

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 10, 2015

STATE OF TENNESSEE v. JAMES ANDREW PAIGE

**Appeal from the Criminal Court for Sumner County
No. 2013CR263 Dee David Gay, Judge**

No. M2014-01618-CCA-R3-CD – Filed July 28, 2015

The defendant, James Andrew Paige, pled guilty to one count of aggravated statutory rape, a Class D felony. He received a five-year sentence as a Range II offender with the trial court to determine the manner of service. The trial court ordered the defendant to serve his sentence in incarceration. On appeal, the defendant contends that the trial court erred in denying him alternative sentencing. Following our review, we affirm the judgment of the trial court.

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

JOHN EVERETT WILLIAMS, delivered the opinion of the Court, in which THOMAS T. WOODALL, P.J., and CAMILLE R. MCMULLEN, J., joined.

David A. Doyle, District Public Defender (on appeal), and John. D. Pellegrin, Gallatin, Tennessee, (at sentencing) for the Appellant, James Andrew Paige.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; L. Ray Whitley, District Attorney General; and Jayson Criddle, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

FACTS AND PROCEDURAL HISTORY

This case arose after the forty-five-year-old defendant had sexual intercourse with the victim, his seventeen-year-old niece. The defendant was initially charged with one count of rape and one count of aggravated statutory rape. In exchange for the defendant's guilty plea to aggravated statutory rape, the State agreed to *nolle prosequi* the rape charge. At the guilty plea hearing, the State set forth the following as the factual basis for the plea:

[I]f this case had proceeded to trial today, the State anticipates the proof would have been that the defendant engaged in, according to the victim, nonconsensual sexual intercourse with her that resulted in her becoming pregnant. There was a pregnancy, as well as an abortion. We had the DNA tested, and the DNA did match the defendant's DNA.

It's my understanding the defense contests whether or not it was consensual. That is not an issue for this, but, by entering this plea agreement, the State is not conceding that it was consensual; just that that is not an element of this offense.

The defendant admitted that he was guilty of aggravated statutory rape, and the trial court accepted his guilty plea.

At the sentencing hearing, Detective Sam Uldrich testified that he began investigating the defendant's case for the Goodlettsville Police Department after the victim and her mother filed a police report. Detective Uldrich spoke with the victim, and she alleged that the defendant forcibly raped her, which resulted in a pregnancy. The victim participated in a forensic interview, where she "gave a full and open disclosure of the events." After the forensic interview, Detective Uldrich spoke with the defendant and asked "if he would be willing to come in and talk to [Detective Uldrich] so we could get this straightened out." The defendant declined, but he agreed to voluntarily provide Detective Uldrich with a DNA sample.

The victim and her family ultimately decided to terminate the pregnancy, and Detective Uldrich attended the proceeding with the victim. Detective Uldrich collected a DNA sample from the fetus and sent the sample, along with the defendant's DNA, to a laboratory for testing. The results of the DNA test showed a "99.99 percent" certainty that the defendant was the father. Once Detective Uldrich received the results, a warrant was issued for the defendant's arrest. Detective Uldrich went to arrest the defendant and informed him of the test results. The defendant claimed that the DNA must have belonged to his son, and he told Detective Uldrich that he caught the victim and his son

having sexual intercourse. Detective Uldrich explained to the defendant that if the DNA had belonged to his son, the test results would have revealed a different percentage match.

Kimberly Gulden testified that she interviewed the defendant in order to prepare his presentence report. She described the defendant as “very defensive” throughout the interview and “pretty difficult to deal with.” He told Ms. Gulden that he did not commit the crime that he was charged with, and he stated that he had never committed a crime or been on probation. When Ms. Gulden began to discuss the necessary information to schedule his psychosexual evaluation, the defendant became “very defensive” and indicated that he did not feel as though the evaluation was necessary. The defendant “just wanted to argue” with Ms. Gulden that the intercourse with the victim had been consensual. Ms. Gulden informed him that minors were incapable of consensual sexual intercourse in Tennessee, and the defendant responded that she was “of the age of consent in other states.” Ms. Gulden confronted the defendant about his familial relation to the victim, and “he indicated that he was only related by marriage.” Ms. Gulden testified that the defendant “continued to have a justification for his actions, no matter what he was confronted with.”

Ms. Gulden conducted a home visit with the defendant, and she learned that he kept a handgun in his home. She conducted a further inquiry into his criminal history and discovered that the defendant had been charged with attempted sexual battery and later pled guilty to the reduced charged of simple assault in 1997. Ms. Gulden testified that someone “who is not able to see the criminal nature of their actions isn’t a good candidate for probation[.]” She stated that while the defendant admitted that he had sexual intercourse with the victim, he contended that the intercourse was consensual. She said that “every step of the way there was some type of justification for his behavior.”

Laura Lisk testified that she worked for the Board of Probation and Parole as the supervisor for sex offenders. Ms. Lisk accompanied Ms. Gulden on the defendant’s home visit to discuss the general conditions of probation and the specialized conditions of probation for sex offenders. During the discussion, the defendant asked Ms. Lisk several hypothetical questions:

“Well, what if I were to move to another state where this isn’t a crime? I wouldn’t have to register as a sex offender. Well, if I had committed this crime in another” -- if this had happened -- you know. “If I had sexual intercourse with my niece in another state where it’s not a crime” - - he was asking me, “What’s the big deal?”

When Ms. Lisk read the condition prohibiting the ownership or possession of a firearm, both the defendant and his wife remarked that they had a handgun in the house. Before she left the residence, Ms. Lisk informed the defendant that the gun would need either to be removed from the home or to be placed in a lockbox. In response, the defendant “was very flippant.” He told Ms. Lisk that he had not yet been sentenced, but she reminded him that he had been convicted and was currently a convicted felon who could not be in possession of a firearm. Ms. Lisk agreed that throughout the interview, the defendant did not exhibit any remorse or seem to accept responsibility for his actions. She testified that the defendant “did not feel like he had committed a crime” because he claimed that the intercourse was consensual.

After leaving the defendant’s residence, Ms. Lisk alerted the Goodlettsville Police Department that the defendant was a felon in the possession of a firearm. Ms. Lisk returned to the defendant’s home with police, who were intending to execute a search warrant. The police knocked on the door several times, and the defendant did not answer for “[m]aybe 30 minutes, maybe 45 minutes.” The defendant eventually signed a waiver for police to search the home for the weapon, and officers discovered the gun in a lockbox. Ms. Lisk testified that the police could have arrested the defendant at his home and that during the encounter the defendant “was uncooperative; he was arrogant. It was almost like a cat and mouse game.”

The defendant underwent a psychosexual evaluation, and the report was entered as an exhibit. Ms. Lisk stated that the defendant’s psychosexual evaluation was different from the reports she normally saw because it contained only the defendant’s version of the events and because it did not appear that the provider of the report spoke to anyone other than the defendant.

Ms. Lisk testified that she identified “several issues” with the defendant’s psychosexual evaluation report. First, the report contained only the defendant’s version of the events, and there was no comparison between the defendant’s story and “an official” report. Second, several of the assessments used to analyze the defendant were unfamiliar to Ms. Lisk. Third, the report commended the defendant for reconciling with his wife and attempting to rebuild his marriage but did not “address whatsoever that [the defendant] committed a crime” or contain the defendant’s response to the fact that the rape, whether forcible or not, was illegal and required “sexual deviance.” She also noted that the report did not recommend that the defendant “seek out sex offender treatment for that type of deviance.” When asked about the defendant’s suitability for probation, Ms. Lisk testified that the defendant “was extremely uncooperative” and believed that he had not committed a criminal act. She believed that the defendant would not cooperate with sex offender treatment, would not attend therapy, “and we would be right back in court.”

The victim's mother testified that prior to the incident, the defendant was "a son" to her parents and the defendant's wife was "a second mom" to the victim. The victim was a good student who played basketball and intended to go to college. Her mother noticed that in the time period between the rape and the report, the victim became "[v]ery angry and difficult to deal with." The victim's mother testified that since the incident, the victim was "angry," "hurt," and "not functioning the way that she should be" at her age. She believed that the incident made the victim "harder" and caused her not to "trust anybody." The victim's mother testified that although she was personally opposed to abortion, she "knew that [the victim] having the baby wasn't an option." She felt that the family "had no choice" but to proceed with an abortion. She believed that the abortion negatively impacted her daughter.

Shawn Lilly testified that she was a therapist at Ashley's Place, the Sumner County Child Advocacy Center. Ms. Lilly testified that the victim had no desire to participate in therapy for several months after the incident. When she began therapy, the victim told Ms. Lilly "that she had increased feelings of fear, sadness, a lot of anger when she thought about what had happened to her, that she was very fearful to be alone, to go into public places, and she had a lot of fear around strangers." Prior to the rape, the victim had planned to obtain a basketball scholarship to attend college and study to become an athletic trainer. Ms. Lilly testified that the victim's anger after the rape led to conflicts with her basketball coach that resulted in her decision to quit the team. Ms. Lilly testified that the victim became angry and fearful at the prospect of a trial and that she told Ms. Lilly that she would have preferred to drop the charges instead of testifying in court against the defendant. Ms. Lilly stated that the victim still struggles with depression and had difficulty maintaining jobs, relationships, and enrollment in school.

Ms. Lilly read a victim impact statement that the victim had prepared that discussed the ways that the rape had impacted her life. The statement said that prior to the rape, the victim envisioned herself attending college on a basketball scholarship. After the rape, she became afraid to go places alone and "terrified of college life because you never know what kind of people you can trust." The incident left her "confused about whether or not to go to college because [she is] afraid to be around crowds and nervous to be around men." Since the rape, her relationship with her aunt, whom she once viewed as a second mother, became almost nonexistent. The victim described her abortion as "horrifying." The statement said that the victim was "way beyond angry with" the defendant and that he "really screwed up" her life. The victim asked that the defendant receive "the maximum sentence time possible" because he "hurt [her] in a way that will affect [her] for the rest of [her] life."

The defendant testified on his own behalf. He testified that after receiving his undergraduate degree in social work, he joined the United States Army Reserves and

worked as a juvenile counselor. He later returned to school and received a graduate degree in “rehab counseling.” The defendant was employed counseling young adults at the time of the rape. The defendant worked several part time jobs after his arrest and managed to find full-time employment. He testified that his current employer was “fully aware” of his criminal charge when they hired him for a full-time position. Several individuals wrote letters on behalf of the defendant vouching for his character. The defendant testified that he was unsure why prior witnesses concluded that he had not accepted responsibility for his actions and believed he did not do anything wrong “because all along [he] always said that [he] was at fault . . . because [he] was the adult in the situation.” He admitted that he lied to his in-laws when he first told them about the incident. The defendant expressed remorse for the incident, noting that it cost his extended family, including the victim, “a lot.” The defendant continued to attest that the sexual encounter was consensual. He believed that he would not be a problem if placed on probation.

On cross-examination, the defendant relayed his version of the incident. On the day of the rape, he overheard the victim on the telephone having an “explicit conversation” and laughing. The defendant asked her what she was laughing about, and the two were standing very close together. They were having a “general conversation about sex,” and the defendant “got to groping her.” He testified that “[o]ne thing led to another” and that he had intercourse with the victim for several minutes. He stated that neither he nor the victim verbalized that they should have sex but that “[i]t just happened.”

The defendant further testified that he never told detectives that his son had sexual intercourse with the victim. Regarding his disclosure of his prior criminal history, the defendant testified that he could not remember whether the question arose in his psychosexual evaluation. He testified that Ms. Gulden never asked if he previously had been on probation. The defendant admitted that he pled guilty to assault, but he could not recall the underlying facts of the crime.

The trial court found that the defendant was not a favorable candidate for alternative sentencing because he was sentenced as a Range II offender. The court also found that confinement was necessary to avoid depreciating the seriousness of the offense and to provide an effective deterrence to others likely to commit a similar offense. The trial court considered the circumstances of the offense; the defendant’s potential or lack thereof for rehabilitation; whether full probation would unduly depreciate the seriousness of the offense; and whether a sentence other than full probation would provide an effective deterrent to others likely to commit a similar crime.

In considering the circumstances of the crime, the court found that the defendant was a forty-five-year-old social counselor who had sexual intercourse with his seventeen-year-old niece. The court found that the intercourse resulted in a pregnancy that was later terminated. The court noted that the victim's mother testified that she "hated" abortion but felt that there was "no choice" but to terminate the victim's pregnancy. The court found that the defendant's actions "absolutely destroyed" the family. The court noted that the defendant's extended family no longer spoke to him and that the families stopped seeing each other.

Regarding the defendant's potential for rehabilitation, the trial court stated, "I note that it's okay if we talk about the things the defendant wants to talk about on his own terms, but I see a coldness here that scares me." The court observed that the defendant did not appear to be affected when Ms. Lilly read the victim's impact statement and found that the defendant had not addressed "the life that [he] affected and the problems that [the victim] had to go through." The court found that the defendant initially blamed his son and was "very defensive." The court also found that the defendant lied to Ms. Gulden when he said that he had never been on probation. The court found that, contrary to the psychosexual evaluation, the defendant had not expressed remorse or regret for his actions. The court found that "[t]here has been a lack of the defendant to accept responsibility. He has an attitude of justification, mitigation, or spin." The court further found that the defendant never acknowledged the wrongfulness of having intercourse with his seventeen-year-old niece to whom he was a father figure. It cited to the defendant's statements to Ms. Lisk attempting to excuse his conduct based upon his kinship through marriage to the victim and the law of consent in other states. The court stated that the defendant did not "really show any possibility for rehabilitation."

In regards to the seriousness of the offense, the court found "by a preponderance of the evidence that there are elements of force. This was an uncle, a position of love and trust." The court found that the victim was a student athlete who had goals and was planning for the future at the time of the offense. The court observed that the "incident continues to trip her up over and over again," as, after the rape, "she ha[d] conflicts, avoidance issues, lack of interest, irritable, anger, fear," and difficulty trusting men. The court opined, "I don't see how the offense of what you were convicted of could be more serious under these terms. There has been a family destroyed, there has been an abortion, and there has been total destruction." The court also found that incarceration was necessary for deterring others from committing a similar crime because "[s]exual intercourse with minors we can't have in society today. Sexual intercourse with family members we can't have that today."

The court considered factors that weighed in favor of probation, such as the defendant's employment, work history, education, and minimal criminal record. The

court found that “the factors that I’ve enumerated here outweigh those good factors in [the defendant’s] life.” The court further found:

Also, in looking at the relevant statute, 40-35-103, I find conclusively that confinement is necessary to avoid depreciating the seriousness of the offense. I can’t go over that again. I’ve covered it. It doesn’t get any more serious when you have intercourse with a 17-year-old niece, a father figure, there’s a pregnancy, there’s abortion, and there is destruction, total destruction of the family.

Also, I find that confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses. We cannot have uncles, father figures, having sex with our nieces. We cannot have it. We will not have it. And, sir, when we cannot protect our children in our homes, they can be protected in this courtroom.

Sir, I deny probation for you. I deny alternative sentencing for you. Sir, this sentence of five years at 35 percent will be served in the state penitentiary. You will be in custody.

The defendant filed a timely notice of appeal, and we proceed to consider his claim.

ANALYSIS

The defendant argues that the trial court erred in ordering to serve his sentence in the penitentiary. Specifically, the defendant contends that the trial court should have sentenced him to Community Corrections or probation.

This court reviews the denial of an alternative sentence or probation 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 presumption of reasonableness applies only to within-range sentences that are based upon the purposes and principles of the Sentencing Act. *Id.*

Incarceration is generally reserved for “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.” T.C.A. § 40-35-102(5) (2010). A defendant who is either an especially mitigated or standard offender and 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.” T.C.A. § 40-35-102(6)(A). Here, the defendant was convicted of a Class D felony but sentenced

as a Range II offender. Therefore, the trial court properly found that he was not a favorable candidate for an alternative sentence.

A defendant who receives a sentence of ten years or less may be eligible for probation. T.C.A. § 40-35-303(a). However, the defendant bears the burden of establishing that they are a suitable candidate for probation. T.C.A. § 40-35-303(b). “This burden includes demonstrating that probation will ‘subserve the ends of justice and the best interest of both the public and the defendant.’” *State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008) (quoting *State v. Housewright*, 982 S.W.2d 354, 357 (Tenn. Crim. App. 1997)). In determining whether full probation is appropriate, the trial court “may consider the circumstances of the offense, the defendant’s potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes.” *State v. Boggs*, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). The trial court may consider the defendant’s truthfulness in determining the potential for rehabilitation, “and the lack of candor militates against the grant of probation.” *State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002).

In ordering a sentence of incarceration, the trial court must consider the following:

(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.

T.C.A. § 40-35-103(1)(A)-(C).

Here, the trial court considered the circumstances of the offense and the defendant’s potential for rehabilitation. The trial court also considered the seriousness of the offense and whether probation would provide an effective deterrent to others. The court found that incarceration was necessary to avoid depreciating the seriousness of the offense and that confinement was particularly suited to effectively deter others likely to commit the same offense. The record fully supports the findings of the trial court. We conclude that the trial court did not abuse its discretion in denying the defendant an alternative sentence.

CONCLUSION

Based upon the foregoing reasoning, we affirm the judgment of the trial court.

JOHN EVERETT WILLIAMS, JUDGE