

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2023

FILED

08/25/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. BENJAMIN SPENCER BROWN

**Appeal from the Criminal Court for Hamilton County
No. 305870 Barry A. Steelman, Judge**

No. E2022-00577-CCA-R3-CD

The defendant, Benjamin Spencer Brown, appeals the trial court's imposition of consecutive sentences for his Hamilton County Criminal Court jury convictions of criminally negligent homicide and reckless endangerment. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JILL BARTEE AYERS and KYLE A. HIXSON, JJ., joined.

Jessica F. Butler, Assistant Public Defender-Appellate Division (on appeal); Steven E. Smith, District Public Defender; and Steven Brown and Kevin Loper, Assistant District Public Defenders (at trial), for the appellant, Benjamin Spencer Brown.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Coty G. Wamp, District Attorney General; and Cameron Williams and Andrew Coyle, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On September 26, 2018, the Hamilton County Grand Jury indicted the defendant on one count of felony murder during the perpetration of aggravated child abuse and one count of aggravated child abuse. The charges related to the death of a two-year-old female victim in August 2018. On February 14, 2022, the petit jury returned verdicts of the lesser included offenses of negligent homicide and reckless endangerment. Following a sentencing hearing, the trial court sentenced the defendant to consecutive terms of confinement of two years for criminally negligent homicide and 11 months, 29 days for reckless endangerment.

The only portion of the trial transcript that appears in the appellate record is the transcript of the defendant's trial testimony. He testified that he was 30 years old at the time of trial and that at the time of the offenses, he lived in Soddy Daisy with Brandi Giannunzio, who was also charged with offenses as a result of the victim's death. Ms. Giannunzio earned money babysitting, and the victim and her sibling were two of the children for whom she cared.

On August 9, 2018, Ms. Giannunzio had a hair appointment and asked the defendant to watch the victim and her sibling while Ms. Giannunzio went to a salon located not far from her home. The defendant testified that when the victim complained of a headache, he told the victim to use the bathroom and that he would give her Tylenol when she finished. The victim, who had been undergoing potty training, went to the bathroom while the defendant spoke to his father on the telephone. When the defendant ended the call, he went to the bathroom to check on the victim and found that she had not used the bathroom. He stated that he gave the victim a chewable Tylenol and carried her into the living room. He said that when he set the victim down on her feet, she began having a seizure, that her legs buckled, and that she fell to the floor.

The defendant testified that the victim was not responsive when he asked her if she was okay. The victim began biting her tongue, and the defendant picked her up and laid her on the sofa. The defendant tried to pry the victim's teeth apart to prevent her from biting her tongue. When the defendant took the victim to the bathroom to put cold water on her, she began pulling her hair out. The defendant took the victim into his arms and laid her back on the sofa. He testified that he did not feel comfortable calling for an ambulance because he did not know the victim's last name or her medical condition. Instead, he called Ms. Giannunzio, who immediately left the salon for home. The defendant then called his father and related the situation, and his father told him to call 9-1-1. Ms. Giannunzio called 9-1-1 once she returned home.

The defendant testified that he did not see a mark on the victim's face until she was being examined by the paramedics who responded to the 9-1-1 call. When a police detective arrived, the defendant lied to the detective, telling him that Ms. Giannunzio was at home when the victim's seizure occurred. Ms. Giannunzio rode in the ambulance with the victim to the hospital, and the defendant took the victim's sibling and followed the ambulance in his vehicle. The defendant testified that he did not strike the victim and did not know what caused the mark on her face. Sometime after August 9, 2018, the victim succumbed to her injuries and passed away.

At the April 27, 2022 sentencing hearing, the defendant sought judicial diversion or probation, both of which the State opposed. The State sought a maximum

incarcerative sentence of two years for criminally negligent homicide and 11 months and 29 days for reckless endangerment. The prosecutor opined that no basis for consecutive sentencing existed.

The presentence investigative report reflected that the defendant dropped out of school in the ninth grade and that he had been employed as a roofer. His prior convictions included speeding and a seatbelt violation in 2015, speeding in 2021, misdemeanor assault in 2017, and misdemeanor theft in 2013, for which he received a suspended 11-month, 29-day sentence. The defendant was treated for a “temper problem” when he was a juvenile. He was not a current user of alcohol, but he had been using marijuana since he was 12 years old. He reported that he used marijuana on a daily basis. He acknowledged that the longest period in which he did not smoke marijuana was for a three-month period approximately three years prior to his March 1, 2022 interview with the probation officer who prepared presentence report. He reported that he last used marijuana on February 28, 2022, the day before his interview, and that he would not be able to pass a drug screen. He had not undergone any drug treatment. Although the defendant stated that Ms. Giannunzio was his fiancée, he was not divorced from his wife. The defendant was determined to be a moderate risk to reoffend.

During the sentencing hearing, the State presented the testimony of Claude Stamey, whose daughter was married to the defendant. Mr. Stamey owned a roofing company, and the defendant worked for him until Mr. Stamey learned that the defendant had been stealing from him. At some point after firing the defendant, Mr. Stamey underwent open-heart surgery, and the defendant came to Mr. Stamey’s house one morning shortly after Mr. Stamey returned home from the surgery. Mr. Stamey testified that the defendant grabbed him and caused him to fall on the front porch. The defendant then struck Mr. Stamey approximately ten times in the face with a 15-pound porch ornament. After the defendant started to leave, he stopped in the driveway, produced a knife that appeared to be a box-cutter, and started to return to the porch with the knife. His advancement toward the porch was terminated by the arrival of police officers. As a result, the defendant was convicted of assault on March 27, 2017.

Two witnesses, Barbara Brewer and Jeanie Burchard, testified that they were close to the victim and had experienced grievous loss over the victim’s death. Tiffany Shell, the victim’s mother, testified, “The loss of a child is a continuous loss that unfolds every day.” Ms. Shell said that eight months after the victim’s death, she was treated in a mental hospital because she “gave up on life,” stopped eating, and lost 70 pounds. She also was treated by a therapist for two years. She believed the defendant should be incarcerated for his crimes. David Shell, the victim’s father, testified that as a result of the verdicts of lesser included offenses, the defendant “got away” with killing the victim. Mr. Shell stated that two years in confinement was “nowhere near enough.”

The defendant presented the testimony of Brandy Spurgin-Floyd, an attorney who represented him in a divorce action against Emily Stamey Brown. Ms. Spurgin-Floyd testified that the defendant was seeking custody of his child with Ms. Brown. She further testified that the defendant had completed five weeks of a 12-week drug treatment class.

The trial court reviewed the factors applicable to a consideration of judicial diversion. The court found that the defendant's amenability to correction, his criminal record, his social history, his physical and mental health, the circumstances of the offenses, and the interest of the public weighed against diversion.

In reviewing the defendant's criminal history, the trial court credited Mr. Stamey's testimony and found that the defendant's attack of Mr. Stamey was "significantly violent" and that due to the familial relationship between the defendant and Mr. Stamey, the defendant's actions constituted "domestic assault." The court noted that the defendant had a prior theft conviction, which is "a crime of dishonesty," and that the defendant made a "false report to law enforcement" and "hindered the investigation" when he lied to the detective in the present case. The court stated that the defendant acknowledged smoking marijuana on February 28, 2022, two weeks after the verdict was rendered, that he was "smoking marijuana knowing that he's going for a presentence investigation," and that "the fact that he's still acquiring and using an illegal drug is significant." The court stated that although speeding violations, generally, are not considered significant, the defendant's speeding convictions were "worthy of mention" as one of the speeding violations occurred while the defendant was released on bail pending trial.

In examining the circumstances of the offenses, the trial court found that the defendant's actions were "reprehensible to an excessive degree" and illustrated "a lack of sympathy for a helpless child." The court stated that according to the evidence presented at trial, the victim did not exhibit any symptoms until she was with the defendant and that rather than seeking medical attention, the defendant's "first thought was how can I keep it from people's knowledge that I'm the one with the child when she can't stand up anymore, and she's about to bite her tongue in [two]." The court noted the trial testimony of one of the responders that when he arrived at the home, it appeared that the defendant and Ms. Giannunzio "were trying to get their story straight." The court found that the defendant affirmatively misrepresented the facts to law enforcement when stating that Ms. Giannunzio was present at the time of the victim's seizure. After reviewing all of the factors, the court denied judicial diversion, noting that the defendant's convictions should "be memorialized permanently."

The trial court then turned to adjudicating the sentences. The court acknowledged its consideration of the sentencing principles, "all relevant facts and

circumstances,” the evidence presented during the trial and the sentencing hearing, and the presentence report. The court acknowledged the defendant’s regular appearances in court and his stable work history as mitigating factors, *see* T.C.A. § 40-35-113(13), but the court afforded little weight to these mitigating factors. By way of enhancement, the court found that the defendant had a previous history of criminal convictions and behavior, *see* T.C.A. § 40-35-114(1), based on his prior convictions, his lying to a law enforcement officer, and his procurement and possession of illegal drugs. The court also applied Code section 40-35-114(4), finding that the victim was particularly vulnerable due to her age. The court found that the enhancement factors “substantially outweigh[ed]” the mitigating factors and imposed sentences of two years for criminally negligent homicide and 11 months and 29 days for reckless endangerment.

The trial court then considered the manner of service of the sentences. The court reviewed the principles governing sentences of confinement and ruled that confinement was necessary to avoid depreciating the seriousness of the offenses. *See* T.C.A. § 40-35-103(1)(B). On this point, the court found the circumstances of the offenses grave in view of the verdicts for lesser included offenses: “[T]he Court, having heard the evidence in the case, has difficulty reconciling that verdict with the facts that the Court has heard. And that’s really only relevant with regard to why the Court would treat this criminally negligent homicide situation different than so many others.” The court found that the defendant’s explanation at trial for his failure to call 9-1-1 was not credible and that the actual reason that the defendant failed to call 9-1-1 was that he did not want it to be known that he was alone with the victim. The court noted that the circumstances not only involved “an act of omission” by the defendant but also involved “an affirmative act to hide the truth.” The court said the facts were more egregious than most criminally negligent homicides. The court also found that based on the defendant’s criminal history, measures less restrictive than confinement had been applied unsuccessfully to the defendant. *Id.* § 40-35-103(1)(C). Thus, the court ordered the defendant serve his sentences in confinement.

Although the State opined that no basis existed to support consecutive alignment of the sentences, the trial court concluded that consecutive sentences were warranted, finding that the defendant “is an offender whose record of criminal activity is extensive.” *Id.* § 40-35-115(b)(2). The court noted that the defendant committed the instant offenses in 2018 at the approximate age of 26, domestic assault at age 24, theft at age 22, two traffic offenses at age 24, and one traffic offense at age 29 while released on bail pending trial and that he had been using marijuana since age 12 and up to the day prior to his interview for purposes of the presentence report. The court noted “the degree of violence” committed by the defendant that resulted in the assault conviction. The court stated that the speeding violations were particularly significant to the reckless endangerment conviction, which required “a gross deviation,” because the speeding

violations indicated “disregard to the safety of himself and others” and he “has been speeding about the community in his motor vehicle when he was on bail for this case.” The court further stated that the defendant had “been engaged in the persistent use of illegal drugs” and had been “supporting the drug trade” since the age of 12 and that the conduct continued even after he was convicted of the instant offenses.

The defendant did not file a motion for new trial but filed a timely notice of appeal. On appeal, he challenges the trial court’s imposition of consecutive sentences.

Our supreme court has adopted an abuse of discretion standard of review for sentencing and has prescribed “a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act.” *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The application of the purposes and principles of sentencing involves a consideration of “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed.” T.C.A. § 40-35-103(5). Trial courts are “required under the 2005 amendments to ‘place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.’” *Bise*, 380 S.W.3d 698-99 (quoting T.C.A. § 40-35-210(e)). Under the holding in *Bise*, “[a] sentence should be upheld 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.” *Id.* at 709. The standard of review adopted in *Bise* “applies similarly” to the imposition of consecutive sentences, “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).” *State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013).

In imposing consecutive sentences, the trial court relied upon Code section 40-35-115(b)(2), which permits the imposition of consecutive sentences when “[t]he defendant is an offender whose record of criminal activity is extensive.” Our supreme court recently recognized that in applying this provision, “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.” *State v. Perry*, 656 S.W.3d 116, 128 (Tenn. 2022). The court listed the following “non-exclusive considerations” that courts should examine in evaluating whether a defendant has a record of criminal activity that 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).

“[A] defendant need not have prior criminal convictions or activity to qualify as an offender whose record of criminal activity is extensive,” and the Sentencing Act does not require “criminal activity apart from that for which the defendant is being sentenced to support the relevant finding under section 40-35-115(b)(2).” *Id.* at 131 (citations omitted). Prior convictions or criminal activity, however, “may demonstrate ‘a consistent pattern of operating outside the confines of lawful behavior’ and provide some stronger measure of justification for finding that a defendant is an offender whose record of criminal activity is extensive.” *Id.* (quoting *State v. Dickson*, 413 S.W.3d 735, 748 (Tenn. 2013)).

The State asserts that the appellate record is incomplete because the only portion of the trial transcript that the defendant included was “his own self-serving testimony.” The appellant’s duty under Tennessee Rule of Appellate Procedure 26(b) is “only to prepare a record as necessary to convey the issues on appeal.” *State v. Caudle*, 388 S.W.3d 273, 279 (Tenn. 2012). We conclude that the record contains adequate information for a meaningful review. *See id.* (“[T]he key to meaningful appellate review under the abuse of discretion standard is whether the trial court recites a proper basis for the sentence.”). The record before us includes the sentencing hearing transcript, the presentence report, the exhibits entered during the sentencing hearing, the transcript of the defendant’s trial testimony, and the judgments, and we will presume the transcript of the remaining portion of the trial supports the trial court’s decision. *See id.* (“If . . . the record is adequate for a meaningful review, the appellate court may review the merits of the sentencing decision with a presumption that the missing transcript would support the ruling of the trial court.”).

The defendant asserts that the trial court failed to provide reasons on the record establishing that he had a record of criminal activity that is extensive. He specifically argues that the trial court improperly relied on his history of marijuana usage and failed to consider the factors set forth in *Perry*. He maintains that as a result, the presumption of correctness does not apply to the trial court's decision and that this court should conduct a de novo review.

This court has recognized that "an extensive record of criminal activity may include criminal behavior which does not result in a conviction." *State v. Koffman*, 207 S.W.3d 309, 324 (Tenn. Crim. App. 2006) (quoting *State v. William L. Vaughn*, No. M2002-01879-CCA-R3-CD, 2003 WL 21877929, at *5 (Tenn. Crim. App., Nashville, Aug. 1, 2003)). This court also has upheld the trial court's consideration of a defendant's admitted use of illegal drugs in finding that the defendant was an offender whose record of criminal activity was extensive. *See id.* (citing cases). The defendant relies on our supreme court's recent opinion in *Perry* to support his claim that the trial court erred in considering his history of marijuana use. In *Perry*, our supreme court did not consider the 22-year-old defendant's "occasional marijuana usage" from age 15 through approximately age 20, noting that the trial court did not refer to the marijuana usage in addressing consecutive sentencing. *Perry*, 656 S.W.3d at 131-32. Our supreme court also stated in a footnote that "although the record contains evidence of some limited prior criminal activity, given the nature and circumstances of the activity, we believe it carries very little, if any, weight in establishing that the Defendant has an extensive record of criminal activity." *Id.* at 132 n. 18.

The court in *Perry*, however, did not preclude any consideration of a defendant's admitted use of illegal drugs in determining whether the defendant has an extensive record of criminal activity. Furthermore, unlike the defendant in *Perry* who only used marijuana on occasion during an approximate five-year period, the defendant in the present case reported using marijuana on a daily basis with his first marijuana use at the age of 12 and his last marijuana use on February 28, 2022, two weeks after the trial and one day prior to his interview for purposes of preparing the presentence report. During the interview, the defendant acknowledged that he would be unable to pass a drug screen. We conclude that the trial court did not err in relying, in part, on the defendant's persistent and recent illegal drug use in determining that he had an extensive record of criminal activity.

Although the trial court sentenced the defendant prior to the release of our supreme court's decision in *Perry*, the record reflects that the trial court identified multiple facts related to the amount, scope, time span, and frequency of the defendant's criminal activity. Even if the trial court's findings were inadequate with respect to some of the considerations set forth in *Perry*, these deficiencies do not negate the presumption of reasonableness afforded to a trial court's sentencing decisions. *See Perry*, 656 S.W.3d at

133 (holding that the trial court’s failure to specifically address the time span and frequency of the criminal activity did not negate the presumption of reasonableness when the trial court followed “appropriate sentencing procedure,” identified multiple facts related to the amount and scope of the defendant’s criminal activity, and stated its reasons for ordering partial consecutive sentencing, thus providing a basis for meaningful appellate review). The trial court stated the sources for its sentencing decision and followed the appropriate sentencing procedure. The trial court also “articulated on the record its reasons for ordering . . . consecutive sentencing, thereby providing a basis for meaningful appellate review.” *Id.* Therefore, the trial court’s findings were sufficient to warrant the presumption of reasonableness, and we must uphold the trial court’s decision absent an abuse of discretion.

The record reflects that during an approximate five-year period, the defendant engaged in criminal conduct that resulted in three misdemeanor convictions for theft, assault, and reckless endangerment and a felony conviction for criminally negligent homicide. His assault conviction resulted from his violent attack of his father-in-law, and his convictions for criminally negligent homicide and reckless endangerment were the result of the death of a small child left in his care. Thus, the severity of the defendant’s conduct and resulting convictions escalated during the five-year period. Although the trial court acknowledged that traffic offenses generally are afforded little weight, the court expressed concern that the defendant received a speeding violation while released on bond pending the trial in the instant case when the jury ultimately convicted him of reckless endangerment. The trial court emphasized the defendant’s extensive use of marijuana for a large number of years and his continued use of marijuana even after he was convicted of the instant offenses.

The defendant asserts that the “trial court’s goal was to incarcerate [the defendant] for as long as the statute allowed” because the trial court disagreed with the jury’s verdict. The trial court noted that it respected the jury’s verdict but expressed difficulty reconciling the verdict with the evidence presented at trial. The trial court found that the facts in this case were more egregious than most criminally negligent homicides, and due to the defendant’s failure to include in the appellate record the transcript of all evidence presented at trial, we presume that the trial court’s factual findings regarding the egregious nature of the offenses are correct. *See Caudle*, 388 S.W.3d at 279. Furthermore, based on the trial court’s findings, the defendant’s convictions and criminal activity demonstrate “a consistent pattern of operating outside the confines of lawful behavior.” *Perry*, 656 S.W.3d at 131 (quoting *Dickson*, 413 S.W.3d at 748). The record supports the trial court’s finding that the defendant is an offender whose record of criminal activity is extensive. *See* T.C.A. § 40-35-115(b)(2). We conclude that the trial court did not abuse its discretion in imposing consecutive sentences.

For the foregoing reasons, we affirm the judgments of the trial court.

JAMES CURWOOD WITT, JR., JUDGE