

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 29, 2025

FILED

11/06/2025

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. TYLER DAVID MASHBURN

Appeal from the Circuit Court for Sevier County
No. 23-CR-676-III Jeffrey D. Rader, Judge

No. E2024-01728-CCA-R3-CD

Defendant, Tyler David Mashburn, entered an open plea of guilt to one count of aggravated assault with the trial court to determine the length and manner of service of the sentence. Prior to the sentencing hearing, Defendant requested judicial diversion and submitted a certificate of eligibility. Following a sentencing hearing, the trial court denied diversion and imposed a five-year sentence of split confinement, with nine months to serve and the remainder on supervised probation. On appeal, Defendant argues that his sentence is excessive and the trial court erred by denying his request for judicial diversion. Following our review of the record, the briefs of the parties, and the applicable law, we reverse the judgment of the trial court and remand this case for further proceedings consistent with this opinion.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

JILL BARTEE AYERS, J., delivered the opinion of the court, in which TOM GREENHOLTZ and KYLE A. HIXSON, JJ., joined.

Aaron M. Kimsey, Sevierville, Tennessee, for the appellant, Tyler David Mashburn.

Jonathan Skrmetti, Attorney General and Reporter; William C. Lundy, Assistant Attorney General; James B. Dunn, District Attorney General; and Amelia C. Atnip, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

The facts of this case as set forth by the State at the guilty plea submission hearing are as follows:

On October the 15th of 2022, the victim was working in his character outside the Haunted Mansion in Gatlinburg, the haunted house in Gatlinburg. He had an outfit on to look like, you know, a character out of the haunted house. He had a clacker in one hand, a jar in the other.

He went to walk, and he walked past the defendant, the defendant's wife, two children - - three children. The defendant's son was frightened by him. He moved back around to the back of the group as they were walking.

The defendant's wife got very angry, felt like he was scaring her children. She confronted him. They got into an argument. She wanted to speak to a manager. That didn't work out like she wanted it to. So he told them to leave, and they went walking up the sidewalk.

While the victim was entertaining two small children with their mother filming it on the cell phone - - he was cutting up, laughing, playing with them - - the defendant runs up and just blind-sides him, punching him very hard, knocks him to the ground, temporarily knocks him out, crushes the bones in his face. He's there on the sidewalk bleeding in front of all these tourists, and all these people saw it and witness[ed] it. It was a bad situation.

[Defendant] then leaves. Walks away. He walks away with his family. They cut up through a motel driveway. They go back behind the driveway. You can hear the police sirens coming in the distance. The defendant's son said that he told them to run, and so they went around this back alleyway to avoid the police and they continued to walk around the block to go back out to their car in the opposite direction from which their vehicle was parked.

The victim suffered serious injury to his face. That required plastic surgery. He was out of work for a while. He was in a lot of pain when I went and met with him.

At the sentencing hearing, Tennessee Department of Correction employee Robert McGill testified that he prepared the presentence report in this case, and conducted a validated risk and needs assessment. Defendant "scored low for every domain that we

have.” The domains are mental health, alcohol and drug use, education, residential, family, employment, attitudes and behaviors, and friends.

Mr. McGill testified that Defendant graduated from Loudon County High School and attended Chattanooga State Community College in an International Brotherhood of Electrical Workers Apprenticeship. He obtained a Bachelor of Science Degree in Construction Management and a journeyman’s wiring certificate. Defendant also reported that he had a welding certificate. Mr. McGill testified that Defendant’s criminal record consisted of driving offenses such as driving without a license while registration was expired and speeding. He also had a charge for failure to appear.

On cross-examination, Mr. McGill testified that the failure to appear charge was from the Cleveland, Tennessee Police Department on May 25, 2024, and the disposition of the charge was unknown. He said that Defendant did not have a prior felony or misdemeanor conviction that would disqualify him from eligibility for judicial diversion.

The victim, Jonathan McCarter, testified that in October 2022, he had been working as an actor at the Ripley’s Haunted Adventure in Gatlinburg for fifteen years. At the time of the assault in this case, he was dressed in a “Baby Face” costume and standing in front of Ripley’s trying to “draw in business by acting and entertaining people on the street.” A video of the assault shows that while the victim was interacting with a woman and young children on the sidewalk, Defendant walked up and punched him in the face. Bystanders led the victim to a bench; he was covered in blood and in excruciating pain. He was later taken to LeConte Hospital, where he underwent reconstructive surgery on his nose.

The victim testified that he was “blindsided” by the punch from Defendant; he did not see it coming. He said that he did not harm any children that day and had told Defendant’s family that he was just doing his job – “It’s Halloween.” The victim testified that while he no longer suffered physically from the assault, he continued to suffer mentally. He also experienced more anxiety in crowded places, and had stopped working as an actor for Ripley’s. The victim asked for “justice to be served and [w]hatever the judge sees fit.”

On cross-examination, the victim testified that his “Baby Face” costume was a mixture of a “redneck” and a “hillbilly” with a baby on the side of his head. He also carried “[t]eeth pliers” as a prop. On the day of the assault, he was “clacking” the pliers; he thought his costume was entertaining. He was on Ripley’s property the entire time and adhered to Ripley’s policy of not hurting or touching anyone. The victim said that most of the time, people interacted with him, and in the video, he was “playing with some kids[.]” He agreed that the sidewalk got crowded at times, and some people were more afraid than others.

The victim's mother, Marilyn McCarter, read her impact statement and asked the court to give Defendant the maximum sentence.

Defendant's twelve-year-old son, J.M.,¹ testified that he understood the difference between the truth and a lie. He remembered the encounter in Gatlinburg with the victim who was dressed in a scary costume. J.M. testified that the victim did not harm him, and Defendant did not say anything to the victim at the time. J.M.'s stepbrother, stepsister, and stepmother were also present. J.M. noted that his stepsister is "highly autistic," and his stepmother was holding her when they encountered the victim. He did not see his sister run away or run into the street. J.M. testified that he did not see Defendant punch the victim, but he heard Defendant say that he was "going to give the guy a taste of his own medicine." Defendant walked away and then came back and said, "Let's go," and they ran away. J.M. said he knew that something bad had happened.

J.M. testified that he lived with his mother most of the time and when asked if Defendant was a good father, he made a hand gesture that Defendant was "so-so." He said that when Defendant got angry, "[h]e always storms off or he does something bad to one of us." J.M. testified that on one occasion, Defendant pushed him, and he fell back. Defendant also kicked J.M.'s stepbrother, while wearing boots, and left a bruise on his side. J.M. further testified: "I accidentally hit my [step]sister in the eye, and he spanked me too hard and was going to do it more, and [my stepbrother and stepsister] had to drag him out of the room."

Defendant testified that on October 15, 2022, he and his family had been at the Ripley's 5-D movie theater in Gatlinburg. He said that they exited the theater and were walking down the sidewalk when the victim approached them and scared J.M. and Defendant's stepdaughter. Defendant said that he held his stepdaughter tighter, and J.M. ran around him. Defendant and his family then continued walking down the sidewalk. Defendant's wife was upset because the children were scared and she talked with some employees at the "ticket booth." Defendant testified:

They got into an argument. I was still trying to calm down [J.M.]. [My stepdaughter] was still trying to get away. That's when I grabbed her to keep her from going out in the road. [My wife] came back over there. She was crying. I don't really know what all was said. I walked back over there. I got [my family] around the corner out of the situation. I went back to talk [to the employees] to settle on things, see if we could get a refund from the

¹ Because it is the policy of this court to protect the identity of minor victims, we will identify Defendant's son by his initials.

ticket booth. I went back over. [The victim] began talking, and I reacted negatively. I should have never done it, but that's beyond - - that's past. I'm here to take ownership.

Defendant agreed that he punched the victim twice in the face and ran off. He said, "I was just in the moment. I perceived something that wasn't necessarily reality mainly because I was frustrated that it had happened and that they thought it was okay. I was scared." He said that he did not intend to hurt the victim "in that way" and apologized to him.

On cross-examination, Defendant said that he was provoked but should have called the "authorities" and "let them deal with it." He said that the victim scared the children and put them in a dangerous situation. Defendant said that because he had been comforting the children, several minutes passed before he assaulted the victim. He agreed he did not handle the situation correctly.

The trial court listened to arguments by both sides and made the following findings:

Let me say for the record that this case has been troubling to the Court. I have handled numerous criminal cases over many, many years. I have seen a lot of different circumstances, and I have found very few to be as troubling as this case has been since the plea was entered and thoughts that the Court had concerning this.

I have had the opportunity today to listen to the proof, and, for the record, I want to be clear that I have reviewed the applicable statutes under 40-35-209 and 40-35-501, which talk about particular classifications. I have also had the opportunity to review 40-35-113 and 114, which refer to mitigation and enhancement factors. Specifically I have reviewed these things in light of the proof today and want to be clear in terms of where I am falling on this today.

Specifically, under 40-35-113, based on the proof in this record, I do not find that subsection (2) is applicable, nor do I find that subsection (3) is applicable. Subsection (6) is not applicable in this Court's opinion. Subsection (11) I do not find to be applicable.

I do find that there are factors which would indicate that the defendant has no prior record, that he's been gainfully employed. He has supportive family. There's no indication that he's been in trouble before or caused any kind of problem in the past. The Court notes that I have looked at the STRONG-R

and the presentence report as well and believe that much of that indicates that the defendant has a clean record and history. I'm not really struck by any of that.

Under T.C.A. 40-35-114, I have also considered the enhancement factors, and I find specifically a couple: Number (5), the defendant treated this victim with exceptional cruelty during the commission of the offense; and, number (6), the personal injuries inflicted upon the [victim] were particularly great.² The Court recognizes that there is a provision in the statute which talks about serious bodily injury, and I believe this passes that threshold in its application.

I have today in looking at this and considering these factors determined that I am treating this defendant as a Range I offender and I have looked at the evidence, specifically the attorneys' arguments, their statements. I have reviewed the sentencing memorandum as well as the victim impact statement. I have listened to the victim's statement and the victim's mother as well as the son. I have listened to the defendant's statement today. And I am very much struck and disturbed by the nature of this conduct.

The defendant injured the victim critically. The injury was extensive to the face and it did require surgery, and certainly I can tell that there was a lot of suffering involved. The victim was simply working on that particular day at the haunted mansion as he had been doing for fifteen years and this occurred on property owned by Ripley's. The circumstances were such that the defendant was upset apparently because the children must have been frightened by the appearance of the victim and then chose to assault the victim under those circumstances.

The Court notes that in review of 40-35-210, I want to be clear that I have considered carefully the goals and the purposes of the sentencing statute, that

² While not raised by either party on appeal, we note that enhancement factors (5) and (6) do not apply to Defendant's aggravated assault conviction in this case. The enhancement factor for exceptional cruelty is usually applied in "cases of abuse or torture." *State v. Williams*, 920 S.W.2d 247, 259 (Tenn. Crim. App. 1955). "It is well established that proper application of enhancement factor (5) requires a finding of cruelty under the statute 'over and above' what is required to sustain a conviction for an offense." *State v. Arnett*, 49 S.W.3d 250, 258 (Tenn. 2001) (quoting *State v. Embry*, 915 S.W.2d 451, 456 (Tenn. Crim. App. 1995)). As to the application of enhancement factor (6), the personal injuries inflicted upon the victim were particularly great, this is an element of the offense of aggravated assault causing serious bodily injury. An enhancement factor cannot be an essential element of the offense. *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002); *State v. Pitts*, No M2021-01334-CCA-R3-CD, 2022 WL 17097248, at *5 (Tenn. Crim. App. Nov. 22, 2022), *no perm. app. filed*.

I have weighed the relevant factors and information I have stated above with regards to the PSI and the risk assessment. The sentencing alternatives I have considered with regard to what's available and I have listened to what the State requests and what the defendant believes is appropriate. I was particularly struck by the video in terms of the way this occurred and how it occurred in close proximity to members of the public. I mean, especially, there were young children there when this occurred.

If the motivation of the defendant was to address the conduct that he believed was inappropriate, he certainly had many options that were available to him which he did not take. I think it's indicative of the kind of problems that we face across the country and especially in the community and in communities across the state with just the lack of civility and the lack of basic respect that the Court expects, especially of a parent. As I stated, this case has been very concerning to me because I want to be fair to all sides, but I also have to recognize that there are certain things that are going to be required in this situation.

The defendant requests diversion specifically in this case, and I've had the chance to review this. I find it's not a case for pretrial diversion³ given the violent nature of the defendant's actions, the injuries sustained by the victim, the fact that this was carried out on a sidewalk in close proximity to the public. For me to place this defendant on diversion would diminish, in my opinion, the action, and I do not find that that's appropriate.

The trial court sentenced Defendant to five years as a Range I standard offender, with nine months to be served at one-hundred percent release eligibility in the county jail and the remainder to be served on supervised probation. It is from this sentence that Defendant now appeals.

Analysis

Defendant challenges the length and manner of service of his sentence arguing that his five-year sentence on split confinement is excessive. He further argues that the trial court erred by denying his request for judicial diversion. The State asserts that the trial court acted within its discretion by imposing an in-range sentence and denying judicial diversion.

³ Although the trial court used the term "pretrial diversion," it is clear from the record that Defendant was seeking judicial diversion, and the court simply misspoke.

A. Judicial Diversion

Initially, we will consider Defendant's claim that the trial court erred by denying his request for judicial diversion. Following a determination of guilt by plea or by trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A); *State v. Dycus*, 456 S.W.3d 918, 925 (Tenn. 2015). A qualified defendant is one who is found or pleads guilty to the offense, is not seeking deferral for certain sexual offenses or an offense committed by an elected or appointed person, has not been previously convicted of a felony or Class A misdemeanor, and has not previously been granted judicial or pretrial diversion. T.C.A. § 40-35-313(a)(1)(B)(i)(a)-(e). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against him, and the defendant may have the records of the proceedings expunged. T.C.A. § 40-35-313(a)(2), (b); *Dycus*, 456 S.W.3d at 925. Thus, "judicial diversion is not a sentence; rather, the grant or denial of judicial diversion is simply a decision to defer a sentence or to impose one." *State v. Sheets*, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *6 (Tenn. Crim. App. Apr. 12, 2023), *no perm. app. filed* (citing *State v. King*, 432 S.W. 3d 316, 324-25 (Tenn. 2014)). "Our supreme court has described judicial diversion as a 'legislative largess' available to a qualified defendant." *Dycus*, 456 S.W.3d at 925 (citing *King*, 432 S.W.3d at 323); *see also State v. Hodge*, No. E2024-01455-CCA-R3-CD, 2025 WL 2828436, at *3 (Tenn. Crim. App. Oct. 6, 2025), *perm. app. not yet filed*.

With a guilty plea to the Class C felony of aggravated assault and no prior criminal record, Defendant met the statutory requirements for eligibility for judicial diversion. *See* T.C.A. § 40-35-313(a)(1)(B). Mere eligibility for judicial diversion, however, does not entitle a defendant to judicial diversion. *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In determining whether to grant diversion, the trial court must consider the following factors: (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, (f) the deterrence value to the accused as well as others, and (g) whether judicial diversion will serve the interests of the public as well as the accused. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998).

The decision to grant or deny a qualified defendant judicial diversion "is entrusted to the discretion of the trial court." *King*, 432 S.W.3d at 323 (citation omitted). This court will apply a presumption of reasonableness to a trial court's decision regarding judicial diversion so long as the trial court considers the *Electroplating* factors, identifies the relevant factors, and explains on the record the reasoning for its decision. *Id.* at 326 (citing *State v. Bise*, 380 S.W.3d 682, 706 (Tenn. 2012)). In doing so, this court will uphold a trial court's decision denying or granting judicial diversion so long as there is "any substantial evidence to support the trial court's decision." *Id.* "Substantial evidence" is "[e]vidence

that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla.”” *State v. Clark*, 452 S.W.3d 268, 280 (Tenn. 2014) (quoting Black’s Law Dictionary 640 (9th ed. 2009)). A trial court is “not required to utilize any ‘magic words’ or specifically reference the case names . . . when discussing the relevant factors in order to receive the presumption of reasonableness.” *King*, 432 S.W.3d at 327 n.8.

In this case, the trial court denied Defendant’s request for judicial diversion based on the “violent nature of the defendant’s actions, the injuries sustained by the victim, the fact that this was carried out on a sidewalk in close proximity to the public,” and the court’s belief that diversion would diminish the action. Although a trial court may deny diversion based solely on the nature and circumstances of the offense, the court is required to consider all the *Electroplating* factors and state on the record why the nature and circumstances of the offense outweigh any other factors to be considered. *See State v. Nauss, Alias*, No. E2011-00002-CCA-R3-CD, 2012 WL 988139, at *4 (Tenn. Crim. App. Mar. 22, 2012); *State v. King*, No. M2001-02026-CCA-R3-CD, 2002 WL 31520648, at *4 (Tenn. Crim. App. Nov. 13, 2002).

Here, the record does not show that the trial court considered and weighed any of the other *Electroplating* factors in denying Defendant’s request for judicial diversion. We note that neither the State nor Defendant argued or even mentioned the *Electroplating* factors in their arguments regarding judicial diversion. Although the trial court made general findings as to some of those factors, such as Defendant’s lack of a prior criminal record and his social history, in considering Defendant’s overall sentence, the court failed to consider and weigh those factors in its decision to deny diversion. The trial court also failed to make any findings as to Defendant’s amenability to correction, his mental and physical health, and whether judicial diversion would serve the interests of the public as well as the accused. Because the trial court failed to consider all the appropriate factors in its denial of judicial diversion, and because its statements regarding its denial are conclusory, we find that a remand is appropriate to ensure an adequate record for review. *See State v. Lewis*, 978 S.W.2d 558 (Tenn. Crim. App. 1997); *Nauss*, 2012 WL 988139, at *4. Accordingly, we reverse the trial court’s denial of judicial diversion and remand this case for a new hearing. On remand, the trial court is instructed to place on the record its consideration of all the required factors and make the appropriate findings in support of its decision to grant or deny judicial diversion. If diversion is again denied, the trial court should consider the length and manner of service of Defendant’s sentences.

B. Length of Sentence and Full Probation

Defendant argues that his sentence for aggravated assault should be reduced to three years to be served on full probation. However, because we have reversed and remanded this case for a new hearing due to the trial court’s failure to make appropriate findings

regarding judicial diversion and because judicial diversion is not a sentence, but a decision to defer a sentence or to impose one, *King*, 432 S.W.3d at 324-25, we need not address the length and manner of service of the sentence.

CONCLUSION

After a thorough review of the record and applicable authorities, the judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

S/ *Jill Bartee Ayers*
JILL BARTEE AYERS, JUDGE