2013 when the defendant and co-defendant suspected the victims of eating without permission. They handcuffed J.M. to the cabinet and interrogated him. When they learned the victims had snuck food to each other, they took the handcuffs off

J.M. and placed them on A.M. The co-defendant then kicked A.M. and the defendant hit him while lecturing J.M. about not providing food to A.M.

The aggravated child abuse covered by counts seventeen through twenty were based on evidence indicating, from January to May of 2013, both the defendant and co-defendant deprived the victims of food for long periods and often left them handcuffed overnight.

Finally, count thirty, charging the defendant with child abuse, related to an incident in 2009 or 2010 when the defendant tied J.M. with rope and handcuffed him as punishment for taking food. The defendant left J.M. in this condition overnight.

Initially, during police interviews, the defendant denied abusing the victims, stating they were troubled and had either fabricated or exaggerated the abuse. However, on October 21, 2014, the defendant admitted the victims' accounts were true and the abuse had been escalating since January of 2013. He acknowledged, at times, A.M. spent more time in handcuffs than out of them. He admitted that when the victims disappeared, the defendant and co-defendant conspired to lie and claim the victims had behavioral problems and exaggerated the extent of the punishment. The defendant later testified for the State at the co-defendant's trial.

During the guilty plea hearing, the defendant confirmed he understood the plea agreement and the charges against him. He acknowledged the agreement did not provide for a specific sentence. The trial court then reviewed the defendant's rights with him, and the defendant affirmed he understood his rights to a jury trial, to confront witnesses, and to remain silent. The defendant stated he was pleading guilty because he was, in fact, guilty. He asserted he entered into the plea agreement freely, knowingly, and voluntarily. The defendant agreed no one threatened him or otherwise induced his plea by promising him anything. He declined to ask any questions of the court.

2. Sentencing Hearing

Neither the State nor the defendant presented witnesses during the sentencing hearing. Two of the defendant's children indicated they wished to present a collaborative victim impact statement.² Jack stated he did not intend to defend the defendant's actions but wanted to tell the court about the positive aspects of his life. Jack ascribed the defendant's willingness to participate in the crimes to the negative influence of the co-

² The children presented their victim impact statement in two parts. The first part was given by Jack McIntosh, who was not a victim of the defendant's abuse, and the second part was given by J.M., one of the victims in the present case. To avoid confusion, we will refer to them as Jack and J.M. respectively. No disrespect is intended.

defendant. Jack praised the defendant for taking responsibility for his actions and sparing the victims the ordeal of a trial. Jack insisted the defendant's time in confinement pending sentencing had served as a "wake-up call" and caused him to rethink his life.

J.M. concluded the collaborative statement. He indicated he had given a great deal of thought to the sentence he would like his father to receive. J.M. hoped the defendant would be able to attend J.M.'s high school graduation, but realized this would be impossible given the sentencing range. J.M. expressed his hope that, with concurrent sentencing, the defendant would be able to attend J.M.'s college graduation. He believed with proper counseling and assistance, the defendant could prove he was still a "good person."

After Jack and J.M. concluded their statements, the State introduced the presentence report. The State indicated there was nothing in the defendant's upbringing that explained his actions. The defendant was unemployed and admitted to past drug use, including the use of marijuana, LSD, and cocaine.

The State proceeded to argue the applicable enhancement factors. The State introduced transcripts of the defendant's interview with detectives and of his testimony from the co-defendant's preliminary hearing during which the defendant lied about the extent of the abuse. The State argued that lying to law enforcement, in addition to his drug use, indicated a history of criminal behavior sufficient to warrant enhancing the defendant's sentence.

The State continued, arguing the defendant was a leader in the commission of the offense involving two or more criminal actors, specifically the defendant and the co-defendant actively cooperated in the abuse of the victims. Next, the State noted the abuse involved more than one victim and the victims were particularly vulnerable because of age, being fourteen and sixteen respectively at the time of the abuse. The State further argued the defendant treated, or allowed the victims to be treated, with exceptional cruelty by engaging in systematic starvation, torture, and abuse in conjunction with the co-defendant over the course of several months. Next, the State argued the personal injuries inflicted upon the victims were particularly great, pointing out that one of the victims still had scars from the abuse at the time of the co-defendant's trial several months later. Furthermore, the abuse was committed to gratify the defendant's desire for pleasure or excitement, specifically, his desire to please the co-defendant. Additionally, the State argued the defendant employed a deadly weapon during the commission of the offense, pointing to the use of water to drown the victims. Next, the defendant had no hesitation about committing the crime even though the risk to human life was high because the victims could have very well starved or drowned during the continuing abuse. Finally, the State argued the defendant abused a position of public or private trust

that significantly facilitated the commission or the fulfillment of the offense as he was both victims' father.

The State next presented the factors warranting consecutive sentencing. The State argued the defendant was an offender whose record of criminal activity was extensive based on pleading guilty to sixteen different felonies. Next, the State maintained the defendant was a professional criminal who knowingly devoted his life to criminal acts as a major source of livelihood. Finally, the State argued the defendant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high because there was a real possibility starvation or drowning could have caused the victims' deaths.

The defendant responded, arguing particular factors should not be considered. First, the defendant argued his false statements to the police cannot be considered prior criminal behavior. Additionally, the defendant noted he had no prior arrests or convictions. Next the defendant argued the record pointed towards the co-defendant, not the defendant, being the leader in the commission of the abuse, given that the State sought and received the same enhancement factor for the co-defendant. Additionally, the defendant urged the trial court not to weigh heavily the age the victims, the cruelty of the abuse, and the severity of the injuries, as all are elements of aggravated child abuse. The defendant also argued there was no evidence to support the defendant committed the abuse to satisfy his pleasure, pointing out that particular enhancement factor is primarily for sexual abuse cases. Furthermore, the defendant argued there was no proof he participated directly in the "waterboarding" incidents; therefore, he did not utilize a deadly weapon, but merely failed to intervene. Finally, the defendant again urged the trial court not to weigh heavily the risk of life posed by the abuse and the abuse of a position of trust by the defendant, as both were also elements of aggravated child abuse.

The defendant then argued for the mitigating factors he believed applied. First, the defendant argued co-defendant's counsel, Mr. Garza, misrepresented the scope of his services to the defendant, and set up the defendant "to be the fall guy" for the co-defendant which resulted in his initial false statements. Second, once the defendant obtained independent counsel, he fully cooperated with the State and provided invaluable testimony to aid in the prosecution of the co-defendant. Next, the defendant argued his crimes were committed under unusual circumstances, namely to placate the co-defendant. The defendant noted, as the co-defendant was now out of his life, he was unlikely to commit these crimes again. Finally, the defendant maintained there was an element of duress and domination based on the co-defendant's effect on him. While the defendant conceded there was insufficient evidence to support a defense, there was sufficient evidence to potentially mitigate his sentence. Specifically, the co-defendant emotionally manipulated the defendant into participating in the abuse.

Turning to whether consecutive sentences were appropriate, the defendant argued there was no basis to impose consecutive terms. First, the defendant noted there was no basis under the law to impose consecutive sentences for multiple counts of aggravated child abuse. Additionally, the defendant noted he is not a dangerous offender, his criminal activity was limited only to the time he was involved with the co-defendant. Finally, the defendant noted the child abuse conviction (Count 30) was only a misdemeanor conviction and should not be used for consecutive sentencing purposes.

After hearing the defendant's response, the trial court announced its findings. The trial court noted the support of the defendant's family and his assistance in the State's case against the co-defendant. However, the trial court stated, in relevant part:

[I]n this case, there was a huge amount of evidence . . . showing how these two victims, [A.M.] and [J.M.], were tortured, were beat, were deprived of the means of basic sustenance, food, water, facilities for bodily functions. They were beat, they were drowned, they were starved, they were handcuffed to cabinets, forced to stand up sometimes for days at a time, stand until their feet were swollen and threatened, . . . most of it at the command or done by [the co-defendant], . . . but some of it was carried out by the . . . [the] defendant himself.

...

However, he stands criminally responsible for all those things. When [A.M.] was being burned, [the defendant] was [] criminally responsible for that burning and for everything else that was done. [There is] ample evidence to support nearly anything that any sentence in any manner of service that this [c]ourt can fashion.

...

This was an amazingly huge, long, extended pattern of criminal conduct, horribly assaultive criminal conduct against two young -- young men, boys, actually. And in this [c]ourt's view, punishing the defendant only once for what he did to two victims would deprecate the seriousness of victimizing two people instead of one.

The trial court ordered the defendant to serve eight years for each conviction of aggravated child abuse. The trial court also imposed a sentence of eleven months and twenty-nine days for the single child abuse conviction. The court ordered two counts of

aggravated child abuse to be served consecutively, with all the remaining convictions to be served concurrently for an effective sentence of sixteen years. This timely appeal followed.

Analysis

On appeal, the defendant argues the trial court erred when imposing consecutive sentences because the trial court relied on the number of convictions in the indictment and did not make an explicit finding of fact regarding the defendant's criminal history independent of the instant case. The State argues the record adequately supports the imposition of consecutive sentences and, even if the trial court did not make an explicit finding, under de novo review, the sentence is proper. After our review of the record, we agree with the State.

When determining the appropriate sentence, the trial court must consider these factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) the 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; and (7) any statement the defendant made on his own behalf about sentencing. *See* Tenn. Code Ann. § 40-35-210; *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 when determining the sentence alternative or length of a term to be imposed. Tenn. Code Ann. § 40-35-103.

When the record establishes the sentence imposed by the trial court was within the appropriate range and reflects a “proper application of the purposes and principles of our Sentencing Act,” this Court reviews the trial court's sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The trial court must state on the record the factors it considered and the reasons for the sentence imposed. Tenn. Code Ann. § 40-35-210(e); *Bise*, 380 S.W.3d at 706. The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

In *State v. Pollard*, 432 S.W.3d 851 (Tenn. 2013), the Tennessee Supreme Court expanded its holding in *Bise* to also apply to decisions by trial courts regarding consecutive sentencing. *Id.* at 859. This Court must give “deference to the trial court's

exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b).” *Id.* at 861. “Any one of [the] grounds [listed in section 40-35-115(b)] is a sufficient basis for the imposition of consecutive sentences.” *Id.* at 862 (citing *State v. Dickson*, 413 S.W.3d 735 (Tenn. 2013)). As applicable in this matter, Tennessee Code Annotated section 40-35-115 provides the trial court may order sentences to run consecutively if the court finds by a preponderance of the evidence “the defendant is an offender whose record of criminal activity is extensive.” Tenn. Code Ann. § 40-35-115(b).

If the trial court fails to provide adequate reasons on the record for imposing consecutive sentences, this Court should neither presume that the consecutive sentences are reasonable nor defer to the trial court’s exercise of its discretionary authority. *Pollard*, 432 S.W.3d at 863-64. Faced with this situation, the appellate court has two options: (1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences. *Pollard*, 432 S.W.3d at 864; *see also Bise*, 380 S.W.3d at 705 & n. 41.

The defendant argues the trial court improperly relied on the number of victims as a criterion for ordering consecutive sentences. The record indicates, starting as far back as 2010 and lasting until 2013, the defendant and co-defendant engaged in systematic and continuous abuse of both victims. The defendant beat, starved, and “waterboarded” both victims. Additionally, the defendant engaged in what can best be analogized to torture. He forced the victims to kneel on uncooked rice or handcuffed them in uncomfortable positions for several hours. Based on these facts, the trial court found “[there is] ample evidence to support nearly anything that any sentence in any manner of service that this [c]ourt can fashion.” Additionally, the trial court noted, “This was an amazingly huge, long, extended pattern of criminal conduct, horribly assaultive criminal conduct.”

We agree these findings are indicative of an extensive record of criminal behavior in harmony with Tennessee Code Annotated section 40-35-115(b)(2). The trial court did not abuse its discretion in relying on the volume and duration of the abuse when ordering the defendant to serve consecutive sentences. *Dickson*, 413 S.W.3d at 735; *see* Tenn. Code Ann. § 40-35-115(b)(2) (“The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that . . . the defendant is an offender whose record of criminal activity is extensive.”).

Moreover, even if these findings are insufficient, we concur with trial court’s conclusion under de novo review. *Pollard*, 432 S.W.3d at 864. The defendant argues he has no prior criminal history and the trial court improperly relied on the defendant’s

criminal behavior in the instant case to order consecutive sentencing. However, even if a defendant has no prior convictions, “current offenses may be used in determining criminal history for purposes of consecutive sentencing.” *State v. Carolyn J. Nobles*, No. M2006-00695-CCA-R3-CD, 2007 WL 677861, at *12 (Tenn. Crim. App. Mar. 7, 2007), *no perm. app. filed*; *see also State v. Cummings*, 868 S.W.2d 661, 667 (Tenn. Crim. App. 1992) (upholding consecutive sentencing for a defendant with no prior criminal record who was convicted of eight crimes in a single trial based on the fact that the defendant’s record of criminal activity was extensive). As detailed above, the record establishes, by a preponderance of the evidence, the defendant has an extensive record of criminal activity, committing numerous acts of abuse against the victims over several years. This extensive history of criminal behavior is sufficient to warrant ordering two of the sentences for aggravated child abuse to run consecutively. *See Cummings*, 868 S.W.2d at 667; *see also* Tenn. Code Ann. § 40-35-115(b)(2). The defendant, therefore, is not entitled to relief.

Conclusion

Based upon the foregoing authorities and reasoning, the judgments of the trial court are affirmed.

J. ROSS DYER, JUDGE