

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 11, 2023

FILED

10/09/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. NICOLAS WAYNA JOHNSON

**Appeal from the Circuit Court for Madison County
No. 21-591 Roy B. Morgan, Jr., Judge**

No. W2022-01041-CCA-R3-CD

A Madison County jury convicted the Appellant, Nicolas Wayna Johnson, of possession of marijuana with intent to sell or deliver (counts one and two), possession of a firearm with intent to go armed during the commission of a dangerous felony (counts three and four), theft of property up to \$1,000 (count five), and possession of unlawful drug paraphernalia (count six). Following a sentencing hearing, the trial court merged counts one and two and imposed a concurrent sentence of two years. The trial court also merged counts three and four and imposed a sentence of three years to be served in the Tennessee Department of Correction. By operation of law, the trial court ordered the concurrent two-year term for counts one and two to be served consecutively to the three-year term in counts three and four. See Tenn. Code Ann. § 39-17-1324(a), (e)(1), (g)(1). For counts five and six, the trial court imposed a concurrent term of eleven months and twenty-nine days, to be served concurrently with all other counts, for an effective sentence of five years in confinement. The sole issue for our review is whether the trial court abused its discretion in denying alternative sentencing. Because the Appellant was eligible for probation on the theft and drug-related offenses, we remand for resentencing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Reversed
and Remanded for Resentencing**

CAMILLE R. McMULLEN, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JILL BARTEE AYERS, JJ., joined.

J. Colin Morris, Jackson, Tennessee, for the Appellant, Nicolas Wayna Johnson.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Michelle R. Shirley, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

In a one-day trial on May 13, 2022, the proof supporting the Appellant's convictions established that Investigator Robert Pomeroy of the Jackson Police Department observed the Appellant engage in multiple hand-to-hand drug transactions in the parking lot of the Sonic Drive-In restaurant on October 20, 2020. Investigator Pomeroy said the Appellant was wearing a backpack and a Sonic t-shirt "walking from car to car, not with food bags, just seeing different people." After watching the Appellant interact with "two or three" cars, Investigator Pomeroy approached the Appellant while the Appellant was leaning into another car. At this point, Investigator Pomeroy observed the Appellant with a digital scale in one hand and a bag of marijuana in the other hand. The Appellant was taken into custody. Investigator Pomeroy also recovered the backpack he had seen the Appellant wearing earlier, which was located at the Appellant's feet at the time of his arrest. A search of the backpack revealed a stolen firearm, valued at approximately \$400, and another large bag of marijuana. Laboratory analysis later confirmed the substance recovered from the Appellant was 26.36 grams of marijuana.

The Appellant, age nineteen at the time of the offense, testified at trial and did not dispute Investigator Pomeroy's version of events. Rather, the Appellant explained that on the day of the offense he was working at the Sonic Drive-In restaurant. His sister drove to the Sonic Drive-In parking lot, and the Appellant was leaning inside of her car when he was arrested. The Appellant said that at the moment he was arrested, his sister had handed him everything found in his hands, the digital scale and the marijuana. The Appellant denied selling marijuana to her; but, he admitted that he smoked marijuana and purchased an ounce of marijuana at a time to support his habit. He was unaware that the firearm in his backpack was stolen and explained that he had purchased it from his "homeboy" weeks before the offense. He explained he was currently employed, had never been in trouble with "the law[,] and had no prior criminal history. Based on the above proof, the jury convicted the Appellant as charged.

A month later on June 13, 2022, the trial court conducted a sentencing hearing. There was no proof offered at the hearing other than the presentence report, which was admitted into evidence without objection. The presentence report showed that the Appellant's criminal history consisted of a single traffic offense. He had dropped out of high school in his senior year because he had "missed too many days" and had fallen into the "wrong crowd." The Appellant self-reported that while his family were "drunks," he did not drink alcohol. He admitted, however, to smoking marijuana from age sixteen to eighteen, but he quit smoking because it made him "feel slow." The Appellant reported that he had seven brothers and five sisters. He had no relationship with his mother and was raised by his father, who had given him a house in which to reside in Dyersburg, Tennessee.

The Appellant also reported working as a cook at various restaurants and employment at the Kellogg's plant in sanitation for four or five months, which was not verified. The Appellant's most recent employment was at SRG Factory making car parts. After the State requested the trial court to impose an effective sentence of four years on the firearm-related convictions, trial counsel acknowledged the mandatory minimum sentence required under Tennessee Code Annotated section 39-17-1324(a), (e)(1), (g)(1).

Trial counsel also acknowledged that the felony drug convictions were required to be served consecutively to the firearm-related convictions. Trial counsel then urged the trial court to impose the three-year minimum sentence for the firearm related convictions and the two-year minimum sentence for the underlying dangerous felony drug convictions, and concurrent sentencing as to the Appellant's remaining convictions. Trial counsel then stated, "[T]here's just no way I can come up with an argument today that will accommodate him getting probation, and I so wish I could. . . . I don't think he's eligible for diversion on this charge. I think he's disqualified."

In sentencing the Appellant, the trial court began by stating that trial counsel "can't change the law. . . . It's a statute, and [the court] [has] to follow the law whatever it is I've got to follow the law. I'm duty-bound." The trial court recalled the facts of the case, the Appellant's testimony during trial, and the jury's rejection of the Appellant's testimony. The trial court also considered the presentence report, "arguments of counsel, alternative sentencing[,] and what would be proper on behalf of the [Appellant] and the State[.]" The trial court acknowledged that the case "again is going to carry some mandatory jail time." The court then analyzed the enhancement and mitigating factors applicable to the Appellant's sentence. The court specifically noted the Appellant's age, twenty-one at the time of the presentence report, and acknowledged the Appellant was a youthful offender with no criminal history. The court weighed these factors in the Appellant's favor in determining the Appellant's sentence. The court then stated the Appellant was a Range I offender for each offense and imposed the minimum sentence within the range for the felony offenses.

For the possession of marijuana with intent to sell or deliver (counts one and two), which were merged, the trial court imposed a concurrent sentence of two years. For the possession of a firearm with intent to go armed during the commission of a dangerous felony (counts three and four), which were also merged, the trial court imposed a sentence of three years to be served in the Tennessee Department of Correction. By operation of law, the trial court ordered the concurrent two-year term for counts one and two to be served consecutively to the three-year term in counts three and four. See Tenn. Code Ann. § 39-17-1324(a), (b)(1)-(2), (g)(1), (2). For the remaining counts, theft of property up to \$1,000 (count five), and possession of unlawful drug paraphernalia (count six), the trial

court imposed a concurrent term of eleven months and twenty-nine days, to be served concurrently with all other counts, for an effective sentence of five years in confinement.

A timely motion for new trial was filed, arguing that the Appellant's sentences for the possession with intent to sell or deliver marijuana, possession of drug paraphernalia, and theft of property up to \$1,000 "should have been allowed to be served in an alternative sentencing program." At the July 11, 2022 hearing, trial counsel moved the trial court to resentence the Appellant and impose an alternative sentence on all of his offenses of conviction except the possession of a firearm with intent to go armed during the commission of a dangerous felony based on the Appellant's lack of criminal history. The trial court denied the motion based on its "very specific findings" from the sentencing hearing. The Appellant filed a timely notice of appeal, and this case is properly before this court for review.

ANALYSIS

The Appellant contends the trial court abused its discretion in denying alternative sentencing for each of his convictions except the possession of a firearm with intent to go armed during the commission of a dangerous felony. Specifically, the Appellant argues the concession made during the sentencing hearing, that he would be unable to present an argument for alternative sentencing, was limited to the Appellant's firearm related convictions and not the Appellant's other three convictions. The Appellant argues further that the trial court did not consider Tennessee Code Annotated section 40-35-103(1)(A)-(C) in relation to his criminal history upon imposition of confinement. The State responds that the Appellant failed to establish his suitability for probation and that he has failed to show the trial court erred in its denial of an alternative sentence. We agree with the Appellant.

A trial court's decision regarding alternative sentencing is reviewed for an abuse of discretion, accompanied by a presumption of reasonableness for a sentence that falls within the appropriate range and reflects that a decision was based on the purposes and principles of sentencing. State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). A trial court's decision regarding probation will only be invalidated if the court "wholly departed from the relevant statutory considerations in reaching its determination." State v. Sihapanya, 516 S.W.3d 473, 476 (Tenn. 2014) (order) (per curiam). Under an abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. Id. at 475. The trial court must also consider a defendant's potential or lack of potential for rehabilitation or treatment. See Tenn. Code. Ann. § 40-35-103(5).

Under the revised Tennessee sentencing statutes, a defendant is no longer presumed to be a favorable candidate for alternative sentencing. State v. Carter, 254 S.W.3d 335, 347

(citing Tenn. Code Ann. § 40-35-102(6)). Instead, the “advisory” sentencing guidelines provide that a defendant “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(6). A defendant shall be eligible for probation, subject to certain exceptions, if the sentence imposed on the defendant is ten years or less. Id. § 40-35-303(a). A defendant is not, however, automatically entitled to probation as a matter of law. The burden is upon the defendant to show that he is a suitable candidate for probation. Id. § 40-35-303(b); State v. Goode, 956 S.W.2d 521, 527 (Tenn. Crim. App. 1997); State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996).

In order to meet this burden, the defendant “must demonstrate that probation will ‘subserve the ends of justice and the best interest of both the public and the defendant.’” State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (quoting State v. Dykes, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990)).

A trial court may deny alternative sentencing when:

(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)(A)-(C). A trial court should also consider a defendant’s potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Id. § 40-35-103(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). A defendant with a long history of criminal conduct and “evincing failure of past efforts at rehabilitation” is presumed unsuitable for alternative sentencing. Tenn. Code Ann. § 40-35-102(5). Ultimately, in sentencing a defendant, a trial court should impose a sentence that is “no greater than that deserved for the offense committed” and is “the least severe measure necessary to achieve the purposes for which the sentence is imposed.” Id. § 40-35-103(2), (4).

The Appellant was convicted of possession of a firearm with the intent to go armed during the commission of a dangerous felony, a Class D felony with a mandatory minimum sentence of three years, see Tenn. Code Ann. § 39-17-1324(a), (g)(1), and is ineligible for

probation by statute for his firearm conviction. See Id. § 39-17-1324(e)(2). Furthermore, the sentence imposed for the firearm conviction “shall be served consecutive to any other sentence the person . . . is sentenced to serve for conviction of the underlying dangerous felony.” Id. § 39-17-1324(e)(1). This statute does not limit the trial court’s discretion to grant probation for the underlying dangerous felony conviction. See State v. Lindsey, No. E2017-01542-CCA-R3-CD, 2018 WL 3058299, at *2 (Tenn. Crim. App. June 20, 2018). Nor does it make the Appellant ineligible for probation on the underlying dangerous felony.

Although trial counsel argued in the motion for new trial as well as on appeal that his statement during sentencing that the Appellant was ineligible for probation was limited to the firearm conviction, it appears that the trial court was misled by trial counsel’s argument at sentencing and deemed the Appellant ineligible for probation as to the theft and underlying dangerous felony drug-related convictions. The record shows the trial court referred to being “duty-bound” by the law, and it did not consider any of the factors under Tennessee Code Annotated section 40-35-103(1)(A)-(C). See State v. Wilson, No. W2019-01550-CCA-R3-CD, 2020 WL 6828966, at *1 (Tenn. Crim. App. Nov. 19, 2020) (“The trial court did not indicate whether it examined the statutory considerations for imposing confinement and did not place in the record its reasons for imposing the sentence.”). At the motion for new trial hearing, the trial court announced that it had made “very specific findings on record that day[,]” and stood on those findings. However, the trial court in fact made no specific findings regarding Appellant’s suitability for probation for those eligible convictions.

Accordingly, we remand this case for the trial court to consider the Appellant’s suitability for probation for his two-year sentences for the felony drug convictions and the eleven-month and twenty-nine-day sentences for the theft and drug paraphernalia offenses. State v. Lindsey, No. E2017-01542-CCA-R3-CD, 2018 WL 3058299, at *3 (Tenn. Crim. App. June 20, 2018); State v. Moore, No. W2013-00179-CCA-R3-CD, 2014 WL 465751, at *12 (Tenn. Crim. App. Feb. 4, 2014) (holding that although the defendant was statutorily ineligible for probation for his firearm conviction pursuant to 35-17-1324(e), he was eligible for probation for his eight-year sentence for attempted second degree murder, which was the underlying dangerous felony).

CONCLUSION

Based on the above reasoning and authority, we reverse the judgments of the trial court and remand for the limited purpose of considering the Appellant’s suitability for probation for his two-year sentences for the felony drug convictions and the eleven-month and twenty-nine-day sentences for the theft and drug paraphernalia offenses.

CAMILLE R. MCMULLEN, PRESIDING JUDGE