IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE AT JACKSON

Assigned on Briefs August 1, 2023

STATE OF TENNESSEE v. CHRISTOPHER DAVID PACE

Appeal from the Circuit Court for Henderson County
No. 21-096-3 Kyle C. Atkins, Judge

No. W2022-01092-CCA-R3-CD

Defendant, Christopher David Pace, entered a partially open plea in which the length of his sentence was agreed upon. The trial court would determine the manner of service at a separate sentencing hearing. On appeal, Defendant argues that the trial court erred because it relied only upon a "Specific Data Report" in sentencing Defendant. Alternatively, Defendant argues that the trial court abused its discretion in denying Defendant's request for alternative sentencing. The State concedes that it was reversible error for the trial court to sentence Defendant without a presentence report. We find that the trial court erred in failing to consider the validated risk and needs assessment as required by Tennessee Code Annotated section 40-35-210(b)(8). However, we conclude that the issue is waived. We further conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing. We accordingly affirm the judgment of the trial court.

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

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

Brennan M. Wingerter, Assistant Public Defender – Appellate Director, Franklin, Tennessee (on appeal); Jeremy Epperson, District Public Defender; and Hayley Johnson, Assistant Public Defender, Jackson, Tennessee (at plea), for the appellant, Christopher David Pace.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Jody S. Pickens, District Attorney General; and Chadwick R. Wood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

Defendant was indicted by the Henderson County Grand Jury on March 31, 2021 for one count of sale of 0.5 grams or more of methamphetamine and one count of delivery of 0.5 grams or more of methamphetamine, both Class B felonies. These charges stemmed from a controlled drug buy with a confidential informant. Defendant entered a partially open plea to one amended charge of facilitation of sale and delivery of methamphetamine, a Class C felony, on May 16, 2022. The parties agreed that Defendant's sentence should be six years at 35% but left the manner of service of the sentence to the trial court. The trial court accepted Defendant's plea, ordered a presentence report be prepared, and scheduled a sentencing hearing for July 18, 2022.

At the sentencing hearing, the State offered into evidence a "Presentence Report" which was made an exhibit to the hearing. The record shows that the "Presentence Report" is actually a "Specific Data Report" prepared by the Tennessee Department of Corrections. The specific data report lists Defendant's criminal history and various biographical information, as well as information about Defendant's family members and health history. The specific data report contains a written statement from Defendant in which he states that he committed these crimes to get money because his ailing mother's Social Security check had been stolen.

The State requested that the trial court sentence Defendant to incarceration based on his prior criminal history and its previously filed Notice of Intent to Seek Enhanced Punishment. The State's Notice of Intent argued that Defendant's criminal history was extensive and that he committed the offense while on bond or probation, though it did not rely on any specific enhancement factors at the hearing. Defendant urged the trial court "to impose a period of shock incarceration followed by . . . intensive probation and treatment." Defendant argued that the principles of the Sentencing Act would not be served by imposing a sentence of incarceration in light of Defendant's drug addiction.

The trial court ordered that Defendant serve his six-year sentence in incarceration with a release eligibility of 35%, relying chiefly on his criminal history as shown in the specific data report and his past failures at probation.

Defendant appeals.

Analysis

Defendant and the State agree: (1) that the specific data report is not a presentence report for sentencing purposes; (2) that the trial court committed reversible error by failing

to consider a presentence report with a validated risk and needs assessment; and (3) that this Court should remand this matter for a new sentencing hearing in which a presentence report containing the assessment will be prepared or produced and considered. We agree that it was error for the trial court not to consider a validated risk and needs assessment, but we conclude that that issue is waived. We further find that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing.

Validated Risk and Needs Assessment

Trial courts are required to order a presentence report when a defendant is convicted of a felony. T.C.A. § 40-35-205(a). Tennessee Code Annotated section 40-35-210(b), in relevant part, requires a trial court to consider the presentence report in making sentencing decisions, and Tennessee Code Annotated section 40-35-207(a) mandates the contents of the report. Because presentence reports are a mandatory component of sentencing, this Court has previously held that the failure to prepare a presentence report constitutes reversible error. *See State v. Rice*, 973 S.W.2d 639, 642 (Tenn. Crim. App. 1997).

Both Defendant and the State cite *State v. Anderson*, No. E2019-02256-CCA-R3-CD, 2021 WL 98914 (Tenn. Crim. App. Jan. 12, 2021), *no perm. app. filed*, for the proposition that a trial court errs by relying on a specific data report in lieu of a presentence report in sentencing. *Anderson* does not support that proposition. In *Anderson*, a panel of this Court held that "the trial court erred by sentencing the defendant in the absence of the presentence report." *Id*. at *4. *Anderson* makes no mention of a specific data report—it is inapposite here.

The "validated risk and needs assessment" is a mandatory component of a presentence report. T.C.A. § 40-35-207(a)(10). The assessment is "a determination of a person's risk to reoffend and the needs that, when addressed, reduce the risk to reoffend through the use of an actuarial assessment tool designated by the department that assesses the dynamic and static factors that drive criminal behavior." *Id.* § 40-35-207(d). Though the trial court is required to consider the results of the validated risk and needs assessment in sentencing a defendant, *see id.* § 40-35-210(b)(8), "the statute does not mandate that any particular weight be given to the risk and needs assessment, and . . . the weight to be assigned to the assessment falls within the trial court's broad discretionary authority in the imposition of sentences." *State v. Solomon*, No. M2018-00456-CCA-R3-CD, 2018 WL 5279369, at *7 (Tenn. Crim. App. Oct. 23, 2018), *no perm. app. filed* (citing *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012)).

The specific data report used here is similar to a presentence report. It contains biographical information about Defendant, some information about Defendant's physical

history, a record of Defendant's prior convictions, and information relating to the enhancement factors in the notice filed by the State. *Cf.* T.C.A. § 40-35-207(a).

Significally here, Defendant did not object at the sentencing hearing to the lack of a validated risk and needs assessment. Referencing the specific data report, which was admitted as an exhibit without objection, defense counsel urged the trial court "to take into consideration [Defendant]'s written statement included in the investigation report in light of mitigating number . . . 7 . . . , which is he frankly acknowledged a motivation -- that he was motivated by the desire to provide necessities for his family." Defense counsel made no mention that the report did not contain a Strong-R assessment.

It is well-settled that "[t]he failure to make a contemporaneous objection constitute[s] waiver of the issue on appeal." *State v. Gilley*, 297 S.W.3d 739, 762 (Tenn. Crim. App. 2008). This Court has determined that the issue of lack of the validated risk and needs assessment is waived when no objection was made at the sentencing hearing. *State v. Ailey*, No. E2017-02359-CCA-R3-CD, 2019 WL 3917557, at *31 (Tenn. Crim. App. Aug. 19, 2019), *no perm. app. filed* (citing *Gilley*, 297 S.W.3d at 762). Although the trial court failed to consider the validated risk and needs assessment, this issue is waived for our consideration. *See* Tenn. R. App. P. 36(a).

Denial of Alternative Sentencing

Defendant argues that even if even if the failure to consider the validated risk and needs assessment was not reversible error, the trial court abused its discretion in denying his request for alternative sentencing. The State concedes on the first issue, so it makes no argument as to this issue. For the following reasons, we conclude that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing.

"Sentences 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 trial court's decision regarding probation or other alternative sentencing is reviewed likewise. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (citing *Bise*, 380 S.W.3d at 708).

Tennessee Code Annotated section 40-35-103 states that trial courts should look to the following considerations in deciding whether a sentence of confinement is appropriate:

> (A) Confinement is necessary to protect society by restraining an individual 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). Additionally, "[t]he sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed," and "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative or length of a term to be imposed." *Id*. § 40-35-103(4), (5).

As to alternative sentencing, "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant should be considered in determining the sentence alternative[.]" *Id.* § 40-35-103(5). In deciding whether probation is suitable, the trial court should consider: "(1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) special and general deterrence value." *State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017) (citing *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998)). "[T]he burden of establishing suitability for probation rests with the defendant." T.C.A. § 40-35-303(b). Our supreme court has "emphasize[d] that there are no 'magic words' that trial judges must pronounce on the record, [but] it is also critical that, in their process of imposing sentence, trial judges articulate fully and coherently the various aspects of their decision as required by our statutes and case law." *Trent*, 533 S.W.3d at 292. Additionally, "a defendant's criminal history is a critical factor in evaluating his or her amenability to correction[.]" *State v. Thompson*, 189 S.W.3d 260, 267 (Tenn. Crim. App. 2005).

Here, the trial court sentenced Defendant to confinement after making several findings on the record. First, the trial court found that the interests of society would be protected by confinement. The trial court, examining the specific data report, found that Defendant had been committing crimes "since he was 25 on a pretty regular basis." The trial court also found that measures less restrictive than confinement had been applied unsuccessfully to Defendant. The trial court noted that Defendant had previously been on probation at least twice and had been revoked both times. These findings were sufficient to support sentencing Defendant to confinement. *See* T.C.A. § 40-35-103(1).

As to alternative sentencing, the trial court examined the information contained in the specific data report and concluded that Defendant's criminal history in particular weighed against granting probation. The trial court found that the circumstances of the offense "probably" weighed in favor of probation. The trial court also found that "whether

or not [Defendant] might reasonably be expected to be rehabilitated and the chance that he's going to commit another crime" weighed against probation. After examining these factors, the trial court found that alternative sentencing was not appropriate for Defendant and denied his request. Though the trial court's findings did not perfectly track the language of the *Electroplating* factors, we conclude that the trial court's findings were sufficient to deny Defendant's request for alternative sentencing. *See Trent*, 533 S.W.3d at 291. The trial court did not abuse its discretion in denying Defendant's request for alternative sentencing and ordering Defendant to incarceration.

Defendant contends that the trial court "did not account for [Defendant's] history of drug use and apparent lack of treatment over the years." But the trial court was entitled to find that incarceration was appropriate given Defendant's lengthy criminal history. It may be that Defendant requires treatment for a drug problem. We trust our trial courts to make these decisions after weighing the appropriate factors, which the trial court did here. That Defendant is unhappy with the trial court's decision and would have preferred drug treatment, does not mean that the trial court abused its discretion. Indeed, the specific data report states that Defendant had been to a drug treatment facility at some point in the past. The facility's efforts were evidently unfruitful. Defendant is not entitled to relief.

CONCLUSION

Though the trial court erred in sentencing Defendant without the validated risk and needs assessment, we conclude that this issue was waived and that the trial court did not abuse its discretion in denying Defendant's request for alternative sentencing. We therefore affirm the judgment of the trial court.

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TIMOTHY L. EASTER, JUDGE