

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 22, 2023 Session

FILED

05/26/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. CHRISTOPHER DAVID McINTOSH

Appeal from the Criminal Court for Union County
No. 5624 E. Shayne Sexton, Judge

No. E2022-00715-CCA-R3-CD

The defendant, Christopher David McIntosh, appeals his effective 10-year sentence imposed by the Union County Criminal Court as a result of his guilty-pleaded convictions of six counts of sexual battery by an authority figure and two counts of theft of property valued at \$1,000 or less. On appeal, the defendant contends that the trial court erred in imposing partially consecutive sentences and in ordering him to serve nine months of his sentence in confinement. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Ann C. Short and Donald A. Bosch, Knoxville, Tennessee, for the appellant, Christopher David McIntosh.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Assistant Attorney General; Jared R. Effler, District Attorney General; and Tyler Hurst and April Bradshaw, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

The Union County Grand Jury charged the defendant with six counts of statutory rape by an authority figure and two counts of theft of property valued at \$1,000 or less. The sexual offenses centered around the defendant's relationship with and conduct toward a 17-year-old female student at Union County High School where the defendant was employed as a teacher. The theft charges related to two Chromebook computers belonging to the school that the defendant gave to the victim and another student.

The victim began her senior year of high school in 2018. She was given a role as a teacher's aid and was assigned to assist the defendant, who provided technological support to the staff and was in charge of the Chromebook computers used by the students at the school. He would repair the students' Chromebooks and provide new devices when necessary. He operated out of a small office, known as the Chromebook depot, located near the auditorium in the school building.

According to the victim's testimony at the defendant's sentencing hearing, the defendant gave her souvenirs from a trip to Japan and occasionally bought her meals from Subway, candy, and soft drinks. The defendant also complimented her clothing and called her "cute." The victim stated that, generally, she did not receive such attention from others and that the defendant's compliments made her feel "happy" and "special." She stated that when she informed the defendant of her birthday in August 2018, he asked her whether she was 18 years old yet, and she told him that she was not. The victim acknowledged that she developed a "crush" on the defendant, that they began exchanging text messages, and that she informed the defendant of her feelings via text message over Christmas break. Although the defendant initially resisted the victim's entreaty, she admittedly continued to pursue a personal relationship with the defendant. Ultimately, the victim and the defendant began exchanging text messages of a sexual nature, and hugging and kissing in the depot eventually led to sexual intercourse in January 2019. The victim testified that between January and April of 2019, she and the defendant engaged in sexual intercourse four times, that she performed oral sex on the defendant between 14 and 16 times, that the defendant penetrated her vagina with his hand "[m]aybe less than ten" times, that he performed oral sex on her on one occasion, and that the victim referenced occasions during which the defendant groped her breasts. All of the episodes occurred in the Chromebook depot, and all but one episode occurred during school hours.

The victim told a friend about her relationship with the defendant, and news of the relationship spread around the school, resulting in the principal's calling the victim into his office. He required her to submit a written statement in which she lied and denied any misconduct with the defendant. Nevertheless, the principal removed the victim from the Chromebook depot and assigned her as an aid to a female art teacher. The move effectively ended the sexual activity between the victim and the defendant. The victim continued sending messages to the defendant, and as the victim's high school graduation neared, the defendant began responding to the victim's text messages. Prior to the victim's graduation, the defendant gave her an "Uber card" and told her that when she arrived at college, they could arrange to meet, have dinner, and then go to a hotel room. The meeting never occurred because the victim "got caught" when her mother found evidence of the defendant's conduct on the victim's cellular phone. The victim was grounded for the summer of 2019, and ultimately the defendant was arrested and indicted.

The victim graduated as valedictorian of her high school class. At the time of the defendant's sentencing hearing, the victim had completed her junior year of college where she was majoring in computer science with a 3.2 grade point average. The victim had a fiancé, to whom she became engaged in late 2019, a few months after they began dating during the summer of 2019. The victim testified that the stress of the case had affected her grades and her relationship with her fiancé. She stated that she had nightmares that the defendant would "try to find me and kill me because I don't know what he could do with a computer, he was pretty smart."

The defendant entered into a plea agreement that called for the six counts of statutory rape by an authority figure to be reduced to sexual battery by an authority figure, a Class C felony. *See* T.C.A. § 39-13-527(b). Pursuant to the plea agreement, the defendant also pled guilty to the theft offenses as charged in the indictment. The agreement called for the trial court to determine the sentence as well as the manner of service. The State sought a sentence of full incarceration that included consecutive alignment, while the defendant requested concurrent alignment and full probation.

The trial court conducted an extensive sentencing hearing during which the victim testified and the defendant rendered an allocution. In sentencing the defendant, the court recognized that teachers have a responsibility to their students, that the relationship between a teacher and a student is "one of total imbalance" whereby many students believe "they're at the total whim of a teacher—the grades, their life, everything," that the fact that the victim "started this" or had a "crush...doesn't matter," and that "[a]dults, and particularly teaching adults with a master's degree, have the responsibility to take those relationships and put them in their proper perspective."

The court applied two enhancement factors: (1) "[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range;" and (15) "[t]he defendant committed the offense on the grounds or facilities of a pre-kindergarten through grade twelve (pre-K-12) public or private institution of learning when minors were present[.]" T.C.A. § 40-35-114(1), (15). The court noted that the defendant did not have a prior criminal history, but the court relied upon the series of offenses against the victim in applying enhancement factor (1). The court gave "little" weight to enhancement factor (1) and "great weight" to enhancement factor (15). The court applied as mitigating factors that the defendant's conduct did not cause or threaten serious bodily injury and that the defendant cooperated and pled guilty. *See* T.C.A. § 40-35-113(1), (13). After weighing the enhancement and mitigating factors, the court imposed a five-year sentence for each of the convictions for sexual battery by an authority figure. The court also imposed sentences of 11 months and 29 days for the theft convictions.

The court concluded that consecutive sentences were warranted, based on Code section 40-35-115(b)(5), in that the defendant was convicted of two or more statutory offenses involving sexual abuse of the minor victim with aggravating circumstances. The court rejected the State's request for full consecutive sentences, finding that the effective sentence would not serve the ends of justice and would not "properly address the concerns that we have here." The court imposed partially consecutive sentences, ordering the defendant to serve his five-year sentences for the first two counts of sexual battery by an authority figure consecutively to each other and concurrently with the sentences for the remaining convictions, resulting in an effective 10-year sentence.

The court found that the defendant was a favorable candidate for alternative sentencing. The court reviewed the defendant's presentence report and noted multiple factors that were favorable to the defendant, including his lack of history of drug and alcohol abuse, the determination that he had a low risk to reoffend based on the risk and needs assessment, his physical and mental condition, his lack of a prior criminal history, and his prior actions and character. The court observed that there was "scant information about anything negative of this defendant." The court noted that the defendant's actions were "focused on one young lady," that the court did not observe "any predator style issues," that the court did not believe "rehabilitation would be a goal for probation," and that due to the lack of a psychosexual examination, the court did not have "any good information about rehab." The court stated that there was no information regarding the defendant's background that suggested that the defendant would not abide by the terms of probation or that he was a danger to society in general. The court, however, denied full probation primarily because it determined that full probation would depreciate the seriousness of the offenses. The court stressed the critical importance of the relationship between school teachers and their pupils, commenting that parents should be able to rely upon an educational system in which their children would be safe from improper conduct by teachers and school staff. The court placed "great weight" on this factor. The court found that the offenses were particularly "enormous, gross, or heinous," stating that "[i]t's certainly heinous to [the victim], and I take nothing away from the experience she's gone through." The court ordered the defendant to serve nine months of his sentence in confinement with the balance of his 10-year sentence to be served on probation.

The trial court entered its judgments on July 7, 2022, and the defendant filed a timely notice of appeal. In his appeal, the defendant challenges the trial court's imposition of partially consecutive sentences and its failure to grant full probation.

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 consider, 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). The same standard of review also applies to a trial court’s decision regarding “probation or any other alternative sentence.” *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012).

Consecutive Sentencing

In imposing partially consecutive sentences, the trial court relied upon Code section 40-35-115(b)(5), which permits the imposition of consecutive sentences when

[t]he defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant’s undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

The defendant asserts that the trial court failed to make adequate findings regarding the aggravating circumstances upon which the trial court relied in applying Code section 40-35-115(b)(5) and that, as a result, this court should conduct a de novo review. The defendant also asserts that none of the aggravating circumstances are supported by the evidence presented at the sentencing hearing.

Although our supreme court has “stressed the importance of placing findings on the record,” the court also has recognized that the trial court’s findings need not be “particularly lengthy or detailed.” *State v. Perry*, 656 S.W.3d 116, 126 (Tenn. 2002)

(quoting *Bise*, 380 S.W.3d at 706). Rather, “the trial court simply must ‘set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.’” *Id.* at 126-27 (quoting *Rita v. United States*, 551 U.S. 338, 356-57 (2007); *Bise*, 380 S.W.3d at 706). “[O]n a practical level, ‘less comprehensive findings may require appellate courts to more carefully review the record.’” *Id.* at 127 (quoting *Bise*, 380 S.W.3d at 706).

This court has applied a presumption of reasonableness and reviewed a trial court’s decision to order consecutive sentences for abuse of discretion “[b]ecause the trial court provided reasons on the record establishing at least one of the seven grounds listed in [Code section 40-35-115(b),]’ despite the trial court’s failure to ‘make specific findings regarding the other considerations required in subsection (5).’” *State v. Donald Ray Penninton, Jr.*, No. E2020-00415-CCA-R3-CD, 2021 WL 2172189, at *11 (Tenn. Crim. App., Knoxville, May 27, 2021), *no perm. app. filed* (quoting *State v. James Edward Church*, No. M2014-01306-CCA-R3-CD, 2016 WL 520616, at *12-13 (Tenn. Crim. App., Nashville, Feb. 10, 2016)). Although the trial court did not specifically recite the aggravating circumstances listed in Code section 40-35-115(b)(5), the trial court made findings related to the aggravating circumstances. The trial court’s findings, when viewed in totality, established that the trial court “‘considered the parties’ arguments and ha[d] a reasonable basis for exercising [its] own legal decisionmaking authority.’” *Perry*, 656 S.W. 3d at 126-27 (quoting *Rita*, 551 U.S. at 356-57; *Bise*, 380 S.W.3d at 706). Thus, we apply a presumption of reasonableness and review the trial court’s decision to impose partially consecutive sentences for abuse of discretion.

We conclude that the trial court’s decision to impose partially consecutive sentences based upon Code section 40-35-115(b)(5) is supported by the record. The defendant was convicted of multiple offenses of sexual abuse of a minor. Throughout its findings, the trial court emphasized that the defendant was the victim’s teacher, that the relationship between a teacher and a student is “one of total imbalance” and of critical importance, and that parents should be able to rely upon an education system in which their children would be safe from improper conduct by a teacher. The record also reflects that the defendant’s undetected sexual activity with the victim involved up to 30 acts of sexual abuse, not including the instances during which the defendant kissed the victim and groped her breasts. Although the defendant pled guilty to six counts of sexual battery by an authority figure, which only requires “sexual contact,” *see* T.C.A. § 39-13-527(a), as lesser offenses to the original charges of statutory rape by an authority figure, which requires “sexual penetration,” *see* T.C.A. § 39-13-532(a), the proof presented during the sentencing hearing established that numerous instances of sexual penetration occurred. Even after the victim was removed as the defendant’s aid, the defendant sought to continue the sexual relationship by suggesting that they procure a hotel room.

The defendant maintains that no evidence was presented establishing that the victim suffered residual, physical, or mental damage. The trial court appeared to agree, stating that it was “impressed” with the victim’s “ability to rebound from this.” “However, not all of the aggravating circumstances listed in section 40-35-115(b)(5) ‘must be present to support the imposition of consecutive sentencing.’” *State v. Doane*, 393 S.W.3d 721, 738 (Tenn. Crim. App. 2011) (quoting *State v. James M. Powers*, E2001-02363-CCA-R3-CD, 2022 WL 31387308, at *5 n. 4 (Tenn. Crim. App., Knoxville, Oct. 23, 2002)). “[C]onsecutive sentences may still be appropriate under section 40-35-115(b)(5) even when one factor militates against them if the other aggravating circumstances have been established and carry sufficient weight.” *Id.* Accordingly, we cannot conclude that the trial court abused its discretion in determining that partially consecutive sentencing was warranted under Code section 40-35-115(b)(5).

The defendant argues that the trial court’s imposition of partially consecutive sentences resulting in an effective 10-year sentence was unnecessary to protect the public from further criminal conduct of the defendant or to “ensure rehabilitative efforts have more time to take effect.” The record reflects that the trial court considered both the State’s argument for complete consecutive sentencing and the defendant’s argument for complete concurrent sentencing, determined that neither argument would result in a sentence that was appropriate under the facts and circumstances of the case, and, instead, found that an effective 10-year sentence was appropriate. Such findings reflect that the trial court considered whether consecutive sentencing was “justly deserved in relation to the seriousness of the offense” and was “no greater than that deserved for the offense committed.” T.C.A. §§ 40-35-102(1); -103(2). We conclude that the trial court did not abuse its discretion in imposing partially consecutive sentences.

Denial of Full Probation

A defendant is eligible for probation if the actual sentence imposed upon the defendant is 10 years or less and the offense for which the defendant is sentenced is not excluded by statute. T.C.A. § 40-35-303(a). A defendant who has committed the most severe offenses, whose criminal history evinces a clear disregard for the laws and morals of society, and who evinces a failure of past efforts at rehabilitation is to receive priority for incarceration. T.C.A. § 40-35-102(5). A standard offender convicted of a Class C, D, or E felony who does not fall into the categories listed above “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). The court “shall consider, but is not bound by” this guideline. T.C.A. § 40-35-102(6)(D).

The party appealing the sentence has the burden of demonstrating its impropriety. T.C.A. § 40-35-401, Sentencing Comm’n Cmt. The defendant also bears the

burden of establishing that he is 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 incarceration is an appropriate sentence, the trial court should consider whether:

- (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).

The defendant received an alternative sentence of split confinement in this case. The trial court denied the defendant’s request for full probation, finding that confinement was necessary to avoid depreciating the seriousness of the offenses. When the denial of alternative sentencing is based solely on a concern regarding depreciating the seriousness of the offense, this court must apply a “heightened standard of review.” *State v. Sihapanya*, 516 S.W.3d 473, 476 (Tenn. 2014) (order) (per curiam). Generally, to deny alternative sentencing solely on the basis of the seriousness of the offense, “the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement.” *State v. Trotter*, 201 S.W.3d 651, 654 (Tenn. 2006) (quoting *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997)). In order for a trial court to deny an alternative sentence solely on the basis of the offense itself, “the circumstances of the offense *as particularly committed in the case under consideration* must demonstrate that the defendant committed the offense in some manner more egregious than is contemplated simply by the elements of the offense.” *State v. Trent*, 533 S.W.3d 282, 292-93 (Tenn. 2017) (emphasis in original).

The defendant asserts that the trial court failed to make sufficient findings in ordering split confinement and that, therefore, this court should conduct a de novo review. The trial court's findings reflect that the trial court considered the evidence presented during the sentencing hearing, the defendant's presentence report, the arguments of each party, and the principles of sentencing. The trial court listed multiple factors that were favorable to the defendant but ultimately found that full probation would depreciate the seriousness of the offenses, emphasizing the importance of the relationship between teachers and their pupils. The trial court further found that the offenses were particularly "enormous, gross, or heinous," thus, employing the required heightened standard. The trial court's findings reflect that the trial court "considered the parties' arguments and ha[d] a reasonable basis for exercising [its] own legal decisionmaking authority." *Perry*, 656 S.W. 3d at 126-27 (quoting *Rita*, 551 U.S. at 356-57; *Bise*, 380 S.W.3d at 706). Thus, we apply a presumption of reasonableness and review the trial court's decision to deny full probation for abuse of discretion.

In finding that full probation would depreciate the seriousness of the offenses, the trial court emphasized the importance of the relationship between teachers and their pupils and the parents' reliance on an educational system in which their children would be safe from improper conduct by a teacher. The defendant asserts that the circumstances of the offenses were not more egregious than those contemplated by the elements of the offenses. Although the defendant pled guilty to six counts of sexual battery by an authority figure, the evidence presented at the sentencing hearing established that the defendant engaged in up to 30 acts of sexual abuse with the victim, many of which went beyond sexual contact to include sexual penetration, an element of the original charges of statutory rape by an authority figure. See T.C.A. § 39-13-532(a). Thus, the defendant received a very beneficial plea agreement, which "colors the nature and circumstances of the conviction offense." *State v. Hayden Daniel Rutherford*, No. M2016-00014-CCA-R3-CD, 2016 WL 7212573, at *5 (Tenn. Crim. App., Nashville, Dec. 13, 2016) (quoting *State v. John Clayton Fields*, No. M2014-01691-CCA-R3-CD, 2015 WL 4072503, at *6 (Tenn. Crim. App., Nashville, July 6, 2015)) (emphasis in original). This court has "consistently 'recognized that leniency in the terms of a plea agreement may support the imposition of a formidable sentence.'" *Id.* (quoting *John Clayton Fields*, 2015 WL 4072503, at *6); see *State v. Krystal Bowman*, No. E2011-01905-CCA-R3-CD, 2012 WL 3264481, at *3 (Tenn. Crim. App., Knoxville, Aug. 13, 2012); *State v. Larry J. Coffey, Jr.*, No. E2008-00087-CCA-R3-CD, 2009 WL 400642, at *7 (Tenn. Crim. App., Knoxville, Feb. 18, 2009). Accordingly, the record demonstrates that the circumstances of the offenses were more egregious than those contemplated by the elements of the offenses to which the defendant pled guilty and were especially reprehensible, offensive, or otherwise excessive or exaggerated. By denying full probation on the basis that it would depreciate the seriousness of the offenses while recognizing the factors that were favorable to the defendant, the trial court essentially found that the circumstances of the offenses outweighed the factors

favoring a sentence other than confinement. We conclude that the trial court did not abuse its discretion in denying the defendant's request for full probation and imposing a term of split confinement.

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

JAMES CURWOOD WITT, JR., PRESIDING JUDGE