

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
May 12, 2015 Session

**STATE OF TENNESSEE v. JOHN CLAYTON FIELDS II**

**Appeal from the Circuit Court for Cheatham County  
No. 16932 George Sexton, Judge**

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**No. M2014-01691-CCA-R3-CD – Filed July 6, 2015**

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The defendant, James Clayton Fields II, appeals the determinations of sentencing and judicial diversion made by the Cheatham County Circuit Court. The defendant's convictions of aggravated assault and three counts of child abuse and his effective three-year sentence all resulted from his *nolo contendere* pleas. The State did not oppose judicial diversion, and the manner of service of the effective sentence was left to the trial court's determination. The defendant appeals the trial court's denial of probation and judicial diversion and the order to serve the three-year effective sentence in confinement. We affirm the judgments of the trial court.

**Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the appellant, John Clayton Fields II.

Herbert H. Slatery III, Attorney General and Reporter; Ahmed A. Safeeullah, Assistant Attorney General; Dan M. Alsobrooks, District Attorney General; and Robert S. Wilson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The trial court accepted the defendant's four no-contest pleas to one count of aggravated assault, a Class C felony, and three counts of child abuse, a Class A misdemeanor. The aggravated assault was a lesser included offense of an original charge of aggravated sexual battery. The plea agreement specified sentences of three years for

aggravated assault and sentences of 11 months and 29 days each for the misdemeanors, with all sentences to be served concurrently. The agreement called for the trial court to determine the defendant's request for judicial diversion and, should diversion be denied, to consider his bid for probation.

In the sentencing hearing, the presentence investigator outlined the factual bases for the offenses. The aggravated assault resulted from the complaint of a then 13-year-old female that while she slept on the couch at the home of the defendant, her uncle, he moved her to his bed and that, when she awoke, "her shirt was pulled up and that her pants were down." The victim reported that the defendant "was behind her and was rubbing her vagina with his hands" and "was placing his penis on her back above her buttocks." The investigator indicated that the child abuse charges emanated from the defendant's giving a controlled substance to three minor victims.

The investigator testified that the defendant reported to him that his ex-sister-in-law "conspired" with his niece and cousin to retaliate for the defendant's role in the ex-sister-in-law's being convicted of theft. The investigator testified that the defendant exhibited no remorse and that he commented that the injustice in the case was done to him.

The investigator introduced a victim impact statement of the then 16-year-old female assault victim in which the victim said the defendant's actions left her "sad, mad and scared." The victim opined that the defendant should receive professional treatment, should be barred from associating with kids, and should be incarcerated. The victim reported having panic attacks as a result of the defendant's actions and indicated that her "main worry is that he gets off with this and continues to do this to kids."

The investigator testified that he received victim impact statements from two of the three child abuse victims. An 11-year-old victim of one of the abuse offenses said the offense made her feel "sad, mad and scared." She opined that the defendant should see a doctor, go to prison or jail, and stay away from kids. A 14-year-old victim of one of the abuse offenses said the offense made her feel "sad, mad." She also opined that the defendant should "stay in prison or jail, . . . go to a doctor to get help, [and] stay away from kids."

The investigator testified that the defendant completed secondary school and acquired some college credits and that he reported having problems with post-traumatic stress disorder, depression, and anxiety. The investigator said that the defendant was evaluated as a low risk for sexual offending. The defendant had no prior criminal record.

The investigator opined that the defendant's lack of remorse was problematic because "a lot of times . . . in order to change how someone thinks they have to accept responsibility of their actions."

The defendant testified in the sentencing hearing that he had lived in Cheatham County for about 30 years. He attended a police academy and worked as a police officer for Cheatham County and Ashland City before going to Iraq as a defense department contractor to train Iraqi police officers. He said he had recently served as a diplomatic security contractor in the former country of Burma. He said he was scheduled to return there to train security personnel for construction of a gas pipeline.

In Iraq, the defendant was injured and required surgery when he returned home. He testified that, at the time of the sentencing hearing, he remained under physical restrictions and was taking prescribed medications for depression-related symptoms.

The defendant said that, as a result of the victim's accusations, he lost custody of his 10-year-old son. The defendant read into evidence the following statement he had given the investigative reporter:

My ex-sister-in-law conspired with my niece and my cousin to pay me back for my involvement in my ex-sister-in-law's arrest and conviction for felony theft. My cousin perjured herself while testifying against me in court. My niece admitted to committing theft with her mother while testifying in court but no charges were sought against them. I took a plea because I used to be a police officer and would not have been given a fair trial by a jury due to media coverage and recent misjudgments by juries. An injustice did occur but to a dedicated public servant and protector, me.

The defendant denied all accusations made by the victims in this case. He said he could have no remorse for something he had not done. He indicated that he was sad because the allegations had torn his family apart, but he reiterated that he otherwise was not remorseful because he had done nothing to cause the situation.

The defendant admitted, however, to giving two victims an over-the-counter medication, Benadryl. He said that, years before, he had consulted a physician about giving his son a small dose of Benadryl and that the physician assured him it was harmless. He had given a small dose to the victims in question to help them sleep because "it was midnight and they were being horribly mean to each other."

On cross-examination, the defendant admitted that one of the victim's laboratory reports from Vanderbilt Hospital showed that the victim had ingested benzodiazepines. He denied providing her with benzodiazepines. He further denied giving another victim moonshine.

On redirect examination, the defendant pointed out that, before these allegations, he had never before been in trouble with the law.

Following arguments of counsel, the trial court made several findings. It found that the defendant's claim of conspiracy was not credible because it involved too many people. Accordingly, the court rejected the claim that "nothing happened." The court thereupon reasoned that the defendant was not "subject to being rehabilitated." The judge opined that granting probation or diversion would depreciate the seriousness of the offense and that such offenses need to be deterred. After being prompted by the prosecutor, the trial court indicated that it had considered the "full range of the Sentencing Act [and] the statements made, the evidence presented at the sentencing hearing," concluding that it had "considered all the sentencing principles that are required in sentencing."

Now on appeal, the defendant posits that the trial court erred by denying judicial diversion and probation.

"Judicial diversion" is a reference to the provision in Tennessee Code Annotated section 40-35-313(a) for a trial court's deferring proceedings in a criminal case. *See* T.C.A. § 40-35-313(a)(1)(A). Pursuant to such a deferral, the trial court places the defendant on probation "without entering a judgment of guilty." *Id.* To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(i)(b), (c). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). The statute states that a trial court may grant judicial diversion in appropriate cases. *See* T.C.A. § 40-35-313(a)(1)(A) (stating that court "may defer further proceedings"). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

“Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to analyze cases involving judicial diversion.” *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

[T]he defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

*Id.* at 343-44; *see also State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the trial court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The trial court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion by failing to grant judicial diversion. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

Judicial diversion, is not now, and never has been, a sentence. *See, e.g., State v. Turco*, 108 S.W.3d 244, 247 (Tenn. 2003); *Alder v. State*, 108 S.W.3d 263, 267 (Tenn. Crim. App. 2002) (“The judicial diversion probationary period is not a sentence nor is it punishment.”). Probation, on the other hand, is a form of sentencing; it represents an alternative to incarceration. *See generally* T.C.A. §§ 40-35-103, -104. Thus, the considerations for probation fall within the general protocol for sentencing.

Our supreme court has adopted an abuse of discretion standard of review for sentencing and has prescribed “a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act.” *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012) (stating that “although the statutory language continues to describe appellate review as de novo with a presumption of correctness,” the 2005 revisions to the Sentencing Act “effectively abrogated the de novo standard of appellate review”). The application of the purposes

and principles of sentencing involves a consideration of “[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed.” T.C.A. § 40-35-103(5). Trial courts are “required under the 2005 amendments to ‘place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.’” *Bise* at 706 n.41 (citing T.C.A. § 40-35-210(e)). Under the holding in *Bise*, “[a] sentence should be upheld so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute.” *Id.* at 709. Trial courts must still consider the principles of sentencing enumerated in Code section 40-35-210(b). *See Bise*, 380 S.W.3d at 698 n.33 (citing T.C.A. § 40-35-210(b)), 706 n.41.

The imposition of a three-year sentence in this case mandated the trial court’s considering probation as a sentencing option. *See* T.C.A. § 40-35-303(a), (b). Traditionally, the defendant has borne the burden of establishing his “suitability for full probation.” *State v. Mounger*, 7 S.W.3d 70, 78 (Tenn. Crim. App. 1999); *see* T.C.A. § 40-35-303(b). Such a showing required the defendant to demonstrate that full probation would “subserve the ends of justice and the best interest[s] of both the public and the defendant.” *State v. Dykes*, 803 S.W.2d 250, 259 (Tenn. Crim. App. 1990) (quoting *Hooper v. State*, 297 S.W.2d 78, 81 (1956)), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000). Recently, however, the supreme court expanded the holding in *Bise* to the trial court’s decision regarding probation eligibility, ruling “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).

When a trial court orders confinement and therefore rejects any form of alternative sentencing such as probation, split confinement, or periodic confinement, it must base the decision to confine the defendant upon the considerations set forth in Code section 40-35-103(1), which provides:

(1) Sentences involving confinement should be based on the following considerations:

(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; . . . .

*Id.*

In the present case, the trial court denied judicial diversion and probation based largely upon the defendant's lack of candor and failure to accept responsibility. The court found that, despite the defendant's no-contest plea and his testimony in which he denied committing the conviction offenses, the defendant was factually guilty. As a consequence, the court opined that rehabilitation via diversion or probation was unlikely.

We examine first the denial of judicial diversion. We must recognize that the trial court did not review on the record the various factors for determining judicial diversion despite that nearly all of the mandated factors were addressed in the hearing. In addressing the claim for judicial diversion by a qualified defendant, the trial court shall consider

(a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice -- the interests of the public as well as the accused.

*State v. King*, 432 S.W.3d 316, 326 (Tenn. 2014) (citing *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. 1996)). The supreme court reiterated established law by stating that "the trial court must weigh the factors against each other and place an explanation of its ruling on the record." *Id.* (citing *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998)), and held that the decisions in *Bise* and *Caudle* "did not abrogate the requirements set forth in *Parker* and *Electroplating*, which are essential considerations for judicial diversion." *Id.* "[O]nly by analyzing all of the relevant factors, including those favorable to the defendant, can appropriate candidates for this legislative largess be

identified in a manner consistent with the purpose of the pretrial diversion act.” *Id.* (quoting *State v. Curry*, 988 S.W.2d 153, 158 (Tenn. 1999)).

Although the trial court is not required to recite all of the *Parker* and *Electroplating* factors when justifying its decision on the record in order to obtain the presumption of reasonableness, the record should reflect that the trial court considered the *Parker* and *Electroplating* factors in rendering its decision and that it identified the specific factors applicable to the case before it. Thereafter, the trial court may proceed to solely address the relevant factors.

*Id.* at 327.

“If, however, the trial court fails to consider and weigh the applicable common law factors, the presumption of reasonableness does not apply and the abuse of discretion standard, which merely looks for ‘any substantial evidence’ to support the trial court’s decision, is not appropriate.” *Id.* In this situation, the appellate court, in its discretion, may conduct a de novo review or remand for reconsideration by the trial court, guided by considerations such as the “adequacy of the record” and the “fact-intensive nature of the inquiry.” *Id.* at 328.

In the present case, we believe the record enables us to make a de novo review of the defendant’s bid for diversion. The testimony and the exhibits in the hearing touched on the factors under review, and the State offered a description of the defendant’s conduct at issue.

In reviewing the *King* factors, we know that the defendant had no prior criminal record. His social history also favored his bid for diversion; he apparently worked throughout his adult life; he was employed either in law enforcement or as a contractor for the defense department. We see no indication of drug or alcohol abuse. The defendant’s physical and mental health is somewhat checkered, apparently due to his service overseas, and we view this factor as neutral. The record contains no factual basis for concluding that denying diversion was needed to deter others, but deterrence of the defendant from committing similar future offenses has some merit.

That said, we look at the defendant’s amenability to correction and the circumstances of the offense.

Although the trial court did not quantify the value of the amenability to correction factor vis-a-vis the other factors, it is clear that the court believed the



defendant's lack of remorse belied his amenability to correction or rehabilitation. The defendant essentially complains that requiring him to evince remorse when he did not actually offend the law is unfair if not arbitrary. We would agree that, when a court concludes that the defendant pleaded no contest merely to advance personal goals and that such defendant may not have actually offended the law, the requirement of remorse sounds Torquemadian. A no-contest plea, however, is not per se an amulet for warding off claims of remorselessness and its concomitant lack of amenability to correction. When the trial court hears testimony from live witnesses and finds that the crime occurred, as did the court in the present case, we defer to that finding of fact with the consequence that a lack of remorse becomes an apt consideration. See *State v. Dowdy*, 894 S.W.2d 301, 307 (Tenn. Crim. App. 1994) (“[T]he trial court observed the defendant’s statements, attitude and demeanor, and found that she was dishonest and unrepentant. This basis alone is sufficient to give the trial court the benefit of discretion.”) (citations omitted). In *State v. Cody Garris*, this court said that “the trial court denied judicial diversion largely based upon the defendant’s lack of candor and failure to accept responsibility, which are both acceptable grounds for the denial of both judicial diversion and probation.” *State v. Cody Garris*, No. M2012-01263-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App., Nashville, Mar. 6, 2013). Thus, utilizing the trial court’s underlying finding of fact, the defendant’s lack of both candor and remorse is a strong factor supporting the denial of judicial diversion.

Our de novo review of the circumstances of the offenses also points toward denying diversion. With respect to the aggravated assault offense in particular, we know that the Class C felony conviction offense was reduced by agreement from the charge of aggravated sexual battery, a Class B felony. See T.C.A. § 39-13-504(b). In addition to reducing the class of the offense, the elimination of aggravated sexual battery removed a plethora of sanctions that would have been levied upon the defendant as a sexual offender, not the least of which would have been his disqualification for judicial diversion. See *id.* § 40-35-313(a)(1)(B)(ii)(c); see also, e.g., *id.* §§ 40-35-120(a), (b)(1) (classifying aggravated sexual battery as a violent offense for purposes of computing a defendant’s “repeat violent offender” classification); 40-35-501(i)(1), (2)(H) (abolishing release eligibility for persons convicted of aggravated sexual battery); 40-39-202(30)(C) (classifying person convicted of aggravated sexual battery as a violent sexual offender for purposes of sexual offender registration and monitoring); 39-13-524(a)(1) (subjecting a person convicted of aggravated sexual battery to community supervision for life). Thus, the benefit to the defendant of avoiding an aggravated sexual battery conviction is enormous. We juxtapose that against the facts of the case showing that the victim’s allegations could have resulted in a charge of aggravated sexual battery and a separate charge of rape. This juxtaposition reveals that the defendant received a very beneficial plea agreement, and accordingly this recognition colors the nature and circumstances of the *conviction offense*. This court has previously recognized that leniency in the selection

of a conviction offense may support a formidable sentence. *See, e.g., State v. Larry J. Coffey, Jr.*, No. E2008-00087-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Knoxville, Feb. 18, 2009) (commenting with approval that “the trial court based the denial of probation on the nature and circumstances of the offense, noting that the jury was lenient in its verdict of simple assault considering that the defendant ‘beat the hell’ out of the victim” and stating, “Clearly, this is a severe case of assault and the trial court acted within its discretion by denying alternative sentencing and ordering the maximum incarceration available for the misdemeanor.”) (citing *State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, slip op. at 15 (Tenn. Crim. App., Nashville, Feb. 18, 1998)), *perm. app. denied* (Tenn. Aug. 24, 2009); *State v. Steven A. Bush*, No. 01C01-9605-CC-00220, slip op. at 9 (Tenn. Crim. App., Nashville, June 26, 1997); *State v. Fredrick Dona Black*, No. 03C01-9404-CR-00139, slip op. at 3-4 (Tenn. Crim. App., Knoxville, Apr. 6, 1995) (noting that the trial court may consider a defendant’s enjoyment of leniency in selection of a particular conviction offense in awarding or rejecting alternative sentencing). Because we believe that the selected conviction offense and three-year sentence was lenient and beneficial to the defendant in light of the facts of the case, the nature and circumstances of the conviction offense militate against the largess of judicial diversion.

Consequently, upon our de novo review which necessarily utilizes the trial court’s factual findings, we affirm the denial of judicial diversion based upon the weight of the lack of amenability to correction and the nature and circumstances of the offense.

Turning to the denial of probation and being mindful that the burden lay upon the defendant to demonstrate entitlement to full probation, the same factors that justified the denial of judicial diversion inform and support the decision to deny probation. “[A] criminal defendant’s rehabilitative potential is a factor to be considered in the grant or denial of probation. Candor is a relevant factor in assessing a defendant’s potential for rehabilitation, and the lack of candor militates against the grant of probation.” *State v. Souder*, 105 S.W.3d 602, 608 (Tenn. Crim. App. 2002) (citations omitted). As we have noted above, the trial court found that the defendant was not candid, did not accept responsibility for his actions, and was not remorseful. Furthermore, the nature and circumstances of the offense again play into the probation calculus, taking into account the leniency afforded by the State in the selection of the conviction offense and sentence. At bottom, the rationale supporting the denial of judicial diversion also supports the denial of probation in this case.

We point to the “well-recognized nexus between the ‘nature and characteristics’ of the offense and sentencing to avoid depreciating the seriousness of the offense. The nature and characteristics, or circumstances, of the offense have long been recognized as grounds for denying probation.” *State v. Kimberly E. Cunningham*, No.

E2006-00189-CCA-R3-CD, slip op. at 14 (Tenn. Crim. App., Knoxville, Sept. 7, 2007) (noting that the utility of the nature and circumstances of the offense as a basis for denying probation has been codified in Tennessee Code Annotated section 40-35-103(1)(B) which provides for confinement if it ‘is necessary to avoid depreciating the seriousness of the offense’’). In a proper case, probation may be denied solely on the basis of Code section 40-35-103(1)(B) when the nature and circumstances of the offense justify confinement to avoid depreciating the seriousness of the offense.

Accordingly, the judgments of the trial court are affirmed.

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JAMES CURWOOD WITT, JR., JUDGE

