IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2023

STATE OF TENNESSEE v. DEMARIO ANTIJUAN JONES

Appeal from the Circuit Court for Fayette County
No. 21-CR-117 J. Weber McCraw, Judge

No. W2022-01270-CCA-R3-CD

The Defendant, Demario Antijuan Jones, pleaded guilty to unauthorized use of an automobile and three counts of driving while license was cancelled, suspended, or revoked, and received an effective sentence of eleven months and twenty-nine days at seventy-five percent service. On appeal, the Defendant contends that the trial court erred by imposing the maximum sentences and by denying him an alternative sentence. We affirm the trial court's judgments.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Bo Burk, District Public Defender; Matthew C. Edwards, Assistant Public Defender, Somerville, Tennessee, for the appellant, Demario Antijuan Jones.

Jonathan Skrmetti, Attorney General and Reporter; Brent Cherry, Senior Assistant Attorney General; Mark E. Davidson, District Attorney General; and Raven Icaza, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On July 26, 2021, a Fayette County grand jury indicted the Defendant in case number 21-CR-117 for unauthorized use of an automobile, a Class A misdemeanor, in count one, and driving while license was cancelled, suspended, or revoked, a Class B misdemeanor, in counts two, three, and four. Tenn. Code Ann. §§ 39-14-106, 55-50-504. On August 10, 2021, the Defendant pleaded guilty as charged in case number 21-CR-117. On that day, the trial court held a consolidated sentencing hearing for the Defendant's

convictions in case number 21-CR-117 and a separately indicted case number 21-CR-118, in which the Defendant was convicted of vandalism, a Class A misdemeanor; two counts of aggravated criminal trespass, Class B misdemeanors; possession of a Schedule VI controlled substance, a Class A misdemeanor; aggravated assault, a Class C felony; aggravated domestic assault, a Class C felony; interference with a 9-1-1 call, a Class A misdemeanor; and evading arrest, a Class A misdemeanor.[1]

The presentence report was entered as an exhibit at the sentencing hearing. Regarding the Defendant's conviction for unauthorized use of an automobile, the report indicated that the Defendant "did unlawfully and knowingly take [a] vehicle, to-wit: a company work truck belonging to [T]ri-[S]tate [G]uardrail and [S]ign [C]ompany, without the effective consent of the owner, and without the intent to deprive the owner thereof[.]" The report also indicated that the Defendant had driven a motor vehicle on public roads, streets, or highways while his privilege to operate a motor vehicle was cancelled, suspended, or revoked on three separate occasions: December 9, 2020, December 16, 2020, and March 3, 2021.

The presentence report indicated that the Defendant had convictions for aggravated burglary, theft, and violation of a restraining order, which he obtained after the offenses in case number 21-CR-117 but before the consolidated sentencing hearing. The Defendant had prior convictions for failure to use a safety belt/child restraint, failure to appear, and possession of less than one-half ounce of marijuana. The report stated that based upon his convictions, the Defendant was classified as a Range I offender. The report also indicated that the Defendant was assessed with the Strong-R Assessment tool, which resulted in a score of "high violent risk level."

Erica Tatum, the victim in case number 21-CR-118, was the sole witness to testify at the hearing. She testified about the Defendant's history of abuse toward her, the violent nature of the Defendant's actions related to case number 21-CR-118, and the injuries she suffered as a result.

At the conclusion of the hearing, the trial court considered the presentence report, the principles of law regarding sentencing, the nature and characteristic of the criminal conduct, and enhancing or mitigating factors. The court found that enhancement factor one applied based on the Defendant's previous criminal history of criminal convictions or behavior. *See* Tenn. Code Ann. § 40-35-114(1). The trial court found that no mitigating

[1] The Defendant's notice of appeal does not include case number 21-CR-118, and the record does not contain the indictment, trial transcripts, or judgments for case number 21-CR-118. Following this recitation of case number 21-CR-118 convictions at the sentencing hearing, the trial court asked if these convictions were correct, and both parties agreed.

factors applied. In deciding whether to grant an alternative sentence or order confinement, the trial court considered the presentence report, the Defendant's mental and physical condition, and the Defendant's social history. The trial court considered the facts and circumstances surrounding the offenses and the nature and circumstances of the conduct involved. The court expressed concern about the Defendant's potential for rehabilitation and considered the interest of society in being protected from possible future criminal conduct by the Defendant. The trial court found that measures less restrictive than confinement had been unsuccessful and that full probation would unduly depreciate the seriousness of the Defendant's offenses. The trial court sentenced the Defendant to concurrent sentences in case number 21-CR-117 of eleven months and twenty-nine days confinement at seventy-five percent service for count one and six months at seventy-five percent service for counts two, three, and four, to be served consecutively to the Defendant's sentence in case number 21-CR-118.[2] On September 12, 2022, the Defendant filed a notice of appeal in case number 21-CR-117.[3]

II. ANALYSIS

The Defendant argues that the trial court erred by imposing the maximum within range sentences and by denying him an alternative sentence in case numbers 21-CR-117 and 21-CR-118. Specifically, the Defendant argues that the trial court improperly weighed his prior criminal record. The State responds that the trial court did not err by sentencing the Defendant to an effective sentence of eleven months and twenty-nine days in case number 21-CR-117 because the sentence does not exceed the maximum punishment for the Defendant's convictions and is consistent with the purposes and principles of the sentencing statutes. The State argues that the Defendant's claims regarding case number 21-CR-118 should be considered waived because the Defendant failed to file a notice of appeal for that case.

When an accused challenges the length of a sentence or manner of service, this court reviews the trial court's sentencing determination under an abuse of discretion standard accompanied by a presumption of reasonableness. *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012); *see also State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (applying

[2] The trial court imposed an effective six-year sentence in case number 21-CR-118.

[3] We note that the Defendant's notice of appeal was untimely. Because his judgments were filed on August 10, 2022, the deadline to file his notice of appeal was Friday, September 9, 2022. *See* Tenn. R. App. P. 4(a), 21(a). The Defendant filed his notice of appeal on Monday, September 12, 2022. However, in the interest of justice, we will waive the timely filing. *See* Tenn. R. App. P. 4(a) (providing "in all criminal cases the 'notice of appeal' document is not jurisdictional and the timely filing of such document may be waived in the interest of justice").

the *Bise* standard to "questions related to probation or any other alternative sentence"). This court will uphold the trial court's sentencing decision "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. Moreover, under such circumstances, appellate courts may not disturb the sentence even if we had preferred a different result. *See State v. Carter*, 254 S.W.3d 335, 346 (Tenn. 2008). The 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.; *see also State v. Arnett*, 49 S.W.3d 250, 257 (Tenn. 2001).

Although our supreme court has not specifically considered whether the *Bise* standard of review applies to misdemeanor sentencing determinations, it has stated that "the abuse of discretion standard of appellate review accompanied by a presumption of reasonableness applies to all sentencing decisions." *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014) (citing *State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013)). Consequently, we join the growing number of panels of this court that have held the *Bise* standard similarly applies to appellate review of misdemeanor sentencing. *See, e.g., State v. Willard Hampton*, No. W2018-00623-CCA-R3-CD, 2019 WL 1167807, at *12 (Tenn. Crim. App. Mar. 12, 2019) (collecting cases).

The Sentencing Reform Act was enacted in order "to promote justice" and "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." Tenn. Code Ann. § 40-35-102. In determining the proper sentence, the trial court must consider: (1) the evidence adduced 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 enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the Administrative Office of the Courts ("AOC") as to Tennessee sentencing practices for similar offenses; (7) any statement the defendant wishes to make in the defendant's 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. Tenn. Code Ann. § 40-35-210(b).

The purposes and principles of the Sentencing Reform Act include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," Tennessee Code Annotated section 40-35-102(1), a punishment sufficient "to prevent crime and promote respect for the law," Tennessee Code Annotated section 40-35-102(3), and consideration of a defendant's "potential or lack of potential for . . . rehabilitation," Tennessee Code

Annotated section 40-35-103(5). *See Carter*, 254 S.W.3d at 344. 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).

A. Case Number 21-CR-117

An individual convicted of a misdemeanor has no presumption of entitlement to a minimum sentence. *State v. Johnson*, 15 S.W.3d 515, 518 (Tenn. Crim. App. 1999) (citations omitted). "[A] misdemeanor offender must be sentenced to an authorized determinant sentence[,]" and "a percentage of that sentence, which the offender must serve before becoming eligible for consideration for rehabilitative programs, must be designated." *State v. Palmer*, 902 S.W.2d 391, 394 (Tenn. 1995). The trial court must fix a percentage of the sentence, not to exceed seventy-five percent, that the defendant must serve in confinement before being eligible for release into rehabilitative programs. *See* Tenn. Code Ann. § 40-35-302(d). Furthermore, in misdemeanor sentencing, the "trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." *State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998); *see* Tenn. Code Ann. § 40-35-302(b), (d).

The trial court is not required to conduct a separate sentencing hearing before imposing a misdemeanor sentence, so long as the trial court allows the parties "a reasonable opportunity to be heard on the question of the length of any sentence and the manner in which the sentence is to be served." Tenn. Code Ann. § 40-35-302(a). There is no strict requirement that the trial court make findings on the record regarding the percentage of the defendant's sentence to be served in confinement. *Troutman*, 979 S.W.2d at 274. Thus, the trial court is afforded considerable latitude in misdemeanor sentencing. *See Johnson*, 15 S.W.3d at 518.

In this case, the trial court clearly complied with the requirements for misdemeanor sentencing. The trial court considered the presentence report, the principles of law regarding sentencing, the nature and characteristic of the criminal conduct, and enhancing or mitigating factors. The trial court found that enhancement factor one applied based on the Defendant's previous criminal history of criminal convictions or behavior. *See* Tenn. Code Ann. § 40-35-114(1). The trial court found that no mitigating factors applied. In deciding whether to grant an alternative sentence or order confinement, the trial court considered the presentence report, the Defendant's mental and physical condition, and the Defendant's social history. The trial court considered the facts and circumstances surrounding the offenses and the nature and circumstances of the conduct involved. The

court expressed concern about the Defendant's potential for rehabilitation and considered the interest of society in being protected from possible future criminal conduct by the Defendant. The trial court found that measures less restrictive than confinement had been unsuccessful and that full probation would unduly depreciate the seriousness of the Defendant's offenses.

The trial court properly sentenced the Defendant to a within range sentence at seventy-five percent service for his convictions for unauthorized use of an automobile, a Class A misdemeanor, in count one, and driving while license was cancelled, suspended, or revoked, a Class B misdemeanor, in counts two, three, and four. *See* Tenn. Code Ann. §§ 39-14-106 (unauthorized use of a vehicle); 40-35-111(e)(1)-(2) (providing the maximum punishment for a Class A misdemeanor is "eleven months, twenty-nine days or a fine not to exceed two thousand five hundred dollars, or both[,]" and the maximum punishment for a Class B misdemeanor is "six months or a fine not to exceed five hundred dollars, or both"); 55-50-504 (driving on a cancelled, suspended, or revoked license). Accordingly, the Defendant is not entitled to relief regarding this issue.

B. Case No. 21-CR-118

The Defendant failed to include case number 21-CR-118 in his notice of appeal.[4] *See* Tenn. R. App. P. 3(f) (requiring the notice of appeal to "designate the judgment from which relief is sought"). The record contains the judgments for case number 21-CR-117 and the transcript of the consolidated sentencing hearing for case numbers 21-CR-117 and 21-CR-118. However, the record does not include the indictment, trial transcripts, or judgments for case number 21-CR-118. Moreover, the Defendant did not submit a reply brief addressing the State's argument that the Defendant's claims regarding case number 21-CR-118 are waived for his failure to file a notice of appeal for that case. Accordingly, we conclude that the Defendant has not raised an appeal from his convictions in case number 21-CR-118, and his claims regarding case number 21-CR-118 are not properly before this court. *See* Tenn. R. App. P. 3(f).

III. CONCLUSION

Based upon the foregoing and the record as a whole, we affirm the judgments of the trial court.

[4] On September 16, 2022, the Defendant filed in the trial court a "Waiver of Appeal of Finding of Guilt" for his convictions in case number 21-CR-117 but expressed a desire to appeal the sentences. The Defendant did not include case number 21-CR-118 in this waiver, nor did he otherwise mention that case.

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KYLE A. HIXSON, JUDGE