

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

FILED

Nov. 19, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

AT JACKSON

SEPTEMBER SESSION, 1996

STATE OF TENNESSEE,)	C.C.A. NO. 02C01-9601-CR-00003
)	
Appellee,)	
)	
)	SHELBY COUNTY
VS.)	
)	HON. JOSEPH B. DAILEY
TALMADGE G. WILBANKS,)	JUDGE
)	
Appellant.)	(Judicial Diversion)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Talmadge G. Wilbanks, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a Shelby County jury of reckless driving and unlawful carrying of a weapon. The trial court sentenced him to ten days for each offense, with the sentences to run concurrently, and imposed a two hundred fifty dollar (\$250) fine. The trial court suspended the sentences and placed the Defendant on probation for six months. In this appeal, the Defendant argues that the trial judge abused his discretion by denying him judicial diversion. We conclude that the Defendant's issue lacks merit and affirm the judgment of the trial court.

The facts are not in serious dispute. On July 1, 1993, Officer Michael Brown of the Memphis Police Department was traveling eastbound on Winchester in a marked police car to answer an alarm call. He stopped at the red traffic light at Winchester and Outland. While waiting at the red light, he observed a red Mustang convertible with the top down coming westbound on Winchester toward him. The Mustang was traveling at a high rate of speed and was weaving in and out of the three lanes of westbound traffic. Officer Brown estimated the Mustang's speed at seventy to eighty miles per hour (70-80 mph). Brown witnessed the Mustang drive through the red light at Winchester and Outland, nearly striking vehicles traveling north and south on Outland in the process. As the Mustang drove through the red light, Officer Brown looked at the driver of the Mustang, and the driver of the Mustang looked at Brown. Because

Brown had to answer the alarm call, he did not stop the Mustang but instead transmitted what he had witnessed over the radio to any other officers in the area.

Officer Russell Bourne was in a parking lot at the corner of Winchester and Goodlett when he heard Officer Brown's transmission regarding the Mustang. Moments later, Bourne observed a red Mustang convertible traveling at a high rate of speed weaving in and out of westbound traffic on Winchester. Bourne estimated the speed of the Mustang at seventy-five miles per hour (75 mph) or more. Bourne pulled out onto Winchester heading west, accelerated up to the speed limit, and turned on his blue lights. The Mustang approached him from behind and passed him. Bourne accelerated to catch the Mustang, and the Mustang eventually pulled over into the driveway of an apartment complex. The Defendant, who was the driver of the Mustang, had exited his car before Officer Bourne approached him. According to Officer Bourne, the Defendant was somewhat uncooperative during their meeting, saying that he "hadn't done anything" and that he "was late for work and needed to get going." Bourne placed the Defendant under arrest for reckless driving.

Because the Mustang was partially blocking the entrance to an apartment complex and its convertible top was down, Bourne decided that it was unsafe to leave the car where it was. He called a tow truck to take the Mustang to a lot and began an inventory search of the car. Bourne found a small purse of the type generally used to carry items such as cellular phones on the console between the driver and passenger seats. He opened the purse and discovered a handgun loaded with a full magazine of thirteen bullets as well as one bullet in the chamber of the gun. He also discovered another fully loaded magazine in the

purse. As Bourne was searching the Mustang, Officer Brown arrived on the scene after having answered the alarm call. Brown identified the Defendant as the driver of the Mustang he had seen run the red light.

The Defendant offered no proof at trial. The jury convicted him of reckless driving and unlawful carrying of a weapon. At the sentencing hearing, both the State and the Defendant relied solely on the proof adduced at trial and the presentence report. The presentence report revealed that the Defendant is thirty-six years old, married, and has two children, ages thirteen and eleven. He is a high school and college graduate and has been employed by the Federal Aviation Administration since 1990. He served in the United States Marine Corps from 1976 to 1980 and was honorably discharged. The Defendant has no history of alcohol or drug abuse and has no prior criminal convictions. In his statement to the investigating officer, the Defendant indicated that he had possessed a permit to carry a weapon in Indiana. When he moved to Tennessee, he failed to obtain a similar permit because several individuals told him that "it was no big deal."

Relying on the information contained in the presentence report, the Defendant requested that the trial court place him on judicial diversion pursuant to Tennessee Code Annotated section 40-35-313. The trial court denied the request for diversion, stating only that, "I'm not going to put him on diversion, but I'll place him on probation." The trial judge then sentenced the Defendant to ten days for each offense with a fine of two hundred fifty dollars (\$250), suspended the sentences, and placed him on probation for six months.

The sole issue presented by the Defendant in this appeal is whether the trial court abused its discretion in denying judicial diversion. The State, in response, argues that the Defendant has no right to appeal from the denial of judicial diversion under Tennessee Code Annotated section 40-35-401 or Rule 3 of the Tennessee Rules of Appellate Procedure. We disagree.

Rule 3(b) of the Tennessee Rules of Appellate Procedure provides that in a criminal action, with the exception of certain judgments of conviction entered pursuant to guilty pleas, an Appellant may appeal as of right from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals. Pursuant to this rule, the Appellant may also appeal as of right from an order denying or revoking probation, and from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding.

Tennessee Code Annotated section 40-35-401(a) provides that “[t]he defendant in a criminal case may appeal from the length, range or manner of service of the sentence imposed by the sentencing court.” The statute provides further that one of the grounds for appeal is that “[t]he sentence was not imposed in accordance with this chapter.” Tenn. Code Ann. § 40-35-401(b)(1). Furthermore, although Tennessee Code Annotated section 40-35-313 is commonly known as judicial diversion, the statute is officially referred to as probation with expungement from official records. Tennessee Code Annotated section 40-35-313 is included in the sentencing part of the Criminal Sentencing Reform Act of 1989 and, in fact, follows immediately after the provisions dealing with other forms of probation.

Most importantly, our jurisdiction by statute extends to review of the final judgments of trial courts in “proceedings instituted with reference to or arising out of a criminal case.” Tenn. Code Ann. § 16-5-108(a)(2). Rules 37(a) and (b) of the Tennessee Rules of Criminal Procedure provide that an appeal as of right “lies from any order or judgment in a criminal proceeding where the law provides for such appeal.” This Court has previously observed that “the statute establishing jurisdiction in this Court apparently anticipates that all final judgments arising out of criminal cases are appealable.” State v. McCary, 815 S.W.2d 220, 221 (Tenn. Crim. App. 1991).

In the present case, the Defendant is appealing from the imposition of suspended sentences and probation, as is reflected on the judgments entered by the trial court. He contends that the sentences were not imposed in accordance with Tennessee Code Annotated Title 40 Chapter 35, the Criminal Sentencing Reform Act of 1989. More specifically, he contends that his sentences were not imposed in accordance with the statutory provisions of Tennessee Code Annotated section 40-35-313 and its interpretation by Tennessee courts. Accordingly, we conclude that the Defendant’s appeal is from a judgment entered by the trial court arising out of a criminal prosecution and is therefore properly before this Court.

We now return to the principal issue before us in the present case, namely whether the trial court abused its discretion in denying judicial diversion. 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. For instance, in

determining whether to grant pretrial diversion, a district attorney general should consider the 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 pretrial diversion will serve the ends of justice and best interests of both the public and the defendant. See State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993); State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). A trial court should consider the same factors when deciding whether to grant judicial diversion. See State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993); State v. Anderson, 857 S.W.2d 571, 572-573 (Tenn. Crim. App. 1992). Moreover, a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration. See Bonestel, 871 S.W.2d at 168.

In addition, this Court applies "the same level of review as that which is applicable to a review of [a] district attorney general's action in denying pre-trial diversion." State v. George, 830 S.W.2d 79, 80 (Tenn. Crim. App. 1992); see also, Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572. In other words, this Court reviews the record to determine whether the trial court abused its discretion. See Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572. To find an abuse of discretion, we must determine that no substantial evidence exists to support the ruling of the trial court. See Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572.

In the case sub judice, the trial court did not state its reasons for denying judicial diversion. This cursory denial is obviously inadequate in light of the requirements set forth in Bonestel and Anderson. Nevertheless, in considering the entire record, we can only conclude that there is substantial evidence to support the ruling of the trial court.

The record reveals that the Defendant was driving approximately seventy to eighty miles per hour (70-80 mph) down a well-traveled street, weaving in and out of traffic. He disregarded a red traffic light and nearly struck vehicles that were proceeding through the intersection. When he was pulled over by a police officer, the Defendant's statements demonstrated that he did not recognize the seriousness of his conduct. Moreover, the Defendant was traveling with a fully loaded handgun and did not have a permit for doing so. At the sentencing hearing, the trial court expressed concern that the Defendant did not understand the significance of his actions in carrying a loaded handgun without a permit.

While the trial judge noted the positive aspects of the Defendant's personal history, he found that the Defendant did not merit judicial diversion. The discretion for granting or denying judicial diversion rests with the trial court. From the record before us, we cannot conclude that the trial judge abused his discretion. The judgment of the trial court is therefore affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

JERRY L. SMITH, JUDGE