

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 21, 2023

FILED

08/21/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JAMES HOWARD SMITH

Appeal from the Circuit Court for Dickson County
No. 22CC-2020-CR-97 David D. Wolfe, Judge

No. M2022-01586-CCA-R3-CD

Defendant, James Howard Smith, entered nolo contendere pleas to two counts of rape of a child, a Class A felony, and one count of aggravated sexual battery, a Class B felony. The trial court imposed consecutive sentences of forty years for each of the two rape of a child convictions and ten years for the aggravated sexual battery conviction, resulting in an effective sentence of ninety years. On appeal, Defendant contends the trial court imposed an excessive sentence. After review, we affirm the judgments of the trial court.

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

MATTHEW J. WILSON, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and KYLE A. HIXSON, J., joined.

Matthew T. Mitchell (on appeal and at sentencing) and William B. (Jake) Lockert, III (at plea hearing), District Public Defenders, for the appellant, James Howard Smith.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; W. Ray Crouch, Jr., District Attorney General; and Danielle Bryson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Background

In August 2020, the Dickson County Grand Jury indicted Defendant on three counts of especially aggravated sexual exploitation of a minor, three counts of aggravated sexual exploitation of a minor, one count of sexual exploitation of a minor, four counts of rape of a child, one count of aggravated sexual battery, and two counts of incest. The named

victims in the rape of a child, aggravated sexual battery, and incest counts were two members of Defendant's family who were younger than thirteen at the time of the offenses.

Defendant subsequently entered nolo contendere pleas to two counts of rape of a child, with both counts involving the first family member (Victim One), and one count of aggravated sexual battery, involving a second family member (Victim Two). The other counts of the indictment were dismissed. Per the terms of the plea agreement, the trial court would set the length and manner of the sentences at a sentencing hearing.

At the plea acceptance hearing, the State set forth the underlying facts of this case:

Judge, if this case went to trial the proof would be that Detective [Levasseur] with the Dickson County Sheriff's Office received a tip through NCMEC, the National Center for Missing and Exploited Children, that detailed sexual abuse and pornographic photos of children through a Tum[blr] account that linked back to [Defendant]. He, through legal process, confirmed that account went through an IP address that went to [Defendant's] house and obtained a search warrant to search that house and to obtain all of the electronics there as well as any evidence pertaining to the crime.

As a part of that he interviewed [Defendant] and [Defendant] admitted to sexual penetration of [Victim One]. He also admitted to aggravated sexual battery of [Victim Two].

A part of the proof at trial would be the three photos that he took on December the 30th of 2019 of the sexual abuse of [Victim One], and the child was forensically interviewed and made no disclosures. However, from other evidence on the phone Detective [Levasseur] would be able to present that the identity of the child through another photograph taken an hour later and identified by family members as [Victim One].

A part of the proof from the State would also be a lengthy Tum[blr] chat between [Defendant] and another individual where he discussed his plans to commit the assault on December the 30th as well as sent the images to that individual after they occurred and discussed in detail what he did. The proof would also from that chat detail admissions regarding [Victim Two] which corroborate his confession to Detective [Levasseur].

II. Sentencing Hearing

A. Evidence Presented

Two witnesses testified for the State at the sentencing hearing. The first witness, Officer Christina Bright with the Board of Probation and Parole, compiled the presentence report, which was based in part on an interview that one of Officer Bright's colleagues conducted with Defendant. In the interview, Defendant "admitted on some level to allegations" against one of the family members referenced in the indictment, but he also named as victims the other family member referenced above and a third juvenile family member. Defendant claimed that he had been sexually abused as a child, but Officer Bright asserted Defendant "did not go into details." The "Strong R" assessment completed as part of the presentence report indicated Defendant scored as a "moderate" risk to reoffend.

Lieutenant Scott Levasseur with the Dickson County Sheriff's Office (DCSO) investigated this case in his former role as an investigator with DCSO's Internet Crimes Against Children unit. In May 2020, a children's advocacy group provided DCSO with a tip that Defendant was one of several persons sharing sexually explicit photographs of children on Tumblr, a social media website. For three of the photographs, the investigator reviewed the exchangeable image file (EXIF) data, which included technical data concerning the camera which captured the image and "the geolocation and time" each image was captured. This led him to suspect the three images were taken at Defendant's home. The investigator's suspicions were confirmed when Comcast, Defendant's internet service provider, linked the IP address from which the images were uploaded onto Tumblr to Defendant's residence.

After connecting the photographs to Defendant, the investigator obtained a search warrant and met Defendant outside his home. Defendant provided his phone to the investigator, and the investigator observed that Defendant's phone "matched the EXIF data that [the investigator] had pulled off the images." Defendant initially claimed his phone had been "hacked," but he acknowledged that he had some sexually explicit communications with other persons on Tumblr. The investigator showed Defendant some non-pornographic photographs, pulled from Tumblr, of the two child victims; Defendant acknowledged these were the two family members referenced in the indictment. Defendant eventually acknowledged that the three sexually explicit photographs depicted the older of the two victims; Defendant told the investigator that this victim was about nine years old at the time these photographs were taken, and the other victim was four years old.

The investigator's report described the three photographs as follows:

Three image files depict close-up pictures of prepubescent girl's genitals wearing purple shorts, pulled back, along with flower designed panties. She appears to be under a green blanket or comforter. In two of the pictures the adult male's penis is between the child's legs close to her vagina. In one of those pictures the child's hand is holding his penis.

In a later interview, the investigator confronted Defendant with a transcript depicting a series of exchanges between Defendant and another Tumblr user in which, as the investigator put it, the two men "were exchanging photos back and forth of children and commenting what they wanted to do sexually to the children" and "speaking about their past experiences of sex with children[.]" Toward the end of the Tumblr exchange, Defendant wrote to the other user that Defendant had, in the past, "played with [the two victims] and did sexual things with them" and had "raped [a third family member] when she was a newborn" by placing his penis inside this victim's mouth. Defendant informed the other Tumblr user that Defendant would be babysitting the two family member victims that evening and would "play with them." The other user asked Defendant to "take pictures for me," to which Defendant replied, "I'll try." After this Tumblr exchange, Defendant uploaded the three photographs of one of the victims, which led to this case.

During this second interview, Defendant, who had initially told the investigator that he had abused the older of the two named victims only once, admitted to abusing this victim "four or five times . . . over the last three or four years." Defendant also admitted to taking the photographs which showed him abusing this victim on December 30, 2019. Defendant told the lieutenant that he had used his iPhone to take the photos, but the photos had been deleted from Defendant's phone by the time this interview occurred. Defendant admitted placing his fingers inside Victim One's vagina while she slept, and regarding Victim Two, Defendant "admitted to tickling [her], playing tickling games, and . . . his hand spending longer down in her crotch area than he should have." Defendant also claimed during the interview that he had not actually raped the third victim referenced in the Tumblr chats.

The investigator testified that in the Tumblr chats, Defendant "stated numerous times how sexually gratifying it was to look at the pictures, how good it felt to have her hand on his penis, how hot it was. All of [Defendant's] discussions on the chat [were] all about sexual gratification."

Defendant presented no proof on his behalf. The State presented a victim impact statement written by a family member of the victims. In the statement, the family member said, "We went from a trusting family to one being very suspicious, and all of these changes occurred in only a matter of minutes for us. But you, [Defendant], had your hands in all of these changes that we have had thrown at us for quite some[] time." The family member stated the victims' "lives will never be the same again because of [Defendant's] action[s],"

and that “whatever the Judge hands [Defendant] today . . . in no way will help us to ever forget what [Defendant] did to our family.”

B. Parties’ Arguments

The State argued the trial court should enhance the individual sentences based on the existence of several statutory enhancement factors under Tennessee Code Annotated section 40-35-114. The State argued that based on Defendant’s admission that he had committed these offenses for “three or four years” before his arrest, the trial court should apply factor (1), “[t]he defendant has a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range[.]” The State also argued for the application of factor (3), “[t]he offense involved more than one (1) victim.” Regarding factor (4), “[a] victim of the offense was particularly vulnerable because of age or physical or mental disability,” the State acknowledged the victims’ ages were elements of the offenses to which Defendant pleaded, but the State argued this factor should apply because the victims were between the ages of four and five when their abuse started and the victims were “still learning what is right and wrong and [did not] know when to tell about touches that happen.”

Citing to the Tumblr chats, the State argued for the application of factor (7), “[t]he offense involved a victim and was committed to gratify the defendant’s desire for pleasure or excitement[.]” Finally, because Defendant was a family member of the victims and was left alone in the house “specifically as a caregiver” for the children at the time these offenses occurred, the State argued for application of the enhancement factor (14), “[t]he defendant abused a position of public or private trust[.]”

The State argued the trial court should impose consecutive sentences based on Tennessee Code Annotated section 40-35-115(b)(5), which permits the trial court to impose consecutive sentences if the court finds:

The 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.

Regarding the considerations of this consecutive sentencing factor, the State emphasized there was a significant relationship between Defendant and his victims, as “he was in a position of trust, he was left as caregiver. The relationship was one of family.” Regarding the length of Defendant’s undetected sexual history, the State asserted that

Defendant “admitted to [Lt. Levasseur] that his contact with [Victim One] had begun three to four years earlier.” Furthermore, Defendant “was very cautious to be secret with his activity. He groomed these children over a period of time and it went undetected until he took the photographs and sent them over the internet.”

Regarding the other two statutory considerations, the nature and scope of the sexual acts and the extent of the residual physical and mental damage to the victims, the State argued:

[T]he victims here are young, they would not have testified had this case gone to trial, but one of the residual damage[s] that the Court should consider is the fact that this abuse was documented and that it was sent out over the internet, and it was sent out to someone who cannot only save it but can also distribute it. And that peer to peer sharing means that these acts can live on forever. And it is the . . . State’s desire and the family’s desire that this child never knows what happened to her. But those images will live on.

Defense counsel argued for the application of the mitigating provided in Tennessee Code Annotated section 40-35-113(1), “[t]he defendant’s criminal conduct neither caused nor threatened serious bodily injury,” because the victims did not suffer physical injury. Defense counsel argued for the application of the “catch-all” mitigating factor set forth in section 40-35-113(13) because the offenses did not involve penile penetration and because Defendant had been sexually abused as a child. Defendant argued the sentences “should all be r[u]n concurrent[ly] as one sentence with one plea here . . . we would ask the [c]ourt to simply have mercy on [Defendant].”

C. Sentences Imposed

In sentencing Defendant, the trial court applied the sentence enhancement factors requested by the State. The trial court observed that Defendant had no prior criminal convictions, but given the length of time these offenses occurred and Defendant’s admission in his Tumblr chats that he had sexually assaulted another family member when she was an infant, the trial court found “there is a history of extensive criminal behavior on [Defendant]’s part.” The trial court also found the offenses involved more than one victim, given that three family members (the two victims named in the indictment and the third family member referenced in the Tumblr chats) were victimized by Defendant. Because the victims “were very young. . . . [T]hey were all below the age of six or seven years at the time of the commission of the offense,” the trial court found the victims were particularly vulnerable. Based on Defendant’s Tumblr chats, the trial court found Defendant’s offenses were “committed for his desire for pleasure or excitement.” Finally,

citing to the family relationship between Defendant and the victims, the trial court found the Defendant abused a position of trust.

The trial court announced that it had considered Defendant's proposed mitigating factor, but found none applied. Regarding Defendant's claim that the victims did not suffer serious bodily injury, the trial court stated, "the fact that there was no crippling injury does not mean that these children are not going to suffer as a result of this for the rest of their lives." In addressing the "catch-all" mitigating factor, the trial court noted that if Defendant had been abused as a child, "it is regrettable, but . . . it's certainly not a justification for what took place in this case."

In light of these findings, the trial court sentenced Defendant to forty years in the Department of Correction for each of the two rape of a child convictions. This sentence represents the maximum Range II sentence for a person convicted of a Class A felony. *See* Tenn. Code Ann. §§ 39-13-522(b)(2) (an offender convicted of rape of a child "shall be punished as a Range II offender" unless the trial court chooses to sentence defendant as Range III offender); 40-35-112(b)(1) (Range II sentences for Class A felony). The trial court sentenced Defendant to ten years in prison for the aggravated sexual battery conviction, an in-range sentence for a defendant convicted of a Class B felony as a Range I standard offender. *See id.* §§ 39-13-504(b) (offense classification); 40-35-112(a)(2) (Range I sentences for Class B felony).

The trial court ordered all sentences to be served consecutively, finding:

Under [Section] 40-35-115[,] the Court can consider sentencing these . . . multiple convictions consecutively. That statute provides that if the defendant is convicted of two 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 fact that this gentleman was [related] to these victims [. . .] in this Court's opinion certainly qualifies that as being an aggravating circumstance.

The time span of his undetected sexual activity, the indictment itself, ranges, alleges that this occurred over a period of some three years. That's the count that he pled no contest to. The nature and scope of the sexual acts, again, the very nature of the acts and the description of those acts set forth in the Tum[blr] account are some of the most aggravated that I have seen in my years on the bench.

And the extent of the residual physical and mental damage to the victim or victims. While there is no psychological evidence before this Court

to indicate that there was a psychological or physical damage to these children, it is this Court's opinion that by its nature these types of offenses will carry on in the victims' lives and will result in long-term issues for these children unfortunately.

Thus, the total effective sentence the trial court imposed was ninety years in the Department of Correction. This timely appeal followed.

III. Analysis

Defendant argues the trial court imposed excessive sentences. Specifically, Defendant challenges the length of his individual sentences and argues that the trial court abused its discretion by imposing consecutive sentences because the State failed to establish the victims suffered psychological harm. We disagree.

A. Standard of Review

"[S]entences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). A reviewing court should uphold the sentence "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 709-10.

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.'" *Id.* at 698-99 (quoting Tenn. Code Ann. § 40-35-210(e)). However, the statutory factors are advisory only. *See* Tenn. Code Ann. § 40-35-114; *see also Bise*, 380 S.W.3d at 701; *State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). Our supreme court has stated that "a trial court's weighing of various mitigating and enhancement factors [is] left to the trial court's sound discretion." *Carter*, 254 S.W.3d at 345. In other words, "the trial court is free to select any sentence within the applicable range so long as the length of the sentence is 'consistent with the purposes and principles of [the Sentencing Act].'" *Id.* at 343 (quoting Tenn. Code Ann. § 40-35-210(d)).

In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received 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 mitigating and enhancement factors set out in Tennessee Code Annotated

sections 40-35-113 and -114; (6) any statistical information provided by the Administrative Office of the Courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made on the defendant's own behalf about sentencing; and (8) results of the validated risk and needs assessment conducted by the Department of Correction and contained in the presentence report. Tenn. Code Ann. § 40-35-210(b); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in determining the length of a term to be imposed. Tenn. Code Ann. § 40-35-103.

The abuse of discretion standard adopted in *Bise* also applies 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); *see also* Tenn. R. Crim. P. 32(c)(1) (stating that the trial court, in ordering consecutive sentencing, “shall specify the reasons for this decision”). The trial court must find by a preponderance of the evidence that one of the statutory classifications for consecutive sentencing exists. *See* Tenn. Code Ann. § 40-35-115(b).

B. Defendant’s Individual Sentences

The evidence produced at the sentencing hearing supports fully the trial court’s application of the sentence enhancement factors and the sentences imposed for Defendant’s convictions. Through his interviews with Lt. Levasseur and his Tumblr chats, Defendant admitted to a years-long pattern of abuse with the young victims—abuse which may have, based on Defendant’s Tumblr chats, included a victim other than those named in the indictment. Given the close family relationship between Defendant and the victims, Defendant clearly abused a position of private trust. The victims’ youth made them particularly vulnerable, as they likely would have been unable or unwilling to resist or otherwise stop Defendant’s advances. And based on Defendant’s Tumblr chats, in which he discussed in disturbing detail the enjoyment he derived through abusing his young victims, Defendant clearly committed these acts for his own sexual gratification. Given the evidence supporting the trial court’s application of these enhancement factors and the imposition of sentences within the appropriate ranges, this court concludes the trial court did not abuse its discretion in imposing forty-year sentences for both child rape convictions and a ten-year sentence for the aggravated sexual battery conviction.

C. Consecutive Sentencing

In his brief, Defendant argues that because the trial court relied on “evidence, not in the record, of the [victims’] long-term harm, its sentencing decision [imposing consecutive sentences] was based on a clearly erroneous assessment of the proof and thus constitutes an abuse of discretion.” However, as the State notes in its brief, this court has concluded that “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) (internal quotations omitted). Consecutive sentences based on multiple sexual offenses against child victims may still be proper “even when one factor militates against them if the other aggravating circumstances have been established and carry sufficient weight.” *Id.*

In this case, the trial court cited to evidence introduced at the sentencing hearing which supported several of the other factors in subsection (b)(5)—the multiple years of abuse against the victims, the fact that Defendant and the victims were close family members, and the egregious nature of the offenses as depicted in the photographs shared on Tumblr and in Defendant’s Tumblr chats. In fact, Defendant described “masturbating [Victim One] while she slept” on four or five different occasions over the previous three or four years. Defendant also admitted to “playing” with [Victim Two] and letting “his hand spend[] longer down in her crotch area than he should have.” Defendant even stated that he inserted his penis into a third victim’s mouth when she was a newborn. A Victim Impact Statement from a family member reads, “I do know that my daughter and my three granddaughters’ lives will never be the same again.” Each of these circumstances weighed considerably in favor of imposing consecutive sentences. Thus, even if there was insufficient proof that the victims suffered physical and psychological harm, the trial court did not abuse its discretion in imposing consecutive sentences based on subsection (b)(5). Defendant is not entitled to relief on this issue.

IV. Conclusion

For the reasons stated above, we affirm the judgments of the trial court.

MATTHEW J. WILSON, JUDGE