IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
May 20, 2008 Session

STATE OF TENNESSEE v. KEATON M. GUY

Direct Appeal from the Criminal Court for Anderson County
No. A6CR0077 Donald R. Elledge, Judge

No. E2007-01827-CCA-R3-CD - Filed December 8, 2008

The defendant, Keaton M. Guy, appeals the sentencing decision of the Anderson County Criminal Court. The defendant entered an open guilty plea to one count of reckless vehicular homicide, a Class C felony, and one count of aggravated assault, a Class D felony. Following a sentencing hearing, the trial court denied his application for judicial diversion and imposed concurrent sentences of four years and two years for the respective convictions. The court also denied the defendant's request for alternative sentencing and ordered that the effective four-year sentence be served in confinement. On appeal, the defendant raises three issues for our review: (1) whether the court abused its discretion in denying the application for judicial diversion; (2) whether the court imposed an excessive sentence based upon the erroneous application of enhancement and mitigating factors; and (3) whether the court erred by denying alternative sentencing, specifically probation. Following review of the record, we affirm the judgments of the trial court.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JERRY L. SMITH, J., joined. JOSEPH M. TIPTON, P.J., concurred in results only.

David A. Stuart, Clinton, Tennessee, for the appellant, Keaton M. Guy.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; David S. Clark, District Attorney General; and Sandra N. C. Donaghy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The underlying facts of the case, as recited at the guilty plea hearing, are as follows:

> [A]ccording to a case file submitted by Trooper Kelly Smith of the Highway Patrol, on October 28, 2005, he responded to a single vehicle crash at 1280 Laurel

> Road. He observed three sets of tire marks, a utility pole, the guard rail was damaged, a utility pole was broken, and a small tree was damaged. He observed the black truck next to a private driveway north of the damaged tree. The defendant was standing in the private drive and was being attended by E.M.S. He admitted to law enforcement that he had been driving, that he was trying to scare one of the passengers, Carmen McGuff, and that he sped up in the curve. He lost control of the vehicle. And at that time, the young woman that was killed was ejected from the car, and she was found about 80 feet west from the private drive. And the other female occupant was injured seriously, and she's the victim of the reckless aggravated assault. And she has sustained injuries causing her to be in a wheelchair. The law enforcement asked the defendant how fast he was driving, and he indicated that he thought he was driving about 60 miles per hour. There was no proof of intoxication or drugs at the time so it's a reckless vehicular homicide. . . .

The defendant was subsequently indicted for one count of vehicular homicide and one count of aggravated assault. He later entered to an open guilty plea to the charged offenses and filed an application for judicial diversion. Following the court's acceptance of the plea, a sentencing hearing was held.

The State introduced the presentence report as evidence at the hearing. The report indicated that the defendant was twenty years old at the time of sentencing and that he had no prior criminal history. The report also stated that the defendant had graduated from high school and that he worked as a plumber's helper and a disc jockey. In response to a question concerning his version of the events, the defendant wrote "no statement."

As its first witness, the State called Trooper Kelly of the Tennessee Highway Patrol, who investigated the single-car wreck. He testified that he had called in the Critical Incident Response Team who, after investigating, prepared a report which indicated that the defendant was traveling eighty-six miles per hour at the time of the crash. He also read into evidence a statement which he took from the defendant:

> Before we left the house, Carmen had smoked pot in the room we were in and we made out when we all decided to go to the movies and eat. So we'd left the house and I told them to buckle up, that I didn't sit there and watch them. I assumed they had buckled up, and we left the house and started to the movies. I asked them if they really wanted to take my truck because . . . [the] back-end of the truck messed up. They said no, my truck looked cool. So Anessa said, I could scare her so when we got across the railroad tracks, I speed up seeing the turn. I slowed to about 55 or 65 miles per hour. Then in the turn, the truck hopped and the truck slide to the left. I over-corrected and the truck slide to right, hitting the guard rail, and we flipped a bunch of times.

Trooper Kelly testified that the speed limit for the road which the defendant was driving on was forty-five miles per hour and that the road was very curvy with a "slight elevation to it." The trooper acknowledged that the defendant had no drugs or alcohol in his system, that he was emotional and crying at the scene, and that he cooperated with police during the investigation.

Mrs. Karen Hohman, the mother of the fourteen-year-old victim who died as a result of the wreck, read a statement into evidence. In the statement, she said that her family had been devastated by the effects of the defendant's actions. She further stated that she was upset that the defendant, on his website, was advocating the use of seatbelts to save lives when, according to her, the cause of this wreck was the "game" played by the defendant to scare the victims. She further indicated that the fact that the defendant had tattooed her daughter's picture on his chest was inappropriate and that it hurt her and her family greatly.

Wilma Swain, the grandmother of the two victims, also testified about the devastating effects of the wreck upon their family. She stated that "since the accident, they've been a lot of work and a lot of money spent taking care of the family and Carmen- making sure she's got a correct place to live and to take care of her little boy." She indicated that she and her husband had spent between $30,000 and $35,000 on Carmen's medical expenses during the first year following the incident and that they still continued to help with the bills. She also testified that any settlement received by Ms. McGuff was being taken by the State to reimburse TennCare for medical bills. She further stated that she felt that the defendant had no remorse regarding the events or he would not have put information regarding the accident on the internet or tattooed a picture of her granddaughter on his chest.

The defendant submitted multiple letters written on his behalf. One such letter was from a Florida doctor who treated the defendant as a child. According to the letter, the doctor had diagnosed the defendant with ADHD and oppositional defiant disorder and had prescribed medications, which proved to be helpful. The doctor further wrote that he was under the impression that the defendant had discontinued his medications upon his move to Tennessee and that ADHD, left untreated, had an associated high risk of traffic accidents.

The defendant exercised his right to allocution and made the following statement:

> I know there's nothing I can . . . ["]sorry" is not going to change or help anything. Putting the pictures up was just to help show my friends not to do anything stupid, to always buckle up because it does help occasionally. The tattoo, I mean, she was a friend. I mean, I want to remember her, and I don't want to ever forget it. I live with it everyday. I can't not. I see it in dreams, and I see it when I wake up. I see it on the road everyday. People fly by and the picture comes back. There's not a day that I have forgotten it. I mean, you ask any of my friends now. I mean, I drive the safest possible - I mean, five below the speed limit. They say I'm the safest now ever. I mean, I was young; I was stupid. I didn't know any better. I mean, you don't

think that something like this could change you, but it does a lot. And I just hope you do the right thing in making your decision. . . .

After hearing the evidence presented, the trial court denied the defendant's application for judicial diversion. The court further imposed concurrent sentences of four years for the vehicular homicide and two years for the aggravated assault. Finally, the court denied the defendant's request for an alternative sentence and ordered that the sentences be served in the Department of Correction. The specific findings of the court are as follows:

> . . . The Court would note, of course, that [the defendant] made no statement at [the] time . . . he filled out the questionnaire. The Court would further note that today that [the defendant] did not present himself for direct and/or cross examination. The Court would further note that I have observed [the defendant] during these proceedings. And for the record, these have been emotional proceedings. Emotional to everybody involved. I've never once seen [the defendant] express any type of emotion except smile, candidly. I've never seen any type of emotion although he says he has regret. I've never seen anything that to me would appear as if he has. And maybe, . . . you're just good at hiding that but I've not seen anything that shows any type of remorse in this case at all other than your verbal statements.
>
> Trooper Smith testified and the exhibit show[s], . . . the damage done to the vehicle that was in this wreck. As a result of that wreck, Carmen McGuff sits before us today in a wheelchair and for the rest of her life will be a paraplegic. I so find. I further find that on the first year alone to take care of her it was between thirty and thirty-five thousand dollars. I further find that just in terms of her - she was apparently entitled to some monies that the State seized because of additional monies that the State had paid for her. I further find that it's obvious from the record and the testimony today and from the personal observations of Ms. McGuff that she's going to have extensive medical bills. . . .
>
> Ms. Hohman, fourteen years old, got in a truck with the . . . defendant in this cause of action. And I don't know who suggested that they go faster, but let me further find in this case that [the defendant] was in control of the vehicle that caused the death and the tragic disability. . . . [The defendant] did not ensure that either of the injured parties were on a seatbelt. But candidly from the testimony presented and I so find that the speed that he was traveling was 86 miles per hour based upon the testimony of the Trooper. He traveled that rate of speed and I so find knowing that his truck would hop, as he called it, when the truck would get up to 45 miles an hour. That is important because I further find that in this case that the speed limit was 45 miles an hour. So all he had to do was obey the law and all he had to do to obey the law was to drive the speed limit. I find that he intentionally, negligently violated the law and not only exceeded 45, he almost doubled the speed limit. And I further find

that that's really important because he knew the problems that he would have with this truck when he drove the truck as he did.

To use his own words and I wrote it in quotes: He knew that the back end of the truck was so messed up the truck would hop, and it would hop doing 45 or above.

And, you know, another thing here is he says he slowed down, slowed to 55 to 65. Let's assume that was correct, which I don't find it to be correct; I've already found the speed was 86 miles an hour. But that's anywhere from 10-to-20 miles faster again than the speed limit. I further find that the victim in this case, Ms. Hohman, was fourteen years of age, had no control over the vehicle, had no control over how it was driven. If she encouraged him to drive fast and I'm not certain who did the encouragement, it certainly isn't a fourteen-year-old child to say that but regardless, [the defendant] made that decision.

I further find that [the defendant] was upset at the time at the scene of the wreck. He had no drugs or alcohol in his system. He was also cooperative. I think logical minds could conclude based upon the proof that's been presented today that whether they were buckled up or not, the speed at which they hit the light pole and the tree were sufficient in and of itself- I can't make that an absolute finding because I am not a medical doctor- but I don't find that it's just the car seat. And candidly as I said, I read all the letters before I came here today. And certainly your father is representing you and in looking at that, how can a fourteen year old take credit or be blamed for something that [the defendant] did while he was totally operating the vehicle? I don't understand that.

Let me address the mitigating factors first, the mitigating factors that I found. I do not think No. 3 exists that there were substantial grounds existing to excuse the defendant's criminal conduct. I do find under No. 6, I think the defendant's birthday was March or May of that year so he was an adult. He was 18 already. He's 20 as he sits here today. And I find, although there's not been proof to that effect, I find that mitigating factor No. 6 may or may not have played a role in substantial judgment in committing the offense. No. 8 that he was suffering from a mental or physical condition that significantly reduced his culpability for the offense. We have before us a gentleman who turned 18, and I understand in the letter that the parents would provide the medication for him. But the proof before me today uncontradicted that he was working and, in fact, earned fourteen thousand dollars that year, chose not to take medication. And, most importantly, as he sits here today, there's no proof that he's under medication. As part of the defense, if in fact that is a defense, what's to say he wouldn't do it again? I mean, we're sitting here today at a sentencing hearing and he is still not under medication. He's still not receiving any type of treatment so I don't find No. 8 as a factor. No. 11, I likewise don't find that as a factor as a mitigating offense that the defendant although guilty of the crime

committed the offense under such unusual circumstances that it is unlikely that that sustained intent to violate the law motivated the criminal conduct. I mean, speeding is speeding. I just can't find that.

Let's go to enhancement factors. I've already ruled on some of these enhancement factors, but let's address the ones that I specifically believe. . . . Factor No. 7, offense involved, the victim was committed to gratify the defendant's desire for pleasure, excitement - there's no question. He was driving 86 miles an hour. In my mind, there's no question even if he slowed down, he was still exceeding the speed limit by 10-to-20 miles an hour knowing that his truck even when he was doing 47 miles an hour, he knew his truck would have problems with the rear end. I think he enjoyed it. And I find No. 7 to be appropriate. And I do find that he abused the position of [private] trust when Ms. Hohman, fourteen years old, sat in his truck. . . . This was someone that she has nobody to look out for her or had nobody to look out for her.

Ms. McGuff apparently was an adult at the time but Ms. Hohman wasn't. She was a minor. So I find . . . enhancement factors, I candidly think that factors 4 and 7 also apply. I'm sorry, 4 would apply but I'm basing this on actually 7 and 14 and 10.

. . . I also find that . . . Factor No. 10 is an enhancement factor so, you know, there's no question that driving any vehicle at 80-something miles an hour on this road that's a curvy road, knowing that if you're driving over 45 miles an hour that you're going to have trouble with your vehicle - is placing a high risk to human life.

With that said, I find obviously that he is a standard offender. Now in terms of diversion and part of this is part of what I've already found, we've got a gentleman here who has according to his doctor attention deficit disorder that while he was a minor, his parents would buy his medication for him. He's an adult as we sit here today, and there's no proof he still uses medication. There's still no proof that he would do anything to comply to ensure that his judgment is correct or his judgment is lawful. So I don't think that, candidly, that he would be amenable to diversion.

Let me further find, too. And I based this on State v. Harris, 953 S.W.2d 701 and at 705, and State versus Z-e-o-l-l-a, 928 S.W.2d 457. This Court cannot, I cannot in any way diminish the crime that we have before us. Under State vs. Zeolia, they were asking for alternative sentences in that case and that involved arson. It actually just involved loss and damages where there was a significant amount of financial damages. Well, we have that already in this case. We have a significant amount of financial damages already incurred, already paid, and trust will be paid as long as Ms. McGuff lives. So we cannot diminish the seriousness of this offense at all. I truly think that confinement is necessary to avoid depreciating the seriousness

of this offense for the reasons that I have previously stated. And consistently 40-35-103, subparagraph (1)(b) consistent with the findings that I've made, I find that probation at this time is not an option. It's my intent that there should be confinement in jail. . . .

Analysis

On appeal, the defendant raises three challenges to the sentences imposed by the trial court, each of which relate to the length or manner of service of the sentence imposed by the trial court. When an accused challenges the length, range, or manner of service of a sentence, this court has a duty to conduct a *de novo* review of the sentence with a presumption that the determinations made by the trial court are correct. T.C.A. § 40-35-401(d) (2006); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn.1991). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *Ashby*, 823 S.W.2d at 169. The burden is on the defendant to show that the sentencing was improper. T.C.A. §40-35-401, Sentencing Comm'n Cmts.

When conducting a *de novo* review of the sentence, this court must consider: (a) the evidence, if any, received 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) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210 (2006); *Ashby*, 823 S.W.2d at 168. Furthermore, we emphasize that facts relevant to sentencing must be established by a preponderance of the evidence and not beyond a reasonable doubt. *State v. Winfield*, 23 S.W.3d 279, 283 (Tenn. 2000) (citing *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997)).

I. Judicial Diversion

First, the defendant argues that the court erred by failing to articulate the grounds upon which it relied to deny judicial diversion. He contends that, based upon the facts of the case and the defendant's record, diversion should be granted. "Judicial diversion is a legislative largess whereby a defendant adjudicated guilty may, upon successful completion of a diversion program, receive an expungement from all 'official records' any recordation relating to 'arrest, indictment or information, trial, finding of guilty, and dismissal and discharge' pursuant to the diversion statute." *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). A defendant is eligible for judicial diversion when he or she is found guilty or pleads guilty to a Class C, D, or E felony and has not previously been convicted of a felony or a Class A misdemeanor. T.C.A. § 40-35-313(a)(1)(B)(I) (2006). With these requirements in mind, it is undisputed that the defendant is statutorily eligible for judicial diversion. However, eligibility under the diversion statute does not ensure the grant of diversion.

The decision of whether to grant a request for judicial diversion lies within the sound discretion of the trial court, and this court will not disturb that decision on appeal absent an abuse

of discretion. *State v. Robinson*, 139 S.W.3d 661, 665 (Tenn. Crim. App. 2004). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In deciding whether to grant judicial diversion, the trial court must consider the following factors: (1) the accused's amenability to correction; (2) the circumstances of the offense; (3) the accused's criminal record; (4) the accused's social history; (5) the status of the accused's physical and mental health; (6) the deterrence value to the accused as well as others; and (7) whether judicial diversion will serve the ends of justice. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *Parker*, 932 S.W.2d at 958.

The record must indicate that the court has weighed all of the factors in reaching its determination. *Electroplating, Inc.*, 990 S.W.2d at 229. If the trial court denies a request for judicial diversion, it should state in the record "the specific reasons for its determinations." *Parker*, 932 S.W.2d at 958-59. If the trial court "based its determinations on only some of the factors, it must explain why these factors outweigh the others." *Electroplating, Inc.*, 990 S.W.2d at 229. In *State v. Curry*, a pretrial diversion case, our supreme court held that the circumstances of the offense and the need for deterrence may alone justify a denial of diversion, but only if all of the relevant factors have been considered as well. 988 S.W.2d 153, 158 (Tenn. 1999). "Judicial diversion is similar in purpose to pretrial diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under [Tennessee Code Annotated section] 40-15-105." *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

The State concedes that the trial court did not specifically enumerate each factor in denying diversion but argues that the record reflects that the court did consider all appropriate factors in making its determination that diversion was not appropriate. We agree that the court did address the requisite considerations in arriving at its decision to deny diversion. In its findings, the court specifically discussed the circumstances of the offense in great detail, noting the extensive injuries caused by the defendant's traveling at such a high rate of speed. Moreover, it noted that the defendant was eighteen years old at the time of the wreck and that he worked two jobs, making $14,000 per year. The court also discussed the defendant's diagnosis with ADHD and the defendant's refusal to take medication for this condition. The court referenced that the defendant had no alcohol or drugs in his system and that he was cooperative with police. The court also indicated that he had read all the letters submitted on behalf of the defendant and considered the presentence report, which indicated that the defendant had no criminal history. The court noted the defendant's lack of remorse, despite the defendant's assertions to the contrary, indicating a lack of candor to the court. *See State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994) (holding consideration of defendant's candor while testifying was probative of prospects for rehabilitation). Moreover, from the comments made by the court, it is apparent that the deterrence value to the defendant and others was a consideration. Finally, the court specifically found that the defendant was not "amenable" to diversion. Because the court considered the appropriate factors, we are unable to conclude that he abused his discretion in denying diversion.

The offenses committed by the defendant in this case were indeed very serious. He got into a vehicle, which he knew would malfunction, and drove eighty-six miles per hour in order to frighten his passengers. A wreck resulted in which a fourteen-year-old died and another young woman was left paralyzed with extensive medical bills for the rest of her life. Moreover, the court specifically noted that the defendant did not appear to accept responsibility for his part in the wreck but, instead, blamed his passengers for failing to wear seatbelts and for encouraging him to speed. The court also referenced the defendant's refusal to take prescribed medication and indicated that, by the defense's own theory, another wreck could occur because the ADHD, left untreated, increased the risk of automobile accidents. The trial court was in a better position than this court to observe the appellant's demeanor and attitude. Based upon these facts, we conclude that there is ample evidence contained in the record to support the trial court's denial of diversion. As such, we may not revisit the issue. *See Cutshaw*, 967 S.W.2d at 344.

Moreover, the denial of diversion is also supported by the denial of probation in this case. "[T]he same guidelines are applicable in diversion cases as are applicable in probation cases, but they are more stringently applied to those seeking diversion." *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995) (citing *State v. Holland*, 661 S.W.2d 91, 93 (Tenn. Crim. App. 1983)). Thus, because there was a sound basis for the denial of full probation, as discussed *infra*, we must conclude that the trial court did not abuse its discretion in denying the defendant's application for judicial diversion. *See Bingham*, 910 S.W.2d at 456 (defendant who was not suitable candidate for full probation was similarly not entitled to judicial diversion).

II. Excessive Sentence Enhancement and Mitigating Factors

Next, the defendant contends that the court erred in its application of enhancement factors and in its refusal to apply certain mitigating factors in determining the length of the sentences imposed. The defendant's criminal conduct, which is the subject of this appeal, occurred subsequent to the enactment of the 2005 Amendments to the Sentencing Act, which became effective June 7, 2005. The amended statute no longer imposes a presumptive sentence. *State v. Stacey Joe Carter*, 254 S.W.3d 335, 343 (Tenn. 2008). As further explained by our supreme court in *Carter*,

> 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]." Those purposes and principles include "the imposition of a sentence justly deserved in relation to the seriousness of the offense," a punishment sufficient "to prevent crime and promote respect for the law," and consideration of a defendant's "potential or lack of potential for . . . rehabilitation[.]"

Id. (citations and footnote omitted). The 2005 Amendment further deleted appellate review of the weighing of the enhancement and mitigating factors, as it rendered these factors merely advisory and non-binding in the sentencing determination. Under current sentencing law, the trial court is, nonetheless, required to "consider" an advisory sentencing guideline that is relevant to the sentencing determination, including the application of enhancing and mitigating factors. *Id*. at 344. However,

the trial court's weighing of various mitigating and enhancing factors is now left to the trial court's sound discretion. *Id*. at 344. Moreover, error in the application of an enhancing factor or factors will not necessarily require modification of the sentence if the sentencing record reflects that in determining the specific sentence length, the trial court considered the provisions of Tennessee Code Annotated section 40-35-210(b)(1)-(7). Under these guidelines, we proceed to review the defendant's argument that the misapplication of enhancement factors and the non-application of mitigating factors resulted in an excessive sentence.

a. Enhancement Factors

In his brief, the defendant contends that the court erred in applying enhancement factor (3), that the offense involved more than one victim; (4), that a victim of the offense was particularly vulnerable because of age or physical or mental disability; (6), that the personal injuries inflicted upon, or the amount of damage to property, sustained by or taken from the victim was particularly great; (7), that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; (10), that the defendant had no hesitation about committing a crime when the risk to human life was high; and (14), that the defendant abused a position of public or private trust. *See* T.C.A. § 40-35-114 (3), (4), (6), (7), (10), and (14) (2006). As an initial matter, we note factors (3), (4), and (6), though discussed by the trial court, were not relied upon by the court in setting the sentence length. The court specifically stated, "I'm basing this on actually 7 and 14 and 10." Thus, we review only the court's application of those three factors.

With regard to factor (7), the defendant contends that the factor was erroneously applied because the act producing the pleasure or excitement, here the reckless driving, is an essential element of the offenses to which he pled guilty. The defendant is correct that enhancement factors may only be applied if "appropriate for the offense and if not already an essential element of the offense." *State v. Kissinger*, 922 S.W.2d 482, 489-90 (Tenn. 1996); *see also* T.C.A. § 40-35-114. We disagree with his argument, however. To accept the defendant's argument would virtually preclude use of this factor in any case. Rather, we must look to the motivation behind the act which was committed. Here the factor was appropriately applied because the defendant drove at an excessive rate of speed, knowing his vehicle could malfunction, in order to frighten the victims. We find nothing in the record to preponderate against the court's findings that the defendant committed the act to gratify his own desire for pleasure or excitement.

The defendant likewise contends that factor (10) was inappropriately applied because the State failed to prove that he "demonstrated a culpability distinct from and appreciably greater than that incident to the offense for which he was convicted." Factor (10) is applicable when a high risk to human life is established by facts separate from those necessary to establish an element of the offense. *Bingham*, 910 S.W.2d at 452. Such circumstances arise when a defendant creates a high risk to the life of a person other than the named victim. *Id.*; *see also State v. Williamson*, 919 S.W.2d 69, 83 (Tenn. Crim. App. 1995) (factor (10) applicable to sentence for vehicular homicide where defendant drove her car in an intoxicated condition on crowded highway); *State v. Jerry Douglas Franklin*, No. 01C01-9510-CR-00348 (Tenn. Crim. App., at Nashville, Feb. 28, 1997) (factor (10)

applicable to sentence for vehicular homicide by intoxication where other drivers placed at risk). Notwithstanding, in *State v. Rhodes*, 917 S.W.2d 708, 714 (Tenn. Crim. App. 1995), this court held that enhancement factor (10) does not apply to vehicular assault where the record does not indicate that any other person was actually threatened by defendant's driving because "vehicular assault [unquestionably] reflects the legislature's appreciation of the substantial risk of and actual degree of harm that results from [the] caused injury."

The State contends that the court appropriately applied the factor "because the defendant drove his truck on a curvy road at 86 miles per hour knowing that it had mechanical problems[, and] [i]n doing so, . . . endangered other drivers on the road." However, we are unable to conclude that the factor was properly applied as the record before us is devoid of any evidence regarding other motorists on the road which were endangered by the defendant's actions. *Cf. State v. Davis Oliver Brown*, No. 03C01-9608-CR-00313 (Tenn. Crim. App., at Knoxville, Dec. 16, 1997) (although record did not specifically list the names of persons on the road that night, the facts of the case were sufficient to allow inference that individuals traveling on the highway were also subject to danger or injury). In this case, there was no evidence presented that any other person was traveling on the road on the evening of the incident. In contrast to the facts in *Davis Oliver Brown*, which occurred on an interstate highway within the city limits of an urban area, we are unable to conclude from the record before us if this is heavily traveled roadway or to determine the likelihood of the presence of other people. As such, the record does not support application.

Finally, the defendant challenges application of factor (14), arguing that no relationship of private trust was established and that even if a relationship existed, the State failed to prove that the defendant abused that relationship in committing the crime. In *Kissinger*, 922 S.W.2d at 488, our supreme court held that the application of the abuse of trust factor requires a finding that a defendant occupied a position of trust, either public or private, and that the position of trust occupied was abused by the commission of the offense. They further explained:

> The determination of the existence of a position of trust does not depend on the length or formality of the relationship, but upon the nature of the relationship. Thus, the court should look to see *whether the offender formally or informally stood in a relationship to the victim that promoted confidence, reliability, or faith.*

Kissinger, 922 S.W.2d at 488 (emphasis added). Although the court stressed that the "fact that an offender is older than the victim or that the offender is an adult and the victim is a child is insufficient without more to establish a position of trust," *id.* at 489, it has recently clarified that where "the adult perpetrator and minor victim are members of the same household, the adult occupies a position of 'presumptive private trust' with respect to the minor." *State v. Gutierrez*, 5 S.W.3d 641, 645 (Tenn. 1999).

Obvious examples of a position of private trust include the position of parent, stepparent, babysitter, teacher, or coach. *Gutierrez*, 5 S.W.3d at 645. However, in *State v. Edd Stepp*, No. E2005-02178-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Nov. 2, 2006), a panel of this court

held that "[t]he mere existence of a friendship . . . does not establish 'private trust.'" *See also Gutierrez,* 5 S.W.3d at 646 (holding that a 'live-in' relationship, where two people live together as man and wife, does not establish a 'private trust'). Similarly, the mere relationship of being a "neighbor" is insufficient to support a finding of private trust. *State v. Karl Daniel Forss*, No. E2007-01349-CCA-R3-CD (Tenn. Crim. App., at Knoxville, Jan. 30, 2008).

Based upon the evidence in the record before us, we are unable to conclude that the trial court correctly applied this factor. As noted, the mere fact that the defendant was an eighteen-year-old adult while one of the victims was a fourteen-year-old minor is not sufficient to justify application of the factor, especially in light of the fact that the second victim, who was the cousin of the fourteen-year-old victim, was older than the defendant. We are likewise unable to conclude that simply riding in a vehicle with someone, absent evidence of some type of relationship, is sufficient to establish 'private trust.' There is no evidence in the record of the type of relationship the defendant had to the two victims, other than his own testimony that they were friends. There is no evidence he was a babysitter, custodial figure, or in any position of supervisory authority over the victims. With no such evidence presented, we are unable to speculate that the relationship which existed between the parties was one which promoted confidence, reliability, or faith. Thus, the factor was improperly applied.

b. Mitigating Factors

Next, the defendant contends that the trial court failed to apply certain mitigating factors in its determination of the appropriate sentence length. Specifically, he contends that four factors should have been applied: (3), that substantial grounds exist tending to excuse or justify the defendant's criminal conduct though failing to establish a defense based upon the victims' request that the defendant drive at an excessive rate of speed to scare them; (6), that the defendant, because of youth, lacked substantial judgment in committing the offense because he was eighteen at the time of the wreck, had limited driving experience, and is still lacking in the judgment of a mature adult; (8), that the defendant was suffering from a mental condition that significantly reduced his culpability for the offense based upon his ADHD, as it substantially impairs his judgment and contributes to impulsive decisions; and (11), that the defendant, though guilty of the offenses, committed them under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. *See* T.C.A. § 40-35-113(3), (6), (8), and (11) (2006). He also asserts several facts which he claims should have been considered in mitigation, we assume pursuant to the catchall mitigating factor (13). *See* T.C.A. § 40-35-113(13). Those facts are: (1) he has made restitution to the family of the deceased victim and directly to the injured victim; (2) a contributing factor to the wreck was the dangerous and defective condition of the roadway and the guardrail; (3) the defendant is extremely remorseful; (4) the reckless driving was not the result of drugs or alcohol intoxication; (5) the defendant has no prior criminal history; (6) the defendant has a good work history and work ethic; (7) the defendant cooperated fully with law enforcement; (8) the defendant voluntarily turned himself in following indictment; and (9) the defendant is a slightly built, soft spoken, and mild-mannered man who should not be subjected to a penal environment.

As noted by the State, the defendant does not specify which of the proposed mitigating factors the court failed to consider. Indeed, review of the record, specifically the trial court's findings, reveals that the court considered each of the proposed factors offered by the defendant. The court, after consideration, rejected application of each of the factors, and we finding nothing in the record to indicate that the court acted outside its discretion in so deciding.

c. Length of Sentence Imposed

The defendant was convicted of vehicular homicide, a Class C felony, which carries a range of three to six years for a Range I offender. T.C.A. § 39-13-213(b)(1) (2006); T.C.A. § 40-35-112(a)(3) (2006). He was also convicted of aggravated assault, a Class D felony, which has an applicable Range I sentencing range of two to four years. T.C.A. § 39-13-102(d)(1) (2006); T.C.A. § 40-35-112(a)(4). The court sentenced the defendant to four years for the Class C felony and to two years for the Class D felony.

Although the court improperly applied two enhancing factors, we nonetheless conclude that the sentences imposed are appropriate. The record reflects that in determining the specific sentence length, the trial court considered the provisions of Tennessee Code Annotated section 40-35-210, as well as the required principles of sentencing, such as the circumstances of the offense and the defendant's potential for rehabilitation. As such, we affirm the sentences as imposed.

III. Denial of Alternative Sentencing

Finally, the defendant argues that the trial court erred in ordering that his sentences be served in confinement. The defendant asserts that he should have been given a probationary sentence and that the court erred in basing "its denial on a ground which is factually and legally inapplicable," because the nature of the offenses is not "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree" as required by *Bingham*.

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." T.C.A. § 40-35-102(6). 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. . . .

T.C.A. § 40-35-103(1); *see also State v. Hooper*, 29 S.W.3d 1, 5 (Tenn. 2000). 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. T.C.A. § 40-35-103(2), (4). The court should also consider the defendant's potential for rehabilitation or treatment in determining the appropriate sentence. T.C.A. § 40-35-103(5).

A defendant is eligible for probation if the actual sentence imposed upon the defendant is ten years or less and the offense for which the defendant is sentenced is not specifically excluded by statute. T.C.A. § 40-35-303(a) (2006). The trial court shall automatically consider probation as a sentencing alternative for eligible defendants; however, the defendant bears the burden of proving his or her suitability for probation. T.C.A. § 40-35-303(b). No criminal defendant is automatically entitled to probation as a matter of law. T.C.A. § 40-35-303(b), Sentencing Comm'n Cmts; *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). Rather, the defendant must demonstrate that probation would serve the ends of justice and the best interests of both the public and the defendant. *State v. Souder*, 105 S.W.3d 602, 607 (Tenn. Crim. App. 2002). In determining whether to grant probation, the court must consider the nature and circumstances of the offense; the defendant's criminal record; his or her background and social history; his or her present condition, both physical and mental; the deterrent effect on the defendant; and the defendant's potential for rehabilitation or treatment. *Id.*

While the defendant was eligible for a sentence of probation based upon his receiving a four-year sentence, it is apparent from the record that the trial court did not find the defendant to be an appropriate candidate for a probationary sentence. Review of the trial court's findings reveal that the court did consider the requisite factors in making its determination but based the denial of full probation primarily upon the nature and circumstances of the offense, specifically stating that "confinement is necessary to avoid depreciating the seriousness of this offense." The defendant argues that in order for probation to be properly denied based solely on the nature of the offense, the criminal act, as committed, must be "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." *State v. Cleavor*, 691 S.W.2d 541, 543 (Tenn. 1985). Otherwise stated, the nature of the offense must outweigh all factors favoring full probation. *Id.*

Initially, we note that we are unable to conclude that the decision to deny probation was based *solely* on the nature and circumstances of the offense. Regardless, we reject the defendant's argument and conclude that his actions were reckless to an excessive and exaggerated degree. We acknowledge that the court did not make a specific finding in this regard. However, the record supports such an inference from the trial court's extensive discussion of the nature and circumstances of the offense. In order to frighten one of the victims, the defendant was traveling eighty-six miles per hour on a curvy road in a vehicle that he knew malfunctioned at such a high rate of speed. He lost control of that vehicle and hit a guardrail, a utility pole, and a tree. The two passengers were

thrown from the vehicle, one was severely injured and the other died. The families of the two victims have been devastated and have incurred major expenses as a result of the incident as well. The court also found that the defendant had no remorse for his actions, despite his assertions otherwise. This implicit finding of lack of candor and credibility are indications of a defendant's potential for rehabilitation. *State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983); *State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999). Moreover, as pointed out by the State, the record does not indicate that the defendant has accepted responsibility for his actions based upon his website postings which indicate that the lack of seatbelts, not the speed at which he was traveling, caused the resulting injuries in this case. As such, we conclude that the record before us, which adequately illustrates the seriousness of the defendant's offenses, supports the trial court's denial of probation and that the defendant has failed to carry his burden to demonstrate his suitability for probation.

CONCLUSION

Based upon the foregoing, the sentences imposed by the Anderson County Circuit Court are affirmed.

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JOHN EVERETT WILLIAMS, JUDGE