

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 2, 2015 Session

STATE OF TENNESSEE v. TABITHA GENTRY aka ABKA RE BEY

**Appeal from the Criminal Court for Shelby County
No. 13-01547 James M. Lammey, Jr., Judge**

No. W2014-01456-CCA-R3-CD - Filed August 31, 2015

The Defendant, Tabitha Gentry aka Abka Re Bey, appeals as of right from her Shelby County jury convictions for two counts of aggravated assault and one count of intentionally evading arrest in an automobile. See Tenn. Code Ann. §§ 39-13-102, -16-603. On appeal, the Defendant contends that the trial court erred by: (1) imposing the maximum sentences for each of her convictions; (2) ordering each of her sentences be served consecutively; (3) denying judicial diversion; and (4) denying all other forms of alternative sentencing. Following our review, we conclude that the trial court improperly applied the dangerous offender classification when ordering consecutive sentences. After conducting a de novo review, we conclude that the Defendant's sentences should have been ordered to run concurrently, rather than consecutively. In all other respects, the judgments of the trial court are affirmed.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed
in Part; Reversed in Part; & Case Remanded**

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT L. HOLLOWAY, JR., JJ., joined.

Claiborne Hambrick Ferguson, Memphis, Tennessee, for the appellant, Tabitha Gentry aka Abka Re Bey.

Herbert H. Slatery III, Attorney General and Reporter; Rachel E. Willis, Senior Counsel; Amy P. Weirich, District Attorney General; and Jessica Banti and Rachel Deanne Russell, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION
FACTUAL BACKGROUND

The following facts were adduced at the Defendant's April 2014 trial. On October 9, 2012, Memphis Police Officer Emmanuel Manzano initiated a traffic stop of the

Defendant's vehicle after observing that one of the car's headlights was out. The Defendant pulled her vehicle into a nearby gas station and parked. Officer Manzano approached the car, and the Defendant rolled the driver's side window down approximately two inches. Officer Manzano asked for the Defendant's identification, but she refused to provide it. The Defendant began talking on her cell phone and turned the volume up on the car's radio. After repeated requests from Officer Manzano, the Defendant eventually provided him with a form of identification, which stated that she was a "sovereign citizen" and which Officer Manzano described as "a weird I.D."

At that time, Officer Manzano's partner, Officer Patrick Meads, arrived at the scene. Officer Meads attempted to speak with the Defendant, but she continued to talk on her cell phone and kept the radio's volume turned up. The Defendant steadfastly refused to speak to or otherwise cooperate with either officer. Shortly thereafter, Lieutenant Joseph Pearlman arrived and made another unsuccessful attempt to communicate with the Defendant. The officers ran the car's registration and, by "cross-referenc[ing] the name it was registered to," were able to determine that the Defendant's driver's license was suspended.¹ By the time the officers had positively identified the Defendant, forty to forty-five minutes had elapsed since Officer Manzano had first pulled the Defendant over. After discovering that her driver's license was suspended, the officers decided to arrest the Defendant. Lieutenant Pearlman called his superior officer and received permission to "bust out" one of the Defendant's car windows in order to unlock the car's doors and effectuate the Defendant's arrest.

According to Lieutenant Pearlman, the Defendant was advised that they were going to break out her car's window if she refused to cooperate. The Defendant remained unmoved. Officer Manzano then struck the rear driver's side window multiple times with his baton, but the glass did not break. Officer Meads also attempted to break the window with the baton but to no avail. Both officers were standing on the driver's side of the Defendant's car: Officer Meads was close to the driver's side door, and Officer Manzano was slightly behind him, near the rear driver's side door. Officer Manzano again struck the rear driver's side window, and the Defendant suddenly placed the car in reverse. Both officers had to jump out of the car's path, and the rear-view mirror struck Officer Meads in his side. Lieutenant Pearlman was standing on the curb in front of the Defendant's car and was unaffected by the car's sudden movement. After backing up, the Defendant pulled the car forward and exited the gas station.

Officer Manzano pursued the Defendant in his patrol car, and Officer Meads followed in a second car. The officers pursued the Defendant for six to eight minutes, during which time she failed to adhere to traffic laws, driving slightly above the speed

¹The officers were able to verify the Defendant's identity based on a picture in their database.

limit and running stop signs. It was around 11:00 p.m., and there were few other cars in the area. Eventually, the Defendant pulled into the driveway of a house, where she remained in her car. Officer Manzano quickly exited his vehicle, approached the Defendant's car, and again struck the rear driver's side window with his baton. This time, the window broke. Officer Manzano reached inside the car and unlocked the doors, removed the Defendant from the vehicle, handcuffed her, and placed her in the back of his patrol car. According to Officer Manzano, after being arrested, the Defendant "was just out of control." Because the Defendant continued to kick and scream, the officers utilized a "ripp hobble," which Officer Manzano described as "a long belt that you tie around the ankles of the [arrestee] to restrain her from making any kind of erratic movement."

Upon this proof, the jury convicted the Defendant of two counts of aggravated assault and one count of intentionally evading arrest in an automobile. Following a sentencing hearing, the trial court denied all forms of alternative sentencing and imposed a total effective sentence of fourteen years and ten days² at 30%. In particular, the trial court imposed a maximum, six-year sentence for each aggravated assault conviction and a maximum, two-year sentence for the intentionally evading arrest in an automobile conviction, with the sentences set to run consecutively. This timely appeal followed.

ANALYSIS

On appeal, the Defendant contends that the trial court erred by imposing the maximum sentence for each of her convictions, by ordering those sentences be served consecutively, by denying judicial diversion, and by denying all other forms of alternative sentencing. The State responds that the trial court committed no error in sentencing the Defendant and asks us to affirm the Defendant's sentences in all respects.

Because it is relevant to our review of the trial court's sentencing determinations, we will briefly discuss the Defendant's behavior during the trial process. Throughout the course of the pretrial and trial proceedings, the Defendant was disruptive and uncooperative. The Defendant repeatedly stated that she was a sovereign citizen, in particular a "Moorish American," and protested the court's jurisdiction and the trial judge's authority. Several times, the Defendant asked that the trial court produce a "delegation of authority order signed by Congress." She frequently interrupted the trial judge and, at one point, demanded that the judge pay her "\$30,000] per day for being in prison falsely." Throughout the numerous pretrial hearings, the trial judge exhibited

² The sentence of ten days was the result of a criminal contempt charge imposed upon the Defendant due to her unruly conduct in the courtroom.

exceptional patience and restraint in the face of repeated personal attacks and overall poor attitude of the Defendant.

Although the Defendant was determined to proceed pro se, her combative behavior and refusal to cooperate with the court's instructions rendered that an impossibility. The trial court provided the Defendant with multiple opportunities to represent herself, so long as she would agree to adhere to proper courtroom decorum and to follow the rules of evidence and criminal procedure. The Defendant squandered these opportunities, and counsel was appointed. Even after the appointment of counsel, the Defendant refused to speak to counsel and continued her disruptive behavior in the courtroom, leading to her removal from the courtroom during portions of her trial.

I. Standard of Review

Before a trial court imposes a sentence upon a convicted criminal defendant, it must consider: (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the defendant wishes to make in the defendant's own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b). When an accused challenges the length and manner of service of a sentence, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. State v. Bise, 380 S.W.3d 682, 707 (Tenn. 2012). This standard of review also applies to "the questions related to probation or any other alternative sentence." State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012).

This court will uphold the trial court's sentencing decision "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. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. See State v. Carter, 254 S.W.3d 335, 346 (Tenn. 2008). The burden of showing that a sentence is improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001).

A. Imposition of Maximum Sentences

The Defendant first contends that the trial court erred by imposing the maximum sentence for each of her convictions. The Defendant asserts that the trial court's reasoning was "woefully inadequate" and "does not reflect a reasoned application of the sentencing considerations enumerated at [Tennessee Code Annotated section] 40-35-103." Therefore, the Defendant asks us to conduct a de novo review. The State responds that the trial court placed on the record its reasons for imposing maximum, within-range sentences that comply with "the purposes and principles of the sentencing statute." Therefore, the State asserts that we should apply the more deferential abuse of discretion with a presumption of reasonableness standard and affirm the trial court's sentencing decision.

When imposing the length of the Defendant's sentences, the trial court found that the following enhancement factors applied:

(1) [t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range; [and]

(19) the defendant is convicted of the offense of aggravated assault pursuant to [section] 39-13-102, [and] the victim of the aggravated assault was a law enforcement officer . . . provided, that the victim was performing an official duty and the defendant knew or should have known that the victim was such an officer or employee

Tenn. Code Ann. § 40-35-114. It also found that no mitigating factors applied. The trial court noted that the Defendant had two previous convictions for driving on a revoked license. The court stated that the Defendant refused to "follow the simplest laws," pointing out that she refused to obtain a driver's license. The court placed "tremendous weight" on factor (19), noting that the officers involved in her arrest "were trying to do their duty, and as far as [it could] tell, they were polite to her, they were respectful of her." Accordingly, the court sentenced the Defendant to a maximum of six years on each of the aggravated assault convictions and two years for the intentionally evading arrest in an automobile conviction.

Our amended Sentencing Act no longer imposes a presumptive sentence. Carter, 254 S.W.3d at 343. Instead, Tennessee Code Annotated section 40-35-210 was amended to provide as follows:

(c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific

sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:

(1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and

(2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

(d) The sentence length within the range should be consistent with the purposes and principles of this chapter.

Tenn. Code Ann. § 40-35-210(c), (d) (emphasis added).

“[T]he 2005 amendments rendered advisory the manner in which the trial court selects a sentence within the appropriate range, allowing the trial court to be guided by—but not bound by—any applicable enhancement or mitigating factors when adjusting the length of a sentence.” Bise, 380 S.W.3d at 706. In accordance with the broad discretion now afforded a trial court’s sentencing decision,

misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005. So long as there are other reasons consistent with the purposes and principles of sentencing, as provided by statute, a sentence imposed by the trial court within the appropriate range should be upheld.

Id.

Initially, we note that the Defendant correctly points out that enhancement factor (19) cannot be applied to the intentionally evading arrest in an automobile conviction because that factor only applies to convictions for aggravated assault. See Tenn. Code Ann. § 40-35-114(19). From the record, it is not apparent whether the trial court specifically applied factor (19) when imposing the two-year sentence for intentionally evading arrest in an automobile conviction. However, even if the trial court did err in applying factor (19) to that conviction, the Defendant’s sentence may still be upheld so long as the sentence actually imposed by the court was within the appropriate range. See Bise, 380 S.W.3d at 706. In addition, the trial court properly applied enhancement factor (1) to that conviction.

We are also mindful that “mere inadequacy in the articulation of the reasons for imposing a particular sentence . . . should not negate the presumption [of reasonableness].” Id. at 705-06. Nevertheless, although the Defendant urges us to conduct a de novo review of the length of her various sentences, from the record it appears that the trial court properly considered the purposes and principles of the Sentencing Act before imposing maximum sentences. Therefore, the appropriate standard of review is an abuse of discretion with a presumption of reasonableness. See id. at 707.

In the instant case, the record reflects that the trial court imposed maximum sentences after considering the Defendant’s history of criminal activity and refusal to follow “even the simplest laws.” The trial court properly applied enhancement factor (19) to the Defendant’s aggravated assault convictions and found that enhancement factor (1) applied to each of her three convictions. Furthermore, the trial court considered the fact that the Defendant was responsible for escalating a simple traffic stop and putting the officers’ lives in danger while resisting and then fleeing arrest. From the record, we cannot say that the trial court abused its discretion when it imposed maximum, within-range sentences on each of the Defendant’s convictions, and the Defendant’s argument in this respect is without merit.

B. Consecutive Sentencing

Next, the Defendant contends that the trial court erred by imposing consecutive sentences. Again, the Defendant asserts that the trial court failed to conduct the prescribed analysis before imposing consecutive sentences and asks this court to conduct de novo review. In response, the State argues that the trial court clearly stated its reasons for ordering consecutive service of the Defendant’s sentences and that it did not abuse its discretion in doing so.

Applying the “dangerous offender classification,” the court ordered the Defendant’s sentences to run consecutively. The court noted that, before ordering consecutive service, it had to make two findings in addition to the threshold determination that the Defendant was a dangerous offender: (1) that the circumstances surrounding the commission of the offense were aggravating; and (2) that the aggregate length of the sentence reasonably related to the severity of the convicted offenses. The trial court then stated,

We have two separate victims, and we have the victims of the state of Tennessee – actually the people of Shelby [C]ounty/streets of Memphis whose lives are endangered by her actions in evading the arrest.

....

In order to justify consecutive sentencing in this or any other case, there has to be extraordinary circumstances involved. . . . Here we have extraordinary circumstances in that we have a person who decides that the laws do not apply to her; and that no matter what we do or say, the laws don't apply to her.

....

I think the facts of this case are particularly troubling. We have someone – I don't know how pervasive it is, but we have someone that claims to be of another nationality, and that no one here has any authority. . . . And I think by giving her anything less than consecutive time would be another insult to the decent law-abiding citizens of the [S]tate of Tennessee. Frankly, I think the people of the [S]tate of Tennessee are tired of th[ese] kind of shenanigans.

Tennessee Code Annotated section 40-35-115(b) provides, in pertinent part, that a trial court may order sentences to run consecutively if it finds by a preponderance of the evidence that “[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high” Tenn. Code Ann. § 40-35-115(b)(4). Our supreme court has concluded that when the imposition of consecutive sentences is based on the trial court's finding the defendant to be a dangerous offender, the court must also find “that the terms imposed are reasonably related to the severity of the offenses committed and are necessary in order to protect the public from further criminal acts by the offender.” State v. Wilkerson, 905 S.W. 2d 938, 939 (Tenn. 1995); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999).

Our supreme court has held that “the abuse of discretion standard, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations” “if [the trial court] has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)[.]” State v. Pollard, 432 S.W.3d 851, 860-61 (Tenn. 2013). Thus, the imposition of consecutive sentencing is subject to the general sentencing principles that the overall sentence imposed “should be no greater than that deserved for the offense committed” and that it “should be the least severe measure necessary to achieve the purposes for which the sentence is imposed[.]” Tenn. Code Ann. § 40-35-103 (2), (4). Further, “[s]o long as a trial court properly articulates reasons for ordering consecutive sentences, thereby providing a basis for

meaningful appellate review, the sentences will be presumed reasonable and, absent an abuse of discretion, upheld on appeal.” Id. at 862. (citing Tenn. R. Crim. P. 32(c)(1)) (“The order [for consecutive sentences] shall specify the reasons for this decision and is reviewable on appeal.”); see also Bise, 380 S.W.3d at 705.

However, the abuse of discretion with a presumption of reasonableness standard does not eliminate a trial court’s obligation to comply with Wilkerson. Pollard, 432 S.W. 3d at 863. When a trial court fails to comply with Wilkerson, the appellate courts may conduct a de novo review of the record to “determine whether there is an adequate basis for imposing consecutive sentences” or “remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentencing.” Id. at 864 (citing Bise, 380 S.W.3d at 705 & n.41).

In the instant case, although the trial court mentioned the Wilkerson factors, the record reflects that it failed to adequately consider them. The trial court’s consideration of the Defendant’s belief “that the laws do not apply to her” could be construed as relevant to the likelihood that she will commit further criminal acts. However, the laws that the Defendant refuses to adhere to—such as obtaining a driver’s license and submitting to the authority of the court—are not indicative of any violent tendencies such that the public needs protection from her. Additionally, the trial court did not meaningfully discuss the “severity of the offenses committed.” The trial court did not state any reason why a fourteen year sentence was justly deserved for a crime in which no actual injury resulted to the victims, especially in a case where the Defendant had no prior convictions for violent crimes. Because the trial court failed to engage in the proper analysis, we do not afford the court’s decision to classify the Defendant as a dangerous offender a presumption of reasonableness, and we review the decision under a de novo rather than an abuse of discretion standard. See Pollard 432 S.W.3d at 863-64.

While reviewing the trial court’s consecutive sentencing decision de novo, we keep in mind that the dangerous offender classification “is the most subjective and hardest to apply.” Lane, 3 S.W.3d at 461. Ultimately, our careful review of the record leads us to conclude that the trial court inappropriately classified the Defendant as a dangerous offender. Although the Defendant was convicted of two counts of aggravated assault, the State prosecuted the Defendant under the theory that she “[i]ntentionally or knowingly cause[d] another to reasonably fear imminent bodily injury.” (Emphasis added). In other words, she was not charged with, or found guilty of, actually causing bodily injury to either victim. Additionally, Officer Manzano testified that when the Defendant fled the scene, he was surprised by the slow speed at which she traveled, remarking that while she was “technically” speeding, she was actually traveling at a “normal” rate of speed for that area. The Defendant did run stop signs during her flight from police, but Officer Manzano testified that it was around 11:00 p.m. and that there

were few other cars in the area. From these facts, we cannot say that this behavior is indicative of having “little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high” Tenn. Code Ann. § 40-35-115(b)(4).

Likewise, the officers testified that the Defendant made no overt threats during the traffic stop but rather asserted that they had no authority over her. Lieutenant Pearlman characterized her behavior as “non-compliant but no[t] threatening.” We understand that the trial court was deeply troubled by the Defendant’s behavior—namely, her refusal to cooperate with even simple requests—both during the commission of the offense and in the courtroom. However, the Defendant has no history of violent behavior, and her conduct in committing the aggravated assaults was relatively mild. Cf. State v. Edwards, 868 S.W.2d 682, 685 (Tenn. Crim. App. Mar. 21, 2000) (determining that defendant was properly classified as dangerous offender after being convicted of twenty-one counts of rape, two counts of first-degree burglary, two counts of aggravated burglary, second-degree burglary, aggravated rape, assault with intent to commit rape, and robbery); State v. Donald Ray Williams, No. M2014-00877-CCA-R3-CD, 2015 WL 3466009, at *1, *7-8 (Tenn. Crim. App. June 2, 2015) (concluding that defendant who was convicted of attempted second degree murder, especially aggravated robbery, and especially aggravated kidnapping, and who had previous convictions for second degree murder and attempted second degree murder, was properly classified as a dangerous offender); State v. Merl Wayne Medley, No. M2008-00831-CCA-R3-CD, 2009 WL 4263671, at *15 (Tenn. Crim. App. Nov. 30, 2009) (upholding classification as dangerous offender for defendant convicted of aggravated assault, attempted murder, and solicitation to commit murder, all the result of his multiple attempts to harm the victim, his wife). In sum, the Defendant was improperly categorized as a dangerous offender, and she did not otherwise qualify for consecutive sentencing. Therefore, we reverse that part of the trial court’s sentencing decision and remand for entry of judgment forms reflecting that the Defendant’s sentences are to be served concurrently.

C. Denial of Judicial Diversion

The Defendant contends that the trial court “did not adequately address [the Defendant’s] request for judicial diversion.” The State responds that the trial court “considered and weighed the required factors . . . and stated on the record its reasons for denying diversion.” Therefore, the State asks us to affirm the trial court’s decision to deny judicial diversion.

When considering whether to place the Defendant on judicial diversion, the trial court stated that “putting [the Defendant] on judicial diversion would be an insult to the decent law-abiding citizens of the [S]tate of Tennessee.” The court noted that it was

particularly troubled by the circumstances of the Defendant's offenses, pointing out that the Defendant's uncooperative behavior "was the cause of everything that happened." The court acknowledged that the Defendant did not have much of a criminal record, with only two previous convictions for driving on a revoked license. The court disfavored the fact that she had "never been married, but [had] six children," noting that her social history "doesn't appear to be very good." Although the court found that she appeared to be in good physical and mental health, it also stated that it had "never seen anyone with a wors[e] attitude than [the Defendant]." Although her employment history was unclear, the presentence report reflected that the Defendant had most recently supported herself by doing embroidery out of her home. The court stated, "[I]t defies logic to say that she's amenable to correction in any form or fashion." The court opined that there were no restrictions or types of probation that it could place the Defendant on where she would "obey any of the directives of the court."

The decision to grant judicial diversion lies within the sound discretion of the trial court. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). When the trial court has placed "on the record its reasons for granting or denying judicial diversion," the determination should be given a presumption of reasonableness on appeal and reviewed for an abuse of discretion. State v. King, 432 S.W.3d 316, 327 (Tenn. 2014). We may not revisit the issue so long as the record contains any substantial evidence to support the trial court's action. Parker, 932 S.W.2d at 958.

When making a determination regarding judicial diversion, the trial court must consider the following factors: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's mental and physical health; (6) the deterrent effect of the sentencing decision to both the defendant and other similarly situated defendants; and (7) whether judicial diversion will serve the interests of the public as well as the defendant. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998) (citing Parker, 932 S.W.2d at 958); see also King, 432 S.W.3d at 326 (reaffirming that the Electroplating requirements "are essential considerations for judicial diversion").

A trial court is "not required to recite all of the Parker and Electroplating factors when justifying its decision on the record in order to obtain the presumption of reasonableness." King, 432 S.W.3d at 327. However, "the record should reflect that the trial court considered the Parker and Electroplating factors in rendering its decision and that it identified the specific factors applicable to the case before it." Id. If the trial court "fails to consider and weigh the applicable common law factors, the presumption of reasonableness does not apply and the abuse of discretion standard . . . is not appropriate." Id. "In those instances, the appellate courts may either conduct a de novo review or . . . remand the issue for reconsideration." Id. at 328.

In the present case, the record reflects that the trial court adequately considered and weighed the Parker and Electroplating factors before arriving at its decision to deny judicial diversion. Furthermore, that decision was supported by the record. The Defendant was uncooperative and prone to outbursts in the courtroom, to the extent that she had to be removed from the courtroom for part of her trial. She repeatedly insisted that she had broken no laws and that the court had no jurisdiction over her, reflecting poorly on her overall attitude and calling greatly into question her amenability to correction. From the record, there is no evidence that the trial court abused its discretion when it denied judicial diversion, and the Defendant is not entitled to relief on this issue.

D. Denial of Alternative Sentencing

Finally, the Defendant contends that the trial court erred by denying any form of an alternative sentence. The Defendant argues that the trial court “foreclosed alternative sentencing by virtue of imposition of maximum sentences, to be served consecutively.” The State responds that the trial court did consider probation, which it properly denied after weighing the applicable factors.

At the sentencing hearing, the Defendant’s cousin, Sandra Townsend, testified. Ms. Townsend had known the Defendant since she was a small child. According to Ms. Townsend, at some point in her adulthood, the Defendant had a “change[] in her beliefs,” although Ms. Townsend indicated that this shift did not harm the Defendant’s relationship with her family. Ms. Townsend had spoken with the Defendant since she had been arrested on the present charges and their conversations were mostly “about everyday things that went on with life,” and there had been “no conversation around her beliefs or anything like that.” She testified that if the court granted probation, the Defendant had a good support system in the Memphis area, with people willing to help her meet any requirements of probation.

Following this testimony, the court stated that it “was hoping to get some insight into [the Defendant’s behavior]” but that it still did not understand “the logic” of the Defendant’s beliefs and actions. The court stated that it “[did not] believe that [the Defendant] would adhere to any rules of probation – either partial probation [or] split confinement – [and] that any type of probation in her case would depreciate the seriousness of this offense, so probation is denied.”

A trial court should consider the following when determining any defendant’s suitability for alternative sentencing:

(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 trial court should also consider a defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Stating again, in sentencing a defendant, a trial court should impose a sentence that is "no greater than that deserved for the offense committed" and is "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4).

An offender is eligible for an alternative sentence if he or she is sentenced to ten years or less and has not been convicted of certain specified offenses. See Tenn. Code Ann. § 40-35-303(a). A defendant with a total effective sentence greater than ten years is still eligible for probation if the individual sentences imposed for the convictions fall within the probation eligibility requirements. State v. Langston, 708 S.W.2d 830, 832-33 (Tenn. 1986). A defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6)(A). However, no longer is any defendant entitled to a presumption that he or she is a favorable candidate for alternative sentencing. Carter, 254 S.W.3d at 347. Tennessee Code Annotated section 40-35-102(6) is now only advisory. See Tenn. Code Ann. § 40-35-102(6)(D).

Additionally, no criminal defendant is automatically entitled to probation as a matter of law, see State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). It is the defendant's burden to establish his or her suitability for full probation. See Carter, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-303(b)). The defendant must demonstrate that probation will "subserve the ends of justice and the best interests of both the public and the defendant." Hooper v. State, 297 S.W.2d 78, 81 (Tenn. 1956), overruled on other grounds, State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. State v. Grear,

568 S.W.2d 285, 286 (Tenn. 1978). The same considerations attendant to the determination whether to place a defendant on judicial diversion are relevant to a decision whether to grant other forms of alternative sentencing. See State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995), overruled on other grounds, Hooper, 29 S.W.3d at 9 (noting that the “same guidelines are applicable in diversion cases as are applicable in [alternative sentencing] cases”).

The Defendant was convicted of two counts of aggravated assault, both Class C felonies, and sentenced to six years each for those convictions, and one count of intentionally evading arrest in an automobile, a Class E felony, for which she received a two-year sentence. Contrary to the assertion in her brief, because each of her individual sentences was less than ten years, she was eligible for probation. See Langston, 708 S.W. at 832-33. Furthermore, the trial court did actually consider probation at the sentencing hearing. However, as with the denial of judicial diversion, the trial court considered her an unfavorable candidate for probation based on her poor attitude and her belief that the “laws did not apply to her.” The court explicitly stated its belief that the Defendant would not adhere to any probationary requirements and that granting probation would depreciate the seriousness of the offenses. The trial court’s decision to deny alternative sentencing was supported by clearly articulated reasons, and the Defendant has failed to prove that the court abused its discretion or that she is otherwise a good candidate for an alternative sentence. Accordingly, the Defendant is not entitled to relief on this issue.

CONCLUSION

In sum, we affirm the trial court’s decision to impose maximum sentences for each of the Defendant’s convictions, as well as its decision to deny judicial diversion and alternative sentencing. However, we conclude that the trial court did not properly include, on the record, its reasons for imposing consecutive sentences pursuant to the dangerous offender classification. Upon de novo review of that determination, we conclude that the Defendant cannot properly be classified as a dangerous offender and we, therefore, reverse the trial court’s ruling in this respect. This case is remanded for the entry of judgment forms reflecting that the Defendant’s sentences are to be served concurrently.

D. KELLY THOMAS, JR., JUDGE