

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs at Knoxville January 25, 2023

FILED

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Clerk of the
Appellate Courts

STATE OF TENNESSEE v. HERANDUS WASHINGTON

**Appeal from the Criminal Court for Shelby County
No. 21-00833 J. Robert Carter, Judge**

No. W2022-00352-CCA-R3-CD

The Defendant, Herandus Washington, pleaded guilty to reckless vehicular homicide, a Class C felony. *See* T.C.A. § 39-13-213(a)(1), (b)(1) (2018) (subsequently amended). At the sentencing hearing, the Defendant sought judicial diversion. The trial court denied diversion and imposed a five-year sentence, to be served on probation. On appeal, the Defendant contends that the trial court abused its discretion in denying judicial diversion. We affirm the judgment of the trial court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and KYLE A. HIXSON, J., joined.

Phyllis Aluko (on appeal), District Public Defender; Harry E. Sayle III (on appeal), Assistant District Public Defender; Jeffrey S. Rosenblum (at hearing), and Leslie I. Ballin (at hearing), Memphis, Tennessee, for the appellant, Herandus Washington.

Herbert Slatery III, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; Brad Reasonover, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant's conviction relates to a June 22, 2020 vehicular collision in which five-year-old Collins Leach was killed and her father and brother were injured. The Defendant was the driver of his employer's commercial tractor-trailer truck, and he made an improper lane change and struck the SUV in which the victim was a passenger. The SUV was pushed into a third vehicle. The collision occurred on an interstate. All three vehicles came to rest off the road, with the truck and the SUV in the center median. An eyewitness stated that the truck had been "out of control" for some distance, and another

witness stated that she had seen the truck “swerving for at least two exits.” Video surveillance footage showed the truck traveling at a high rate of speed when it collided with the SUV. After the incident, the truck was inoperable and was towed. It was stored by the company which had employed the Defendant. Attorneys inspecting the truck about one month after the incident found a marijuana “blunt” in the driver’s side door. The marijuana had not been found when the truck was searched by an investigator at the time the truck was towed.

At the combined guilty plea and sentencing hearing, William Moss, Jr., pastor of the Defendant’s church, testified that he had known the Defendant all of the Defendant’s life. Pastor Moss said the Defendant had good moral character and played drums for church services. Pastor Moss said the Defendant had participated in sports and church trips as a child and had never been in “trouble.” Pastor Moss said the Defendant had expressed remorse and accepted responsibility for the collision which killed the victim. Pastor Moss thought that the Defendant would abide by the rules and conditions of the trial court’s sentencing order and that the Defendant would be a “good citizen for the rest of his life.”

Glenn Heard, Jr., testified that the Defendant was an employee of Mr. Heard’s janitorial company on the date of the fatal collision. Mr. Heard said the Defendant worked at night as a janitor while also working a daytime job as a truck driver. Mr. Heard said the Defendant possessed good character and was dedicated and responsible. Mr. Heard had trusted the Defendant to clean a car dealership after hours and to lock the facility after he completed his work. Mr. Heard said that he could see remorse and sadness in the Defendant’s face and that the Defendant had spoken of his remorse related to the fatal collision.

Herbert Washington, the Defendant’s father, testified that the Defendant completed truck driving school after high school graduation. Mr. Washington said the Defendant had been a high school athlete and had earned good grades. Mr. Washington said the Defendant was “really sorry” about the victim’s death and that the Defendant felt “sorry for the [victim’s] family.” Mr. Washington said the Defendant had been affected “pretty dearly,” which resulted in changes to his eating and walking habits. Mr. Washington said the Defendant would be affected all of his life by the incident. Mr. Washington thought the Defendant would follow the rules of a probation sentence.

The twenty-six-year-old Defendant read a statement he had written to the victim’s family, in which he said that he never meant for the incident to happen and that he prayed for God to help them deal with the loss of the victim. The Defendant said he hoped they would forgive him.

The Defendant testified that he graduated from high school in 2012, having played basketball and run on the track team. He said he worked through a temporary employment

agency until going to truck driving school in early 2020 and beginning his career as a truck driver. He acknowledged “a couple of traffic tickets” in 2014 and 2016. He agreed that his driver’s license had been revoked but that he “immediately took care of” it.

The Defendant testified that he had been employed by Eagle Distributing Company for about three to four months before the fatal collision. He said he drove a different route and a different truck daily. He said the company had three or four types of trucks and that the date of the incident was the first time he had driven the truck with the longer, 16’ trailer. He said his duties entailed inspecting the truck to which he was assigned for the day to ensure that it was loaded, to take the truck on the route, and to return the truck to the employer. He said that he usually had a “helper” assigned to assist him but that he did not have one on the date of the incident, which had caused him to take longer to work his route that day.

The Defendant testified that as the truck became lighter from his unloading it along his route, he noticed an issue with its handling and reported to his lead manager that the truck was “swaying a little bit.” The Defendant said that the manager “made it seem like he already knew . . . what was wrong with the trailer” and that the manager told him “to try to make it back in[.]” The Defendant said he began driving back to his workplace because the manager told him to do so and because he did not want to lose his job. He agreed that in hindsight, he should have made a different decision. He did not know his speed at the time of the collision but said it could not have been more than sixty miles per hour because the truck had a governor which did not permit the truck to be driven faster than the speed limit. He disagreed that he had been speeding and said he had not been driving “as fast as the truck would go.” He said he had seen the cars ahead of him slowing, that he had applied the brakes and had pulled the emergency brake, and that the road was slippery from light rain. The Defendant said that after the collision, he “tried to help the family or tried to see what was going on,” that he was scared, and that he did not know what to do. He said he was “[v]ery sorry” about the incident.

The Defendant testified that he was now employed by a waste management company and that he still worked at Mr. Heard’s janitorial service. He identified letters written on his behalf by Mr. Heard, one of his high school teachers, a minister, and his supervisor at Team Waste. The letters were received as an exhibit.

The Defendant testified that he could abide by the law for the rest of his life. He agreed that this included not smoking marijuana. He said that before the fatal collision, he had wanted to be a truck driver but that now he was unsure about that career path and that he might go to “barber school or something like that.” He said he hoped that the trial court would sentence him in a manner in which he eventually would not have a felony record.

The Defendant acknowledged that he had backed into a pole while driving a truck for his employer before the date of the fatal collision. He acknowledged a work-related incident in which a driver claimed the Defendant had hit the person's car with the Defendant's employer's truck, but the Defendant said he had not hit the car and that the car had no damage. When asked about the eyewitness reports that the truck had been "all over the road," the Defendant said the trailer had swayed and said it may have appeared from behind that the truck was "swerving."

The Defendant testified that he had not been smoking marijuana on the date of the incident. He said he did not know why someone at the scene might think the truck smelled like marijuana. He said he learned later about the marijuana eventually found in the truck and noted that he drove a different truck daily. When asked what the results of a drug test would be if he were tested on the day of the hearing, the Defendant stated he would test positive for marijuana.

Kristen Eison testified that she had been driving on the same road as the Defendant on the date of the incident. She said that several miles before the collision occurred, she saw "that first incident" in which she thought the Defendant might lose control of the truck and that she decided to follow the truck from a greater distance. She said that when the collision occurred, she saw the truck spin around and go into the median. She said that she was a nurse and that she stopped to try to help. She said the victim was "bruised, battered and purple" when the victim was removed from the SUV.

Phillip Leach, the victim's father, read a victim impact statement, in which he said the victim was killed the day before her sixth birthday. He said the victim was sweet, friendly, and loving. He said she loved music and had been a good big sister to her brother. He said the victim's family had been devastated by her death. He said he had been unconscious after the collision and that strangers had comforted the victim in her final moments of life. He said that he thought of and missed the victim daily and that he would never understand her death. He said that he did not oppose a probation sentence but that he opposed the trial court's permitting the Defendant to have the conviction expunged from his record. A photograph of the victim was received as an exhibit.

Jessica Leach Wilkins, the victim's mother, read a victim impact statement. She said the victim's death had been devastating to her, the victim's brother, and the rest of the family. Ms. Wilkins said she would never recover from the victim's death. She said the victim had been kind and had included other children if she thought they were being excluded from play. She did not oppose probation but opposed the trial court's allowing the Defendant the opportunity to have his conviction expunged from his record.

The Defendant's Mississippi driving record was received as an exhibit. It reflected that the Defendant had 2014 violations for driving while his license was suspended,

violating the child restraint law, and disregarding a traffic light. He also had 2016 violations for not having a motor vehicle inspection and violating the child restraint law.

The presentence report was received as an exhibit. The Defendant reported good mental and physical health. He reported his last marijuana use in August 2021, which was six months before the sentencing hearing.

After receiving the evidence, the trial court denied the Defendant's application for judicial diversion and sentenced him to five years of probation, with revocation of his driver's license for three years. This appeal followed.

The Defendant contends that the trial court abused its discretion in denying judicial diversion. A trial court may order judicial diversion for certain qualified defendants who are found guilty of or plead guilty or nolo contendere to a Class C, D, or E felony or a lesser crime; have not previously been convicted of a felony or a Class A misdemeanor; and are not seeking deferral for a sexual offense. *See* T.C.A. § 40-35-313(a)(1)(B)(i) (Supp. 2022). The grant or denial of judicial diversion is within the discretion of the trial court. *State v. King*, 432 S.W.3d 316, 323 (Tenn. 2014) (citing T.C.A. § 40-35-313(a)(1)(A)).

When considering whether to grant judicial diversion, a trial court must consider (1) the defendant's amenability to correction, (2) the circumstances of the offense, (3) the defendant's criminal record, (4) the defendant's social history, (5) the defendant's physical and mental health, (6) the deterrence value to the defendant and others, and (7) whether judicial diversion will serve the ends of justice and the interests of the public and the defendant. *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); *see King*, 432 S.W.3d at 326 (stating that recent caselaw affecting the standard of review for sentencing determinations "did not abrogate the requirements set forth in *Parker* and *Electroplating*, which are essential considerations for judicial diversion"). "The record must reflect that the court has weighed all of the factors in reaching its determination." *Electroplating*, 990 S.W.2d at 229. If a trial court refuses to grant judicial diversion, "the court should clearly articulate and place in the record the specific reasons for its determinations." *Parker*, 932 S.W.2d at 958-59. "The truthfulness of a defendant, or lack thereof, is a permissible factor for a trial judge to consider in ruling on a petition for suspended sentence." *State v. Neeley*, 678 S.W.2d 48, 49 (Tenn. 1984).

On review of a decision to grant or deny judicial diversion, this court will apply a presumption of reasonableness if the record reflects that the trial court considered the *Parker* and *Electroplating* factors, specifically identified the relevant factors, and placed on the record the reasons for granting or denying judicial diversion, provided any substantial evidence exists to support the court's decision. *King*, 432 S.W.3d at 327. If,

however, the trial court failed to weigh and consider the relevant factors, this court may conduct a de novo review or remand the case for reconsideration. *Id.* at 328.

Likewise, a trial court's reliance upon an irrelevant factor may result in an abuse of discretion. *See State v. McKim*, 215 S.W.3d 781, 787 (Tenn. 2007). However, a court's mere consideration of an irrelevant factor does not result in an abuse of discretion because "it is the undue consideration of an irrelevant factor that is prohibited." *Stanton v. State*, 395 S.W.3d 676, 687 n.2, 691 (Tenn. 2013). A "trial court is not required to recite on the record all of the . . . factors; however, the record should reflect that the trial court considered all of the factors in rendering its decision that it 'identified the specific factors applicable to the case before it.'" *State v. Dycus*, 456 S.W.3d 918, 930 (Tenn. 2015) (quoting *King*, 432 S.W.3d at 327.).

In denying diversion, the trial court stated the following in considering the *Parker/Electroplating* factors:

And I have to go through each of the considerations. [The Defendant's] amenability to correction I would overall say is good just in the fact that the TBI has sent me a certificate saying he's eligible for my consideration of judicial diversion. And, again, that's something that the – our Legislature has decided that certain offenses can be erased -- I think the words in the family members "erased" and, you know, gotten off your record as if they didn't happen that's exactly what our Legislature says certain classes of offenses must, you know, can't be done and this is one of them that can be as [the prosecutor] correctly pointed out.

It's not automatic. If the Legislature wanted me to place every first offender on diversion it would say "all first offenders, you know, have that first offense the verdict." [sic]

So I'm thinking about the accused and inability [sic] to correction, and the fact that he's not had prior, a significant prior criminal history weighs in its behavior [sic], you know, he's involved in the church, he's a hard working individual, I give him credit for that.

I'm puzzled and given a little problem by his driving history and, again that's not a criminal history but that he has had some driving offenses that do show some disregard for those traffic laws and his admission. And it's a double edge sword, I give him credit for being honest with the Court. If he tells me he couldn't pass a drug test I believe that he couldn't pass one.

If he had lied about it we would not be double checking him right this

moment and kept on it, so I have to give him some credit. But the fact that he has apparently continued to use some illegal substances during the course of this is frightening to the Court.

The circumstances of the offense -- this is one of those instances everyone in the letters of support of the defendant and the defendant himself I absolutely agree, there is no way that [the Defendant] wanted this to happen, and he did not get up that day and say I'm going to, you know, kill somebody, I'm going to hit somebody with the truck.

Clearly this is not an intentional crime and it's not a knowing crime, however, it is a reckless crime and that's higher than just simple negligence and the proof as stipulated to and actually the proof that I've heard the other day, tells me that there was a level of reckless behavior going on in the driving of this vehicle, and [the Defendant] characterizes it as leaving as something having to do with the load of the trailer or perhaps the maintenance, I don't know whether there's some issue in the maintenance of the trailer or not, that's really not before me, but [the Defendant] acknowledges the trailer wasn't handling correctly and I credit Ms. Eisen's testimony that it was leaving such a nature [sic] that it made her and others frightened and to take behavior just a little further.

So I do think in the terms of reckless behavior when you, especially when you know that you're new with a commercial driver's license and you knew [sic] in a truck. And, again, I don't know whether there's maybe blame to be shared with the assignment of a new driver to a variety of different trucks until they get used to one that's for another day's decision or another

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Nevertheless he got in the truck, he was operating it and if he knew it was weaving and he was having trouble controlling it his continuing to operate it rises to a level that certainly satisfies the reckless requirement of this offense and maybe takes it to a slightly higher, you know it's one thing to be reckless with a knife, you might cut yourself or someone when you're reckless with a full size truck you're endangering more than yourself and you're endangering more than property, . . . you're endangering everybody who was near you.

So the circumstances of the offense are very serious. Again, lack of a criminal history is, I think, documented and that's in [the Defendant's] favor. His social history appears to be good. Again, by all accounts a nice young man working two jobs, graduate of high school, you know, that's an excellent

factor in his favor.

As far as his physical and mental health nothing specific presented before me but nothing that would show that he's not in good health, good mental health. Then come to the deterrence . . . value of the -- to the accused as well as others, and I'm emphasizing as well as others.

I don't know that [the Defendant] will ever be in a position to do something like this again. I hope this has had such an effect on him that he's leery about -- for one thing he's not going to be able to drive for at least three years but even when he gets back if he ever gets a driver's license back I hope he's affected by this forever, but deterrence to others.

We live in a community filled with trucks. If anybody has driven on any of our interstates not just Interstate 40 and 240 and the intersections they know what a daily basis, you know, the close connection between automobiles and trucks are, and for anyone who would be willing to operate a truck that wasn't that they weren't able to control for whatever reason whether it was the truck's fault, their fault or even -- it was a very windy day, they just have to understand that there are consequences if they make the decision to do that even though they got to be at work and they're going to be late or they've got things to do they've got to consider what might happen when you're in that, and whether the judicial diversion will serve the interest of the public as well as the accused.

And, again, this sort of duck tails [sic] to that. I appreciate and I applaud the families comments as far as incarceration goes. There are times like I said if sentencing [the Defendant] to jail time could in some way make a difference or bring back the child it would be no question. Sadly I don't know that it could and I think they're to be applauded in realizing that no amount of time that he'd serve in jail would serve to help them.

So I'm going to do this, I do think this is more than the minimum of offenses, it's not a -- this is not just the barest minimum facts on this. I'm going to sentence [the Defendant to] five years in the correctional Center [sic] as a Range 1 Standard Offender[.] I'm not going to assess a fine in this, I just don't see this.

Restitution is not appropriate in this matter that at least has not been alleged or any type of figure on it, and I'm going to do this. I'm going to suspend that sentence, I'm going to place [the Defendant] on five years of probation, the conditions are going to include, of course, no driving for at

least three years, and that he'll have to perform forty-eight hours of community service each year that he's on probation. It can be done in whatever way the Probation Department corrects. [sic]

And the other conditions of -- you know, they're simple enough. Report to the Probation Officers, stay out of trouble, again, no illegal substance. The days of smoking marijuana are over, a condition of this probation are, you know, you'll be drug tested randomly and any illegal drugs would be cause for revocation of that probation.

And for the reasons I've stated I do not feel that judicial diversion in this instance under all these circumstances weighing all of the factors considered, and I'm specifically stating I'm weighing all the factors in reaching this decision.

The Defendant argues that the trial court "failed to appropriately weigh the deterrence value and balance it against diversion" and that this court should conduct a de novo review and grant diversion. The State responds that the court considered and weighed all of the relevant factors and acted within its discretion in denying diversion.

The record reflects that the trial court considered the *Parker/Electroplating* factors and whether diversion would serve the interests of the public as well as the Defendant and that it stated on the record its reasons for denying diversion. *See Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.3d at 229; *see also King*, 432 S.W.3d at 327. The court found that several of the factors weighed favorably for the Defendant, but it was swayed by the egregious circumstances of the offense involving the Defendant's operating a truck he could not control on the interstate, the deterrent value to the Defendant and others, and its determination that neither the best interests of the Defendant nor the public would be served by granting diversion. The court stated that it had weighed the *Parker/Electroplating* factors in making its determination. We "apply a presumption of reasonableness" to the court's denial of judicial diversion. *See King*, 432 S.W.3d at 327.

Upon review, we conclude that the Defendant has not overcome the presumption of reasonableness that attends the trial court's determinations. Thus, he has not shown on appeal that the court abused its discretion in denying diversion. The Defendant was aware that his employer's truck was performing irregularly, and he elected to follow a supervisor's instructions to try to return the truck to the workplace, rather than ensuring that the truck could perform safely before operating it. He drove on an interstate at a speed at which he was unable to brake in order to avoid colliding with the SUV in which the victim was a passenger. The court's concern about future highway safety and truck drivers' willingness to drive in situations in which they could not control their trucks relate to the deterrence value to the Defendant and others and to the best interests of the Defendant and

the public. The court also expressed its alarm at the Defendant's illegal use of marijuana after the fatal collision and his history of driving violations, both of which reflect upon the Defendant's amenability to correction. When balancing the factors which favored a grant of diversion against the negative factors, the court concluded that the ends of justice were not served by granting diversion. Based upon our review of the record, we conclude substantial evidence exists to support the court's determination. *See King*, 432 S.W.3d at 327. The Defendant is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE