IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 26, 2008

STATE OF TENNESSEE v. ALLEN DOANE

Direct Appeal from the Circuit Court for Sevier County
No. 10690-II Richard R. Vance, Judge

No. E2008-00125-CCA-R3-CD - Filed January 5, 2009

The defendant, Allen Doane, appeals the sentencing decision of the Sevier County Circuit Court. Following his conviction for four counts of sexual battery, Class E felonies, the trial court imposed consecutive sentences of two years of incarceration for each conviction, resulting in an effective sentence of eight years. On appeal, the defendant asserts that: (1) the two-year sentences are excessive; (2) the court erred in denying alternative sentencing; and (3) consecutive sentencing is not warranted. Following plain error review, we conclude that error occurred in the application of a sentencing factor in violation of *State v. Gomez*, 239 S.W.3d 733, 740 (Tenn. 2007) ("*Gomez II*"). Further review reveals that the trial court did not err in its denial of an alternative sentence, but error was committed in ordering consecutive sentencing. Accordingly, the decision of the trial court is affirmed with regard to its denial of alternative sentencing, is reversed with regard to the imposition of consecutive sentencing, and is remanded to the trial court for a determination of the appropriate sentence length and reconsideration of consecutive sentencing factor (5).

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed in Part, Reversed in Part, and Remanded

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J.C. MCLIN, JJ., joined.

James W. Greenlee, Sevierville, Tennessee, for the appellant, Allen Doane.

Robert E. Cooper, Jr., Attorney General and Reporter; Matthew Bryant Haskell, Assistant Attorney General; James B. (Jimmy) Dunn, District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The underlying facts of the case, as taken from the presentence report, are as follows:

> The victim . . . stated that during the summer after she was in the sixth grade she and the defendant were at a house he was working on for his business. It was just the two of them and she was sitting on the floor and the defendant came into the room. The victim recalled that the defendant was kissing all over her leg and licking up her leg until he got to her vaginal area and he pulled on her shorts and kept licking her. The victim then pushed him away.
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> Another incident occurred when they were wrestling on the couch and the defendant began to tickle her and he started licking her all over her back and undid her bra. She then finally got free from him. She reported that another time they were in the hot tub and she would go under the water and he used his toes to touch her vaginal area. She then moved to another area of the hot tub and tried to not be around him. She further reported that on several occasions he would try to have the other kids pull down her bathing suit. The victim is the defendant's step-grand-daughter.
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> When the defendant was interviewed by authorities, he reported that he and the victim did horse play several times in the past and that he did lick her and bite her on the neck as he did all the grandchildren. He denied that he ever took her to a house he was working on and stated that during the hot tub incident, several children were in the hot tub and horse playing and body parts got touched.

Based upon the above, the defendant was indicted by a Sevier County grand jury for four counts of aggravated sexual battery, which were alleged to have occurred in the summer of 1999, the fall of 1999, the winter of 2000, and the spring of 2000. At subsequent jury trial, the defendant stated that he did not commit the acts. After hearing the evidence presented, the defendant was found guilty of four counts of the lesser included offense of sexual battery.

At the subsequent sentencing hearing, the victim's stepfather testified and stated that the victim's behavior was greatly affected during the period of the abuse. Specifically, the victim did not want to bathe. He also testified that the victim had been seeing a therapist for a number of years in an attempt to "keep her from self-destructing because of what [the defendant] . . . had done."

The victim's stepmother, who was the defendant's stepdaughter, testified that the defendant began molesting her when she was in kindergarten and continued over a period of two to three years. She described how the defendant would "touch and rub" her vagina underneath her clothing and put her hands on his genitals. She stated that when she finally asked the defendant to stop touching her, the incidents stopped. She did not tell anyone of the incidents until she was eighteen, at which time she told her mother. They confronted the defendant, and he admitted the conduct. Afterward, the defendant returned to church and stopped drinking. The abuse was never reported to the authorities.

Charlie McCoy, a friend of the family, also testified that she had been molested by the defendant. According to McCoy, she helped the defendant with odd jobs in his construction business and, when she was twelve or thirteen years old, the defendant rubbed her inner thigh and rubbed her

vagina while they were together on a job site. Approximately a year later, McCoy told a school resource officer what had occurred. The defendant admitted the conduct when questioned by police. However, McCoy and her mother did not press charges because they were family friends and attended church together. The defendant sought counseling after this incident.

The defendant also testified at the hearing. He admitted that he had committed the acts against the victim in this case and acknowledged that he had lied about his innocence during the trial. He also testified and admitted that he had molested both his stepdaughter and McCoy. However, according to him, only one incident occurred with his stepdaughter, in contradiction to her testimony that it had continued for years. According to the defendant, he was currently pursuing therapy through his church group called "Celebrate Recovery." A counselor with the group testified that the defendant was doing well in the group and was not likely to reoffend if therapy was continued. A psychosexual evaluation was also introduced, which further indicated that the defendant was in the lowest risk category to reoffend.

After hearing the evidence presented, the trial court imposed two-year sentences for each conviction. The court further ordered that the sentences were to be served consecutively, resulting in an effective eight-year sentence. The court additionally found that the defendant was not an appropriate candidate for alternative sentencing and ordered that the sentences be served in the Department of Correction. Following the denial of his motion for new trial, the defendant filed the instant timely appeal.

Analysis

On appeal, the defendant challenges the sentences imposed by the trial court. First, he contends that the two-year sentence imposed for each conviction is excessive. He also asserts that he was improperly denied an alternative sentence. Finally, he contends that the imposition of consecutive sentencing was not warranted.

Initially, we note that the offenses for which the defendant was convicted occurred during the period from "Summer 1999" through "Spring 2000," although he was not sentenced until June 19, 2007. Effective June 7, 2005, our sentencing act was amended in response to *Blakely v. Washington. See* T.C.A. § 40-35-210(c) (Supp. 2005); *cf.* T.C.A. § 40-35-210(c) (2003). In the "Compiler's Notes" section to this amendment, it states:

> Acts 2005, ch. 353, § 18 provided that the act shall apply to sentencing for criminal offenses on or after June 7, 2005. Offenses committed prior to June 7, 2005, shall be governed by prior law, which shall apply in all respects. However, for defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, the defendant may elect to be sentenced under the provisions of the act by executing a waiver of such defendant's ex post facto protections. Upon executing such a waiver, all provisions of the act shall apply to the defendant.

T.C.A. § 40-35-210, Compiler's Notes. In the instant case, the record is devoid of any waiver of the defendant's *ex post facto* protections. Thus, the 2005 amendments to the statute do not apply to the defendant. Therefore, we review the trial court's imposition of the sentences in this case pursuant to the former act, as modified by *Gomez II*.

On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. T.C.A. § 40-35-401 (2003), Sentencing Comm'n Cmts. 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 of the record with a presumption that the determinations made by the court from which the appeal is taken are correct. T.C.A. § 40-35-401(d). The presumption of correctness 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. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, review of the challenged sentence is purely *de novo* without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). When conducting a *de novo* review of a sentence, we must consider: (1) any evidence received at the trial and/or sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancement factors; (6) any statements made by the defendant on his or her own behalf; and (7) the potential for rehabilitation or treatment. T.C.A. § 40-35-210; *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

I. Length of Sentences

First, the defendant contends that the court erred in imposing the maximum sentence within the range because the court's finding that the enhancement factors far outweighed the mitigating factors "violates the stated purposes of the Sentencing Act." From a reading of his argument, he does not challenge application of the enhancement factors applied but rather only the weight given them by the court.

Under the law as it existed before the 2005 amendments, unless enhancement factors were present, the presumptive sentence to be imposed for a Class E felony was the minimum sentence within the applicable range. T.C.A. § 40-35-210(c). As the defendant was sentenced as a Range I offender, the appropriate range was one to two years. *See* T.C.A. § 40-35-112(a)(5) (2003). Tennessee's pre-2005 sentencing act provided that the trial court was to increase the sentence within the range based on the existence of enhancement factors and reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d), (e).

We must reject the defendant's argument with regard to the weight given to the enhancement factors in this case. Our law is clear that the weight assigned to enhancement and mitigating factors is left to the discretion of the trial court as long as the court complies with the purposes and principles of the sentencing act and its findings are supported by the record. *See State v. Gosnell*, 62 S.W.3d 740, 750 (Tenn. Crim. App. 2001) (citations omitted).

However, the Tennessee Supreme Court recently held that the trial court's enhancement of a defendant's sentence, based on factors that had not been found by a jury beyond a reasonable doubt, violated a defendant's Sixth Amendment right to a jury trial as interpreted by the Supreme Court in *Gomez II*, 239 S.W.3d at 740 (citing *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856, 860 (2007)); *see also Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000)) ("' Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'").

In this case, the trial court found the presence of two enhancement factors, namely that the defendant had a previous history of criminal conduct and that he had violated a position of private trust. *See* T.C.A. § 40-35-114(1), (14) (2003). Even though the defendant had no prior criminal convictions, the court based its application of enhancement factor (1) "upon the testimony of witnesses and [the defendant's] own acknowledgment today, that there were two other victims of child sexual abuse committed over a long period of years." The court also applied the catchall mitigating factor based upon the defendant's "extensive positive history of community involvement and volunteer service," his "excellent work history," and his "good reputation in the community." *See* T.C.A. § 40-35-113(13) (2003). Nonetheless, the court went on to find that "the enhancing factors far outweigh the mitigating factors" and that the offenses committed warranted the imposition of the maximum two-year sentence.

Though not challenged by the defendant, who challenges only the court's weighing of the enhancement and mitigating factors, review of the record reveals that the trial court erred in applying the enhancement factor of a position of private trust based upon *Gomez II*. *See Gomez II*, 239 S.W.3d at 740 (a trial court's enhancement of a defendant's sentence, on the basis of judicially determined facts other than a defendant's prior convictions, violated that defendant's constitutional rights under the Sixth Amendment to the United States Constitution). However, as the defendant does not raise the issue, it is waived, and our review is limited to whether plain error occurred. *Id*. at 737.

Rule 52(b) of the Tennessee Rules of Criminal Procedure provides that "[w]hen necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for new trial or assigned as error on appeal." In order to constitute "plain error," the error must satisfy the following factors:

> (a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is 'necessary to do substantial justice.'

State v. Smith, 24 S.W.3d 274, 282 (quoting *State v. Adkisson*, 899 S.W.2d 626, 639 (Tenn. Crim. App. 1994). "[A]ll five factors must be established by the record before [a reviewing court] will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established." *Id*. at 283. It is the defendant who bears the burden of persuasion to demonstrate plain error. *Gomez II*, 239 S.W.3d at 737.

In this case, review of the record clearly establishes the existence of four of the required factors in this case: the record establishes what occurred at the sentencing hearing; a clear and unequivocal rule of law was breached with the application of enhancement factors other than prior criminal history or admitted behavior; a substantial right of the defendant was affected because he was denied his Sixth Amendment right to a jury trial; and the record fails to reflect waiver for tactical reasons. *See id*. at 740-42. With regard to the fifth factor, in *Gomez II*, our supreme court concluded that plain error of a *Blakely* infraction was necessary to do substantial justice. *Id*. at 742. To make that decision in this case, pursuant to *Gomez II*, we must look at what sentence we might impose on the basis of the defendant's prior criminal behavior alone to decide if substantial justice requires plain error review in this case. In short, we look at the relative impact on sentence enhancement for prior criminal behavior versus the other inappropriately applied enhancement factor.

We find no error in application of enhancement factor (1) based upon the defendant's admission that he molested two other victims and that he lied at the trial. Furthermore, as previously stated, the law is clear that the weight assigned to an enhancement factor "is left to the discretion of the trial court so long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record." *Gosnell*, 62 S.W.3d at 750. Additionally, our supreme court has held that, upon the finding of even one enhancement factor, "the statute afforded to the judge discretion to choose an appropriate sentence anywhere within the statutory range." *State v. Gomez*, 163 S.W.3d 632, 659 (Tenn. 2005) ("*Gomez I*"). However, in this case, the trial court was unclear as to the weight assigned to either of the two applied enhancement factors or the mitigating evidence found, saying only that "the enhancing factors far outweigh the mitigating factors." From that statement, we are unable to determine the weight assigned to each of the two factors applied. As such, we conclude that the record establishes that the defendant was deprived of substantial justice in this case and is, thus, entitled to relief. Accordingly, the sentences are vacated, and the case is remanded to the trial court for resentencing in compliance with the dictates of *Gomez II*. Upon remand, pursuant to the dictates of *Gomez II*, the court may apply only enhancement factor (1). However, the the trial court may, and is in the best position to, determine the appropriate weight to be given that enhancement factor in determining the sentence length. *See Gosnell*, 62 S.W.3d at 750.

II. Alternative Sentencing

Next, the defendant asserts that the trial court erred by denying the defendant an alternative sentence, specifically probation. There is no dispute in this case that the defendant was eligible for an alternative sentence in that the sentences imposed in this case were eight years or less. *See* T.C.A. § 40-35-303(a) (2003). Moreover, under the Criminal Sentencing Reform Act of 1989, trial judges

are encouraged to use alternatives to incarceration, and an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. T.C.A. § 40-35-102(6) (2003). Because the defendant was convicted of Class E felonies, the presumption applies. Evidence of the contrary may be establishing by showing that: (1) confinement is needed to protect society by restraining a defendant who has a long history of criminal conduct; (2) confinement is needed to avoid depreciating the seriousness of the offense or that confinement is particularly suited to provide an effective deterrence to people likely to commit similar offenses; or (3) measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. *Ashby*, 823 S.W.2d at 169 (citing T.C.A. § 40-35-103(1)(A)-(C)). The court may also consider the mitigating and enhancement factors set forth in Tennessee Code Annotated sections 40-35-113 and -114 as they are relevant to the section 40-35-103 considerations. T.C.A. 40-35-210(b)(5); *State v. Boston*, 938 S.W.2d 435, 538 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. T.C.A. § 40-35-103(5) (2003); *Boston*, 938 S.W.2d at 438.

Although probation "shall be automatically considered by the court as a sentencing alternative for eligible defendants[,]" T.C.A. § 40-35-303(b), "the defendant is not automatically entitled to probation as a matter of law." *Id.*, Sentencing Comm'n Cmts; *State v. Fletcher*, 805 S.W.2d 785, 787 (Tenn. Crim. App. 1991). Determining whether a defendant is entitled to an alternative sentence necessarily requires a separate inquiry from that of determining whether the defendant is entitled to full probation. *State v. Bingham*, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995), overruled on other grounds by *State v. Hooper*, 29 S.W.3d 1 (Tenn. 2000). These inquiries require a different burden of proof. *Bingham*, 910 S.W.2d at 455. "[A] defendant is required to establish his suitability for full probation as distinguished from his favorable candidacy for alternative sentencing in general." *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see also* T.C.A. § 40-35-303(b) (2003).

To meet the burden of establishing suitability for full probation, the defendant must demonstrate that probation will "subserve the ends of justice and the best interest of both the public and the defendant." *Bingham*, 910 S.W.2d at 456. In determining one's suitability for full probation, the court may consider the circumstances of the offense, the defendant's potential or lack of potential for rehabilitation, whether full probation will unduly depreciate the seriousness of the offense, and whether a sentence other than full probation would provide an effective deterrent to others likely to commit similar crimes. T.C.A. §§ 40-35-210(b)(4), -103(5), -103(1)(B) (2003); *see also Bingham*, 910 S.W.2d at 456. Denial of probation may be based solely upon the circumstances of the offense when they are of such a nature as to outweigh all other factors favoring probation. *Id.* (citing *Fletcher*, 805 S.W.2d at 788-89).

> In determining whether to grant or deny full probation, additional considerations include the defendant's criminal record; social history and present condition of the defendant, including his or her mental and physical conditions where appropriate; defendant's amenability to correction and general attitude, including

behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility, and the best interests of both the defendant and the public.

State v. Blackhurst, 70 S.W.3d 88, 97 (Tenn. Crim. App. 2001) (citing *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993); *State v. Boyd*, 925 S.W.2d 237, 244 (Tenn. Crim. App. 1995)).

The trial court made the following findings with regard to this issue:

> The Court has heard testimony and has seen from the various letters and presentations made through witnesses, as well as the statements, that he is a valued member of his work force, valued member of his church. He has family obligations with his wife and his invalid stepson that he's helped raise, that he's volunteered. He's helped many people. But he has also, as previously mentioned, he has a significant history of the same conduct, same type of conduct toward other children going back many, many, many years, that he does have this history of previous criminal conduct.
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> The Court must also consider the fact that he was untruthful at the trial of the case. The jury found that he was untruthful, and now, today, he has admitted that he did lie under oath on the witness stand committed perjury.
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> The Court would even further find that he was not completely truthful today. In his testimony, he - - when questioned about his conduct with his stepdaughter many, many years ago, testified it only happened one time. The stepdaughter had previously testified in this - - in the other hearing that it occurred multiple times over a period of two to three years, caused her great problems, but significantly has admitted perjury. That must be a strong consideration.
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> All of those factors, and to avoid depreciating the seriousness of these very serious offenses committed on a young child over a period of many, many months, all warrant the denial of probation, and that these sentences should be served, but the Court must go further and consider the option of split confinement.
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> Considering, again, all of the evidence, and considering the long history of criminal conduct, these offenses, that is, occurring over a period from the summer of 1999 to the spring of the year 2000, together with the previous history of criminal conduct involving two other victims, to avoid depreciating the seriousness of these offenses and having considered the potential for rehabilitation, the Court is mindful that [the defendant] had previously undergone counseling treatment on a previous occasion, yet re-offended, must also consider

> that he has been in counseling with the recovery group for an extended period of time, yet he still came into this Court and lied under oath. And for all those reasons, the Court is of the opinion that split confinement would not be appropriate. So the sentences must be served.

The defendant contends that the evidence presented "clearly shows a defendant who has attempted, successfully, to reform himself in the community by changing his environment, working responsibly, and attending appropriate counseling." He further asserts that it "would not be responsible to interrupt the defendant's progress to order in incarceration." While acknowledging that the acts were "awful and not really defensible," he asserts that this is "more the tale of sickness and torment and anguished compulsion than predator seeking prey."

Review reveals that the trial court properly considered the required principles of sentencing and that the record supports a sentence of confinement in this case. With regard to probation, the defendant has simply failed to carry his burden in establishing his suitability or that it will "subserve the ends of justice and the best interest of both the public and the defendant." The court specifically considered the defendant's social history, his family obligations, his work history, and his involvement in church, which were all favorable to a grant of probation. However, the court noted the defendant's past attempts at rehabilitation which were not successful, as well as the multiple number of victims previously abused and the defendant's lying about the instant case at trial. Based upon these facts, the court found that sentencing the defendant to probation would depreciate the seriousness of the offense, and we agree.

The court went on to note that other forms of alternative sentencing, specifically split confinement, were also not appropriate based upon the need to avoid depreciating the seriousness of the offense. If the seriousness of the offense forms the basis for the denial of alternative sentencing, Tennessee courts have held that "'the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible or otherwise of an excessive or exaggerated degree,' and the nature of the offense must outweigh all factors favoring a sentence of confinement." *State v. Grissom*, 956 S.W.2d 514, 520 (Tenn. Crim. App. 1997); *Bingham*, 910 S.W.2d at 454; *State v. Hartley*, 818 S.W.2d 370, 374-75 (Tenn. Crim. App. 1991).

After review, we conclude that the denial of alternative sentencing was warranted based upon the need to avoid depreciating the seriousness of the offense. Again, the trial court considered the positive factors established by the defendant weighed in favor of an alternative sentence. However, the circumstances of the offense are reprehensible and the nature of the offense outweighs the positive factors in favor of an alternative sentence. The defendant in this case abused his young step-granddaughter, a girl who was entrusted to his care, despite the fact that he had previously abused her stepmother for a period of approximately one year. As a result of the abuse, the victim in this case had to seek years of therapy to deal with the effects of the defendant's actions. A sentence of confinement is justified upon the record before us.

III. Consecutive Sentencing

Last, the defendant contends that the court erred in ordering that his four sentences be served consecutively. A trial court may impose consecutive sentencing upon a determination that one or more of the criteria set forth in Tennessee Code Annotated section 40-35-115(b) exists. This section permits the trial court to impose consecutive sentences if the court finds that "[t]he defendant is an offender whose record of criminal activity is extensive." T.C.A. § 40-35-115(b)(2) (2003). The length of the sentence, when consecutive in nature, must be "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved" under the circumstances. T.C.A. § 40-35-102(1), -103(2).

In imposing consecutive sentences, the trial court found:

> The Court has considered the - - again, all of the evidence, considered the case law set forth in the *State vs. Wilkerson*, the State versus Woods in determining whether they should be run concurrently or consecutively.
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> The Court does find that he has an extensive record of criminal activity, going back to his stepdaughter when she was a child, to witness, Charley, who testified, continuing on through the years, eventually conduct involving his step-granddaughter, for which he stands convicted. That history of sexually molesting three young girls over a period of many, many years certainly qualifies under that aspect.
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> Circumstances surrounding the offenses show that these multiple offenses were aggravated by his gaining positions of trust through affection, through family relationship, through which he abused these children. We must find that extended confinement is necessary to protect society from an offender who has demonstrated through his conduct the repetitive nature of his criminal conduct, that the extended confinement, and that the aggregate of such confinement is necessary and that should reasonably relate to the seriousness of these offenses. These offenses are egregious. From all of which, the Court finds that a sentence of eight years is appropriate and more than justified by the proof in this case and that these sentences should be ordered to run consecutively.

On appeal, the defendant contends that the court ordered consecutive sentencing "out of frustration that two years disrespected the victim in this case and the victims of the uncharged conduct." He further contends that the court should not have emphasized the facts that the defendant lied because he was in a "catch 22" because, if he "expressed a lack of candor," he would be described as evasive and non-repentant but if he was candid, he would be described as a liar.

After review, we conclude that the court erred in finding that the defendant was an offender whose record criminal activity was extensive. On the facts before us, the defendant has no prior criminal convictions. He did acknowledge the abuse of two prior victims. However, while the time

span covered was approximately twenty-seven years, there were significant periods of that time when no instances occurred. The defendant abused his stepdaughter when she was six or seven years old for a period of one to two years, and the proof fails to establish the number of occurrences or the regularity of the criminal conduct during that period. There were then no instances of misconduct established until the defendant committed the single act of abuse against McCoy. There were no other allegations made that any other inappropriate conduct occurred until the defendant committed the instant offenses. Though reprehensible and indicative of a person with behavioral problems, we cannot conclude that uncharged acts constitute "an extensive record of criminal activity." Moreover, we must give some credence to the defendant's argument that the trial court inappropriately considered the circumstances of the crimes committed against all three victims, rather than focused on the circumstances of the instant offense. This is evidenced by the court's statement that "these multiple offenses were aggravated by his gaining positions of trust through affection, through family relationship, through which he abused *these* children." (emphasis added). Accordingly, this factor does not support the imposition of consecutive sentencing.

Nonetheless, our review of the record reveals that consecutive sentencing may be supported under a separate criteria. Our statute also allows trial courts to impose consecutive sentencing upon a finding by a preponderance of the evidence that:

> (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and the victim or victim, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims[.]

T.C.A. § 40-35-115(5). The record establishes that the defendant in this case was convicted of four offenses involving sexual abuse of a minor. Nonetheless, because application of the factor requires consideration of certain aggravating circumstances, it is our determination that the trial court is in the best position to determine the applicability of this factor. As such, we reverse the imposition of consecutive sentencing based upon factor (2) but, upon remand, instruct the trial court to consider the applicability of factor (5).

CONCLUSION

Based upon the foregoing, the case is remanded to the trial court for resentencing in accordance with *Gomez II*, and the trial court is directed to consider and assign the weight it deems appropriate to the single enhancement factor of prior criminal behavior. The case is further remanded with regard to the consecutive sentence, and the court is directed to consider the applicability of factor (5) only in its determination of whether consecutive sentencing is appropriate. In all respects, the denial of any alternative sentence is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE