

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 22, 2008

STATE OF TENNESSEE v. JEFFREY L. BRADEN

**Direct Appeal from the Circuit Court for Williamson County
Nos. II-CR102142, II-CR122288 Timothy L. Easter, Judge**

No. M2007-02719-CCA-R3-CD - Filed April 1, 2009

The Defendant, Jeffrey L. Braden, entered pleas of guilty to aggravated assault, a Class C felony, in case number II-CR102142, and to simple assault, offensive touching, a Class B misdemeanor, in case number II-CR122288. The terms of the negotiated plea agreement in case no. II-CR102142 provided that the determination of the length and manner of service of the Defendant's sentence was left to the trial court's determination. The agreed upon sentence in case no. II-CR122288 was six months, with the manner of service of the Defendant's sentence left to the trial court's determination. Following a sentencing hearing, the trial court sentenced the Defendant as a Range I, standard offender to five years for his aggravated assault conviction. The trial court imposed the agreed upon sentence of six months in case no. II-CR122288 and ordered that the Defendant serve his sentences concurrently. The trial court denied the Defendant's request for alternative sentencing and ordered the Defendant to serve his sentences in confinement. On appeal, the Defendant argues that the trial court erred in determining the length of his sentence for his aggravated assault conviction and in denying the Defendant's request for alternative sentencing. After review, we affirm the judgments of the trial court.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., J., joined. THOMAS T. WOODALL, J., not participating.

Dana M. Ausbrooks, Assistant Public Defender, Franklin, Tennessee, for the appellant, Jeffrey L. Braden.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; and Kim R. Helper, District Attorney General, for the appellee, the State of Tennessee.

OPINION

I. Sentencing Hearing

At the guilty plea submission hearing, the Defendant waived the State's presentation of a factual basis in support of his pleas of guilty in case no. II-CR102142 and II-CR122288. The circumstances surrounding the the Defendant's convictions, therefore, are gleaned only from the sentencing hearing and presentence report which was introduced as an exhibit at the sentencing hearing without objection.

Don Emerson, the victim of the aggravated assault offense, testified that he worked for Don Cartee at a horse training facility in Williamson County. On June 28, 2006, Mr. Cartee called the victim at home after work and told him that the Defendant was interested in working at the facility. Mr. Cartee asked the victim to pick up the Defendant in Franklin the next morning and bring him to work. The victim complied with Mr. Cartee's request, and he and the Defendant worked together off and on throughout the next day cleaning stalls. The victim said that at approximately 4:00 p.m., the Defendant told him that it was time to go home and asked the victim to take him to Mr. Cartee. The victim stated that he normally worked until 6:00 p.m. or 7:00 p.m. The Defendant asked Mr. Cartee for his pay because he was ready to go home. Mr. Cartee told the victim that payday was not until Monday, and the two men began to argue. The victim said that the Defendant grew more and more angry and begged Mr. Cartee to pay him. After a few minutes, Mr. Cartee pulled a few bills from his pocket and threw them down, saying, "There, that's all I've got." The Defendant refused to take the money and begged the victim to take him home. The victim told the Defendant that he could not leave without Mr. Cartee's permission. Mr. Cartee and the Defendant argued again, and then Mr. Cartee said, "Just take him home."

The victim said that the Defendant was very angry on the ride to Franklin. The Defendant told the victim that he was going to "screw up all of [Mr. Cartee's] equipment," and that the Defendant "could really mess him up." The victim said that several young women boarded horses at the facility, and the Defendant said that "he would not want to see those young ladies . . . hurt." This statement concerned the victim, and he reassured the Defendant that he would be paid for his day's work on the following Monday. As the two men drove to Franklin, Mr. Cartee called the victim on his cell phone and asked, "Have you got him home yet?" The victim responded, "No, I do not." The Defendant began screaming, "Pay me my money, you owe me my money, pay me my money." The victim disconnected the call.

The Defendant gave the victim directions to his house. The victim pulled up to a stop sign, and the Defendant reached for the car door handle. Then the Defendant said, "Somebody's going to pay me my money. I'm going to get my money one way or the other." The Defendant asked the victim if he had any money, and the victim told him, "No." The victim said that he "felt a little uneasy" when the Defendant continued to sit in the car. At that point, the Defendant suddenly slammed the victim's head into the steering wheel and then pinned him against the car door. The Defendant began striking the victim with his fists. The victim said that his ear was torn in three

places, and the blows cracked his eye socket and broke his right thumb. Someone opened the car door, dragged the Defendant out of the car, and told the victim to “[l]eave, just leave.” The victim said that his vehicle was blocked at the intersection and someone told him that the Defendant was “coming after [him] again.” At that point, police officers arrived, and the victim was eventually transported to Williamson County Medical Center.

On cross-examination, the victim acknowledged that the Defendant was very polite on the ride to work and that he did not notice the Defendant argue with any of the other employees during the day. The victim acknowledged that the Defendant did not appear to be out of control during his argument with Mr. Cartee, just angry. The victim said that just before he reached the stop sign, a large vehicle pulled into the road, and he was forced to stop his vehicle. The victim stated that the Defendant “absolutely lost it,” and hung out of the passenger side window, cursing at the driver of the other vehicle.

No witnesses were called to testify about the circumstances surrounding the charged offense in case no. II-CR12288. The presentence report, however, contains the narrative from the affidavit of complaint as follows:

On 8 October 2006 at approximately 9:18 p.m., [the Defendant] was being assisted to his bunk [in the Williamson County Jail] when he became combative with correction officers. Officers attempted to talk to [the Defendant] and calm him down, but instead he grabbed a shower rod. [the Defendant] then started swinging the rod, striking at the windows in the pod area. When Corporal [David] Walker entered the pod area, [the Defendant] was still swinging the rod and struck Corporal Walker on his right hand and arm. Immediately [Defendant] was sprayed and taken into custody.

The Defendant introduced as an exhibit the forensic evaluation performed by The Guidance Center after the Defendant was charged with assault in case no. II-CR122288. After his evaluation, Dr. Jorge Victor Boero concluded that the Defendant was competent to stand trial and that a defense of insanity could not be supported. He stated that the Defendant “did have a mental illness or condition at the time of [the] alleged offense that would have caused him to lack the capacity to form the requisite mental state” for the offense of assault. Dr. Boero observed that the Defendant had a long history of psychosis and was currently been treated for schizophrenia, paranoid type.

The Defendant testified at the sentencing hearing that he currently resided with his mother and step-father in Franklin. The Defendant said that he was incarcerated in the Williamson County Jail for approximately five months for the aggravated assault offense and acknowledged that he incurred the simple assault charge while incarcerated. The Defendant said that he had not committed any further offenses since being released on bond.

Following his release, the Defendant said that he worked for a pizza company for approximately one and one-half weeks before leaving to find a better job. He next worked in a

nursing home's laundry facility, but he was discharged approximately one month later when his employer learned that he had a prior felony conviction. The Defendant said that he was next employed by a construction company until September. The Defendant said that although he was now unemployed, he was scheduled to contact the manager of a gasoline company the next day to see if the company would hire him.

The Defendant said that he left school after the seventh grade. He said that he was currently taking Zyprexis for his bipolar disorder, Dilantin to control his seizures, Prozac for depression, and various drugs to control the side effects of these prescription drugs. The Defendant stated that he had taken his medicine as prescribed while he was on bond for the current charges.

The Defendant said that he pled guilty to especially aggravated robbery shortly after he turned eighteen and was sentenced to fifteen years confinement in the Department of Correction. The Defendant said that he was not paroled early and was released after the completion of his sentence in August 2005. He said that he was diagnosed with bipolar disorder shortly after he was incarcerated for his especially aggravated robbery conviction and that he suffered a "mental breakdown" at the Northwest Correctional Facility, after which he was sent to the DeBerry Special Needs Facility. He said that he did not see a doctor between August 2005 and June 2006 when the current offenses were committed, but he was currently being treated by The Guidance Center.

The Defendant stated that he had obeyed the law since the incident, maintained employment, and treated people "respectfully" and "honestly." The Defendant said that he "[j]ust made that mistake of – prior to the incidents, just being on different medications, and they have records to prove [it], so just since then it's been okay with society, no problems at all."

On cross-examination, the Defendant acknowledged that possession of marijuana was illegal but stated that he had not used marijuana in "over seven or eight years." The Defendant did not remember telling the probation officer that he had used marijuana every day from the age of thirteen until he was thirty-one years old. The Defendant acknowledged that a weapon was used during the offense leading to his especially aggravated robbery conviction, but he explained that his brother carried the gun. The Defendant said that he had a juvenile adjudication for shoplifting. He said that he was considered for parole on two or three occasions but that his request was denied because he had "two or three" disciplinary infractions. He explained that his failure to follow prison rules stemmed from his mental instability.

The Defendant acknowledged that his anger was directed toward Mr. Cartee, not the victim, but he stated, "I'm not saying what I did was right to [the victim], but [you] also have to look at the fact too I was violated." The Defendant described the assault against the victim as a "slim mistake." The Defendant agreed that he should be punished for the aggravated assault offense, but he stated that he had already been punished when he spent five months in the county jail before he was released on bond. He acknowledged that he assaulted Corporal David Walker at the county jail but explained that he was not administered his "rightful medication," and it was "a horrible jail." The

Defendant stated, “I’m not saying what I did then was right, but I was provoked, I was pushed. I felt, you know, my life was in danger.”

The State called Cheryl Gilliam as a rebuttal witness. Ms. Gilliam testified that she was employed by the Tennessee Board of Probation and Parole and prepared the Defendant’s presentence report. Ms. Gilliam said that in response to the question concerning prior drug use, the Defendant wrote that he used “weed” from the age of thirteen until he was thirty-one years old. On cross-examination, Ms. Gilliam said that the Defendant had finished the questionnaire before their initial meeting.

At the conclusion of the sentencing hearing, the trial court found that the Defendant’s prior criminal history was applicable as an enhancement factor in considering the length of his sentence for his aggravated assault conviction. See Tenn. Code Ann. § 40-35-114(1). The trial court acknowledged the Defendant’s history of mental illness but assigned little weight to that consideration as a mitigating factor in case no. II-CR102142. See Tenn. Code Ann. § 40-35-113(13). Based on the presence of one enhancement factor, the trial court sentenced the Defendant to five years for his aggravated assault conviction in case no. II-CR102142 and imposed the agreed upon sentence of six months in case no. II-CR122288. These sentences were to be served concurrently.

In considering the Defendant’s request for alternative sentencing, the trial court found that although the Defendant’s prior criminal history was not lengthy, such history was “significant and very serious, and very concerning to the [c]ourt.” The trial court further found that the Defendant was a dangerous offender from whom society needed to be protected. The trial court found that the grant of some form of alternative sentencing would depreciate the seriousness of the offense based on the victim’s testimony and the Defendant’s “violent criminal past.” Accordingly, the trial court denied the Defendant’s request for probation or some other form of alternative sentencing as to both convictions and ordered the Defendant to serve his sentences in confinement.

On appeal, the Defendant argues that the length of his sentence for his aggravated assault conviction is improper because the trial court erred in weighing the applicable enhancement and mitigating factors. Specifically, the Defendant contends that more consideration should have been given to his mental status, as reflected in Dr. Boero’s evaluation, in mitigation of the length of his sentence. The Defendant also challenges the trial court’s denial of his request for alternative sentencing.

II. Standard of Review

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is improper. See Tenn. Code Ann. § 40-35-401, Sentencing Comm’n Comments; see also State v. Arnett, 49 S.W.3d 250, 257 (Tenn. 2001). When a Defendant challenges the length, range, or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that the determinations made by the court from which the appeal is taken are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of

correctness, however, ““is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.”” State v. Carter, 254 S.W.3d 335, 344-45 (Tenn. 2008) (quoting State v. Ashby, 823 S.W.2d 166, 169 Tenn. 1991)). “If, however, the trial court applies inappropriate mitigating and/or enhancement factors or otherwise fails to follow the Sentencing Act, the presumption of correctness fails,” and our review is de novo. Carter, 254 S.W.3d at 345 (quoting State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1002); State v. Pierce, 138 S.W.3d 820, 827 (Tenn. 2004)).

A trial court is mandated by the Sentencing Act to “impose a sentence within the range of punishment.” Tenn. Code Ann. § 40-35-210(c). A trial court, however, “is no longer required to begin with a presumptive sentence subject to increase and decrease on the basis of enhancement and mitigating factors.” Carter, 254 S.W.3d at 346. Therefore, an appellate court is “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.” Id.

In conducting a de novo review of a sentence, this Court must consider (a) the evidence adduced at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (f) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (g) any statement the the Defendant wishes to make in the the Defendant’s own behalf about sentencing. Tenn. Code Ann. § 40-35-210(b); see also Carter, 254 S.W.3d at 343; State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002).

Effective June 7, 2005, our legislature amended Tennessee Code Annotated section 40-35-102(6) by deleting the statutory presumption that a Defendant who is convicted of a Class C, D, or E felony, as a mitigated or standard offender, is a favorable candidate for alternative sentencing. Our sentencing law now provides that a Defendant who does not possess a criminal history showing a clear disregard for society’s laws and morals, who has not failed past rehabilitation efforts, and who “is an especially mitigated or standard offender convicted of a Class C, D or E felony, should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(5), (6) (emphasis added). Additionally, a trial court is “not bound” by the advisory sentencing guidelines; rather, it “shall consider” them. Tenn. Code Ann. § 40-35-102(6) (emphasis added).

No longer, therefore, is any defendant entitled to a presumption that he or she is a favorable candidate for probation. Carter, 254 S.W.3d at 347. Generally, the defendants classified as Range II or Range III offenders are not to be considered as favorable candidates for alternative sentencing. Tenn. Code Ann. § 40-35-102(6). If a defendant seeks probation, then he or she bears the burden of “establishing suitability.” Tenn. Code Ann. § 40-35-303(b). As the Sentencing Commission points out, “even though probation must be automatically considered as a sentencing option for

eligible the Defendants, the Defendant is not automatically entitled to probation as a matter of law.” Tenn. Code Ann. § 40-35-303, Sentencing Comm’n Cmts.

The following considerations provide guidance regarding what constitutes “evidence to the contrary”:

(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

Tenn. Code Ann. § 40-35-103(1); see also *Carter*, 254 S.W.3d at 347. Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. § 40-35-103(2), (4). The court should also consider a defendant’s potential for rehabilitation or treatment in determining the appropriate sentence.

III. Length of Sentence

The Defendant contends that the trial court improperly rejected his mental status as a mitigating factor in determining the length of his sentence. See Tenn. Code Ann. § 40-35-113(13) (permitting the trial court to consider any other factor in mitigation which is consistent with the purposes of the Sentencing Act). The Defendant points out that Dr. Boero’s evaluation noted that the Defendant was currently being treated for schizophrenia, paranoid type, and had previously been diagnosed with schizoaffective disorder, bipolar type. Dr. Boero also stated in his report that the Defendant “has a long-standing history of psychosis (visual and auditory hallucinations), anxiety, depression, suicidal ideations and attempts, and interpersonal violence.” The Defendant submits that he was not undergoing mental health treatment when the assaults occurred but that he has been taking his medication since being released on bond from the Williamson County Jail.

The trial court found that Dr. Boero’s evaluation had already been taken into consideration in case no. II-CR122288 resulting in the State’s agreement to the Defendant’s entry of a plea of guilty to a Class B misdemeanor assault. Nonetheless, the trial court found that Dr. Boero concluded “that despite these serious psychological symptoms, the Defendant . . . seemed aware of his situation and was able to appreciate the nature of his actions.” The trial court gave little weight to the Defendant’s mental state as a mitigating factor in regard to case no. II-CR102142.

The 2005 amendment to the Sentencing Act deleted appellate review of the weight assigned by the trial court to any applicable enhancement or mitigating factors. Carter, 254 S.W.3d at 345. Rather, the statutory enhancement and mitigating factors are “advisory, not binding, on the trial courts.” Id. Thus, “appellate courts are therefore left with a narrower set of circumstances in which they might find that a trial court has abused its discretion in setting the length of a Defendant’s sentence.” Id.

The Defendant does not challenge the trial court’s consideration of his past criminal history as an enhancement factor. We observe that our supreme court has recognized that under our Sentencing Act, a trial court does not abuse its discretion if it determines that an enumerated mitigating factor exists but does not serve to reduce a defendant’s sentence. Id. Based on our review, we conclude that the trial court’s imposition of a sentence of five years for the Defendant’s aggravated assault conviction is consistent with the purposes of the Sentencing Act. The Defendant is not entitled to relief on this issue.

IV. Denial of Alternative Sentencing

The Defendant argues that the trial court erred in denying his request for alternative sentencing. He submits as positive factors his assumption of responsibility for the offenses as evidenced by his entry of pleas of guilty, his avoidance of committing any new offenses since being released from the Williamson County Jail on bond, and his adherence to his medication schedule.

The trial court acknowledged that the Defendant was a favorable candidate for alternative sentencing options pursuant to Tennessee Code Annotated section 40-35-102(6). The trial court first found that although the Defendant did not have a long criminal history, his prior convictions were “significant and very serious, and very concerning to the Court.” The trial court further found as follows:

This offense, based upon the evidence that I’ve heard here today from the victim, and, frankly, from the testimony of [the Defendant] himself, is an offense that is not one that is a slim mistake. This was a brutal beating which resulted in the . . . broken bones, an eye socket . . . cuts to the ear. This beating rises to the level of nothing short of being a brutal, uncalled for offense. Before this [c]ourt is a defendant who has previously been convicted of a crime of violence, he continues to commit crimes of violence, as evidenced by this testimony today; he is a . . . [thirty-three]-year-old defendant who has had a sporadic employment [history], not able to hold a job for . . . any substantial amount of time; and he does have a tendency, based upon the evidence, to blame others even for not being able to hold down a job.

The trial court found that the Defendant was a dangerous offender based on the evidence presented at the sentencing hearing and that alternative sentencing would depreciate the seriousness of the offense. The trial court stated, “I am not willing to do that based upon the testimony of the victim in this case, and this Defendant’s violent criminal past.”

Based on our review of the record, we conclude that the trial court did not abuse its discretion in denying the Defendant's request for some form of alternative sentencing. The Defendant is not entitled to relief on this issue.

CONCLUSION

After a thorough review, we affirm the judgments of the trial court.

DAVID H. WELLES, JUDGE