

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs December 20, 2022

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. DAVID RAY DUNCAN

**Appeal from the Criminal Court for Scott County
No. 11187 E. Shayne Sexton, Judge**

No. E2022-00647-CCA-R3-CD

As relevant to this appeal, the Defendant, David Ray Duncan, was convicted by a jury of the offense of unlawfully possessing a controlled substance while present in a penal institution. On appeal, the Defendant challenges the legal sufficiency of the evidence supporting his conviction. He also argues that the trial court should have excluded evidence produced after the deadline established by the court's scheduling order, and he challenges the propriety of his effective twelve-year sentence. We affirm the Defendant's conviction, but we respectfully remand the case for resentencing in accordance with Tenn. Code Ann. § 39-11-211.

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

TOM GREENHOLTZ, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Darren F. Mitchell, Jacksboro, Tennessee (at sentencing and on appeal) and Leif E. Jeffers, Huntsville, Tennessee (at trial) for the appellant, David Ray Duncan.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Jared Effler, District Attorney General; and Thomas E. Barclay, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On August 23, 2017, the Defendant was indicted for the offenses of possessing a controlled substance while present in a penal institution; unlawful possession of buprenorphine, or Suboxone, a Schedule III controlled substance; and possession of drug paraphernalia. On May 14, 2018, the trial court entered a scheduling order that set the case for trial in October and established discovery exchange dates for the parties. The State's discovery exchange date was set for August 24, 2018.

A. PRETRIAL DISCOVERY

On July 31, 2018, the State provided its pretrial discovery to the Defendant in response to his requests. On September 17, 2018, which was twenty-four days after its discovery exchange deadline, the State filed a notice of supplemental discovery providing the Defendant with a forensic chemistry report from the Tennessee Bureau of Investigation ("TBI") issued that same day.

On September 24, 2018, the Defendant filed a motion to exclude the forensic chemistry report provided in the State's supplemental discovery. In his motion, the Defendant asserted that the State provided the testing results after the date ordered by the trial court for the exchange of discovery and only shortly before the trial. As for the remedy, the Defendant did not ask the trial court for a continuance of the trial date based on the newly obtained discovery, nor did he assert the potential need to adjust his defense. Instead, he requested that the trial court suppress "all evidence related to any TBI testing of any substance related to this case."

The State responded to the Defendant's motion asserting that the evidence did not exist prior to its August 24, 2018, discovery deadline. When the district attorney general's office determined on August 6, 2018, that the evidence had not been submitted to the TBI, the office ensured that the evidence was hand-delivered to the TBI that same day. On September 17, 2018, the TBI gave the State a report of the requested testing.

On October 8, 2018, the trial court held a pretrial hearing on the Defendant's motion to exclude evidence. After hearing arguments from both the Defendant and the State, the trial court found that the testing results did not change the nature of the case. It noted that the case "is a Suboxone case" and that "[i]t's been a [S]uboxone case since day one[.]" Distinguishing the testing results from one that "may change the very flavor of the trial" by identifying a "chemical change," the trial court concluded that "there [was] not a substantive violation of discovery" in the case.

B. JURY TRIAL

On October 11, 2018, the Defendant's trial began as scheduled. The State first called Deputy Shane Blevins of the Scott County Sheriff's Office ("SCSO") to testify. Deputy Blevins testified that on July 29, 2017, he made contact with the Defendant when he went to his residence in the Annadale area of Scott County to serve an arrest warrant. Deputy Blevins testified that he and Deputy Gordon Byrd entered the residence and spoke with the Defendant. Deputy Blevins, Deputy Byrd, and the Defendant were in the living room when the Defendant asked Deputy Byrd if he could take his Suboxone before being taken to jail. Deputy Blevins testified that the deputies gave the Defendant permission to take the medication. Deputy Blevins escorted the Defendant to his bedroom, where the Defendant raised the bed's mattress, retrieved an empty syringe, and stated "that was the only way" he could take the Suboxone. Deputy Blevins testified that he refused to allow the Defendant to inject himself. Deputy Blevins also testified that he never saw the Defendant possess Suboxone on July 29, 2017.

The State's next witness, SCSO Deputy Tony Jones, testified that he was present when the Defendant was arrested on July 29, 2017. He stated that while executing the arrest warrant, he heard other deputies give the Defendant permission to take his medication before being taken into custody. Deputy Jones testified that he was responsible for transporting the Defendant to the Scott County Jail. He stated that before the Defendant was placed inside his patrol car, he conducted a pat down of the Defendant. The Defendant denied having any weapons or narcotics. Deputy Jones recalled asking the Defendant several times during transport if he had anything that Deputy Jones should know about. Each time the Defendant responded, "No." Once at the jail, Deputy Jones asked the Defendant again if he had anything because if he entered the jail with it, he would be charged. Again, the Defendant answered in the negative. Deputy Jones testified that he never saw the Defendant in possession of Suboxone on July 29, 2017.

The State then called Lee Johnson, a Scott County correctional officer, to testify. Deputy Johnson testified that on July 29, 2017, he came into contact with the Defendant in the "garage area" of the Scott County Jail. He testified that he asked the Defendant whether he had any drugs or anything that could "stick or poke" Deputy Johnson. The Defendant answered, "No." Deputy Johnson testified that before the Defendant entered the jail, he heard Deputy Boshears ask the Defendant again if he had anything. The Defendant responded to Deputy Boshears, "No, I don't have anything on me. I already told you."

Deputy Johnson also testified that he was responsible for escorting the Defendant into the jail and conducting a search of the Defendant in the jail's secured area on July 29. After completing a pat down of the Defendant, he asked the Defendant to open his mouth

to “make sure he didn’t have [anything] inside of his mouth.” Although the Defendant opened his mouth, he also tilted his head to the ceiling, thereby preventing the deputy from performing an adequate search. When the deputy corrected him, the deputy could see an object in the far corner of the Defendant’s mouth. Deputy Johnson stated that the Defendant retrieved a blue and white wrapper from his mouth and said that he “forgot that was in there.” Deputy Johnson testified that inside the wrapper was an orange strip of what he identified as Suboxone.

The State next called Deputy Tanner Boshears, a corrections officer at the Scott County Jail, to testify. Deputy Boshears testified that when the Defendant arrived at the jail, the deputy met the Defendant in the “garage area.” Deputy Boshears stated that before he removed the Defendant from the patrol car, he asked the Defendant if he had anything as far as “drugs, paraphernalia, anything that [would poke him or stick him].” Deputy Boshears recalled asking these questions of the Defendant twice, but each time the Defendant responded, “No.” Additionally, the deputy testified he was present during Deputy Johnson’s search of the Defendant. He stated that during the search, he heard the Defendant say there was “nothing in his mouth.” But Deputy Boshears then saw the Defendant pull a wrapper from his mouth and heard the Defendant say that “it was a Suboxone wrapper.”

Special Agent Ashley Cummings testified that she worked in the TBI Knoxville Crime Laboratory as a forensic scientist in the drug identification unit. She testified that she tested the item removed from the Defendant’s mouth on July 29, 2017. Special Agent Cummings visually inspected the evidence submitted to her and described the evidence as being “a partial strip” of Suboxone. She testified that after a complete examination of the partial strip, her testing concluded the evidence “was found to contain [b]uprenorphine . . . a synthetic opiate . . . a schedule [III] drug in the State of Tennessee.” She clarified that Suboxone is the “brand name” for buprenorphine.

Finally, Captain Glynnndara Tucker testified that she was employed as the Scott County Jail Administrator on July 29, 2017. She stated that the Scott County Jail is classified as a penal institution where inmates are housed. She testified that her duties included “the safety and security of the officers and inmates of the facility and the running of the facility.” Captain Tucker stated that on the date of the Defendant’s arrest, he was searched in a secured area of the jail and that she did not give him written permission, verbal permission, or authorize anyone else on her staff to grant the Defendant permission to possess a controlled substance inside of the jail.

After the State rested its case, the Defendant also rested without presenting further evidence. Following the conclusion of the trial, the Defendant was found guilty of possessing a controlled substance while present in a penal institution and unlawfully

possessing a Schedule III controlled substance. The Defendant was found not guilty of possession of drug paraphernalia.

C. SENTENCING

On April 11, 2022, the court held a sentencing hearing on the Defendant's 2018 convictions. Neither party offered witness testimony at the sentencing hearing, but each elected to argue their respective positions.

The State argued that the Defendant had eleven felony convictions and a series of misdemeanor convictions from Scott County and surrounding counties. It asserted that the Defendant was not suitable for alternative sentencing, as the Defendant had previously not complied with alternative-sentencing opportunities. It further argued that the Defendant had prior infractions while on alternative sentencing, including the present case, that made him an unlikely candidate for rehabilitation. To that end, the State asked the trial court to sentence the Defendant to fifteen years as a Range III, persistent offender.

The Defendant asserted he was a suitable candidate for alternative sentencing because he was "maturing," which he argued was evidenced by the decline in violations he had accumulated over the years. The Defendant did not contest that he possessed a lengthy criminal history; however, he argued that mitigating factors were present to consider in determining his sentence. As one mitigating factor, he asserted that the conduct "neither caused nor threatened serious bodily injury." In addition, he stated that he suffered from seizures, was in special education courses, and could not read or write, which were all qualities that tended to "lower his responsibility." He also argued that the commission of the offense occurred under unusual circumstances, as the deputies permitted him to take his medication, and that "he put it in his mouth to take it."

The Defendant also encouraged the trial court to consider the change in classification of the felony offense made by the General Assembly. Although he did not specifically argue for a reduction in the offense classification, the Defendant asserted that the change in the felony classification from a Class C felony to a Class D felony revealed "the legislature's reevaluation of the seriousness of the [offense]." Finally, the Defendant asked for a sentence of ten years as a persistent offender, and he requested that the trial court consider alternative sentencing.

In its ruling, the trial court addressed the mitigating factors raised by the Defendant. First, it found that "there was no question" that the conviction offense was non-violent. The court stated it would "not give any weight" to the Defendant's diminished responsibility argument because his conduct was "a blatant attempt to sneak drugs into a

jail.” The trial court also found that the Defendant had shown a “sustained intent” to commit crimes of the same nature, as he was reprimanded for again having contraband in the jail even after his original trial. The trial court also noted that the Defendant was on probation when he committed the instant offenses.

The trial court found little evidence that the Defendant had potential for rehabilitation. It also found that the Defendant would not abide by the rules of probation and that “probation hasn’t worked [and] alternative sentencing has not worked.” The trial court stated that the “record is replete with compliance failures and total disengagement with any kind of supervision.”

In sentencing the Defendant, the trial court stated it considered the legislature’s change in the felony class of the conviction offense, though “the defendant may not be given direct credit for that.” Finding that the Defendant was convicted of a Class C felony as a persistent offender, the trial court sentenced the Defendant to twelve years, or at the mid-point in the range. Also, because of what it found to be the Defendant’s extensive criminal history, the court ordered the sentence to be served consecutively to the Defendant’s two prior probated sentences.

On appeal, the Defendant raises no issue concerning his misdemeanor conviction or sentence for simple possession of a controlled substance. However, with respect to his felony conviction for possessing a controlled substance while present in a penal institution, the Defendant argues that the evidence introduced at trial was insufficient to support that conviction beyond a reasonable doubt. He also asserts that the trial court erred in denying his motion to exclude the forensic chemistry report. Finally, he argues that the trial court erred in sentencing him to twelve years and ordering that the sentence be served consecutively to prior sentences. After review, and for the reasons given below, we affirm the Defendant’s felony conviction, but we respectfully remand the case for resentencing.

ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the sufficiency of the evidence presented at trial to sustain the conviction of possessing contraband while present in a penal institution. More specifically, the Defendant argues that, because he received permission from the arresting deputies to use his Suboxone before being taken into custody, he did not possess the requisite intent needed to be convicted of the crime. The Defendant asserts that the State did not prove that he knowingly possessed Suboxone without permission to do so. We respectfully disagree.

“The standard for appellate review of a claim challenging the sufficiency of the State’s evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Miller*, 638 S.W.3d 136, 157 (Tenn. 2021) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). “The standard of review is the same whether the conviction is based upon direct or circumstantial evidence.” *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (internal quotations and citations omitted).

On appeal, this Court “neither re-weighs the evidence nor substitutes its inferences for those drawn by the jury.” *State v. Wagner*, 382 S.W.3d 289, 297 (Tenn. 2012) (citing *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997)). Moreover, the trier of fact, and not this Court, resolves “all questions as to the credibility of trial witnesses, the weight and value of the evidence, and issues of fact raised by the evidence.” *State v. Lewter*, 313 S.W.3d 745, 747 (Tenn. 2010). “Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.” *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009).

To obtain a conviction for possessing contraband while present in a penal institution, the State must have proven beyond a reasonable doubt that the defendant “[k]nowingly possess[ed] any controlled substances or controlled substance analogues found in chapter 17, part 4 of this title] . . . while present in any penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution[.]” Tenn. Code Ann. § 39-16-201(b)(2) (2018) (subsequently amended). A person “acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist.” *Id.* § 39-11-302(b) (2018).

Viewing the evidence in a light most favorable to the State, a rational trier of fact could have found the essential elements of this offense beyond a reasonable doubt. At trial, a forensic scientist from the TBI testified that the strip recovered from the Defendant’s mouth while he was at the Scott County Jail contained buprenorphine. The law provides that any “material, compound, mixture, or preparation containing” buprenorphine is a Schedule III controlled substance. Tenn. Code Ann. § 39-17-410(e)(2)(A) (Supp. 2017).

In addition, Captain Tucker testified that the Scott County Jail is classified as a penal institution. *See State v. Kilpatrick*, 52 S.W.3d 81, 86 (Tenn. Crim. App. 2000) (“[T]he county jail in which the defendant was detained falls, in our view, within the definition of penal institution contained in Tenn. Code Ann. § 39-16-601(4) and constitutes a ‘penal institution where prisoners are quartered or under custodial supervision’ within the meaning of Tenn. Code Ann. § 39-16-201.”). She also testified that prisoners were being

housed at the Scott County Jail on the day the Defendant was present and that the Defendant was searched in the secure area of the jail.

In response, the Defendant concedes that “[t]here is no question that the Defendant possessed a Suboxone strip on July 29, 2017. There is also no question that he took the Suboxone strip into the Scott County Jail via a partially opened wrapper in his mouth.” Instead, the Defendant argues that because he believed that the arresting deputies permitted him to possess the Suboxone strip, he thus lacked an “unlawful intent” to possess the Suboxone inside the Scott County Jail.

As an initial matter, no proof exists in the record to show that the arresting officers gave the Defendant permission to take Suboxone into the Scott County Jail. But, even if the Defendant subjectively believed that to be the case—and no evidence supports that proposition either—his subjective belief is unhelpful to him for two reasons. First, the statute in effect at the time of the Defendant’s offense only required the State to prove that he knowingly possessed a controlled substance while present in a penal institution. The statute did not require that he also possess the controlled substance with an “unlawful intent.” Indeed, the General Assembly did not add this language to the statute for another two years. *See* 2019 Tenn. Pub. Acts, ch. 486, § 7 (eff. July 1, 2019).

Second, the statute also provided then, as now, that only one person could authorize someone to possess a controlled substance while present in a penal institution: the chief administrator of the institution. *Compare* Tenn. Code Ann. § 39-16-201(b)(2) (2014) *with* Tenn. Code Ann. § 39-16-201(b)(2) (Supp. 2022). SCSO Captain Tucker testified unequivocally that she did not give the Defendant permission to possess a controlled substance at any time, whether in writing or otherwise. She also testified that she did not authorize any other person to give such permission to the Defendant. This evidence was sufficient to support the jury’s verdict. *See State v. Eads*, No. E2006-02793-CCA-R3-CD, 2008 WL 2790434, at *6 (Tenn. Crim. App. July 21, 2008) (affirming conviction for possession of contraband while present in a penal institution, in part, when “the administrator of the jail [testified] that the defendant did not have permission to have the weapon in the facility”). Because the Defendant concedes that he lacked permission to possess Suboxone from the only person authorized by statute to give it, he may not avoid criminal liability under this statute simply because he believed that others had permitted him to do so.

Because a rational jury could have found each element of the crime beyond a reasonable doubt, we affirm the trial court’s judgment as there was sufficient evidence to support his conviction for possessing a controlled substance while present in a penal institution. That said, the judgment, which identifies the conviction offense as being “Introduction of Contraband into Penal Institution,” does not accurately identify the

Defendant's conviction offense by name. Therefore, although we remand the case for resentencing, the new judgment should identify the Defendant's conviction offense as being the unlawful possession of a controlled substance while present in a penal institution. See *State v. Underwood*, No. E2020-01080-CCA-R3-CD, 2021 WL 6013938, at *5 (Tenn. Crim. App. Dec. 16, 2021), *perm. app. denied* (Tenn. May 20, 2022).

B. PRETRIAL DISCOVERY

The Defendant next argues that the trial court erred when it denied his motion to exclude any testimony regarding the testing of the Suboxone because the testing results were provided to him after the State's discovery deadline had passed. The State asserts that the trial court did not abuse its discretion in allowing the evidence to be presented at trial. We agree with the State.

Trial courts may enter scheduling orders regulating the exchange of pretrial discovery, Tenn. R. Crim. P. 16(d), and, indeed, the court's entry of such orders may help facilitate its "obligation to manage [its] dockets in a timely manner," see *State v. Davis*, 466 S.W.3d 49, 79 (Tenn. 2015) (Lee, J., concurring). Where the trial court enters such an order, it has "wide discretion in fashioning a remedy for non-compliance with a discovery order[.]" *State v. Downey*, 259 S.W.3d 723, 737 (Tenn. 2008); *State v. Collins*, 35 S.W.3d 582, 585 (Tenn. Crim. App. 2000) ("In examining failure to comply with discovery, we have emphasized that a trial court has great discretion in fashioning a remedy for non-compliance with discovery.").

In selecting an appropriate remedy for the delayed production of discoverable evidence, "the sanction should fit the circumstances of the case." *Downey*, 259 S.W.3d at 737. A trial court may consider several factors, but "[w]hether a defendant has been prejudiced by a failure to disclose information is a significant factor in fashioning an appropriate remedy." *State v. McBride*, No. M2020-00765-CCA-R3-CD, 2021 WL 3871968, at *5 (Tenn. Crim. App. Aug. 31, 2021), *no perm. app.* Indeed, when considering a sanction, "a court should consider whether any prejudice can be removed by lesser means[.]" *State v. Partin*, No. M2017-02381-CCA-R3-CD, 2019 WL 2383650, at *11 (Tenn. Crim. App. June 5, 2019).

When seen in this light, it is clear that there "is no mandatory exclusion that follows a violation" of a discovery order. *State v. Mathis*, No. M2009-00123-CCA-R3-CD, 2012 WL 4461767, at *37 (Tenn. Crim. App. Sept. 26, 2012). Indeed, this Court has expressly held that "evidence should not be excluded except when it is shown that a party *is actually prejudiced* by the failure to comply with the discovery order and that the prejudice cannot be otherwise eradicated." *State v. Garland*, 617 S.W.2d 176, 185 (Tenn. Crim. App. 1981)

(emphasis added and citing Tenn. R. Crim. P. 16(d)(2)). And, the burden of making these showings rests with the accused. *See State v. Brown*, 836 S.W.2d 530, 548 (Tenn. 1992) (“[T]he burden rests on the defense to show the degree to which the impediments to discovery hindered trial preparation and defense at trial[.]”), *superseded by statute on other grounds as recognized by State v. Davis*, No. W2000-03137-CCA-R3-CD, 2002 WL 1483221, at *8 (Tenn. Crim. App. Mar. 25, 2002).

In this case, the State complied with its disclosure obligations under Rule 16. However, if the Defendant believed that the State had separately violated the trial court’s scheduling order, he chose only to seek full exclusion of the testing report from the evidence at trial. In choosing this path, though, the Defendant was required to show that he had suffered actual prejudice and that no lesser measure could have remedied the prejudice that actually existed. *Garland*, 617 S.W.2d at 185.

During the trial court’s hearing on this issue, the Defendant did not argue that prejudice existed because he was surprised by the testing, for example, or that the late disclosure affected his trial strategy and presentation. He also disclaimed that the State had acted in bad faith. Instead, the Defendant argued that the late disclosure affected his ability to negotiate a resolution with the State. In other words, the sole prejudice identified by the Defendant involved the impact of the report on plea negotiations: had he known that the State had evidence to prove its case, he may have been more likely to enter a plea earlier in the case.

Two issues exist with this alleged prejudice. First, even this alleged prejudice was speculative, and the Defendant conceded at the motion hearing that his having the confirmatory report “may not have” had any “impact” on the plea negotiations at all. Indeed, the Defendant made no showing that the State had materially changed its negotiating position in light of the delayed disclosure or that the Defendant was now willing to agree to a plea offer that he had previously rejected on incomplete information. We respectfully disagree that the Defendant has shown actual prejudice in this context.

Second, and in a variation on the theme, the Defendant alleges in his brief that once the trial court entered its trial scheduling order and the trial date was set, the Defendant’s only choices were to proceed to trial or to enter an open plea. However, the trial court entered its scheduling order and cut off plea negotiations on May 14, 2018, more than ninety days before the State’s disclosure date. As the State observes, even if the State disclosed the TBI report months before that August disclosure date, the Defendant would still not have been able to enter a negotiated plea agreement. In other words, the passing of the State’s August disclosure date did not cause any prejudice, at least not in the way that the Defendant defines it.

Ultimately, the Defendant gambled with the resolution of his case. He rolled the dice thinking that the State could not prove an essential element of its charge, but also banking on his ability to exclude adverse evidence if it turned up, even in the absence of bad faith or actual prejudice. At the time, the strategy may have seemed like a good gamble, but the trial court did not err in failing to give effect to the Defendant's backup plan. Accordingly, we conclude that the trial court acted within its discretion to deny the sole exclusionary remedy requested by the Defendant.

C. SENTENCING

In his final issue, the Defendant argues that the trial court erred in two ways in imposing its sentence. First, the Defendant asserts that the trial court's sentence of twelve years as a Range III, persistent offender was "excessive." He argues that because the General Assembly reduced the offense classification for his conviction offense before he was sentenced, the trial court should have sentenced him to the minimum sentence in the range. He also argues that the trial court failed to make any findings in ordering that his sentence be served consecutively to two prior sentences.

"[W]hen a defendant challenges the length of a sentence that falls within the applicable statutory range and reflects the purposes and principles of sentencing, the appropriate standard of appellate review is abuse of discretion accompanied by a presumption of reasonableness." *State v. King*, 432 S.W.3d 316, 321 (Tenn. 2014) (citing *State v. Bise*, 380 S.W.3d 682, 706-07 (Tenn. 2012)). While trial courts need not comprehensively articulate their findings with regard to sentencing, "sentences should be upheld so long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed [on the record]." *Bise*, 380 S.W.3d at 706. Our supreme court has also recognized that the *Bise* standard applies to the review of a trial court's determination of consecutive sentencing as well. *See State v. Pollard*, 432 S.W.3d 851, 860 (Tenn. 2013) ("[T]he discretionary language as to consecutive sentencing calls for the adoption of an abuse of discretion standard with a presumption of reasonableness.")

1. Sentence Length

The Defendant asserts that the length of his twelve-year sentence is excessive, arguing principally that the trial court failed to give effect to the legislature's reduction in the offense classification for his felony conviction. The State does not address this

argument in its brief, though it argues that the trial court's sentence was otherwise appropriate.

In 2019, the General Assembly reduced the offense classification for the offense of possession of contraband while present in a penal institution from a Class C felony offense to a Class D felony offense. 2019 Tenn. Pub. Acts, ch. 486, § 7 (eff. July 1, 2019). Because of the delay attributed to the post-conviction proceedings mentioned earlier, the Defendant's April 2022 sentencing hearing was held after this change in the law. Generally speaking, when the legislature reduces the penalty for a crime, and this reduction takes place after the offense was committed, but before the sentence is imposed, the defendant is entitled to the benefit of the reduced punishment. *See* Tenn. Code Ann. § 39-11-112 (referred to herein as the "Savings Statute"); *cf. State v. Menke*, 590 S.W.3d 455, 470 (Tenn. 2019) (applying Tenn. Code Ann. § 39-11-112 to allow "a defendant convicted of an offense that occurred before the effective date of the Public Safety Act to be sentenced under the amendments"); *State v. Keese*, 591 S.W.3d 75, 84 (Tenn. 2019) (recognizing that Tenn. Code Ann. § 39-11-112 "only applies when the defendant is sentenced after the effective date of the relevant amendment").

Indeed, we have recognized this principle specifically in the context of when a defendant is convicted for possessing a controlled substance while present in a penal institution. In *State v. Adkins*, No. M2019-02284-CCA-R3-CD, 2021 WL 2100447, at *2 (Tenn. Crim. App. May 25, 2021), *perm. app. denied* (Tenn. Sept. 22, 2021), the defendant was convicted of the identical Class C felony offense for which the Defendant stands convicted here. Like the Defendant here, the *Adkins* defendant was sentenced after the 2019 amendments reducing the offense to a Class D felony took effect, but the trial court nevertheless sentenced the defendant based upon the previous Class C felony offense classification.

In analyzing the effect of the Savings Statute on the defendant's sentencing, the *Adkins* panel reversed the sentences, holding that, by the plain language of the Savings Statute, "the lesser penalty would apply to his sentence[s]." *Id.* at *12. As such, the *Adkins* panel remanded the case for resentencing, holding that the Savings Statute "required the trial court to apply the lesser penalty and to enter judgments showing that the Defendant's convictions were Class D felonies," rather than the Class C felony offenses for which the defendant was originally convicted. *Id.*

Our supreme court has recognized that "[a] trial court's improper application of either the offender classification or the offense classification will directly result in a 'wrong sentence range.'" *Menke*, 590 S.W.3d at 464. In this case, the trial court did not give formal effect to the provisions of the Savings Statute or to our decision in *Adkins*, both of which required "the trial court to apply the lesser penalty and to enter judgments showing

that the Defendant’s convictions were Class D felonies.” *Adkins*, 2021 WL 2100447, at *12. The trial court did note the reduced offense classification, but it expressly declined to give the Defendant “direct credit for that.” It is unclear from the record, therefore, to what extent the trial court’s informal consideration of the reduced offense class affected its decision, though it is perhaps notable that the trial court did not impose the maximum sentence despite the Defendant’s lengthy criminal history. As such, we believe that the best course is to remand the case for resentencing so that the trial court has an opportunity to consider and weigh all of the applicable sentencing factors within the appropriate sentencing range.

Accordingly, we conclude that the Defendant “was entitled to benefit from the [S]avings [S]tatute, and the trial court was required to impose a lesser punishment in accordance with the amendment.” *Id.*; *cf. Underwood*, 2021 WL 6013938, at *1 n.1 (“In 2017, the conviction offense of possession of contraband in a penal facility was a Class C felony. However, in 2019, the statute was amended, lowering the offense to a Class D felony. The sentencing hearing occurred in July 2020, and the record reflects that the Defendant received the benefit of the reduced felony classification pursuant to the Criminal Savings Statute.” (citation omitted)). We respectfully vacate the Defendant’s sentence and remand the case for resentencing on the Defendant’s felony conviction as a Class D felony offense.

2. Consecutive Sentences

Although we remand this case for a new sentencing hearing under the correct offense classification, we take a moment to address the trial court’s imposition of consecutive sentences. The Defendant essentially argues in this appeal that the trial court failed to make the essential findings required before consecutive sentences may be imposed.

In *State v. Pollard*, our supreme court recognized that

[i]n the context of consecutive sentencing, the presumption of reasonableness applies similarly, giving deference to the trial court’s exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)[.]

432 S.W.3d 851, 861 (Tenn. 2013). However, where “the trial court fails to provide adequate reasons on the record for imposing consecutive sentences, the appellate court should neither presume that the consecutive sentences are reasonable nor defer to the trial

court's exercise of its discretionary authority." *Id.* at 863-64. Instead, the supreme court observed that "the appellate court has two options: (1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences." *Id.* at 864.

The process of imposing discretionary consecutive sentences pursuant to Tenn. Code Ann. § 40-35-115 involves two steps. First, the trial court must find by a preponderance of the evidence that "the defendant qualifies for consecutive sentencing under one of the classifications set forth in section 40-35-115(b)." *State v. Perry*, 656 S.W.3d 116, 127 (Tenn. 2022) (footnote omitted). Second, the trial court must "then choose whether, and to what degree, to impose consecutive sentencing based on the facts and circumstances of the case, bearing in mind the purposes and principles of sentencing." *Id.*

In this case, the trial court ordered the Defendant's twelve-year sentence to run consecutively to two prior convictions. In so doing, the trial court identified that its decision to impose consecutive sentences was based upon what it believed to be the Defendant's extensive criminal record. *See* Tenn. Code Ann. § 40-35-115(b)(2) (2019). The trial court also impliedly considered the principles of sentencing in imposing consecutive sentences, just as it expressly discussed the length of the Defendant's criminal record, his lack of rehabilitative potential, and his inability to comply with court orders as reasons for establishing the sentence length.

Significantly, however, our supreme court has since clarified that "in making the finding that an offender has an extensive record of criminal activity, courts should look to those facts from which they can determine that the defendant's record of criminal activity is considerable or large in amount, time, space, or scope." *Perry*, 656 S.W.3d at 128. More specifically, the supreme court stated that trial courts should

look to the following non-exclusive considerations in evaluating whether the proof establishes that the defendant is an offender whose record of criminal activity is extensive:

- (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.

Id. at 129 (footnotes omitted). In resentencing the Defendant on remand, the trial court may also consider whether consecutive sentences are appropriate under the *Perry* considerations. We note that the trial court's reasoning need not be "particularly lengthy or detailed," but it "simply must 'set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decisionmaking authority.'" *Id.* at 126 (quoting *Bise*, 380 S.W.3d at 706).

CONCLUSION

In summary, we hold that the evidence presented at trial was sufficient to sustain a conviction of possession of contraband while in a penal institution. We also hold that the trial court acted within its discretion in denying the Defendant's motion to exclude evidence. Finally, with respect to the Defendant's sentence, we hold that the Defendant was sentenced using an incorrect offense classification and that a new sentencing hearing is required. As such, we affirm the judgment in part, and we reverse it in part.

To that end, we respectfully vacate the sentence and remand the case for resentencing as a Class D felony offense. When the new judgment is entered, we also order that the judgment identify the Defendant's conviction offense as being the unlawful possession of a controlled substance while present in a penal institution as a Class D felony offense.

TOM GREENHOLTZ, JUDGE