IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 1, 2014

STATE OF TENNESSEE v. RANDALL CUNNINGHAM

Appeal from the Criminal Court for Madison County
Nos. 13-90, 13-252, 13-305 Donald H. Allen, Judge

No. W2013-01966-CCA-R3-CD - Filed May 30, 2014

In this appeal, the Defendant contends that the trial court erred in denying all forms of alternative sentencing because he admitted his guilt, and, despite being young, had a good employment history. Upon consideration of the record and the applicable authorities, we conclude that the trial court's denial of alternative sentencing was not in error and affirm the judgments of the trial court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

George Morton Googe, District Public Defender, and Gregory Gookin, Assistant Public Defender, for the appellant, Randall Cunningham.

Robert E. Cooper, Jr., Attorney General and Reporter; Ahmed A. Safeeullah, Assistant Attorney General; Jerry Woodall, District Attorney General; and Brian Gilliam, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The Defendant was indicted in case number 13-90 on January 28, 2013, for committing the following offenses on April 11, 2012: Count 1, aggravated burglary, a Class C felony; Count 2, theft of property, a Class D felony; and Count 3, vandalism under $500, a Class A misdemeanor. See Tenn. Code Ann. §§ 39-13-403, -103, -408. Then, on April 1, 2013, the Defendant was indicted in case number 13-252 for the following offense committed on October 22, 2013: possession of contraband in a penal institution, marijuana, a Class A misdemeanor. See Tenn. Code Ann. § 39-16-201. Later, on April 29, 2013, he

was indicted in case number 13-305 for committing the following offenses on September 30, 2012: Count 1, aggravated burglary, a Class C felony; Count 2, theft of property, a Class D felony; and Count 3, vandalism over $500, a Class C felony.[1] See Tenn. Code Ann. § 39-13-403, -103, -408. Pursuant to a plea agreement, the Defendant would serve an effective six-year sentence in exchange for his guilty pleas to the following: two counts of aggravated burglary, two counts of theft of property, one count of vandalism over $500, one count of vandalism under $500, and possession of marijuana.[2] The manner of service was left to the discretion of the trial court.

The Defendant entered best interest pleas in case numbers 13-90 and 13-305 and pleaded guilty in case number 13-252. A guilty plea hearing on all three cases was held on May 15, 2013. At the hearing, the following factual bases for each plea was proffered:

Case number 13-90

> [O]n April the 11th that [the Defendant] while here in Madison County did unlawfully enter the habitation of Gregory Yates without his consent with the intent to commit theft of property. In Count 2 that on the same day, April the 11th of 2012 while here in Madison County, the [D]efendant . . . did knowingly obtain or exercise control over property or money equal to or gr[e]ater than the value of $100 without the effective consent of the owner Gregory Yates with intent to deprive him of that property. On that same day the [D]efendant did knowingly cause damage to or destruction of property belonging to Gregory Yates over the value of $500.
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> . . . [O]n April the 11th, Gregory Yates, the homeowner, came into his house at 32 Battlefield Cove. There he encountered a burglary in progress. He saw that two windows had been forced open to his home. He also saw two people running from his house and getting into a gray van at which point the homeowner, Mr. Yates, actually followed the van as it drove through several neighborhoods and some streets and that van finally crashed at 91 Pickens Cove. At that point, Mr. Yates called the police and advised them that the two people had left out on foot. Officers with the Jackson Police Department arrived very quickly and found that van. In that van they found a Tennessee

[1] Case number 13-252 occurred after case number 13-305; when the Defendant was arrested on the latter case number and transported to jail, he was found in possession of marijuana and indicted on the former.

[2] The possession of contraband in a penal institution charge was reduced to possession of marijuana, a Class A misdemeanor. See Tenn. Code Ann. § 39-17-415.

driver's license belonging to . . . the [D]efendant before the Court. They also found [the Defendant] himself as he was captured walking along with Nico Cohen, the second person in the van, a short distance from where the van had crashed at 91 Pickens Cove. Mr. Yates was brought back to the scene. He identified some firearms, ammunition, some collector coins that had been taken from his house. They were all recovered in that van. The value of those items was approximately $4000 making it greater than $1000. He also stated that there was a gun safe and there had been damage done to a gun safe. That's the vandalism and the value of that vandalism is about $800 making it greater than $500.

Case number 13-305

On September the 30th of 2012 here in Madison County, the [D]efendant . . . did unlawfully enter a habitation belonging to Thomas Eugene Brown and Janet Brown with the intent to commit theft of property. On that same day, September the 30th, the [D]efendant did knowingly obtain or exercise control over property being money greater than $1000 without the effective consent of the owner Thomas Brown and Janet Brown with intent to deprive them of their property. On that same day, September 30th, 2012 while here in Madison County, the [D]efendant did knowingly cause damage to or destruction of property located at the habitation of Thomas Brown and Janet Brown and that is under the value of $500.

[W]hile the home break in took place on September the 30th and that was reported by the Thomas Brown and Janet Brown on September 30th, the [D]efendant . . . was apprehended October the 22nd of 2012. He was apprehended by deputies with the Madison County Sheriff's Department in the area of Old Bells Road and Windy City Road. He was along with some other people that are listed in 13-252, Charles Hobson and Deon Rivers. [The Defendant] was located inside of a vehicle that was located -- well, the vehicle itself was located on Hollywood Drive. Deputies got there and they made contact with [the Defendant]. [The Defendant] gave the deputies verbal consent to search that vehicle. There they found an Apple laptop computer. Based on the serial numbers that had been provided by the victims, it was linked back to that home burglary that had taken place in the home of Thomas Brown and Janet Brown on Wiley Parker Road back in September about three weeks prior. It was also further determined once records were checked at pawn shops, Affordable Jewelry & Pawn on Old Hickory Boulevard, it was determined that [the Defendant] had pawned on October the 1st, October the

3rd and October the 13th pieces of stolen jewelry that were identified by Janet Brown as being her jewelry that had been taken in part of a home burglary on Wiley Parker Road on September the 30th. The amount of the property that was taken was greater than $1000 with that being a laptop computer which was recovered as well as the jewelry, some rings and necklaces that were taken that belonged to Mrs. Brown that were identified at Affordable Jewelry & Pawn and recovered. The Affordable Jewelry & Pawn had records indicating that the [D]efendant . . . was the one who had taken those items to the pawn shop and received cash for that. The vandalism is for a broken window from which entry was made into the house.

Case number 13-252

[W]hen the [D]efendant was taken into custody based on the facts of 13-305 once it was determined that he was responsible for those charges in 13-305, he was taken into custody on that same day, October the 22nd. The deputies reported that they did a pat down of [the Defendant], but did not find anything on him, but when they got to the jail when he was being booked into the jail here in Madison County Jail that they did find in his pant's right front pocket a small bag described as a baggie of marijuana. The sheriff's department initially weighed it at five grams. It was sent to the lab and confirmed to be marijuana, a Schedule VI controlled substance, and it weighed four grams at the lab. It would be less than half an ounce. He was charged with Introducing Contraband into a Correctional Facility, but based on the fact that he had been patted down previously, I think this was simply a case where he had the marijuana on him and the officers simply missed it in the initial pat down and once he was changing clothes in the jail a more thorough search of his property including his pants w[a]s done. It was in his right front pant's pocket, so he did unlawfully possess that marijuana, less than half an ounce while here in Madison County here on October the 22nd of 2012.

The Defendant agreed that the proffered factual bases for the pleas were substantially correct, and the trial court subsequently accepted the Defendant's pleas, finding that they were "freely, voluntarily, knowingly, and intelligently" entered. At the Defendant's sentencing hearing on June 24, 2013, the State offered the presentence report as evidence, and the Defendant testified on his behalf. During his testimony, the Defendant stated that he completed high school through the tenth grade and that his goal was to get his General Educational Development (GED) certificate whether he was sentenced to prison or given an alternative sentence. He testified that he had four jobs in his life and that he had two possible jobs where he could work when he was released from jail. The Defendant admitted that he

was guilty of all the offenses for which he was charged, that his actions were "not right," and that he was not following anyone's lead; it was his decision to commit the charged offenses, and he took full responsibility. He denied that his actions were drug-related and testified that he had stolen and pawned those items to provide care for his three children. The Defendant insisted that he was not going to do it again and that he would work and not steal when released, explaining that he had been in jail once before but that he had currently been in jail for eight months and that he had never been away from his family that long.

The trial court took the matter under advisement and reset the hearing for July 9, 2013, to announce its ruling. At that hearing, the trial court noted its consideration of the principles of sentencing, enhancement and mitigating factors, and the Defendant's statements on his behalf and offer to write a letter of apology to the victims. The trial court stated that it was necessary to consider the Defendant's behavior since his April 11, 2012 arrest in determining whether he was an appropriate candidate for alternative sentencing; most notable to the trial court was that the Defendant continued his criminal activity. The trial court further noted that the Defendant was arrested for driving on a suspended license on August 14, 2012; then, he committed aggravated burglary on September 30, 2012, pawning those stolen items shortly thereafter; and finally, when he was arrested and charged on October 22, 2012, for the most recent aggravated burglary, he was found in possession of marijuana. The trial court opined that the initial arrest evidently had no effect on slowing the Defendant down in regards to his committing crimes. Issuing its ruling, the trial court stated,

> [W]hen I look at his actions and behavior since his first arrest and when I consider the fact that he committed new offenses while out on release on bond from the first case, the Court finds that it reasonably appears that this defendant will not abide by any terms of probation. Also the Court finds that the interests of society in being protected from this defendant's possible future criminal conduct are great. You know, there's no question in my mind if he had not been arrested and been held on bond in this last case that perhaps there may have been more homes that were burglarized. There is nothing to indicate that he really would have stopped committing these offenses at least nothing presented to the Court that would indicate that.
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> I find that his potential for rehabilitation is poor based upon his previous actions which I have talked about.
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> The Court also finds a sentence of probation in these cases would unduly depreciate the seriousness of these offense[s].
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> Also the Court finds that confinement in these cases is particularly

> suited to provide an effective deterrent to others who are likely to commit similar offenses. . . . The Court finds that there has to be some sort of deterrence to people who go out and commit burglaries time after time.
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> In these cases the Court finds based upon all these circumstances and facts . . . that he is not a good candidate for probation or alternative sentencing.

The Defendant then filed a timely notice of appeal to this court on August 30, 2013.

ANALYSIS

The Defendant contends that the trial court erred in denying all forms of alternative sentencing because he was young, admitted guilt, and had a good employment history. Further, the Defendant stated that he was willing to get his GED if released. The State responds that the trial court properly exercised its discretion in denying alternative sentencing. We agree with the State.

When an accused challenges the 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. 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." State v. Bise, 380 S.W.3d 682, 709-10 (Tenn. 2012). 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 party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.; State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

The Defendant was eligible for probation because the "sentence actually imposed upon [him was] ten (10) years or less." Tenn. Code Ann. § 40-35-303(a). Thus, the trial court was required to automatically consider probation as a sentencing option. Tenn. Code Ann. § 40-35-303(b). However, no criminal defendant is automatically entitled to probation as a matter of law. State v. Davis, 940 S.W.2d 558, 559 (Tenn. 1997). The defendant has the burden of establishing his or her suitability for full probation. See State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). 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 by State v. Hooper, 29 S.W.3d 1, 9-10 (Tenn. 2000).

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). Following the June 7, 2005 amendments to our Sentencing Act, 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. Further, Tennessee Code Annotated section 40-35-102(6) is only advisory. See Tenn. Code Ann. § 40-35-102(6)(D).

In determining any defendant's suitability for alternative sentencing, 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;
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> (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
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> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant[.]

Tenn. Code Ann. § 40-35-103(1)(A)-(C). 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). Ultimately, 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).

In determining the manner of service for Defendant's six-year sentence, the trial court found the following mitigating factors: that the Defendant was young, giving that very slight weight; that the Defendant's criminal conduct neither caused nor threatened serious bodily injury, giving that slight weight; that the Defendant pleaded guilty to the charged offenses; that the Defendant admitted the wrongfulness of and accepted responsibility for his actions; and that the Defendant agreed to apologize to the victims. The trial court also found the following enhancement factors: number 1, that the Defendant had a history of criminal convictions in addition to those necessary to establish the range, which the trial court gave moderate weight; number 13, that at the time the offenses in case numbers 13-305 and 13-252 were committed, the Defendant had been released on bail for the offenses in case number 13-90, which the trial court gave great weight; and, number 9, that the Defendant possessed

a firearm during the commission of the offense. See Tenn. Code Ann. § 40-35-114(1), (9), (13). While the evidence supports the trial court's application of numbers 1 and 13, it does not support the application of number 9. The trial court's sole basis for applying factor number 9 was that, in case number 13-90, two of the items stolen during that burglary/theft/vandalism were firearms and ammunition. However, this court has held that the possession of a firearm enhancement factor is applicable only when the facts "show some reasonable connection between the defendant's conduct or state of mind and the firearm[,]" further noting that its application may also be inappropriate when "the firearm is neither used nor attempted to be used in the commission of the offense." State v. Daugherty, No. 03C01-9203-CR-00082, 1993 WL 330454, *4 (Tenn. Crim. App. Aug. 27, 1993) (quoting State v. Johnnie M. Burns, No. 1, 1988 WL 615, *3 (Tenn. Crim. App. Jan. 6, 1988). It is clear that the Defendant did not even possess the weapons during the aggravated burglary of the home nor the vandalism of the gun safe, and his theft of the weapons from an unoccupied home reveals no reasonable connection between the Defendant's conduct or state of mind and the firearm. Thus, the trial court's application of this factor was in error.

Nevertheless, as illustrated in our prior recitation of the trial court's findings, the record reveals that the trial court considered the principles of sentencing as well as the factors specific to alternative sentencing and found that the Defendant was neither an appropriate candidate for probation nor alternative sentencing. Specifically, the trial court gave great weight to the fact that the Defendant continued to commit similar crimes to those for which he was arrested and subsequently released on bond. The trial court also found that confinement was necessary to avoid depreciating the seriousness of the offense, to protect society from the Defendant and his criminal activities, and to provide an effective deterrent to both the Defendant and others in the community likely to commit similar crimes in the future. Given the trial court's stated findings and the support in the record for those findings, we conclude that the trial court's denial of alternative sentencing was not in error. The Defendant has failed to rebut the presumption of reasonableness afforded to the trial court's sentencing determination; thus, he is not entitled to relief on this issue.

CONCLUSION

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

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D. KELLY THOMAS, JR., JUDGE