IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 18, 2013 Session

STATE OF TENNESSEE v. RYAN NEAL DICKENS

Direct Appeal from the Circuit Court for Cheatham County
No. 16387 Larry Wallace, Judge

No. M2012-02399-CCA-R3-CD Filed October 31, 2013

The appellant, Ryan Neal Dickens, pled guilty in the Cheatham County Circuit Court to voluntary manslaughter. The trial court imposed a sentence of three years, with one year to be served in confinement and the remainder on probation. On appeal, the appellant challenges the trial court's refusal to grant a sentence of full probation. Upon review, we affirm the judgment of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, Ryan Neal Dickens.

Robert E. Cooper, Jr., Attorney General and Reporter; Michelle Consiglio-Young, Assistant Attorney General; Dan Mitchum Alsobrooks, District Attorney General; and Robert Wilson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

A Cheatham County Grand Jury indicted the appellant for voluntary manslaughter and reckless endangerment. The case proceeded to trial, but before the completion of the proof, the appellant agreed to plead guilty to voluntary manslaughter. Wendy Cox, a physical therapist and the clinical director who worked at Star Physical Therapy (hereinafter "the clinic"), testified at trial that the clinic was located in a small shopping center along with other businesses, including a restaurant called Don Panchos. At approximately 2:00 p.m. on June 20, 2011, she saw the appellant, who had a physical therapy appointment, park in the

parking lot and exit his truck. A truck driven by the victim, Shannon Scott Paul, was following the appellant's truck and parked one space away from the appellant. The victim got out of the truck and started talking to the appellant, who was larger than the victim. Cox thought the appellant and the victim were friends having a conversation until she saw the appellant "punch" the victim. The men then began trading punches. During the fight, they were close together. Three or four gunshots were fired, and someone in the clinic locked the door. When the men separated, the appellant's shirt was torn, and he was bleeding.

Cox saw the appellant chase the victim into Don Panchos. Shortly thereafter, two more gunshots were fired. The appellant ran out of the restaurant and came to the door of the clinic. He banged on the door but was unable to enter because the door was locked. The appellant told the people in the clinic to call the police. When they informed him that the police had been called, he sat on the patio outside Don Panchos. Cox saw a gun by the door to the clinic.

Cox said that the front of the clinic was glass and that she had a clear view of the events, which transpired fifty feet or less from her vantage point inside the clinic. Cox did not see the victim with a gun; however, after hearing the first set of shots, she saw blood on the appellant's shoulder and face. Cox did not see the victim fall but saw his body lying on the ground.

Stephanie Strange, the receptionist at Star Therapy, said that on June 20, a patient approached her and mentioned that two people had "pull[ed] up outside pretty fast." Strange looked outside, and saw the appellant and the victim get out of their respective trucks. The victim approached the appellant "with a purpose," and they began talking. The victim appeared angry, and the men began yelling at each other. Strange said the victim appeared "very, very upset," that the appellant was also upset, but that the appellant "was trying to keep his composure." The appellant, who was the larger man, hit the victim, who was the smaller man, hard enough to knock the victim off balance. When the victim regained his balance, he "went after" the appellant, and they began "scuffling." Strange heard a noise, which she later learned was a gunshot, and the men separated. Strange called the police but kept watching the events. The victim ran in the direction of Don Pancho's. Five to ten seconds later, the appellant chased the victim. Thereafter, the appellant approached the clinic and put the pistol outside the clinic's window.

On cross-examination, Strange said that the appellant told the victim to "[b]ack off or I'm going to hurt you."

Pamela Polk, who was a therapist at Star Therapy, testified that on June 20, she saw two trucks drive into the parking lot, one immediately following the other. She said that she

did not pay much attention to the parking lot until someone said that people were fighting outside. She saw the men "scuffle" with each other and heard approximately three gunshots. At that point, Polk locked the front door to the clinic. Polk said that she did not see who threw the first punch and that she did not see the end of the fight when the victim fled. She also did not see anyone with a gun.

Robert Daniel Cordle, Sr., testified that he was paying for his therapy session at Star Therapy when he saw the appellant's truck drive into the parking lot, followed closely by the victim's truck. The men spoke to each other, but Cordle could not hear what was said. However, he knew the appellant was "mouthing at" the victim. The appellant, who was the "bigger guy[,] clocked the smaller one[, the victim.]" The blow spun the victim's head around. Cordle said that the appellant "was on [the victim] quick." The men fought more. Cordle did not see a gun, but he saw the victim's hand raise and heard two or three shots. At the time of the shooting, the appellant was "letting [the victim] have it." The victim ran into Don Panchos. Cordle said the victim was "staggering like crazy. I guess he'd got addled pretty dang good." Approximately six to eight seconds later, the appellant followed the victim. Thereafter, the appellant approached the clinic and asked the people inside to call 911. When they informed him the call had been made, the appellant dropped the gun outside the clinic, walked to Don Panchos, and sat on some patio furniture.

On cross-examination, Cordle acknowledged that in a previous statement to police, he did not say that the appellant "kept pounding [the victim] and laying into him." He further acknowledged that he previously stated that he saw the victim pull a gun. He explained that he had not seen a gun but that he was "assuming" because the victim raised his arm right before the shots were fired.

Nineteen-year-old Tanner Owen testified that on June 20, he ate lunch at Don Panchos with Laurie Bagwell. A man, woman, and two children were seated at a table in front of Owen and Bagwell. The victim entered the restaurant "walking rather fast and . . . screaming, where did he go, where did he go?" The victim was wearing a tank top that was ripped off of one shoulder, and blood was on his chest. He was not carrying a gun. He "stormed on through to the back into the breezeway connecting both sides of the restaurant." Shortly thereafter, Owen heard two gunshots then smelled gunpowder. Owen crept toward the front of the restaurant and saw the victim lying on the sidewalk. Owen said that after the shooting, he realized that one of the young children, Eli, had been approximately four or five feet away from the shooting.

On cross-examination, Owen said that he did not see the appellant enter the restaurant. Although the victim had "quite a bit of blood" on him, Owen did not see any injuries.

Ashland City Police Officer Joseph Olivas testified that on June 20, 2011, he was dispatched to a report of a shooting at Don Panchos. After he arrived, Officer Olivas secured the front of the restaurant while another officer secured the back of the location. Thereafter, Officer Olivas learned that the shooter, who was the appellant, was sitting under a nearby umbrella. Officer Olivas instructed people to step away from the appellant and the victim's body and asked the appellant to disclose the location of the gun. The appellant informed Officer Olivas that he had thrown the gun near Star Physical Therapy. At that point, other officers began to arrive at the scene.

Officer Johnny Hunter, a crime scene investigator with the Ashland City Police Department, processed the crime scene. He learned that the victim and the appellant each drove a black Ford pickup truck. When Officer Hunter saw the victim's body, he noticed that the victim was wearing only one shoe. The victim's other shoe was found in the parking lot. Officer Hunter discovered a projectile in the right rear taillight of one of the trucks.

Officer Hunter said that he found two shell casings on the floor of the restaurant. The casings were sent to the Tennessee Bureau of Investigation for testing, which revealed the casings matched the Ruger .380 Tracer pistol that was collected from outside the clinic. The pistol was registered to the victim.

The parties stipulated that the pistol discovered outside the restaurant fired the bullets that killed the victim.

After the foregoing proof was presented at trial, the appellant entered a best interest guilty plea to voluntary manslaughter. The plea agreement provided that the appellant would receive a three-year sentence and that the trial court would determine the manner of service of the sentence. The plea agreement further provided that the reckless endangerment charge would be dismissed.

The State summarized the proof underlying the plea as follows:

> Well, Your Honor, we've heard a number of witnesses. The Court's heard it was an argument. They got into a scuffle. [The appellant] threw the first punch. They were struggling. [The victim] pulled out his gun. He was a gun permit holder. He ended up shooting [the appellant] twice and then they struggled some more. [The victim] ran to Don Panchos, and the proof showed that [the appellant] was at least seven seconds behind him. And the videotape that we haven't seen shows that at the restaurant, it's 17 seconds before [the appellant] killed [the

> victim]. So that would be a total of 24 seconds where he chased him.
>
> So, the State indicates that it's an intentional knowing killing with sufficient provocation to cause a reasonable man to act in an irrational manner detailing beyond a reasonable doubt manslaughter.

At the sentencing hearing, Darryl Smith, the probation officer who compiled the appellant's presentence report, testified that he collected victim impact statements from the victim's father and mother. The statements reflected that the victim's parents wanted the appellant to serve the maximum sentence in confinement. The victim's mother specifically stated that she felt "broken" and did not "know how to be happy anymore."

Smith stated that the appellant did not have a criminal record and that he had earned a general equivalency diploma (GED). The appellant was in good physical health; however, following his altercation with the victim, the appellant had to undergo surgery. He had "some rods and screws" placed in his body and was prescribed Oxycodone and Oxymorphone for the pain. The appellant had two children and was employed at Metro Public Works.

Smith said that between the entry of the guilty plea and the sentencing hearing, the appellant reported to Smith's office. When the appellant missed an appointment, Smith had to call and remind him that a court order required him to report. Smith stated that it seemed the appellant tried to comply with the court's order to the best of his ability.

Officer Jason Matlock with the Ashland City Police Department testified that during the investigation of the offense, he collected a surveillance video from the restaurant, which depicted the shooting. The video was viewed by the court.[1] According to Officer Matlock, the video revealed that the appellant ran into the restaurant with a gun in his hand approximately three or four seconds after the victim. The victim then ran outside, where he was shot by the appellant. Several other people, including two children, were in the restaurant. Specifically, the appellant and the victim ran past a "little boy." Officer Matlock estimated that the child was five to seven feet from the scene of the shooting.

On cross-examination, Officer Matlock stated that during the initial encounter, the victim shot the appellant in the face and in the chest. The appellant later shot the victim twice with the victim's gun. Officer Matlock opined that the victim was shot as the men

[1]The video was not included in the appellate record for our review.

exited the lobby of the restaurant, noting that two bullet casings were found inside the restaurant. The victim died outside on the sidewalk.

Teresa Brunker, a friend of the victim's, testified that the victim was shy, quiet, nice, funny, and happy.

Dennis Paul, the victim's seventy-year-old father, testified that the victim was forty years old when he died. The victim owned a house and a small swimming pool business. The victim's parents had to pay for the victim's funeral, and they were required to assume financial responsibility for the victim's house. Since the victim's death, Mr. Paul has taken medication for depression. Mr. Paul testified that his wife had "suffered more" from their son's death and was unable to testify. He also stated that Mrs. Paul cried frequently and needed emotional support.

Mr. Paul stated that when he was discharged from the Army, he was unable to have feelings for other people. However, as a result of the victim's birth, he regained the ability to love. Mr. Paul said that the victim was close to his family. He described his son as meek, kind, and a person who typically "turn[ed] the other cheek."

Reverend William Knobel testified that the appellant and his family were members of the West Nashville Southern Methodist Church. Reverend Knobel said that the appellant was nice, an "upstanding citizen," and worked hard to provide for his family.

The appellant's wife, Jamie Dickens, testified that she and the appellant had been married for ten years and had three children. She said the appellant was a good man who had always worked and supported his family. The appellant was employed at Metro Public Works.

Mrs. Dickens said that after the incident, the appellant was very emotional and cried frequently. The appellant repeatedly expressed his remorse. When she saw him at the hospital following the shooting, the appellant was crying and was covered in blood from being shot in the face and chest. The appellant told her that he tried to get away from the victim. After his surgery, the appellant had to use a wheelchair, and Mrs. Dickens had to "hand bathe" him for more than a month. The appellant was unable to be as physically active with his children as he was before the shooting. She stated, "There was a 70 percent chance of him ever being able to walk again." Mrs. Dickens said that she felt as if the appellant had "already been almost taken from us and we really need him."

On cross-examination, Mrs. Dickens said that the appellant continued to worked over forty hours per week and that he "subs a lot of work out."

Charles McNeil, the appellant's supervisor at Metro Public Works, testified that the appellant was a "real good employee" and that he never had problems with the appellant. McNeil said the appellant would lose his job if he were incarcerated.

On cross-examination, McNeil said the appellant missed approximately two months of work after he was shot. He had not missed a day of work since his return.

Finally, the appellant made the following allocution:

> I'm sorry for what happened that day. I was going to my appointment. And I'm sorry for the death and the loss of y'all's son. I'm so sorry that, you know, he lost his life that day, but I very well could have been killed that day too. And I just, I wish it wouldn't [have] happened. . . . I wish we had not met that day and none of this would've occurred or happened that day. And then both of us would've been, you know, none of this would've occurred. I just wish it wouldn't [have] happened. I'm so sorry that you lost your son that day. I'm so sorry. I wish it could've been, you know, I don't know what I wish. I just wish it wouldn't [have] happened at all. I'm so sorry that you lost your son. I really didn't mean for that to happen. I really didn't. I'm so sorry. I didn't mean for it to happen. I really didn't.

The trial court began by noting that the appellant was eligible for probation. Nevertheless, the court stated that the appellant did not appear to have taken the situation as seriously as he should have, noting that the appellant had not always diligently reported to his probation officer. The court stated that full probation would depreciate the seriousness of the offense. The court explained:

> We have a situation where the [appellant] pulled into this shopping plaza, the victim pulled in after him, and there was a physical altercation that resulted, of course, and then the victim shot the [appellant]. Obviously, when you would get shot, you probably would not be real happy and would be upset and would be under some type of added provocation type situation. . . .
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> Where the conduct of the [appellant] went over the bounds, of course, is why we're here. He went into the restaurant chasing after the . . . victim, and that's where it turned. And then, of course, the following ended up shooting

and killing him. But, obviously, this is not a cut and dry case as others sometimes.

So there is some weight to the fact that he did chase the victim into the restaurant and followed him, obviously ultimately killing him. The court does apply some weight to that. But the main weight, the heavy weight, I say some weight, obviously, we have a person that passed away and the court is as sorry as anybody that he passed away. But, to some extent, the victim exposed himself to this by shooting the [appellant]. But the real heavy weight the court applies to this case relates to the exposure of the other people in the restaurant, and the court had already considered that as a pretty heavy factor because we have . . . sitting . . . [i]n the same area, two different families. . . . And the [appellant] is carrying a gun around exposing them to potential harm. And then, of course, the [appellant] goes following the victim and, of course, we see on the video which . . . was very telling. We have the child there watching within just a few feet of the actual killing.

So, again, I don't mean to not put a lot of weight on the fact regarding him chasing the victim but, like I said, the victim, to some extent, by approaching the [appellant], exposed himself to the situation that happened, regretfully. But, again, the key here in the court's mind is the fact that the [appellant], at some point in time during this whole ordeal, didn't come to his senses and realize what he was doing, particularly when there's other people around. Maybe if it's just the two of them in an isolated situation or there's witnesses around but not nearby, the court might have made a different ruling on this sentence, but because of that, the court feels like that's a very important factor.

And the court, as far as the seriousness of the offense part, finds that part where he chased the victim and, more weighty, exposed all these other people, particularly the kids, to this violence and shocking behavior. So the court finds that th[e] seriousness of offense should factor in this sentence as well as the deterrence factor because this crime was the result of reckless conduct by the [appellant]. And, again, the conduct continued throughout, even when third parties, innocent third

> parties were around, and the court finds that there needs to be a deterrence because of that. Of course, we can't have people going into restaurants and shooting other people. [A]nd, of course, the casings were found inside the restaurant too, even though it appeared that [the victim] passed away outside the restaurant.

The trial court ordered the appellant to serve one year of his three-year sentence in confinement and the remainder on probation. On appeal, the appellant challenges the trial court's denial of full probation.

II. Analysis

Previously, appellate review of the length, range, or manner of service of a sentence was de novo with a presumption of correctness. See Tenn. Code Ann. § 40-35-401(d). However, our supreme court recently announced that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" State v. Bise, 380 S.W.3d 682, 708 (Tenn. 2012). Our supreme court has further explicitly stated that "the abuse of discretion standard, accompanied by a presumption of reasonableness, applies to within-range sentences that reflect a decision based upon the purposes and principles of sentencing, including the questions related to probation or any other alternative sentence." State v. Caudle, 388 S.W.3d 273, 278-79 (Tenn. 2012). In conducting its review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement by the appellant in his own behalf; and (8) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also Bise, 380 S.W.3d at 697-98. The burden is on the appellant to demonstrate the impropriety of his sentence. See Tenn. Code Ann. § 40-35-401, Sentencing Comm'n Cmts.

An appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a). The appellant's three-year sentence meets this requirement. Moreover, because the appellant was a standard, Range I offender convicted of a Class C felony, he should have been considered a favorable candidate for alternative sentencing absent evidence to the contrary. See Tenn. Code Ann. § 40-35-102(6). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-

35-103(1), may constitute "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.

State v. Zeolia, 928 S.W.2d 457, 461 (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. See Tenn. Code Ann. § 40-35-103(5).

In the instant case, the appellant received the alternative sentence of split confinement. See Tenn. Code Ann. § 40-35-306(a); State v. Williams, 52 S.W.3d 109, 120 (Tenn. Crim. App. 2001). The appellant complains that the trial court should have granted him full probation. An appellant seeking full probation bears the burden of establishing his suitability for full probation, regardless of whether he is considered a favorable candidate for alternative sentencing. See State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996); see also Tenn. Code Ann. § 40-35-303(b). To prove his suitability, the appellant must establish that granting full probation will "subserve the ends of justice and the best interest of both the public and the [appellant]." Carter, 254 S.W.3d at 347 (citations and internal quotations omitted). Moreover,

> [i]n 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.

Boggs, 932 S.W.2d at 477.

The appellant complains that the trial court "denied full probation by focusing on the facts of the reckless endangerment count which was dismissed in settlement." It is well

established that "[w]hen determining whether probation is appropriate it is proper 'to look behind the plea bargain and consider the true nature of the offenses committed.'" State v. Pierce, 138 S.W.3d 820, 828 (Tenn. 2004) (quoting State v. Hollingsworth, 647 S.W.2d 937, 939 (Tenn. 1983)).

In denying full probation based upon the need for deterrence, the court stated, "[W]e can't have people going into restaurants and shooting other people." The court observed that the appellant's actions were reckless. A trial court may properly deny full probation based upon deterrence when the crime committed was the result of intentional, knowing, or reckless conduct. State v. Hooper, 29 S.W.3d 1, 11 (Tenn. 2000).

In denying full probation based upon the need to not depreciate the seriousness of the offense, the trial court found that the appellant's actions in running through a restaurant with a gun in his hand, potentially endangering several other people, including two children. Additionally, the court noted that the appellant killed the victim while a child stood five to seven feet away, witnessing the crime. This court has previously stated that the nature and circumstances underlying the criminal conduct may alone give rise to the denial of probation. See Tenn. Code Ann. § 40-35-210(b)(4); State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). In determining the circumstances of the offense, the trial court relied heavily upon the video of the shooting; however, the video is not in the appellate record for our review. The appellant carries the burden of ensuring that the record on appeal conveys a fair, accurate, and complete account of what has transpired with respect to those issues that are the bases of appeal. Tenn. R. App. P. 24(b); see also Thompson v. State, 958 S.W.2d 156, 172 (Tenn. Crim. App. 1997). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991).

III. Conclusion

In sum, based upon the record before us, we are unable to conclude that the trial court erred in denying full probation. Therefore, we affirm the judgment of the trial court.

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NORMA McGEE OGLE, JUDGE