

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs September 29, 2020

FILED

11/10/2020

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. ROBERT T. MCLEOD

**Appeal from the Circuit Court for Madison County
No. 19-945 Donald H. Allen, Judge**

No. W2020-00290-CCA-R3-CD

Robert T. McLeod, Defendant, entered a best interest guilty plea to five counts of violating the sex offender registry, one count of violating community supervision, and one count of tampering with evidence with an effective sentence of three years. The trial court denied alternative sentencing and ordered Defendant to serve his sentence in incarceration. After a review, we determine that the trial court did not abuse its discretion. Accordingly, the judgments of the trial court are affirmed.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

George Morton Googe, District Public Defender; and Gregory D. Gookin, Assistant District Public Defender, for the appellant, Robert T. McLeod.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Jody Pickens, District Attorney General; and Matthew Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Defendant was convicted of two counts of attempted rape in 2012 in Sumner County. He was released in December of 2017. Upon his release, Defendant signed an agreement indicating he understood the requirements of the sex offender registry. As part of the agreement, Defendant was required to report on a regular basis and wear a GPS tracking device. The day that he was released, Defendant removed his GPS tracker and

absconded. He was eventually apprehended by U.S. Marshall in Florida about one year later.

In December of 2019, Defendant was indicted for five counts of violation of the sex offender registry, one count of violation of the conditions of community supervision, and one count of tampering with the evidence. After being appointed an attorney, Defendant entered a best interest guilty plea.

At the best interest guilty plea hearing, counsel for the State explained that had the case gone to trial, the State would have proven:

On July 5, 2012, [Defendant] was convicted of two counts of attempted rape out of Sumner County, Tennessee, Circuit Court. Because of that . . . he was required to register as a violent sex offender. The testimony would be [from] Camilla Morris who works at the Nor[th]west Correctional Complex that she met with [Defendant] on December 19, 2017 and went over the sex offender registry form . . . with him. He was scheduled to be released on December the 21st. He signed and acknowledged these rules and agreements stating that he would have to register within 48 hours of being released.

[H]e also before being released from TDOC met with Thomas Tucker who went over the rules and regulations regarding the GPS tracking device that [Defendant] would be required to wear upon release from TDOC.

There would also be testimony from Melissa Mann with Community Supervision who would testify that she met with [Defendant] on December 21st of 2017 and explained to him the rules and regulations of the community supervision for life program and that he would have to report to them within 72 hours of being released from TDOC.

The testimony would then be, . . . , that on December 21st of 2017 the Board of Probation and Parole here in Jackson, Tennessee received a tamper violation from [Defendant's] GPS tracking device. Officers were dispatched at that time. The testimony would be from Russell Phillips, Davey Miller, and Joe Rudolph that they arrived at the Phillips 66 gas station on Hollywood and Old Hickory. They searched the area and they could not locate [Defendant]. They then later did locate his ankle bracelet that was located in the store's restroom that had been removed without permission.

[Defendant] was not heard or seen from after that until late January or early February of the next year, 2019, when he was taken into custody. He was tracked by the U.S. Marshall[] and found in Florida and was taken into custody at that time and extradited back to Tennessee. Because he was not seen or heard from . . . he did not - - he obviously did not report to Board of Probation or Parole within the 48 or 72 hours of being released to register with the sex offender registry here in Jackson, Tennessee. He also failed to report the months of March, June, September[,] and December of 2018 because he had absconded and had not reported anytime during that year

[O]n the violation of community supervision, again, that's also for failing to report to the community supervision for life program during that time as well.

Defendant agreed with the factual basis for the plea. The trial court accepted the plea and made a "special finding" that the guilty plea was in Defendant's best interest.

At a sentencing hearing, the State relied upon the presentence report. Defendant called James Ready to testify. Mr. Ready explained that he was Defendant's stepfather and lived in Destin, Florida. Mr. Ready explained that Defendant could live in Florida at "either great uncle Carl's [house] or an apartment of his own" if he were released. Mr. Ready acknowledged that Defendant had Asperger Syndrome, post-traumatic stress disorder, and bipolar disorder. Mr. Ready testified that Defendant's former doctor was retired but that he would do "[e]verything within [his] power" to see that Defendant followed through with any conditions that were imposed upon his release. Mr. Ready stated Defendant had no family in Jackson, Tennessee and had a "strained" relationship with his adoptive father, who lives in Sumner County. According to Mr. Ready, Defendant's adoptive father took Defendant out of Florida to Tennessee against a standing court order.

The trial court noted that Defendant had six prior felony convictions involving "some very serious sexual offenses." The trial court noted that Defendant had "absolutely no ties to Jackson, Madison County, Tennessee" other than being arrested in Jackson for failing to report and tampering with his GPS device after his release on probation on his ten-year sentence. Since that time, Defendant absconded, living in Arizona and Washington before finally ending up in Florida. The trial court took this into consideration "in terms of whether or not he would be a good candidate for probation or some kind of good candidate for alternative sentencing." The trial court observed that Defendant "was given an opportunity" to follow the rules of supervision in the

community “but [Defendant] couldn’t even make it for one day without breaking the rules of supervision.” Defendant had “absolutely no ties to [the Jackson] community and very few ties to this state.” The trial court found that Defendant was not a good candidate for alternative sentencing because he had “proven” that he would not report. The trial court based the decision on Defendant’s history and lack of ties to Tennessee. As a result, the trial court ordered Defendant to serve each of the three-year sentences in incarceration as a Range II, multiple offender as well as the sentences of eleven months and twenty-nine days for violation of community supervision and tampering with a tracking device. Per the plea agreement, the trial court aligned the sentences to run concurrently and awarded credit for time served prior to the sentencing hearing.

Defendant filed a timely notice of appeal.

Analysis

On appeal, Defendant argues that the trial court erred in denying an alternative sentence. Specifically, Defendant claims that the trial court “erroneously denied [Defendant] the opportunity to be placed on probation and demonstrate his potential for rehabilitation” when he demonstrated that he had been in custody for almost one year and had a strong support system at his disposal upon release if he were able to transfer his supervision to Florida. The State, on the other hand, insists that the trial court did not abuse its discretion in ordering Defendant to serve his sentence in incarceration.

When a defendant challenges the length or manner of service of a within-range sentence, this Court reviews the trial court’s sentencing decision under an abuse of discretion standard with a presumption of reasonableness. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012); *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). This presumption applies to “within-range sentencing decisions that reflect a proper application of the purposes and principles of the Sentencing Act.” *Bise*, 380 S.W.3d at 707. A trial court abuses its discretion in sentencing when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shuck*, 953 S.W.2d 662, 669 (Tenn. 1997) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 661 (Tenn. 1996)). This deferential standard does not permit an appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998). The defendant bears the burden of proving that the sentence is improper. T.C.A. § 40-35-101, Sentencing Comm’n Cmts.

A defendant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See T.C.A. § 40-35-303(a). Moreover, a defendant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be

considered a favorable candidate for alternative sentencing absent evidence to the contrary. *See* T.C.A. § 40-35-102(6). In this case, Defendant was eligible, but not considered a favorable candidate for alternative sentencing because he was sentenced to ten years or less but was not an especially mitigated or standard offender.

Although the trial court is required to automatically consider probation as a sentencing option, *see* Tennessee Code Annotated section 40-35-303(b), no criminal defendant is automatically entitled to probation as a matter of law, *see State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). It is the defendant's burden to establish his or her suitability for full probation. *See Carter*, 254 S.W.3d at 347 (citing T.C.A. § 40-35-303(b)). The defendant must demonstrate that probation will "subserve the ends of justice and the best interests of both the public and the defendant." *Hooper v. State*, 297 S.W.2d 78, 81 (Tenn. 1956), overruled on other grounds, *State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). Among the factors applicable to probation consideration are the circumstances of the offense; the defendant's criminal record, social history, and present condition; the deterrent effect upon the defendant; and the best interests of the defendant and the public. *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978). Tennessee Code Annotated section 40-35-103(1) sets forth the following sentencing considerations, which are utilized in determining the appropriateness of alternative sentencing:

- (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.

See also State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). Additionally, "[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." T.C.A. § 40-35-103(5). A defendant with a long history of criminal conduct and "evincing failure of past efforts at rehabilitation" is presumed unsuitable for alternative sentencing. T.C.A. § 40-35-102(5). Our supreme court has specifically held that the abuse of discretion standard, with a presumption of reasonableness, also applies to a review of a denial of alternative sentencing. *Caudle*, 388 S.W.3d at 278-79.

The trial court found Defendant had several prior felonies, no ties to Madison County, and had absconded before even registering as a sex offender as required after his

guilty plea. The record reflects that the trial court engaged in a careful consideration of the facts and the law. The trial court did not abuse its discretion in denying an alternative sentence. Defendant is not entitled to relief.

Conclusion

For the foregoing reasons, the judgments of the trial court are affirmed.

TIMOTHY L. EASTER, JUDGE