

STANDARD OF REVIEW:

State v. Jackson, 2022 WL 370090 (Tenn. Crim. App. 2022)

More than “lip service” to the purposes and principles of sentencing; Not enough to say, “I’ve considered the purposes and principles of sentencing”

Defendant was convicted of aggravated assault by strangulation and domestic assault. Among other things, the trial judge sentenced Defendant to the maximum sentence of 15 years for the aggravated assault relying in part on application of enhancement factor (9) possession of deadly weapon during the offense and finding of no mitigation. The trial court correctly relied upon four other enhancement factors. Court misapplied factor (9) as record shows possession of weapon five hours prior to the offense. With regard to mitigation, Defendant asked court to consider his struggles with substance abuse and mental health issues which was documented in the pre-sentence report and supported by other evidence. Trial court indicated it could not find any mitigating factors to be present in this case.” The trial court’s failure to recognize or consider the mitigation proof submitted amounts to an abuse of discretion and removes the presumption of reasonableness of a defendant’s sentence.

While we recognize that *Bise* and its progeny hold that there are no “magic words” that must be uttered by the trial court and that the misapplication of an enhancement factor alone is not sufficient to amount to an abuse of discretion and remove the presumption of reasonableness of a sentence, we also recognize that our supreme court and this Court have also held that **more than just lip service must be paid to the purposes and principles of sentencing in order to maintain the presumption**. Specifically, our supreme court has noted that

the imposition of a sentence on a criminal defendant is one of the most important decisions that trial courts are called upon to make because they invariably reduce a person's liberty, often eliminating it entirely. Accordingly, it is imperative that trial judges approach the process only after thoroughly familiarizing themselves with the applicable provisions of our Sentencing Act.

Moreover, although we emphasize that there are no “magic words” that trial judges must pronounce on the record, 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. As we recently reiterated, **“our ruling in Bise specifically requires trial courts to articulate the reasons for the sentence in accordance with the purposes and**

principles of sentencing in order for the abuse of discretion standard with a presumption of reasonableness to apply on appeal.” State v. Pollard, 432 S.W.3d 851, 861 (Tenn. 2013) (citing Bise, 380 S.W.3d at 698-99).

State v. Trent, 533 S.W.3d 282, 292 (Tenn. 2017). Based on the foregoing, it is clear that **a trial court is required to articulate how the enhancement and mitigating factors it finds applicable and the weight applied to each furthers and is in line with the purposes and principles of sentencing.** With this framework in mind, we find that when a trial court simply states it has “**considered the purposes and principles of sentencing,**” misapplies an enhancement factor that is not supported by the proof presented at trial, refuses to acknowledge a mitigating factor that is fully supported by the proof presented, fails to conduct the proper review and analysis of the fine imposed by the jury, and then fails to articulate how all these things relate to and further the purposes and principles of sentencing, then the trial court has abused its discretion and the presumption of reasonableness is removed.

Based on our conclusion that the trial court misapplied enhancement factor (9) because no proof supported the factor, the trial court's failure to find and even consider the mitigation proof offered concerning the defendant's mental health, and the trial court's failure to properly review and analyze the fines imposed by the jury, we determine the trial court abused its discretion in sentencing the defendant. Because we have determined enhancement factor (9) is not applicable and the defendant is entitled to some mitigation based on his mental health issues, we reverse the defendant's sentence of fifteen years for aggravated assault and impose a sentence of thirteen years to be served concurrently with his sentence of eleven months and twenty-nine days in the Tennessee Department of Correction.

ALLOCUTION:

Buchanan v. State, 2023 WL 3476879 (Tenn. Crim. App. 2023)

Petitioner filed for post-conviction relief alleging among other things that the trial judge violated her constitutional rights by failing to inform her she could make a statement of allocution at sentencing.

Our own research shows that the trial court does not have an affirmative duty to inquire whether the defendant wishes to provide a statement of allocution. See State v. Stephenson, 878 S.W.2d 530, 551-52 (Tenn. 1994), abrogated on other grounds by State v. Saylor, 117 S.W.3d 239 (Tenn. 2003) (noting that there is no constitutional right to allocution); Tenn. Code Ann. § 40-35-210(b)(7) (emphasis added)

(providing that the trial court is only required to consider “[a]ny statement the defendant wishes to make on the defendant's own behalf about sentencing”) (emphasis added); Marques Johnson v. State, No. M2014-01419-CCA-R3-PC, 2015 WL 832328, at *4 (Tenn. Crim. App. Feb. 26, 2015) (stating that “[a]lthough a trial court's refusal to allow allocution is reversible error, trial courts are not required to inquire whether the defendant wishes to make any such statement.”); State v. Robert Eugene Crawford, Jr., No. E2012-00001-CCA-R3-CD, 2013 WL 4459009, at *27 (Tenn. Crim. App. Aug. 19, 2013) (denying relief because the defendant was given the opportunity to make a statement of allocution and failed to do so). Because the Petitioner failed to establish that appellate counsel's performance was ineffective regarding this issue, we conclude that the post-conviction court properly denied relief.

ENHANCEMENT FACTORS:

State v. Montgomery, 2024 WL 83341 (Tenn. Crim. App. 2024)

Defendant was convicted of especially aggravated kidnapping and aggravated sexual battery. The trial court imposed an effective sentence of thirty-seven years. Defendant claims error with regard to the application of enhancement factors.

We review a trial court's sentencing determinations under “an abuse of discretion standard of review, granting 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 appealing party bears the burden of establishing that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sent'g Comm'n Cmts. So long as the statutory purposes and principles, along with any applicable enhancement and mitigating factors, have been properly addressed, the sentence should be upheld. Bise, 380 S.W.3d at 706. Even the misapplication of an enhancement or mitigating factor, however, “does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005.” Id.

In sentencing a defendant, the Sentencing Act directs the trial court to consider the following:

- (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 §§ 40-35-113 and 40-35-114;
- (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 wishes to make on the defendant's own behalf about sentencing; and
- (8) The result of the validated risk and needs assessment conducted by the department and contained in the presentence report.

Tenn. Code Ann. § 40-35-210(b). The court shall impose “a sentence justly deserved in relation to the seriousness of the offense.” Id. § 40-35-102(1). The court must consider the defendant's potential for rehabilitation or treatment. Id. § 40-35-102(3)(C), -103(5). In addition, the sentence must be “no greater than that deserved for the offense committed” and “the least severe measure necessary to achieve the purposes for which the sentence is imposed.” Id. § 40-35-103(2), (4).

The trial court applied enhancement factors (1) and (8) to both of the Appellant's convictions. In addition, the court applied factors (5), (6), and (7) to the Appellant's aggravated sexual battery conviction. The Appellant contests the application of each of the factors, with the exception of factor (1), that he had a previous history of criminal convictions or criminal behavior, in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1).

The Appellant argues, and the State concedes, that the trial court misapplied factor (7), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, to his aggravated sexual battery conviction. See Tenn. Code Ann. § 40-35-114(7). The trial court is prohibited from applying an enhancement factor that is an essential element of the offense. Id. § 40-35-114. Because sexual battery requires that the touching be for the purpose of sexual arousal or gratification, factor (7) is an essential element of the offense. State v. Kissinger, 922 S.W.2d 482, 489-90 (Tenn. 1996). Accordingly, the trial court erred in applying factor (7).

The Appellant also argues that the trial court erred in applying enhancement factor (8), that he, before trial or sentencing, failed to comply with the conditions of a sentence involving release into the community, to both of his convictions. See Tenn. Code Ann. § 40-35-114(8). He contends that factor (8) does not apply because he had not yet

been sentenced when he fled Shelby County in 2016. The State concedes that applying factor (8) based on his pre-sentencing flight was improper, but argues factor (8) still applies because the Appellant had a prior probation violation. The only probation violation listed in the pre-sentence report, however, was dismissed. The trial court therefore erred in applying factor (8). See State v. Dean, 76 S.W.3d 352, 380 (Tenn. Crim. App. 2001) (concluding that enhancement factor (8) should not have been applied when the alleged parole violation showed no disposition); State v. Evans, No. M2015-00897-CCA-R3-CD, 2016 WL 3992524, at *8 (Tenn. Crim. App. July 21, 2016), no perm. app. filed (concluding that enhancement factor (8) should not have been applied when a condition of bond was violated prior to sentencing).

The Appellant next argues that the trial court erred in applying enhancement factor (5), that he treated a victim with exceptional cruelty during the commission of the offense, to his aggravated sexual battery conviction. See Tenn. Code Ann. § 40-35-114(5). This factor “requires a finding of cruelty over and above that inherently attendant to the crime[.]” State v. Embry, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995). The Appellant contends that his actions “did not demonstrate a level of cruelty above and beyond that which is inherently involved in an aggravated sexual battery.” We disagree. The Appellant handcuffed the victim and placed a ball gag in her mouth. He repeatedly choked her until she lost consciousness, allowed her to regain consciousness, then choked her until she lost consciousness again. He taunted her, laughing and telling her she would never see her children again. This cruelty was greater than that inherently involved in an aggravated sexual battery, and the trial court therefore properly applied factor (5).

Lastly, the Appellant argues that the trial court erred in applying enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great, to his aggravated sexual battery conviction. He contends that the victim suffered only bodily injury, which is an element of the offense. As discussed in Section I.A., however, the victim suffered protracted unconsciousness, which is a serious bodily injury. The trial court therefore properly applied factor (6). See State v. Jones, 883 S.W.2d 597, 602 (Tenn. 1994) (“proof of serious bodily injury will always constitute proof of particularly great injury”).

Despite the trial court's misapplication of enhancement factors (7) and (8), the court did not abuse its discretion in sentencing the Appellant to the maximum within-range sentences. The court properly applied enhancement factor (1) to the Appellant's especially aggravated kidnapping conviction, and properly applied factors (1), (5), and (6) to the

Appellant's aggravated sexual battery conviction. Additionally, the trial court properly applied the purposes and principles of the Sentencing Act. The trial court repeatedly highlighted the seriousness of the offenses and the need to protect society from the Appellant. The trial court expressed concern about the Appellant's potential for rehabilitation, noting that he raped S.N. after the instant offense and failed to acknowledge any wrongdoing. Accordingly, the court did not abuse its discretion.

MITIGATING FACTORS:

State v. Dunn, 2022 WL 2433687 (Tenn. Crim. App. 2022)

Defendant was found guilty of attempted second degree murder, aggravate assault, employment of a firearm during the commission of a dangerous felony and possession of a firearm during the commission of a dangerous felony. Defendant was sentenced to an effective 18-year sentence with six to be served at 100%. Among other things he contends on appeal that his sentence was excessive.

Defendant argues that his sentence was excessive because the trial court failed to specifically mention the mitigating factors Defendant raised when it pronounced sentencing. He contends that “[f]ailure to specifically discuss the fourteen mitigation factors raised by the defense and give them weight constituted an abuse of discretion.” He also asserts that the trial court improperly relied on what may have happened “had the facts been slightly different” when it sentenced Defendant to the top of the range.

The State responds that the trial court acted within its discretion in imposing an effective eighteen-year sentence.

In determining a specific sentence within a range of punishment, the trial court should consider, but is not bound by, the following advisory guidelines:

- (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
- (2) The sentence length within the range should be adjusted, as appropriate, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c) (2020).

To facilitate meaningful appellate review, the trial court must state on the record the factors it considered and the reasons for imposing the

sentence chosen. Tenn. Code Ann. § 40-35-210(e) (2020); State v. Bise, 380 S.W.3d at 682, 706 (Tenn. 2012). Although the trial court should consider enhancement and mitigating factors, such factors are advisory only. See Tenn. Code Ann. § 40-35-114 (2020); see also Bise, 380 S.W.3d at 698 n. 33, 704; State v. Carter, 254 S.W.3d 335, 346 (Tenn. 2008). We note 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. A trial court’s “misapplication of an enhancement or mitigating factor does not invalidate the sentence imposed unless the trial court wholly departed from the 1989 Act, as amended in 2005.” Bise, 380 S.W.3d at 706. “[Appellate courts are] bound by a trial court’s decision as to the length of the sentence imposed so long as it is imposed in a manner consistent with the purposes and principles set out in sections -102 and -103 of the Sentencing Act.” Carter, 254 S.W.3d at 346.

When the record clearly establishes that the trial court imposed a sentence within the appropriate range after a “proper application of the purposes and principles of our Sentencing Act,” this court reviews the trial court’s sentencing decision under an abuse of discretion standard with a presumption of reasonableness. Bise, 380 S.W.3d at 707. The party challenging the sentence on appeal bears the burden of establishing that the sentence was improper. Tenn. Code Ann. § 40-35-401 (2020), Sentencing Comm’n Cmts.

The trial court determined that Defendant was a Range I standard offender. It merged the aggravated assault conviction with the attempted second degree murder conviction and merged the possession of a firearm during the commission of a dangerous felony conviction with the employment of a firearm during the commission of a dangerous felony conviction. Attempted second degree murder, a Class B felony, has a sentencing range from eight to twelve years. Tenn. Code Ann. §§ 39-12-107(a), -13-210(c) (2015); 40-35-112(a)(2) (2020). Employment of a firearm during the commission of a dangerous felony, a Class C felony, has a mandatory six-year sentence in this instance, which must be served consecutive to the underlying dangerous felony. Tenn. Code Ann. § 39-17-1324(b)(1), (e)(1), (h)(1) (2020).

The trial court considered the “evidence, ... the finding of the jury, the pre-sentence investigation, statements made on [Defendant’s] behalf, and on behalf of the [S]tate and the victim in this case.” Based upon the presentence report, the trial court applied enhancement factor (1) and

enhancement factor (8) because Defendant had several prior convictions and “had a previous history of being on probation, [was] on release or probation at the time of the commission of this offense and prior to trial or sentencing.” Tenn. Code Ann. § 40-35-114(1), (8) (2020). As to count one, attempted second degree murder, the trial court found that Defendant employed a firearm during the commission of the offense and applied enhancement factor (9). Tenn. Code Ann. § 40-35-114(9) (2020). Finally, because Defendant was on probation at the time of the offenses, the trial court applied enhancement factor (13). Tenn. Code Ann. § 40-35-114(13)(C) (2020). The trial court considered but did not apply mitigating factors:

The [c]ourt observes that in reading the materials and the position and reviewing the statute as it relates to 40-35-113 and mitigating factors, the [c]ourt has weighed the enhancement factors. **The [c]ourt does not find that there [are] any appropriate mitigating factors to weigh on your behalf that would apply in this case.**

It is true that the trial court did not explicitly enumerate the mitigating factors raised by the defense. However, the trial court is simply required to “consider” these factors, not explicitly discuss each one. See Tenn. Code Ann. § 40-35-114 (2020); see also Bise, 380 S.W.3d at 698 n. 33, 704; Carter, 254 S.W.3d at 346. Moreover, the trial court selected a within-range sentence, detailed its findings on the records, and its decision is presumptively reasonable. Bise, 380 S.W.3d at 707. The court noted that the outcome of the shooting could have been far worse had the facts been slightly different. We find this statement to be indicative of how serious Defendant's actions were and thus supportive of the trial court's decision to impose a top of the range sentence. The trial court did not abuse its discretion, and Defendant is not entitled to relief.

CONSECUTIVE SENTENCES:

State v. Turner, 2024 WL 808713 (Tenn. Crim. App. 2024)

Defendant was convicted of voluntary manslaughter, reckless endangerment with a deadly weapon, and possession of a handgun by a convicted felon for which he received an effective sentence of twenty-seven years confinement. Among other things he appeals the consecutive sentencing.

B. Consecutive Sentences. The Appellant next contends that the trial court failed to make the requisite findings before imposing consecutive sentencing based on the dangerous offender classification. The State responds that the trial court's implied findings were sufficient.

The abuse of discretion standard of review, accompanied by a presumption of reasonableness, applies to consecutive sentencing determinations so long as the trial court provided adequate reasons on the record. State v. Pollard, 432 S.W.3d 851, 859 (Tenn. 2013). Without adequate reasons, however, this court “should neither presume that the consecutive sentences are reasonable nor defer to the trial court's exercise of its discretionary authority.” Id. at 863-64. Instead, this court “has two options: (1) conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences; or (2) remand for the trial court to consider the requisite factors in determining whether to impose consecutive sentences.” Id. at 864.

When a defendant is convicted of more than one offense, the trial court may order consecutive sentences if the court finds, by a preponderance of the evidence, that the defendant fits into at least one of the enumerated categories. Tenn. Code Ann. § 40-35-115(b). In this case, the trial court imposed consecutive sentences based on its finding that the Appellant was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high. See id. § 40-35-115(b)(4). Because the dangerous offender classification is “the most subjective to apply,” the trial court must make two additional findings before ordering consecutive sentences based on this classification. Pollard, 432 S.W.3d at 863 (citing State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999)). The trial court must find that the aggregate sentence is “ ‘reasonably related to the severity of the offenses’ ” and “ ‘necessary in order to protect the public from further criminal acts.’ ” Id. (quoting State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)). Without such findings, the trial court has failed to provide adequate reasons on the record to support the imposition of consecutive sentences. Id.

The trial court in this case failed to make the additional required findings before imposing consecutive sentences based on the dangerous offender classification. We disagree with the State's contention that the court's implied findings were sufficient. Though the court discussed the dangerous nature of the instant offenses, “ ‘[e]very offender convicted of two or more dangerous crimes is not a dangerous offender subject to consecutive sentences.’ ” See Pollard, 432 S.W.3d at 863 (quoting Wilkerson, 905 S.W.2d at 938). Because the court failed to provide adequate reasons on the record, we cannot presume that the consecutive sentences are reasonable, nor defer to the court's exercise of discretion. The record, however, is sufficient to conduct a de novo review of the consecutive sentencing determination.

After a de novo review, we conclude that the effective twenty-seven year sentence is reasonably related to the severity of the offenses. The Appellant, using a handgun he was prohibited from possessing, fired at least eight shots toward the home where his children and their mother lived. He struck two individuals, killing one of them. The Appellant's three children were also inside of the home when the Appellant began firing. He fled the scene without rendering aid and discarded his handgun.

We also conclude that the sentence is necessary to protect the public from further criminal acts. The Appellant has five prior felony convictions, one of which resulted in “severe trauma to [the] head area of [the] victim,” and eight prior misdemeanor convictions. Despite being a convicted felon, he kept a handgun in his truck. An argument and a punch provoked the Appellant to retrieve that gun and fire at least eight shots, knowing that his children and their mother were inside of the home. The record therefore supports the need to protect the public from further criminal acts of the Appellant. Accordingly, there is an adequate basis for imposing consecutive sentences.

State v. Montgomery, 2024 WL 83341 (Tenn. Crim. App. 2024)

Defendant was convicted of especially aggravated kidnapping and aggravated sexual battery. The trial court imposed an effective sentence of thirty-seven years. Defendant claims error in imposing consecutive sentences.

As relevant in this case, a trial court may order multiple sentences to be served consecutively if it finds by a preponderance of the evidence that “[t]he defendant is an offender whose record of criminal activity is extensive” or “[t]he defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(2), (4). When imposing consecutive sentences, the court must still consider the general sentencing principles. State v. Imfield, 70 S.W.3d 698, 708 (Tenn. 2002). When imposing consecutive sentences based on the dangerous offender classification, the court must also find that “the aggregate sentence is ‘reasonably related to the severity of the offenses’ and ‘necessary in order to protect the public from further criminal acts.’ ” Pollard, 432 S.W.3d at 863 (quoting State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995)).

A defendant's record of criminal activity is “extensive” if it is “considerable or large in amount, time, space, or scope.” State v. Perry,

656 S.W.3d 116, 128 (Tenn. 2022). In evaluating whether a defendant's record of criminal activity is extensive, courts should consider the following factors:

- (1) The amount of criminal activity, often the number of convictions, both currently before the trial court for sentencing and prior convictions or activity;
- (2) The time span over which the criminal activity occurred;
- (3) The frequency of criminal activity within that time span;
- (4) The geographic span over which the criminal activity occurred;
- (5) Multiplicity of victims of the criminal activity; and
- (6) Any other fact about the defendant or circumstance surrounding the criminal activity or convictions, present or prior, that informs the determination of whether an offender's record of criminal activity was considerable or large in amount, time, space, or scope.

Id. at 129. The court's consideration of a defendant's criminal activity is not limited to activity for which the defendant was actually convicted. See *id.* (directing courts to consider not just prior convictions, but prior activity).

The trial court did not abuse its discretion by imposing consecutive sentences based on the Appellant's extensive record of criminal activity. The court noted that the Appellant had a lengthy criminal history that began in 1997. The Appellant had five prior misdemeanor convictions, eleven misdemeanor charges that did not result in conviction, and a felony conviction. Before the court for sentencing were two additional felonies. The court also found that the Appellant raped S.N. after fleeing Shelby County. The record therefore supports the trial court's finding that the Appellant had an extensive record of criminal activity. Though the trial court did not specifically make the additional findings required to classify the Appellant as a dangerous offender, the Appellant's extensive criminal history alone justifies consecutive sentences. See State v. Nelson, 275 S.W.3d 851, 870 (Tenn. Crim. App. 2008) (citing State v. Adams, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997)) (“[A]n extensive criminal history, standing alone, is enough to justify the imposition of consecutive sentencing.”). Accordingly, the Appellant is not entitled to relief.

PROBATION:

State v. Trent, 533 S.W.3d 282 (Tenn. 2017)

[T]he imposition of a sentence on a criminal defendant is one of the most important decisions that trial courts are called upon to make because they invariably reduce a person's liberty, often eliminating it entirely.

Accordingly, it is imperative that trial judges approach the process only after thoroughly familiarizing themselves with the applicable provisions of our Sentencing Act. Moreover, although we emphasize that there are no "magic words" that trial judges must pronounce on the record, 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.

Keven Trent pled guilty to one count of vehicular homicide by intoxication. He was sentenced by agreement to eight years with manner of service to be determined by the judge after a hearing. The trial court ordered the sentence to be served in confinement. CCA reversed and ordered full probation finding that the trial court's sole reason for denying probation was the seriousness of the offense and the record did not support that ruling. **[There is a longstanding rule that if probation is to be denied solely because of the seriousness of the offense and the offense is one for which the legislature makes eligible for probation, 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.]**

In this case, the trial court made no findings regarding the particular circumstances of the offense. Instead, it appears he denied probation simply upon the elements of the offense. If so, he abused his discretion. However, the record is unclear as to whether seriousness of the offense was the only basis for denying probation. "Unfortunately, the trial court failed to explain on the record any determinations it made regarding the Defendant's amenability to correction. Nor did the trial court explain why, apparently, it concluded that the Defendant failed to carry his burden of establishing suitability for probation." Trial court also misapplied the only enhancement factor it referenced: that the Defendant "had no hesitation about committing a crime when the risk to human life was high." **["However, the law has been clear for over twenty years that this enhancement factor is applicable only when there is proof that the defendant's conduct in committing the offense created a high risk to the life of someone other than the victim."]** There was no such proof in this case.

In sum, it appears to us that the trial court did not undertake the proper analysis before imposing a sentence in this case....Most significantly, the trial court failed to articulate its reasons for ordering incarceration in accordance with the purposes and principles of sentencing. In particular, because the trial court was not more explicit in its reasoning, we are concerned that it may have ordered incarceration based simply upon the elements of the crime in spite of our legislature having provided that persons who commit vehicular homicide by intoxication are eligible for probation.

Remanded for new sentencing hearing.

State v. Rollins, 2023 WL 4078700 (Tenn. Crim. App. 2023)

Affirmed despite misapplication of enhancement factor; Proper denial of probation based on seriousness of the offense. Articulation of reasoning was thorough!

Defendant pled guilty to one count of reckless vehicular homicide and two counts of reckless endangerment with no agreement as to the sentences. After a sentencing hearing, the trial court denied judicial diversion and alternative sentencing. Defendant was sentenced to six years for reckless vehicular homicide and concurrent sentences for the reckless endangerments. Defendant claims the sentence is excessive, the trial court improperly applied enhancement factors and erred in denying an alternative sentence.

With regard to the denial of diversion, the trial judge went through the applicable factors weighing them for and against diversion and placed significant weight on the “circumstances of the offense.” Great example of how to handle Electroplating factors. Defendant did not appeal the denial of diversion.

As to the length of the sentence, the judge imposed the maximum of six years applying enhancement factors (4) vulnerable victim, (6) particularly great injuries and (14) abuse of private trust.

Trial court misapplied enhancement factor (6) as it is well established that this factor cannot be used with vehicular homicide because the death of the victim is an element of the offense. Nevertheless, in this case “the trial court considered the evidence and the statutorily mandated considerations and referenced the principles and purposes of sentencing. We conclude that, even though the trial court erroneously applied enhancement factor (6), the sentences imposed were within the statutory range and consistent with the purposes and principles of sentencing, and we accordingly conclude there was no abuse of discretion.”

Concerning the denial of probation, the Court said:

Under Tennessee Code Annotated section 40-35-103, the trial court should look to the following considerations to determine whether a sentence of confinement is appropriate:

- (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). Furthermore, “[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(5). In deciding the suitability of probation, 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). “The guidelines applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion” elucidated in State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998). *Trent*, 533 S.W.3d at 291 (quoting State v. Jeremy Brandon Scott, No. M2010-01632-CCA-R3-CD, 2011 WL 5043318, at *11 (Tenn. Crim. App. Oct. 24, 2011), no perm. app. filed). “The burden of establishing suitability for probation rests with the defendant.” T.C.A. § 40-35-303(b). See Electroplating, Inc., 990 S.W.2d at 229.

With regard to the denial of probation, the trial court relied primarily on the circumstances of the offense.

Our review of the record indicates that the trial court “approache[d] the process only after thoroughly familiarizing [itself] with the applicable provisions of our Sentencing Act” and properly applied the provision of the Act to the facts of this case. See Trent, 533 S.W.3d at 292. The trial court was able to “articulate fully and coherently the various aspects of the decision as required by our statutes and case law.” *Id.* The trial court relied on the circumstances of the offense as particularly committed in this case by noting that after driving the car at a high rate of speed with passengers in the car, the car wrecked and burst into flames. Haizley, the

minor victim, suffered injuries so significant that she was transported from Knoxville to Vanderbilt in Nashville via LifeFlight for treatment. She succumbed to her injuries a little over a week after the accident. Two adult passengers were trapped in the car and only able to exit from the driver's side door. They heroically went back into the burning vehicle to rip the car seat holding the toddler free to get her out of the vehicle, while Defendant ran from the scene. Defendant's actions after the wreck went beyond the recklessness required for the crime, evincing a disregard for the human lives within the vehicle, including his two friends and fifteen-month-old child who was left strapped in a car seat inside a burning vehicle. The trial court noted that the offense was "tragic" and "sad" and that the injuries to the deceased victim were "severe" noting especially her "suffering" after the accident.

We conclude that no abuse of discretion has been shown. The trial court was clearly heavily swayed by the particular circumstances of the offense as committed in this case and stated on the record that "there are times when justice just requires to avoid deprec[i]ating the seriousness of the offense" in denying alternative sentencing. Defendant's actions at the time of the crash by running away from the scene arguably contributed to the suffering and ultimately the death of the helpless victim. Although the trial court did not use the terms "especially violent, horrifying, shocking, reprehensible, or offensive or otherwise excessive or exaggerated degree," we are satisfied that the language used by the trial court in describing the particular circumstances of the offense as committed here, meets the standard required by Trotter. See Trotter, 201 S.W.3d at 654-56.

State v. Pitts, 2023 WL 4363415 (Tenn. Crim. App. 2023)

Failure to articulate relevant statutory considerations; Failed to even acknowledge other factors much less indicate that nature of offense outweighed those factors.

Defendant, James Pitts, pled guilty to one count of aggravated assault in exchange for a sentence of six years with manner of service to be determined by the trial court. Two counts of aggravated sexual battery were dismissed. Following a hearing, the judge ordered confinement.

While great deference is given to the trial court in sentencing matters, the trial court is required to at least make minimal findings. Here, however, the record reveals that the trial court essentially determined the defendant had received enough of a "break" by being allowed to plead guilty to aggravated assault, and the court focused on the sentence the defendant

would have received had he been convicted of multiple counts of aggravated sexual battery or rape of a child. The trial court failed to acknowledge any other relevant statutory considerations or articulate the reasons for the sentence of confinement in accordance with the purposes and principles of sentencing.

Remanded for judge to make appropriate findings.

PROBATION REVOCATION:

Although the court's findings do not have to be particularly lengthy and detailed, the court must place sufficient finds and reasons in the record both as to its decision to revoke and the separate discretionary decision as to the consequences. A separate sentencing hearing is not required and references to the sentencing principles is not necessary.

Failure to give reasoning:

State v. Delong, 2024 WL 774937 (Tenn. Crim. App. 2024)

Defendant was on probation for period of ten years for aggravated sexual battery. While on probation the Defendant committed and pled guilty to DUI, which served as the basis of a probation violation warrant. He was ordered to serve the mandatory 48 hours in jail for the DUI, followed by probation. After conducting a probation revocation hearing and hearing from the State that at the time of the original plea, the Defendant had pled to a lesser offense than that charged, the trial judge ordered the Defendant to serve the 10 year sentence in confinement. The complete analysis of the judge was as follows:

“All right. Based upon his admission I’ll find he’s in violation of his probation in a substantial way, based upon both his admission and a preponderance of the evidence. I’m going to revoke him to serve the sentence.”

The Defendant contends that the trial court abused its discretion by ordering him to serve his original ten-year sentence in confinement because the trial judge failed to place any findings on the record.

Probation revocation is a “two-step” process by the trial court. State v. Dagnan, 641 S.W.3d 751, 757 (Tenn. 2022). “The first [step] is to determine whether to revoke probation, and the second [step] is to determine the appropriate consequence upon revocation.” Id. Each step is a separate and distinct decision, although there is no requirement that two

separate hearings be held. *Id.* Upon revoking probation, a trial court may order incarceration for a period of time, execute the original sentence, extend the probationary period by up to two years, or return the defendant to probation “ ‘on appropriate modified conditions.’ ” *State v. Daniel*, No. M2021-01122-CCA-R3-CD, 2022 WL 6644369, at *2 (Tenn. Crim. App. Oct. 11, 2022) (quoting *Dagnan*, 641 S.W.3d at 756). **In determining the consequence of a probation revocation, the trial court may consider “the number of revocations, the seriousness of the violation, the defendant’s criminal history, and the defendant’s character.”** *Dagnon*, 641 S.W.3d at 759 n.5. This court must review and address both decisions on appeal. *Id.* at 757-58. As long as the trial court places sufficient findings and the reasons for its decisions as to the revocation and the consequences on the record, this court’s standard of review is abuse of discretion with a presumption of reasonableness. *Id.* at 759.

Regarding step one, the Defendant acknowledges that his guilty plea to DUI justified the trial court’s finding that he violated the terms of his probation. He claims, though, that the trial court violated step two in *Dagnan* by failing to articulate its reasons for placing his original ten-year sentence into effect. We agree. The trial court said it was revoking his probation based on his “admission” to DUI, but the trial court did not make any additional findings or provide any reasoning for ordering him to serve his ten-year sentence in confinement.

DIVERSION:

State v. Courter, 2021 WL 2909784 (Tenn. Crim. App. 2021)

Diversion factors; Seriousness of offense:

Defendant pled guilty to reckless aggravated assault and was ordered to serve 30 days in jail followed by three years probation. Defendant claims error in denying judicial diversion. More specifically he claims the court failed to consider the Electroplating factors. Facts show that the Defendant and victim got into a fight during which the victim was, at one point, rendered unconscious and while he was unconscious the Defendant stomped the victim’s head with his boot causing a skull fracture and severe hemorrhage of his brain. Trial court denied judicial diversion largely because of the seriousness of the offense finding that the assault was really more than a reckless aggravated assault.

The trial court must consider the following factors in deciding whether a qualified defendant should be granted judicial diversion: (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; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the

interests of the public as well as the defendant. Electroplating, Inc., 990 S.W.2d at 229 (citing Parker, 932 S.W.2d at 958; State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)). The trial court may consider the following additional factors: “the [defendant]’s attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.” State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988) (citations omitted)). The trial court must weigh all of the factors in determining whether to grant judicial diversion. Electroplating, Inc., 990 S.W.2d at 229 (citing Bonestel, 871 S.W.2d at 168). Finally, “a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration.” State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997) (citing Bonestel, 871 S.W.2d at 168).

In King, the court explained how the Bise standard of review is applied to the trial court’s consideration of the Parker and Electroplating factors:

Under the Bise standard of review, when the trial court considers the Parker and Electroplating factors, specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the grant or denial so long as there is any substantial evidence to support the trial court’s decision.

Although the trial court is not required to recite all of the Parker and Electroplating factors when justifying its decision on the record in order to obtain the presumption of reasonableness, the record should reflect that the trial court considered the Parker and Electroplating factors in rendering its decision and that it identified the specific factors applicable to the case before it. Thereafter, the trial court may proceed to solely address the relevant factors.

King, 432 S.W.3d at 327 (internal footnote omitted).

In the instant case, the Defendant argues that because he was a “qualified [D]efendant” for purposes of judicial diversion, the trial court was required to weigh the Electroplating factors “against each other and explain its ruling on the record.” Our review of the record reflects that the

trial court did consider the Parker and Electroplating factors in denying judicial diversion, and it also considered mitigating factors. Despite the Defendant's complaint that the trial court did not properly weigh the factors against each other and explain its ruling on the record, we note that the **trial court is not required to “utilize any ‘magic words’ or specifically reference the case names ‘Parker’ and ‘Electroplating’ when discussing the relevant factors in order to receive the presumption of reasonableness.”** King, 432 S.W.3d at 327 n.8. Therefore, we afford the trial court's denial of diversion a presumption of reasonableness, and we must only determine whether “any substantial evidence” exists in the record on appeal to support the trial court's denial.

The record reflects that the trial court listened to defense counsel's arguments as to why each of the Electroplating factors favored the trial court's granting the Defendant judicial diversion. In denying diversion, the trial court stated that it had to “factor in the serious nature of the offense and the sentencing and the 40-35-313 ... those factors that [defense counsel] has mentioned [are] similar to whether it's probation or not.” **Though the trial court did not utilize “magic words” or reference the Electroplating factors by name, our review of the records reflects that the trial court considered at least factors (2), (3), and (6).** In explaining why it was denying diversion, the trial court noted the circumstances of the assault, referencing the victim's head “bouncing back and forth off the pavement” as the Defendant kicked him in the head; that the assault was the Defendant's “first felony conviction,” though he had two previous DUI arrests; and explained that the Defendant “and everybody else needs to know that there [are consequences] as a result of” their actions. The trial court also noted “in terms of mitigating factors” that the Defendant's alleged cessation of consuming alcohol could be considered “under the catch all provision[.]”

The record shows that the Defendant became intoxicated and assaulted the victim so severely that he suffered a skull fracture and brain hemorrhage and had to be prescribed anti-seizure medication. The Defendant continued to assault the victim even after he was rendered unconscious. While the trial court did not deny judicial diversion solely because of the circumstances of the offense, the record supports the trial court's decision on this ground alone. See State v. Moore, No. E2014-01790-CCA-R3-CD, 2015 WL 4314107, at *4 (Tenn. Crim. App. July 15, 2015) (affirming the denial of judicial diversion and finding that “[t]he circumstances of the offenses [were] very disturbing and weigh[ed] heavily against judicial diversion”); State v. Parson, 437 S.W.3d 457, 496 (Tenn. Crim. App. 2011) (affirming denial of judicial diversion where Defendant's

amenability to correction and the circumstances of the offense “weighed heavily” against judicial diversion despite the satisfactory remaining factors) (citing State v. Jonathan B. Dunn, No. M2005-01268-CCA-R3-CD, 2006 WL 1627335, at *9 (Tenn. Crim. App. June 12, 2006) (affirming denial of judicial diversion where, even though factors (3), (4) and (5) weighed in the defendant's [favor], the circumstances of the offense were “particularly troublesome” where defendant held a gun six inches from the victim's head)); State v. Brian Carl Lev, No. E2004-01208-CCA-R3-CD, 2005 WL 1703186, at *3 (Tenn. Crim. App. Mar. 22, 2005) (“The denial of judicial diversion may be based solely on the nature and circumstances of the offense, so long as all the other relevant factors have been considered, and this factor outweighs others that might favorably reflect on the [defendant]’s eligibility.”) (citing State v. Curry, 988 S.W.2d 153, 158 (Tenn. 1999)). We conclude that the trial court properly considered and weighed the Parker and Electroplating factors on the record and accordingly did not abuse its discretion in denying the Defendant's request for judicial diversion. The Defendant is not entitled to relief.