IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 3, 2021 Session

STATE OF TENNESSEE v. JUSTIN CASE JENKINS

Appeal from the Circuit Court for Madison County
Nos. 19-645, 19-646, 19-647, 19-648, 19-649, 19-650, 19-651
Donald H. Allen, Judge

No. W2020-00577-CCA-R3-CD

The defendant, Justin Case Jenkins, appeals the Madison County Circuit Court's imposition of an effective 16-year sentence and $9,820.35 in restitution for his guilty-pleaded convictions of burglary, theft, vandalism, identity theft, felony evading arrest, and various driving offenses. We affirm the imposition of consecutive sentences but, because the trial court failed to comply with the statutory requirements in ordering restitution, we reverse the restitution orders and remand for a new restitution hearing.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed in Part; Reversed in Part; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and J. ROSS DYER, JJ., joined.

Brennan M. Wingerter, Assistant Public Defender (on appeal), and Greg Gookin (at hearing), Assistant District Public Defender, for the appellant, Justin Case Jenkins.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Jody Pickens, District Attorney General; and Shaun Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In January 2020, the defendant entered a guilty plea to 19 charges in seven different cases with the State's agreeing to his being sentenced as a Range I offender. The parties stipulated to the facts as presented by the State at the plea submission hearing. The State noted that in each of the described events, the defendant drove a stolen vehicle from Smyrna with a stolen Madison County license plate. The State also noted that the defendant admitted to each of the offenses after his arrest.

As to case 19-645, the State presented the following facts:

[O]n or about November the 25th of 2018[,] the victim in this matter, Ms. Amanda Fuller, reported that her vehicle was broken into. The driver's side window was broken out of the vehicle causing the vandalism damage. There were multiple items taken including a wallet, driver's license and debit/credit card, as well as laptops and backpacks and some money. . . . [T]here was a video surveillance from a business that was in the area that did discover this silver Hyundai Santa Fe parked in the parking lot and a subject exit the vehicle and then go back and forth between the victim's vehicle and that vehicle and taking items and then that vehicle left the scene.

As to case 19-646, the State presented the following facts:

[O]n or about December the 12th of 2018[,] the victim in this matter who is an employee of Home Instead Care reported that they observed on video a gray Hyundai parked next to a company vehicle with an unidentified man exiting that vehicle and he was observed on their video surveillance removing tires from a company vehicle and placing the stolen tires in the vehicle that he was in. The value of the tires was about $1000.

As to case 19-647, the State presented the following facts:

[O]n or about December 19th of 2018, the victim in this matter, Ms. Sara Edwards, pulled up to the daycare at West Jackson Baptist Church to run inside there and left her car running and the doors unlocked and somebody entered that vehicle and took her purse and cell phone and several items associated with that. The surveillance from the church showed again this silver Hyundai Santa Fe that [the defendant] was later caught operating pull up and do this and then flee after entering Ms. Edwards' vehicle.

As to case 19-648, the State presented the following facts:

[O]n or about December the 19th of 2018, the victim in this matter, Ms[.] Autumn Rogers, pulled up in front of Kid's First

Daycare on Cheyenne Drive here in Jackson and got out of her vehicle to take her child into the daycare. While she was there, she left her car running and unlocked while she had ran in there and someone had entered the vehicle and stolen her purse and items from the front seat. The video collected from the daycare again showed this silver Hyundai Santa Fe and an individual get out and get these items. That's the same vehicle that [the defendant] was later observed driving.

As to case 19-649, the State presented the following facts:

[B]etween December and January of 2019, [the defendant] did knowingly obtain or exercise control over property under the value of $1000 without the effective consent of the owner being Michael Tyus with intention to deprive the owner thereof.

This was for the stolen license plate. Mr. Tyus reported that someone stole his license plate that was registered to him and was on his Dodge Charger. He lived in Post House Apartments and it happened sometime -- he wasn't exactly sure when, but the license plate was stolen. The license plate was later what was identified as placed on the Hyundai Santa Fe that [the defendant] was driving. That license plate was observed at a lot of these vehicle [sic] and the police knew that that license plate was stolen and didn't belong to this car.

As to case 19-650, the State presented the following facts:

[O]n or about March the 13th of 2019, the victim in this matter, Ms. Leasure, did discover that her vehicle had been broken into at her residence. The vehicle had been unlocked and there was no damage to the vehicle, but taken from her was a driver's license, some debit cards, her wallet was taken from there. She then later observed through checking through her account later on that day that one of her cards had been used at the Huck's gas station so she notified law enforcement about that which they responded to the scene and were able to lift a fingerprint.

Finally, as to case 19-651, the State presented the following facts:

[O]n or about April the 5th of 2019, law enforcement -- this is when they got behind him on that day and began the pursuit to stop him. They did later discover him in possession -- he was in this car and he fled on foot eventually from this car, but was later apprehended in Gibson County.

The State would show that . . . [the defendant] did knowingly obtain or exercise control over property over the value of $10,000 without the effective consent of the owner being Katie Delesandro. This is for the stolen vehicle out of Smyrna, Tennessee. In his statement, [the defendant] said that he bought that vehicle in middle Tennessee for . . . $500, but he knew that it was in his words "hot" or that it was stolen and thus he was in possession of stolen property being Ms. Delesandro's vehicle in Madison County, Tennessee.

He did while upon a public street or other highway flee law enforcement personnel having received a signal for [sic] them to stop and in that attempt to evade arrest did cause risk of death or serious bodily injury to bystanders, pursuing officers or other parties.

. . . [T]here is a dash cam video where he is fleeing. This is in the area of Target, Kroger and that area out north on that frontage road by the bypass where he is fleeing. When he comes to the intersection there I guess best described where Arby's is at Union University Drive and I think that's Stonebrook Drive. . . . He went straight through that intersection without ever stopping. There's [sic] multiple cars in the area. Nobody was struck there, but as he went across into Union University through their property, he actually did strike the back of a vehicle. That person wasn't seriously injured. There was some property damage there, but he did actually strike a vehicle there. Thus he did commit felony evading arrest with that risk of death or serious bodily injury.

He did . . . unlawfully drive a motor vehicle upon a public highway and failed to remain at the scene after having been involved in an accident when he struck that vehicle in the Union University area.

> He did . . . unlawfully display a registration plate because he took the plate from another vehicle . . . and he placed it on this vehicle. The vehicle he was driving did not have proper registration or tags on it.
>
> . . . [H]e fled from the police. The[y] began tracking him with a helicopter and eventually he was captured across the line in Gibson County and then brought back into Madison County.

At the March 2020 sentencing hearing, several victims testified to the amount of loss they suffered by the defendant's offenses. Amanda Fuller testified that on November 25, 2018, she was home from college and that her car was packed with "all of my items that I had brought home for break" for her return trip. The following day she discovered that a window had been broken on her vehicle and some of her belongings had been taken. She stated that she had a $250 deductible for her car insurance but that that insurance did not cover the loss of her laptop and clothing. She stated that she also incurred a $1,500 medical bill from the incident because the incident caused her to experience a "pain crisis" during her high-risk pregnancy. She stated that her total loss was $3,230 and asked the court to order the defendant to pay restitution.

During cross-examination, Ms. Fuller stated that she was hospitalized for four days as a result of the incident.

Charles McQuiston, the owner of Home Instead Senior Care, testified that, on the morning of November 25, 2018, he discovered that "all four tires and rims" had been taken from one of his company vehicles. He stated that it cost $1,664.86 to replace the tires and rims. He could not recall if he had filed an insurance claim for that loss but noted, "I usually don't because of the escalating premiums on an amount like that."

Autumn Rogers testified that someone broke into her vehicle on November 19, 2018. She stated that her vehicle was not damaged but that her purse was stolen along with her wallet, driver's license, debit and credit cards, iPad, electronic stylus, prescription glasses, and vehicle key. She stated that she paid a $112 deductible with her insurance to cover the loss of the iPad. Her total loss amounted to $1,051.73.

Dahona[1] Leasure testified that, on November 25, 2018, her vehicle was broken into while parked at her house. She stated that she received an alert on her telephone

[1] Ms. Leasure's first name is spelled "Dejauna" and "Dejuana" in the transcript of the sentencing hearing, but is spelled "Dahona" in the indictment. Because Ms. Leasure did not spell her first name on the record, we will use the spelling as used in the indictment.

that her debit card had been used. She had left her debit card in her car and, when she went to her vehicle, she discovered that her wallet, a "very expensive" diaper bag, and "some expensive tennis shoes and clothes" were missing. Her vehicle was not damaged. She stated that she did not recover any of her stolen items but that the bank had refunded the fraudulent charges to her debit card. She said that her total loss was $628.

Katie Delesandro testified that her 2016 Hyundai Santa Fe was stolen from the driveway of her middle Tennessee residence shortly after she moved to Tennessee in 2018. She reported the incident to the police and did not hear anything else about the vehicle until July or August of 2019, when she learned that her vehicle had been found in Madison County. She stated that she had already filed an insurance claim on the stolen vehicle by that time and that that claim had been resolved. After she paid a $500 deductible, her insurance covered all but $1,045 on the loss of the vehicle. She said that she also had a GPS system, jewelry, and a firearm in the vehicle when it was taken, but her insurance did not cover the loss of her personal property items that were inside the vehicle when it was stolen. Her total loss was $2,195.76.

During cross-examination, Ms. Delesandro stated that her vehicle was stolen on October 10, 2018.

The defendant's presentence report was exhibited to the hearing without objection.

In rendering its sentencing decision, the trial court considered the victims' impact statements, the presentence report, the "principles of sentencing," and the arguments of counsel. The court noted that the defendant's offenses constituted "very serious criminal conduct because it stretched over several months beginning back in October of 2018 through November of 2018, December of 2018 over into March of 2019 and then over into April of 2019."

As to enhancement factors, the trial court applied factor one, that the defendant had a criminal history beyond that necessary to establish the range; factor eight, that the defendant "failed to comply with the conditions of a sentence involving release into the community"; factor 10, that the defendant "had no hesitation about committing a crime when the risk to human life was high," as to case number 19-651; factor 13, that the defendant committed the current offenses while on probation in a Rutherford County case for which he received judicial diversion; and factor 16, that the defendant had been adjudicated delinquent as a juvenile for acts that would constitute felonies if committed by an adult. *See* T.C.A. § 40-35-114.

As to mitigating factors, the court gave "slight consideration" to the

defendant's being only 20 years old.

The trial court imposed the maximum sentence for each conviction except for the Class D felony of identity theft, for which the defendant received a two-year sentence and the Class C misdemeanor violation of the registration law, for which the defendant received a $10 fine. Finding that the defendant's criminal history was "extensive," the court aligned "the sentences within each docket number . . . concurrently" and aligned the total sentence in each case consecutively, with the exception of case 19-649, which sentence the court aligned concurrently with case 19-650, for a total effective sentence of 16 years' incarceration. The court also ordered the sentences be served consecutively to a sentence for a prior case in Rutherford County. The court ordered restitution to six victims totaling $9,820.35 to be paid in monthly installments of $200. The defendant's convictions, sentences, and restitution orders as indicated by the judgment forms are as follows:

Case #	Convictions	Sentence	Restitution
19-645	Count 1: Burglary of automobile	2 years	$3,230
	Count 2: Theft of property valued at more than $1,000 but less than $2,500	2 years	
	Count 3: Vandalism of property valued at $1,000 or less	11 months, 29 days	
19-646	Count 1: Theft of property valued at more than $1,000 but less than $2,500	2 years	$1,664.86
19-647	Count 1: Burglary of automobile	2 years	$1,050
	Count 2: Theft of property valued at $1,000 or less	11 months, 29 days	
19-648	Count 1: Burglary of automobile	2 years	$1,051.73
	Count 2: Theft of property valued at $1,000 or less	11 months, 29 days	
19-649	Count 1: Theft of property valued at $1,000 or less	11 months, 29 days (concurrent w/ case 19-650)	
19-650	Count 1: Burglary of automobile	2 years	$628
	Count 2: Theft of property valued at $1,000 or less	11 months, 29 days	
	Count 3: Identity theft	2 years	
	Count 4: Theft of property valued at	Merged w/ Ct 3	

	$1,000 or less		
19-651	Count 1: Theft of property valued at $10,000 or more but less than $60,000	6 years	$2,195.76
	Count 2: Felony evading arrest	4 years	
	Count 3: Leaving the scene of an accident	6 months	
	Count 4: Violation of registration law	$10 fine	
	Count 5: Reckless driving	Merged w/ Ct 2	
	Count 6: Failure to stop	Merged w/ Ct 2	

In this timely appeal, the defendant argues that the trial court erred by ordering consecutive alignment of his sentences for what amounted to non-violent property crimes and driving offenses and by imposing restitution in an amount beyond his ability to pay.

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 at 698-99 (quoting T.C.A. § 40-35-210(e)). The abuse-of-discretion standard of review and the presumption of reasonableness also applies to "questions related to probation or any other alternative sentence." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012).

I. Consecutive Sentencing

The defendant contends that the trial court abused its discretion in ordering an effective 16-year sentence, arguing that the total length of the sentence goes against the purposes and principles of the Sentencing Act.

With respect to consecutive sentencing, our supreme court has held that 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). As relevant here, "[t]he court may order sentences to run consecutively if the court finds by a preponderance of the evidence that . . . [t]he defendant is an offender whose record of criminal activity is extensive." T.C.A. § 40-35-115(b)(2).

In our view, the trial court did not abuse its discretion by imposing consecutive sentences. The record supports the trial court's finding that the defendant's criminal history was extensive. The presentence investigation report shows that the defendant was granted judicial diversion for six charges in Rutherford County with a term of supervised probation of five years beginning on July 19, 2018, and that the defendant violated the terms of that probation at least once. The defendant was serving his term of probation in that case when he committed the present offenses. Additionally, the defendant's juvenile record includes adjudications for multiple counts of theft of property, vandalism, burglary, and shoplifting, among other things, from September 2014 through July 2016.

II. Restitution

The defendant challenges the amount of restitution ordered by the trial court, arguing that the court failed to consider his ability to pay.

Although not yet addressed by our supreme court, other panels of this court have consistently held that the abuse of discretion standard articulated in *Bise* applies to orders of restitution. *See e.g.*, *State v. John N. Moffitt*, No. W2014-02388-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Jackson, Jan. 29, 2016) ("When a defendant challenges the restitution amount ordered by the trial court, this court will utilize an abuse of discretion standard of review with a presumption that the trial court's ruling was reasonable.") (citing *Bise*, 380 S.W.3d at 708; *Caudle*, 388 S.W.3d at 279); *State v. David Allen Bohanon*, No. M2012-02366-CCA-R3-CD, slip op. at 6 (Tenn. Crim. App., Nashville, Oct. 25, 2014) ("[B]ased upon *Bise* and *Caudle*, we conclude that the appropriate standard of review for restitution orders is the abuse of discretion standard with a presumption of reasonableness."). Generally, "[a] trial court abuses its discretion when it applies incorrect legal standards, reaches an illogical conclusion, bases its ruling on a clearly erroneous assessment of the proof, or applies reasoning that causes an injustice to the complaining party." *State v. Phelps*, 329 S.W.3d 436, 443 (Tenn. 2010). Moreover, the presumption of reasonableness given to the trial court's decision applies only if the trial court properly applied the purposes and principles of the Sentencing Act. *See Bise*, 380 S.W.3d at 707.

"As a general rule, courts exercising criminal jurisdiction are without inherent power or authority to order payment of restitution except as is derived from legislative enactment." *State v. Alford*, 970 S.W.2d 944, 945 (Tenn. 1998). Code section 40-35-104 provides that the trial court may order the "[p]ayment of restitution to the victim or victims either alone or in addition to any other sentence authorized by" the statute. T.C.A. § 40-35-104(c)(2). Additionally, Code section 40-20-116 provides:

> Whenever a felon is convicted of stealing or feloniously taking or receiving property, or defrauding another of property, the jury shall ascertain the value of the property, if not previously restored to the owner, and the court shall, thereupon, order the restitution of the property, and, in case this cannot be done, that the party aggrieved recover the value assessed against the prisoner, for which execution may issue as in other cases.

Id. § 40-20-116(a).

When the trial court orders the payment of restitution, it must satisfy the requirements in Code section 40-35-304. *See id.* § 40-35-304(g) ("The procedure for a defendant sentenced to pay restitution pursuant to § 40-35-104(c)(2), or otherwise, shall be the same as is provided in this section with" certain statutory exceptions not applicable here.). Code section 40-35-304 provides:

> (b) Whenever the court believes that restitution may be proper or the victim of the offense or the district attorney general requests, the court shall order the presentence service officer to include in the presentence report documentation regarding the nature and amount of the victim's pecuniary loss.
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> (c) The court shall specify at the time of the sentencing hearing the amount and time of payment or other restitution to the victim and may permit payment or performance in installments. The court may not establish a payment or performance schedule extending beyond the statutory maximum term of probation supervision that could have been imposed for the offense.
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> (d) In determining the amount and method of payment or other restitution, the court shall consider the financial resources and future ability of the defendant to pay or perform.

> (e) For the purposes of this section, "pecuniary loss" means:
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> (1) All special damages, but not general damages, as substantiated by evidence in the record or as agreed to by the defendant; and
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> (2) Reasonable out-of-pocket expenses incurred by the victim resulting from the filing of charges or cooperating in the investigation and prosecution of the offense; provided, that payment of special prosecutors shall not be considered an out-of-pocket expense.

Id. § 40-35-304(b)-(e).

We have held that "in theft cases not involving restitution as a condition of probation, section 40-20-116(a) restitution may not exceed either the value assessed by the jury or the theft-value range reflected in the jury's verdict." *State v. Patricia White and Craig White*, No. W2003-00751-CCA-R3-CD, slip op. at 25 (Tenn. Crim. App., Jackson, Oct. 15, 2004).

Here, the trial court's restitution orders failed to comply with the statutory requirements. First, the court failed to consider on the record the "financial resources and future ability of the defendant to pay or perform." *Id.* § 40-35-304(d). The court indicated that it could not make such a determination because the defendant did not testify at the sentencing hearing; however, the statute's requirement of the court to make such a finding is mandatory. *See id.* Although it may be to a defendant's benefit to put on evidence of his financial means, the defendant does not bear the burden of proving his inability to pay. As the defendant correctly points out, the defendant's Uniform Affidavit of Indigency was in the trial record, and the presentence investigation report, which was exhibited to the sentencing hearing, indicated that the defendant had no assets or income and had other certain financial obligations.

Furthermore, the trial court ordered the full amount of restitution to be paid over the course of the effective 16-year sentence. This, however, is impermissible under the statute. The code prohibits a restitution payment schedule to extend beyond the "statutory maximum term . . . that could have been imposed for the *offense*." *Id.* § 40-35-304(c) (emphasis added). Consequently, although the defendant's aggregate sentence is 16 years, the payment schedule may not extend beyond the maximum sentencing term permissible for the specific offense for which restitution is ordered. Restitution is not per se payable over the term of the aggregate sentence.

Additionally, the amount of restitution ordered is reflected on the judgment form of the first count of each case and not necessarily on the judgment relating to the specific offense to which the restitution applies. Because the restitution ordered here corresponds to offenses of theft and vandalism, the judgment forms should reflect the restitution amount ordered for the particular offense. Also, because the defendant's restitution was not ordered as a condition of probation, the amount of restitution may not exceed the theft-value range of which he was convicted. *See Patricia White and Craig White*, slip op. at 25. In case 19-645, the court ordered restitution in the amount of $3,230; however, the defendant was convicted of theft of more than $1,000 but less than $2,500. Similarly, in case 19-647, the trial court ordered restitution of $1,050, but the defendant was convicted of theft of $1,000 or less. These restitution amounts exceed what is permissible.

Finally, at the sentencing hearing, the trial court ordered that the defendant pay $200 per month in restitution and court costs but failed to delineate what portion of the monthly installments was to be allocated to each obligation. The court also failed to indicate how the payments were to be distributed among the six victims.

Because of the errors in the trial court's ordering of restitution, we remand the case for a new restitution hearing at which the trial court must make the appropriate determinations as required by Code section 40-35-304, including the defendant's ability to pay. Furthermore, each restitution order should be reflected on the judgment form of the specific offense that resulted in the pecuniary loss to the victim, and the amount of restitution must not exceed the theft-value range of that offense. Likewise, any payment schedule must not exceed the maximum sentence term permitted for the corresponding offense. Additionally, the court should specify what amount of each monthly installment should be applied to restitution and what amount, if any, should be applied to court costs.

Accordingly, we affirm the imposition of consecutive sentences in this case but reverse the trial court's orders of restitution and remand for a new restitution hearing.

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JAMES CURWOOD WITT, JR., JUDGE