

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
January 29, 2025 Session

FILED

04/25/2025

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JUSTIN KEITH WILLOUGHBY

Appeal from the Criminal Court for Campbell County
No. 19450 Zachary R. Walden, Judge

No. E2023-01499-CCA-R3-CD

The Defendant, Justin Keith Willoughby, entered a no contest plea to a criminal information charging him with reckless aggravated assault. The plea agreement reserved sentencing issues for the trial court's consideration. Following a sentencing hearing, the trial court denied the Defendant's request for judicial diversion. It also imposed a sentence of four years, which it suspended and placed the Defendant on probation. On appeal, the Defendant argues that the trial court abused its discretion in denying his request for judicial diversion. Upon our review, we respectfully disagree and affirm the judgment of the trial court.

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

TOM GREENHOLTZ, J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR., and KYLE A. HIXSON, JJ., joined.

Catalina L.C. Goodwin, Stephen Ross Johnson, and S. Renee Hammond, Knoxville, Tennessee, for the appellant, Justin Keith Willoughby.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Jared Effler, District Attorney General; and Lindsey C. Cadle, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. PLEA PROCEEDINGS

On April 17, 2023, the Defendant entered a no contest plea¹ to a criminal information charging reckless aggravated assault. As the factual basis for the plea, the parties stipulated that the Defendant worked as a uniformed police or security officer with a state community college. The victim was a sixteen-year-old student who was dually enrolled at the community college and her high school.

On October 18, 2018, the victim visited the Defendant's office on campus. While in his office, the Defendant "asked [the victim] to touch his penis which she did." According to the factual basis for the plea, the Defendant's actions caused the victim to suffer extreme emotional distress, ultimately constituting serious bodily injury.

Five days later, the victim reported to Detective Josh Hill with the LaFollette Police Department that she had been raped by the Defendant. As part of the investigation, the detectives interviewed the Defendant. During his initial interview, the Defendant denied that anything inappropriate had occurred with the victim. However, after taking a polygraph exam, the Defendant "admitted to having sexual contact with [the victim] in his office on that day."

Pursuant to the plea agreement, the State agreed to dismiss a prior indictment returned with respect to this incident alleging two counts of statutory rape by an authority figure. The parties also agreed that the trial court would determine whether the Defendant should receive judicial diversion. *See* Tenn. Code Ann. § 40-35-313 (2019). In the event

¹ The written plea agreement refers to the Defendant's plea as a "no contest" plea nearly a dozen times. However, the Defendant insists in this court that he entered a "no contest best interest plea," as if he entered a type of hybrid plea with components of a nolo contendere plea and a best interest plea. In his appellate brief, for example, the Defendant contends that he pled "nolo contendere in his best interest under *Alford* to the offense charged in the information."

The type of hybrid plea described by the Defendant does not exist in our law. As the supreme court described in *State v. Albright*, 564 S.W.3d 809, 818 n.5 (Tenn. 2018), "there are technical differences between a 'best interest'/*Alford* plea and a nolo contendere [or no contest] plea." However, those technical differences do not affect our review of the Defendant's issues in this appeal, and we do not address the Defendant's characterization further.

that the trial court denied granting judicial diversion, the parties agreed that the court would decide the length of the sentence and the manner of its service.

B. SENTENCING HEARING

1. The Parties' Proof

On September 26, 2023, the trial court conducted a sentencing hearing regarding the Defendant's plea to reckless aggravated assault. The State first called a court specialist with the Tennessee Department of Correction, Kelly Andrews, to testify about preparing the presentence report. Ms. Andrews also testified about her interaction with the Defendant. Ms. Andrews noted that during the interview, the Defendant was unusually reserved and was "definitely not forthcoming" in answering questions. However, she did not believe he intentionally avoided cooperating. Shortly before this interview, the Defendant completed a ninety-day inpatient treatment program, attended Alcoholics Anonymous meetings, started counseling, and secured employment. Ms. Andrews acknowledged the Defendant's efforts to regain control of his life following alcohol addiction treatment.

The Defendant's counsel confirmed that although he had pending misdemeanor and felony charges related to alcohol, the present charge was unrelated to substance use. Instead, counsel asserted that Defendant's alcohol dependence stemmed from the emotional stress he encountered from the present charges.

During the hearing, the trial court questioned the sincerity of the Defendant's remorse, particularly noting the Defendant's omission of the victim from his formal apologies. Although the Defendant provided the court with a written apology, the trial judge observed that it addressed only the court and did not explicitly include the victim. The Defendant subsequently apologized to the victim during allocution, expressing remorse for his actions, acknowledging his struggle with depression and alcohol addiction, and describing his commitment to sobriety and restoring his relationships.

2. Trial Court's Findings and Sentencing Decision

After considering the evidence and arguments, the trial court denied the Defendant's request for judicial diversion but sentenced him to four years of probation without incarceration. The court evaluated several enhancement factors, giving minimal weight to

the Defendant's previous marijuana use, but significant weight to the fact that the offense involved the Defendant's desire for personal pleasure or excitement. *See* Tenn. Code Ann. § 40-35-114(1), (7) (2019). Furthermore, the court placed considerable emphasis on enhancement factor (14), which concerns the abuse of a position of trust. The court stressed that the Defendant's position as a uniformed security officer at the community college significantly facilitated the commission of the offense. The Defendant's conduct violated public trust due to his status as a uniformed security officer who misused his authority. The trial court found that no mitigating factors applied.

In evaluating the Defendant's request for judicial diversion, the court discussed the Defendant's potential for rehabilitation, noting his failure to demonstrate genuine acceptance of responsibility and sincere remorse toward the victim. Despite the Defendant's apology during his allocution, the court expressed skepticism about its sincerity, suggesting that the Defendant was motivated to tell the court what it wanted to hear rather than express genuine remorse.

The trial court cited several factors that weighed in favor of the Defendant, including his lack of prior criminal history, strong family and social ties, a stable employment history, community support, educational aspirations, and ongoing recovery efforts. The court viewed the Defendant's physical and mental health as neutral, indicating that they would not impede compliance with probation terms.

The trial court acknowledged the Defendant's openness about mental health struggles and alcohol issues, but was concerned that the Defendant avoided sex offender registration through the plea agreement. Additionally, the court noted that the Defendant had been arrested twice while on bail for the current offense. It also found that the circumstances surrounding the offense, including the sexual nature of the assault, the Defendant's status as a community college campus security officer, and the location being in the Defendant's office, weighed significantly against judicial diversion.

Regarding deterrence, the trial court acknowledged the State's argument that a message should be sent to law enforcement. It also found that granting diversion might undermine public trust in the judicial system by appearing to give preferential treatment to law enforcement officers. Considering all of these factors and the weight assigned to them, the court determined that judicial diversion was not appropriate.

Turning to the sentence to be imposed, the trial court found that incarceration was not an appropriate punishment. The court reasoned that the Defendant did not have a

significant criminal history and posed no ongoing risk to society. It also concluded that the felony conviction alone served as an adequate deterrent to others. Ultimately, the trial court imposed a four-year sentence, suspended the sentence, and placed the Defendant on probation.

On October 24, 2023, the Defendant filed a timely notice of appeal.

ANALYSIS

The Defendant argues that the trial court erred in failing to grant judicial diversion.² More specifically, he asserts that the trial court considered irrelevant factors when denying diversion and improperly weighed other factors in the analysis. He also argues that the court acted arbitrarily, as evidenced by the court considering the same factors to grant full probation but deny diversion. In response, the State argues that the trial court acted within its discretion to deny judicial diversion. We agree with the State.

STANDARD OF APPELLATE REVIEW

Our supreme court has recognized that “the first question for a reviewing court on any issue is ‘what is the appropriate standard of review?’” *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). We review a trial court’s sentencing determinations for an abuse of discretion, “granting 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). As such, we will uphold a sentence “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 709-10.

This deferential standard of appellate review also applies to a trial court’s decision to grant or deny judicial diversion. *See State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014). As the supreme court recognized,

Under the *Bise* standard of review, when the trial court considers the *Parker* and *Electroplating* factors, specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the

² The Defendant’s issues in this appeal relate only to the trial court’s decision to deny judicial diversion. He raises no issue with the court’s four-year sentence or the grant of full probation otherwise.

grant or denial so long as there is any substantial evidence to support the trial court's decision.

King, 432 S.W.3d at 327.

The Defendant asserts that this court should review the trial court's ruling de novo because the trial court based its ruling, at least in part, on irrelevant factors. We respectfully disagree. In considering the Defendant's request for judicial diversion in this case, the trial court considered the purposes and principles of sentencing, possible enhancement and mitigating factors, and the common-law factors applicable to determinations of alternative sentencing and judicial diversion. Indeed, at oral argument, the Defendant acknowledged that the trial court considered all of the *Parker* and *Electroplating* factors.

Importantly, “[m]erely considering an irrelevant factor will not warrant a finding of abuse of discretion; it is the *undue* consideration of an irrelevant factor that is prohibited.” *State v. Brooks*, No. W2015-00833-CCA-R3-CD, 2017 WL 758519, at *7 (Tenn. Crim. App. Feb. 27, 2017), *no perm. app. filed*. As we discuss below, we see no instance in which the trial court placed consideration—much less undue consideration—on an irrelevant factor in determining whether to grant judicial diversion. As such, we accord a presumption of reasonableness to the trial court's denial of diversion and review that decision for an abuse of discretion.

A. DEFERRAL OF PROCEEDINGS (JUDICIAL DIVERSION)

Our supreme court has described judicial diversion as a “legislative largess” available to a qualified defendant. *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). In the context of this case, a qualified defendant may seek judicial diversion after pleading guilty or nolo contendere to an offense that is otherwise eligible for diversion. *See* Tenn. Code Ann. 40-35-313(a)(1)(B). The adjudication of guilt is then “held in abeyance[,] and further proceedings are deferred under reasonable conditions during a probationary period established by the trial court.” *Rodriguez v. State*, 437 S.W.3d 450, 455 (Tenn. 2014).

If the defendant completes this diversionary period, the trial court will discharge the defendant and dismiss the case without entering a finding or judgment of guilt. *See, e.g., State v. Judkins*, 185 S.W.3d 422, 425 (Tenn. Crim. App. 2005); Tenn. Code Ann. § 40-35-313(a)(2). The defendant may then seek to have expunged all official records relating to the “arrest, indictment or information, trial, finding of guilty, and dismissal and discharge.” *State v. Parsons*, 437 S.W.3d 457, 495 (Tenn. Crim. App. 2011) (citation and internal

quotation marks omitted). This expunction “restore[s] the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information.” Tenn. Code Ann. § 40-35-313(b).

In this case, the parties do not dispute that the Defendant is eligible to receive judicial diversion under Tennessee Code Annotated section 40-35-313(a)(1)(B)(i). Importantly, one’s statutory eligibility for judicial diversion does not “constitute entitlement to judicial diversion.” *King*, 432 S.W.3d at 323. “In other words, satisfaction of the eligibility criteria simply allows the trial court to grant diversion in appropriate cases.” *State v. Sheets*, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *7 (Tenn. Crim. App. Apr. 12, 2023) (citation and internal quotation marks omitted), *no perm. app. filed*.

The judicial diversion statute does not specify the criteria by which trial courts should assess whether a qualified defendant is a suitable candidate for judicial diversion. However, in two cases, *State v. Parker*, 932 S.W.2d 945 (Tenn. Crim. App. 1996), and *State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998), this court identified seven common-law factors that a trial court must weigh and consider in this analysis:

The criteria that the trial court must consider in deciding whether a qualified accused should be granted judicial diversion include[]: (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.

Parker, 932 S.W.2d at 958 (footnote omitted); *Electroplating*, 990 S.W.2d at 229. Our supreme court has affirmed the use of these common-law factors, *see State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017); *State v. Dycus*, 456 S.W.3d 918, 929 (Tenn. 2015), and it has required that “the trial court must weigh the factors against each other and place an explanation of its ruling on the record,” *King*, 432 S.W.3d at 326.

In this case, the trial court correctly identified and analyzed each relevant enhancement and mitigating factor, as well as each *Parker* and *Electroplating* factor guiding its consideration of judicial diversion. Notably, the court detailed the weight assigned to each factor, highlighting several factors that favored diversion, including the Defendant’s lack of a criminal record, strong social support, stable employment history,

educational aspirations, and community involvement. Conversely, the court discussed factors weighing against diversion, including the seriousness of the offense, the Defendant's abuse of a position of public trust, insufficient acceptance of responsibility, questionable sincerity of remorse, and potential harm to public confidence in the justice system. The trial court also complied with its duties to weigh the factors against each other in deciding the Defendant's request. From our review of the record, we conclude that substantial evidence exists in the record to support the trial court's decision. *King*, 432 S.W.3d at 326.

Challenging this conclusion, the Defendant argues that the trial court improperly weighed several factors and considered irrelevant ones in its analysis. More specifically, he asserts that the court weighed improper factors in considering his amenability to rehabilitation, the circumstances of the offense, as well as deterrence and the interests of the public. We address each of these arguments in turn.

1. Amenability to Correction

The Defendant first argues that the trial court relied on irrelevant factors when assessing his amenability to correction. He asserts that the court improperly found him to lack genuine remorse for the impact his actions had on the victim. He also argues that the trial court improperly considered that he could have been convicted of other, more serious offenses than the offense for which he was convicted. We respectfully disagree that the trial court improperly considered the Defendant's amenability to correction.

Tennessee courts have consistently held that a lack of remorse is a relevant factor for trial courts to consider in determining suitability for judicial diversion. *See, e.g., State v. Brown*, No. E2019-00223-CCA-R3-CD, 2020 WL 3456737, at *19 (Tenn. Crim. App. June 25, 2020) ("Lack of remorse relates to Defendant's amenability to correction."), *perm. app. denied* (Tenn. Dec. 10, 2020). Moreover, while a defendant is not required to admit guilt to be granted judicial diversion, "there is a critical distinction between confessing guilt to a crime and accepting responsibility for wrongful conduct." *See Stanton v. State*, 395 S.W.3d 676, 688-89 (Tenn. 2013). Indeed, "[a] defendant may admit and assume responsibility for wrongdoing without admitting that he or she has committed a crime." *Id.* at 689. As such, the failure to admit wrongdoing or accept responsibility is a relevant consideration in determining suitability for judicial diversion. *Id.*

In this case, the trial court found that the Defendant's claims of remorse were not sincere or credible. As the trier of fact at the sentencing hearing, the trial court was in the

best position to determine the Defendant's credibility. *See State v. Crabtree*, No. M2021-01154-CCA-R3-CD, 2023 WL 2133831, at *20 (Tenn. Crim. App. Feb. 21, 2023) ("Relative to Defendant's argument that the trial court should have found her assertions of remorse credible, credibility determinations are the province of the finder of fact, in this case the trial court."), *no perm. app. filed*. The trial court determined that the Defendant lacked genuine remorse, as his apologies were more concerned with the effect of his actions on himself and his family rather than the victim. *See State v. Hodges*, No. M2016-01057-CCA-R3-CD, 2017 WL 3085434, at *5 (Tenn. Crim. App. July 20, 2017) (affirming lack of remorse where defendant appeared more concerned with personal consequences than with the victim), *no perm. app. filed*; *State v. Oakes*, No. E2006-01795-CCA-R3-CD, 2007 WL 2792934, at *9 (Tenn. Crim. App. Sept. 27, 2007) (affirming lack of remorse as an appropriate consideration where defendant prioritized personal consequences over victim impact), *perm. app. denied* (Tenn. Mar. 3, 2008). Because this finding has support in the record, we conclude that the trial court properly considered this factor. The Defendant's argument is without merit.

The Defendant also argues that the trial court erred in considering the possibility that the Defendant could have been charged "with any other offense," thereby denying him due process of law. We again respectfully disagree.

When considering judicial diversion, a trial court may not consider an offense that the defendant "could" or "should" have faced if that offense is "different or greater than that for which the defendant was indicted." *State v. Gobble*, No. E2014-01596-CCA-R3-CD, 2015 WL 12978645, at *8 (Tenn. Crim. App. Aug. 12, 2015), *no perm. app. filed*; *see also State v. Lacy*, No. W2016-00837-CCA-R3-CD, 2017 WL 1969764, at *5 (Tenn. Crim. App. May 12, 2017), *no perm. app. filed*. However, a different case arises when a defendant is indicted for a particular offense and evidence indicates that the defendant committed the crime for which he or she is charged. In that case, when the defendant is allowed to plead to a lesser offense to argue for diversion, the beneficial plea agreement "colors the nature and circumstances of the *conviction offense*" and may weigh against a grant of judicial diversion. *See State v. Tollison*, No. M2016-00593-CCA-R3-CD, 2017 WL 781734, at *3 (Tenn. Crim. App. Feb. 28, 2017) (emphasis in original), *no perm. app. filed*.

In this case, the Defendant asserts that "the trial court also relied, at least in part, on its belief that [the Defendant] could have been charged with sexual battery[.]" We respectfully disagree. From our review of the record, the trial court actually expressed *doubt* that the Defendant could be charged with sexual battery on the basis of the stipulated facts. It is true the trial court noted that the Defendant's plea to reckless aggravated assault

avoided the possibility of registration under the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 (“Sexual Offender Registry”). *See* Tenn. Code Ann. §§ 40-39-207(i); 40-39-202(20)(A)(xvi). However, nothing in the record suggests that the court required the Defendant to defend himself against a more serious charge or believed that the defendant should have been charged with a different offense entirely. Instead, we agree with the State that the trial court reflected on the history of the case, along with several other factors, to evaluate the Defendant’s acceptance of responsibility and amenability to rehabilitation.

In essence, the Defendant invites us to reevaluate the trial court’s determination on this factor. However, as we noted above, “our review is limited to determining whether ‘any substantial evidence’ exists in the record to support the trial court’s decision.” *State v. Thomas*, No. W2019-01697-CCA-R3-CD, 2020 WL 5230596, at *4 (Tenn. Crim. App. Sept. 1, 2020), *no perm. app. filed*. Because the record supports the trial court’s decision, the Defendant is not entitled to relief on this issue.

2. Circumstances of the Offense

The Defendant also argues that the trial court should not have weighed the circumstances of the offense against granting judicial diversion. In particular, the Defendant argues that the stipulated facts do not establish facts beyond what is needed to prove the elements of the offense. He also argues that the facts are not shocking, reprehensible, extreme, or exaggerated. We respectfully disagree that the trial court improperly considered the circumstances of the offense.

A trial court may deny a request for judicial diversion based *solely* on the nature and circumstances of the offense, “so long as all of the other relevant factors have been considered, and this factor outweighs all others that might favorably reflect on the [defendant’s] eligibility.” *State v. Fucci*, No. M2022-01425-CCA-R3-CD, 2023 WL 6785862, at *6 (Tenn. Crim. App. Oct. 13, 2023) (citation and internal quotation marks omitted), *no perm. app. filed*. Where the court denies judicial diversion on this factor alone, it must further find that the circumstances of the offense are “especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree,” and outweigh the other diversion factors. *See State v. Bell*, No. E2021-01120-CCA-R3-CD, 2022 WL 3714613, at *5 (Tenn. Crim. App. Aug. 29, 2022) (citing *State v. Trotter*, 201 S.W.3d 651, 654-55 (Tenn. 2006)), *perm. app. denied* (Tenn. Jan. 11, 2023). However, this heightened standard of review does not apply when the denial of diversion is based on other factors as well, and, in this circumstance, the trial court is not required to make these

additional findings. *See, e.g., State v. Hayes*, No. E2021-01123-CCA-R3-CD, 2022 WL 3904724, at *3 (Tenn. Crim. App. Aug. 31, 2022) (declining to apply a heightened standard of review when “[t]he trial court did not base the denial of judicial diversion solely on the circumstances of the offense”), *perm. app. denied* (Tenn. Jan. 11, 2023).

In addition, when deciding whether to grant judicial diversion, “a trial court may also consider ‘a victim impact statement as it reflects on the circumstances of the offense.’” *Sheets*, 2023 WL 2908652, at *9 (quoting *State v. Killgo*, No. E2020-00996-CCA-R3-CD, 2022 WL 2286935, at *8 (Tenn. Crim. App. June 24, 2022)). However, we have recognized that where “the parties went to great lengths to negotiate a plea agreement that did not include a stipulation” as to particular facts, the trial court cannot rely solely upon the victim impact statement to establish those facts. *Killgo*, 2022 WL 2286935, at *8 (declining to find a use of force solely from the victim impact statement when the fact was inconsistent with the negotiated, stipulated facts).

As charged in this case, the offense of reckless aggravated assault required the State to prove that the Defendant recklessly caused serious bodily injury to another. *See* Tenn. Code Ann. § 39-13-102(a)(1)(B)(i) (2018). In assessing the circumstances of the offense, the trial court considered that the assault was sexual in nature, occurred with a uniformed security officer in his office on a public college campus, and had a serious psychological impact on the victim. The court noted that the sexual nature of the offense, as well as the impact of the Defendant’s conduct on the victim, were reflected in the victim impact statement. In so doing, the trial court found that the sexual nature of the assault was “significant beyond the normal scope of reckless assaults that we see.”

Initially, the Defendant takes issue with the trial court’s consideration of the victim impact statement to conclude that the assault was sexual in nature. However, unlike *Killgo*, the trial court’s finding that the assault was committed in a sexual manner was not derived solely from the victim’s impact statement. On the contrary, the stipulated facts announced by the State at the plea hearing provided that the Defendant “asked [the victim] to touch his penis which she did” and “admitted to having sexual contact with [the victim] in his office.” These facts are consistent with the victim’s impact statement and the trial court’s finding as to the nature of this particular assault. *See Killgo*, 2022 WL 2286935, at *8 (affirming consideration of facts in the victim impact statement that were “not inconsistent with the prosecution’s recitation of the stipulated facts at the plea hearing”). As such, the trial court’s finding that the assault was sexual in nature is supported by substantial evidence in the record apart from the victim impact statement.

The Defendant also asserts that the stipulated facts do not establish facts beyond what is needed to prove the elements of the offense. However, the circumstances surrounding the offense are not simply that the Defendant recklessly assaulted the victim and that she suffered serious bodily injury. They also show that the victim was a minor at the time of the offense; that the Defendant was a security officer at the victim's community college; that the offense occurred in the Defendant's office on campus; that the Defendant intentionally assaulted the victim by having her touch his penis; that the Defendant was in uniform and abused his position of trust as a security officer by assaulting the victim; and that the victim's mental injury was so severe that she tried to commit suicide and was hospitalized in a psychiatric hospital for approximately two months. The trial court's consideration of these other circumstances of the offense was supported by the record and was certainly not inappropriate.

Finally, because the trial court denied diversion for reasons in addition to the circumstances of the offense, the heightened review standard does not apply. *See Hayes*, 2022 WL 3904724, at *3. As before, the Defendant essentially asks this court to reevaluate the trial court's weighing of this factor. We respectfully decline the invitation and conclude that the trial court acted within its discretion by finding that this factor weighed against granting judicial diversion.

3. Deterrence and the Interest of the Public

The Defendant next contends that the trial court improperly denied judicial diversion based on considerations of deterrence and the public interest. More specifically, the Defendant argues that the record contains no proof supporting the need for specific or general deterrence. He also challenges the trial court's finding that he occupied and abused a position of trust as a uniformed campus security officer at the time of the offense. We respectfully disagree that the trial court improperly considered either of these factors in denying judicial diversion.

From our review of the record, it is not obvious that the trial court weighed deterrence against granting judicial diversion. It identified deterrence as an *Electroplating* factor, and it noted the State's argument about "sending a message" to those in law enforcement. However, aside from observing that "[w]e've seen that in the State [and district]," the court did not further discuss or express agreement with that argument. Instead, it immediately recognized the consequences of denying diversion on future employment and discussed the public interest. Indeed, the trial court did not assign any weight to considerations of deterrence, either positive or negative, unlike every other factor

in its analysis. As such, we respectfully disagree with the Defendant that the court improperly weighed notions of deterrence against granting judicial diversion.

With respect to the public interest, this court has recognized that this factor encompasses a wide variety of considerations. For example, we recognized in *Sheets* that diversion may favor the interests of the accused when a felony conviction could impair future employment, or when necessary to avoid the stigma associated with a felony conviction. *See Sheets*, 2023 WL 2908652, at *12 (citing cases). On the other hand, we also observed that the public interest may not be served where granting diversion would depreciate the seriousness of the offense, or where the collateral consequences of a conviction would protect the public. *See id.* (citing cases).

In this case, the trial court found that the Defendant had abused a position of trust as a uniformed campus security officer and observed that public confidence in the judicial system would be diminished if “they view anyone getting special treatment because of their connections with the law enforcement community.” This factor was a proper consideration in assessing the public interest.

This court has recognized that “[t]he fact that the appellant violated a position of public trust bears directly on the public interest.” *State v. Houston*, 900 S.W.2d 712, 715 (Tenn. Crim. App. 1995). Indeed, we have “upheld the denial of judicial diversion where the trial court considered the fact that the offender was a law enforcement personnel and either used their position or abused their position to facilitate their disregard for the law.” *State v. Headley*, No. M2008-01185-CCA-R3-CD, 2009 WL 3103791, at *6 (Tenn. Crim. App. Sept. 29, 2009), *perm. app. denied* (Tenn. Mar. 15, 2010). As we have explained,

[P]ublic officials, and especially members of the criminal justice system, are called upon to act in accordance with an even higher standard than that applied to the average citizen. In the normal course of events, an applicant for a suspended sentence has not, prior to committing a crime, taken an oath that he will commit no crime. On the other hand, a public official whose sworn duty is to uphold the law has taken such an oath. Thus [the defendant] stands before the court as one who by committing a crime has violated his oath of office, and has thereby breached the public trust.

Houston, 900 S.W.2d at 715; *see also Woodson v. State*, 608 S.W.2d 591, 594 (Tenn. Crim. App. 1980) (“Thus Woodson stands before the court as one who by committing a crime has violated his oath of office [as a law enforcement officer], and has thereby breached the

public trust. We hold that the trial judge may weigh this factor in determining whether to grant or deny a suspended sentence when a public official is involved.”); *State v. Cameron*, No. E2006-00303-CCA-R3-CD, 2006 WL 2535370, at *4 (Tenn. Crim. App. Sept. 5, 2006) (recognizing, in the context of an assault case, that “the fact that the Defendant, a State Trooper with the Tennessee Highway Patrol, violated a position of public trust bears directly upon the public’s interest”), *perm. app. denied* (Tenn. Jan. 29, 2007).

Importantly, this is not a case where the Defendant’s actions were off-duty and unrelated to his duties as a uniformed campus security officer. *See State v. Lane*, 56 S.W.3d 20, 27 (Tenn. Crim. App. 2000). On the contrary, the trial court was properly concerned that the Defendant committed the instant offense in his office, during office hours, while wearing his uniform, being armed, and acting under the color of authority. *State v. Hopson*, No. 01C01-9508-CC-00244, 1997 WL 71829 (Tenn. Crim. App. Feb. 20, 1997) (affirming denial of judicial diversion for a police dispatcher, who represented law enforcement and committed crimes while in uniform). We conclude that the trial court acted within its discretion by finding that these factors weighed against granting judicial diversion.

Ultimately, the standard of appellate review is important to our analysis. When reviewing a trial court’s decision for an abuse of discretion, we must have “awareness that the decision being reviewed involved a choice among several acceptable alternatives.” *Lee Med., Inc. v. Beecher*, 312 S.W.3d 515, 524 (Tenn. 2010). To that end, we may not “second-guess a trial court’s exercise of its discretion simply because the trial court chose an alternative that [we] would not have chosen.” *State v. McCaleb*, 582 S.W.3d 179, 186 (Tenn. 2019). We also may not substitute our judgment for that of the trial court simply because a party believes that another choice would have been a better decision. *Cf. State v. Willis*, 496 S.W.3d 653, 729 (Tenn. 2016).

The trial court correctly identified the applicable legal standards for considering judicial diversion. It considered and weighed the appropriate factors in the context of the relevant facts, and it made a reasoned choice between acceptable alternatives. Its decision was neither illogical nor unreasonable. As such, even if reasonable minds could disagree with the propriety of the decision—and we have no such disagreement—we conclude that the trial court acted within its discretion to deny the Defendant’s request for judicial diversion. *King*, 432 S.W.3d at 327 (“[W]hen the trial court considers the *Parker* and *Electroplating* factors, specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the grant or denial so long as there is any substantial evidence to support the trial court’s decision.”). The Defendant is not entitled to relief.

B. PURPOSES OF JUDICIAL DIVERSION AND ALTERNATIVE SENTENCING

Finally, the Defendant asserts that the trial court violated his due process rights by failing to articulate why it decided to deny judicial diversion while granting probation. More specifically, he argues that because the factors for considering probation and judicial diversion are largely the same, the trial court's decision to deny judicial diversion was arbitrary because it failed to "differentiate between the two when denying diversion but granting probation." We respectfully disagree that the trial court acted arbitrarily in any way.

Our supreme court has recognized that "[t]he guidelines applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion." *Trent*, 533 S.W.3d at 291 (citation and internal quotation marks omitted). We have also observed that, despite the similarity between the factors used to analyze judicial diversion and alternative sentencing, "these concepts and their underlying purposes are distinct" and should be analyzed separately. *Sheets*, 2023 WL 2908652, at *5.

The primary difference between the two concepts lies in the distinct purposes they serve. For example, "[t]he purpose of judicial diversion is to avoid placing the stigma and collateral consequences of a criminal conviction on the defendant, in addition to providing the defendant a means to be restored fully and to useful and productive citizenship." *State v. Johnson*, 980 S.W.2d 410, 413 (Tenn. Crim. App. 1998). Conversely, when a court considers the question of incarceration, its focus is on the need for incapacitative measures, considering amenability to rehabilitation as well as furthering notions of retributive justice and deterrence. *See* Tenn. Code Ann. § 40-35-103(1)(A)-(C), (5) (2019).

Precisely because the purposes served by each concept are different, consideration of the identical common law factors may yield different results, even in the same case. Consider, for example, the weight to be attributed to the circumstances of a felony offense. In some cases, it may be appropriate for a trial court to recognize that granting diversion—with its deferred adjudication of guilt and expunction of a felony charge—may depreciate the seriousness of a defendant's offense. However, when the trial court considers the prospect of a felony conviction with a sentence involving probation or split confinement, the circumstances of the offense may weigh much differently when the court considers whether incarceration is an appropriate punishment.

In this instance, the trial court provided distinct justifications for its decisions to deny judicial diversion and to grant probation. In the context of judicial diversion, it was found that the circumstances of the offense and the public interest were significant factors weighing against that resolution. However, when considering whether incarceration was warranted after a conviction had been entered, the court emphasized that the need for incapacitation was not evident from a long history of criminal conduct and that rehabilitation was reasonably feasible. It also found that the fact of a felony conviction accounted for both deterrence and the need to avoid depreciating the seriousness of the offense.

In distinguishing between judicial diversion and probation, the trial court gave effect to the purposes served by each concept. It applied and weighed the common law factors independently in each context, demonstrating its understanding that similar factors would carry different weight given the purposes and principles of sentencing. We conclude that the trial court conscientiously exercised its discretion, and the Defendant's arguments to the contrary are without merit.

CONCLUSION

In summary, we hold that the trial court acted within its discretion in denying the Defendant's request for judicial diversion. Accordingly, we respectfully affirm the judgment of the trial court.

s/ *Tom Greenholtz*

TOM GREENHOLTZ, JUDGE