

SENTENCING

**How to Impose a Sentence Without
Abusing Your Discretion**

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What is the Goal of this Presentation?

- Sentencing of a criminal defendant, except in limited circumstances, is placed in the sole discretion of the trial judge. He or She must consider a number of facts and circumstances in arriving at a proper sentence. Though the trial judge has vast discretion in regards to sentencing, that discretion has limitations.
- The goal of this presentation is to outline the parameters of sentencing so your decisions will survive appellate scrutiny.

Standard of Review

- The trial court is granted broad discretion to impose a sentence anywhere within the applicable range, regardless of the presence or absence of enhancement or mitigating factors, and "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed." *State v. Bise*, 380 S.W.3d at 706.

In determining a defendant's sentence, the trial court is to consider the following 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) evidence and information offered by the parties on the mitigating and enhancement factors, (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee, (7) any statement by the Defendant in his own behalf about sentencing, and (8) the result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

- Accordingly, we review a trial court's sentencing determinations under an abuse of discretion standard, "granting a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *Bise*, 380 S.W. 3d at 707. This same standard of review applies to the decision to grant or deny judicial diversion.

Abuse of Discretion

- An abuse of discretion occurs when the trial court applies an incorrect legal standard or reaches a conclusion that is illogical or unreasonable and causes an injustice to the party complaining." *State v. Lewis*, 235 S.W.3d 136, 141 (Tenn. 2007).

Purpose and Intent T.C.A. §40-35-102

- The foremost purpose of this chapter is to promote justice, as manifested by § 40-35-103. In so doing, the following principles are adopted:

(1) Every defendant shall be punished by the imposition of a sentence justly deserved in relation to the seriousness of the offense;

(2) This chapter is to assure fair and consistent treatment of all defendants by eliminating unjustified disparity in sentencing and providing a fair sense of predictability of the criminal law and its sanctions;

(3) Punishment shall be imposed to prevent crime and promote respect for the law by:

(A) Providing an effective general deterrent to those likely to violate the criminal laws of this state;

(B) Restraining defendants with a lengthy history of criminal conduct;

(C) Encouraging effective rehabilitation of those defendants, where reasonably feasible, by promoting the use of alternative sentencing and correctional programs that elicit voluntary cooperation of defendants; and

(D) Encouraging restitution to victims where appropriate;

- (4) Sentencing should exclude all considerations respecting race, gender, creed, religion, national origin and social status of the individual;

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- (5) In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration; and

- 6)(A) A defendant who does not fall within the parameters of subdivision (5), and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary; however, a defendant's prior convictions shall be considered evidence to the contrary and, therefore, a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing;

Principles of Sentencing

- (B) As used in subdivision (6)(A), "separate periods of incarceration or supervision" means that the defendant serves and is released or discharged from a period of incarceration or supervision for the commission of a felony prior to committing another felony;
- (C) If a defendant with at least three (3) felony convictions is otherwise eligible, that defendant may still be considered a favorable candidate for any alternative sentencing that is within the jurisdiction of and deemed appropriate by a drug court;
- (D) A court shall consider, but is not bound by, the advisory sentencing guideline in this subdivision (6).

Principles of Sentencing T.C.A. §40-35-103

- To implement the purposes of this chapter, the following principles apply:
- (1) Sentences involving confinement should be based on the following considerations:
 - (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;

Principles of Sentencing

- (2) The sentence imposed should be no greater than that deserved for the offense committed;
- (3) Inequalities in sentences that are unrelated to a purpose of this chapter should be avoided;
- (4) The sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed;

Principles of Sentencing

- (5) The potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed. The length of a term of probation may reflect the length of a treatment or rehabilitation program in which participation is a condition of the sentence;
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- (6) Trial judges are encouraged to use alternatives to incarceration that include requirements of reparation, victim compensation, community service or all of these; and

Principles of Sentencing

- (7) Available community-based alternatives to confinement and the benefits that imposing such alternatives may provide to the community should be considered when the offense is nonviolent and the defendant is the primary caregiver of a dependent child.

***State v. Jackson*, 2022 WL 370090
(Tenn. Crim. App. 2022)**

- More than just lip service must be paid to the purposes and principles of sentencing.

Allocution

- It is “an unsworn statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. This statement is not subject to cross-examination.” BLACK’S LAW DICTIONARY 75 (7th ed.1999); see also *United States v. Gilbert*, 244 F.3d 888, 924 (11th Cir.2001).
- Included in T.C.A. §40-35-310(b)(7)
- The defendant is not subject to cross-examination. *State v. Keathly*, 145 S.W.3d 123 (Tenn. Crim. App. 2003)

***Buchanan v. State*, 2023 WL 3476879
(Tenn. Crim. App. 2023)**

- “[a]lthough a trial court’s refusal to allow allocution is reversible error, trial courts are not required to inquire whether the defendant wishes to make any such statement.”

How to Impose a Sentence

- Must have a pre-sentence report prepared by the Department of Correction that contains the social, mental, and criminal history of the defendant as well as any risk-assessment information. An additional sexual offender assessment is necessary for any sex crimes.
- Must conduct a hearing wherein each party is given the opportunity to be heard regarding the appropriate sentence.

- The use of Enhancement Factors.
- The use of Mitigating Factors.
- The use of facts adduced at trial.
- Information from witnesses called at the hearing.
- Use of mental health information including sex offender screening.

Enhancement Factors

- T.C.A. §40-35-114 sets out 31 enhancement factors.
- The Court is to identify what enhancement factor exists and the reason the Court finds that it exists.
- The Court is to state how much weight it is attributing to a particular enhancement factor.

- Some enhancement factors cannot be used if they mirror some element of the indicted offense.
- – Possession or employment of a firearm.
- – Offenses having more than one victim.
- – Inflicting serious bodily injury on a victim.

State v. Montgomery, 2024 WL 83341
(Tenn. Crim. App. 2024)

- Even the misapplication of an enhancement or mitigating factor, however, does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act.

Mitigating Factors

- Mitigating factors are listed in T.C.A. §40-35-114.
- As part of sentencing hearing the Court must state what mitigating factor it is considering or why the Court does not feel mitigating factors apply. – If the Court does not make findings, can be found to have abused its discretion.

***State v. Dunn*, 2022 WL 2433687
(Tenn. Crim. App. 2022)**

- It is true that the trial court did not explicitly enumerate the mitigating factors raised by the defense. However, the trial court is simply required to “consider” these factors, not explicitly discuss each one

**Consecutive Sentencing
Mandatory Consecutive Sentencing**

- The defendant committed a felony while on parole or other release program.
- The defendant committed a felony while on bail for a felony for which the defendant was ultimately convicted.
- The defendant committed an escape or a felony committed while on escape.

Discretionary Consecutive Sentence

- The defendant is a professional criminal who has knowingly devoted such defendant’s life to criminal acts as a major source of livelihood;
- The defendant is an offender whose record of criminal activity is extensive;
- The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant’s criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

Discretionary Consecutive Sentence *Wilkerson* factors

- The 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; and both of the following factors apply:
- (a) the circumstances surrounding the commission of the offense are aggravated, and
- (b) the aggregate length of the sentences reasonably relates to the offense of which the defendant stands convicted.

Consecutive Sentencing "Wilkerson Factors"

- "The trial court also imposed consecutive sentencing upon finding that the Defendant is a dangerous offender. In order to impose consecutive sentencing on that basis, a trial court must find that "(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and [that] (2) 'the terms are reasonably related to the severity of the offenses.'" State v. Moore, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting Wilkerson, 905 S.W.2d at 938). The trial court specifically addressed and found the Wilkerson factors applicable".

Sexual Offense

- The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

Additional Considerations

- The defendant is sentenced for an offense committed while on probation; or
- The defendant is sentenced for criminal contempt.
- The defendant has additional sentences not yet fully served.

New Additions

- The defendant was incarcerated at the time of the offense and is convicted of an offense enumerated in [Only for offenses committed on or after 7/1/23.]
- The defendant is convicted of two (2) or more offenses involving more than one (1) victim, irrespective of whether the _multiple offenses were part of a single criminal episode, and the court finds that a separate consecutive sentence for each offense is in the interest of justice.
- [Only for offenses committed on or after 7/1/23.]

Warning

- Do not run any sentence concurrently with a federal sentence. The federal courts and the United States Bureau of Prisons do not have to honor a state order of concurrent sentence and will usually not.

State v. Turner, 2024 WL 808713
(Tenn. Crim. App. 2024)

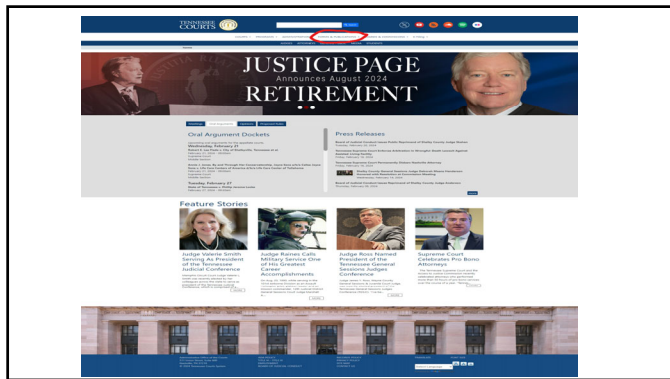
- Trial court failed to make the Wilkerson findings: that the aggregate sentence is reasonably related to the severity of the offenses and necessary in order to protect the public from further criminal acts.

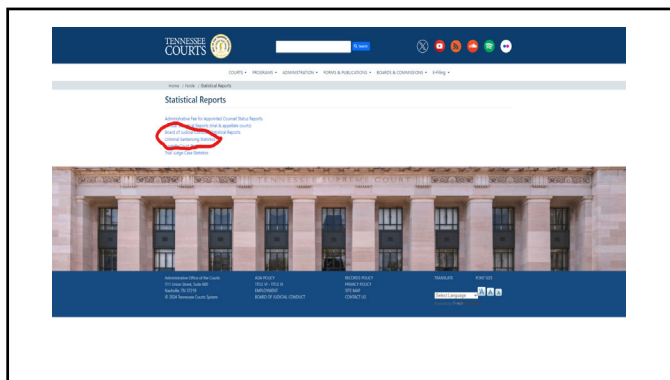
State v. Montgomery, 2024 WL 83341
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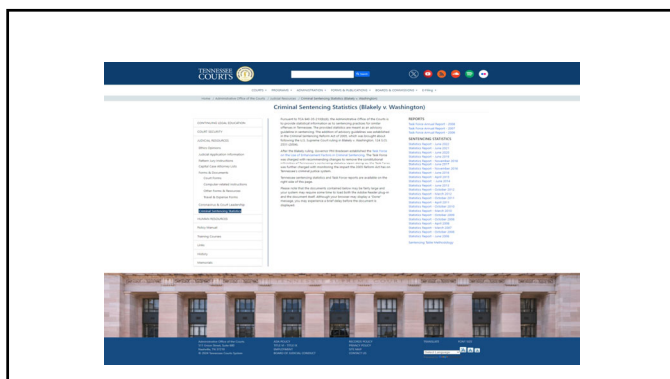
- A defendant's record of criminal activity is "extensive" if it is "considerable or large in amount, time, space, or scope." *State v. Perry, 656 S.W.3d 116, 128 (Tenn. 2022)*. In evaluating whether a defendant's record of criminal activity is extensive, courts should consider the following factors:
- (1) The amount of criminal activity, often the number of convictions, both currently before the trial court for sentencing and prior convictions or activity;
- (2) The time span over which the criminal activity occurred;
- (3) The frequency of criminal activity within that time span;
- (4) The geographic span over which the criminal activity occurred;
- (5) Multiplicity of victims of the criminal activity; and
- (6) Any other fact about the defendant or circumstance surrounding the criminal activity or convictions, present or prior, that informs the determination of whether an offender's record of criminal activity was considerable or large in amount, time, space, or scope.

Sentencing Statistics

- One of the factors that the trial court is to consider when imposing sentence are statistics compiled by the Administrative Office of the Courts showing the average sentences and percentage of alternative sentences imposed throughout the State according to offense and offender status.







The Bottom Line



Probation Procedure

- The presentence report, if not waived.
- The defendant's physical/mental condition and social history.
- The facts and circumstances surrounding the offense, and the nature and circumstances of the criminal conduct involved.
- The prior criminal history of the defendant, or lack thereof.
- The previous actions and character of the defendant.

- Whether or not the defendant might reasonably be expected to be rehabilitated, and the defendant's potential or lack of potential for rehabilitation, including the risk that during the period of probation the defendant will commit another crime
- Whether or not it reasonably appears that the defendant will abide by the terms of probation.
- Whether or not the interests of society in being protected from possible future criminal conduct of the defendant are great.
- Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

- Whether or not the interests of society in being protected from possible future criminal conduct of the defendant are great.
- Whether or not measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.
- Whether or not a sentence of full probation would unduly depreciate the seriousness of the offense.

- Whether or not confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses.
- Whether or not the offense was particularly enormous, gross or heinous.

Probation

T.C.A. §40-35-303

- (a) A defendant shall be eligible for probation under this chapter if the sentence actually imposed upon the defendant is ten (10) years or less;

- No defendant shall be eligible for probation under this chapter if convicted of a violation of § 39-13213(a)(2), § 39-13-304, § 39-13-402, § 39-13-504, § 39-13-532, § 39-15-402, § 39-17-417(b) or (i), § 39-17-1003, § 39-17-1004 or § 39-17-1005.

- T.C.A. §40-35-102 (6)(A) A defendant who does not fall within the parameters of subdivision (5), and who is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary; however, a defendant's prior convictions shall be considered evidence to the contrary and, therefore, a defendant who is being sentenced for a third or subsequent felony conviction involving separate periods of incarceration or supervision shall not be considered a favorable candidate for alternative sentencing;

Probation Considerations

- Must set out on the record the factors that apply.
- Must set out on the record the factors you find disqualify the defendant from probation.
- Can use part suspension where appropriate.
- Cannot impose a probation period beyond the range of punishment of the conviction class.

***State v. Trent*, 533 S.W.3d 282
(Tenn. 2017)**

- [T]he imposition of a sentence on a criminal defendant is one of the most important decisions that trial courts are called upon to make because they invariably reduce a person's liberty, often eliminating it entirely. Accordingly, it is imperative that trial judges approach the process only after thoroughly familiarizing themselves with the applicable provisions of our Sentencing Act. Moreover, although we emphasize that there are no "magic words" that trial judges must pronounce on the record, it is also critical that, in their process of imposing sentence, trial judges articulate fully and coherently the various aspects of their decision as required by our statutes and case law.

***State v. Rollins*, 2023 WL 4078700
(Tenn. Crim. App. 2023)**

- Our review of the record indicates that the trial court "approache[d] the process only after thoroughly familiarizing [itself] with the applicable provisions of our Sentencing Act" and properly applied the provision of the Act to the facts of this case. See *Trent*, 533 S.W.3d at 292. The trial court was able to "articulate fully and coherently the various aspects of the decision as required by our statutes and case law." *Id.*
- Although the trial court did not use the terms "especially violent, horrifying, shocking, reprehensible, or offensive or otherwise excessive or exaggerated degree," we are satisfied that the language used by the trial court in describing the particular circumstances of the offense as committed here, meets the standard required by *Trotter*. See *Trotter*, 201 S.W.3d at 654-56.

***State v. Pitts*, 2023 WL 4363415
(Tenn. Crim. App. 2023)**

- While great deference is given to the trial court in sentencing matters, the trial court is required to at least make minimal findings. Here, however, the record reveals that the trial court essentially determined the defendant had received enough of a "break" by being allowed to plead guilty to aggravated assault, and the court focused on the sentence the defendant would have received had he been convicted of multiple counts of aggravated sexual battery or rape of a child. The trial court failed to acknowledge any other relevant statutory considerations or articulate the reasons for the sentence of confinement in accordance with the purposes and principles of sentencing.

Diversion

- Must be a “C” felony or less that is not statutorily prohibited from probation.
- Must have a clean TBI report. – TBI report just shows there is no prior criminal history that would disqualify a person. Does not mean the person is cleared for diversion.
- Must have a hearing and consider all the factors in granting or denying diversion.

Diversion Factors

State v. Parker, 932 S.W.2d 945 (Tenn.Crim.App.1996)
State v. Electroplating, Inc., 990 S.W.2d 211 (Tenn. Crim. App. 1998)

- The accused amenability to correction.
- The circumstances of the offense.
- The accused criminal record.
- The accused’s social history.
- The accused’s physical and mental health.
- The deterrence value to the accused and others.
- Would diversion serve the interests of the public as well as the accused.

Diversion

- In addition to the seven factors listed above, the trial court may consider the following factors in making its
- decision: “[the defendant’s] attitude, behavior since arrest, prior record, home
- environment, current drug usage, emotional stability, past employment, general reputation,
- marital stability, family responsibility[,] and attitude of law enforcement.” *State v. Anthony Adinolfi*, No. E2013-01286-CCA-R3-CD, 2014 WL 2532335, at *2 (Tenn. Crim. App. June 2, 2014)

Diversion

- The record must reflect that the court has weighed all the previous factors in reaching its determination. *State v. Bonestel*, 932 S.W.2d 163 (Tenn.Crim.App. 1993)
- Refusal to admit guilt is not a good reason to deny diversion. *State v. Lewis*, 978 S.W.2d 558 (Tenn.Crim.App. 1997).

State v. Courter, 2021 WL 2909784 (Tenn. Crim. App. 2021)

- Although the 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, 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. Thereafter, the trial court may proceed to solely address the relevant factors.
- Though the trial court did not utilize "magic words" or reference the Electroplating factors by name, our review of the records reflects that the trial court considered at least factors (2), (3), and (6).

Remember



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