

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER SESSION, 1994

FILED

September 15, 1995

**Cecil Crowson, Jr.
Appellate Court Clerk**

STATE OF TENNESSEE)
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 APPELLEE)
)
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 V.)
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)
 CHRISTOPHER EMMETT WALKER)
)
 APPELLANT)

NO. 01C01-9409-CC-00325

RUTHERFORD COUNTY

HON. JAMES K. CLAYTON
JUDGE

(Sentencing)

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REVERSED AND REMANDED

OPINION FILED: _____

JERRY SCOTT, PRESIDING JUDGE

OPINION

The Defendant, Christopher Walker, appeals the judgment of the Rutherford County Circuit Court wherein he was denied judicial diversion under Tenn. Code Ann. § 40-13-313 and then sentenced to the maximum sentence of two years in the Department of Correction, following his plea of guilty to the offense of statutory rape, a Class E felony. Tenn. Code Ann. § 39-13-506(a). On appeal, he contends that the trial court erred by denying him judicial diversion by improperly weighing the enhancement and mitigating factors and by denying him probation.

Since a sentencing issue has been raised in this appeal, we have conducted a de novo review on the record, with a presumption that the determinations of the trial judge are correct. Tenn. Code Ann. § 40-35-401(d).

Pursuant to Tenn. Code Ann. § 40-35-313(a)(1), any person who has not previously been convicted of a felony or a Class A misdemeanor and who is found guilty or pleads guilty to a misdemeanor or a Class C, D, or E felony may be placed on probation without imposition of a judgment of conviction by the trial court and with the proceedings deferred. If the defendant successfully completes probation, the charge is dismissed. Tenn. Code Ann. §40-35-313(A)(2). As this court has noted, judicial diversion is similar to pretrial diversion under Tenn. Code. Ann. § 40-15-105, except that it follows a finding of guilt and is initiated by the court, not the prosecutor. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). Though the standard for reviewing judicial diversion decisions is not specifically provided in the 1989 Criminal Sentencing Reform Act, this court has addressed and determined the appropriate standard:

We conclude that judicial diversion is similar in purpose to pretrial

diversion and is to be imposed within the discretion of the trial court subject only to the same constraints applicable to prosecutors in applying pretrial diversion under T.C.A. § 40-15-105. Therefore, upon review, if 'any substantial evidence to support the refusal' exists in the record, we will give the trial court the benefit of its discretion. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983). Only an abuse of that discretion will allow us to overturn the trial court.

Anderson, supra. See also State v. Stanley, 727 S.W.2d 259, 260 (Tenn. Crim. App. 1986).

In this case, the Defendant was the only person who testified at the sentencing hearing. The offense resulted from a sexual encounter that the forty-three year old defendant had with a fourteen year old girl whom he had known for several months. He testified that, though he realized the victim was not yet eighteen, he thought she was at least sixteen years old. They met the preceding April due to a common interest in riding horses, and, according to the Defendant, they were planning to marry. The Defendant said that he did not intend to have sex when he visited the victim on the night of the offense, but rather planned only to talk with her in private to "plan some future stuff." However, on cross-examination, the State referred to a letter written by the Defendant to the victim four days before the crime in which the Defendant articulated his "urge to get [the victim] up in [her] hayloft or sneak in [her] window one night." The Defendant then admitted that his sexual longings for the victim were present prior to the night of the statutory rape and that his desire, to which reference was made in the letter, was to have sexual intercourse with the victim.

The Defendant, without hesitation, acknowledged his guilt. Upon learning of the investigation, he went immediately to the police and admitted his actions. After saying that he accepted complete responsibility, the Defendant testified that he was willing to pay for any counselling which may be necessary for the victim's recovery. Moreover, he asserted his willingness to seek counselling for himself or perform community service work. During the hearing, it was shown that the Defendant had no criminal history. On the other hand, he did have a

history of military service for which he had received about twenty medals.

At the beginning of the sentencing hearing, the State expressed its opinion that neither the Defendant nor anyone with a conviction of this type should be entitled to diversion. The judge responded: "I think it only fair for me to say the same thing," but he refused to "prejudge things." He went on to say that he thought it would "take the Court of (Criminal) Appeals to" grant judicial diversion. Later, at the close of the hearing and after commenting that he felt very strongly about sex offenses, the trial judge stated: "I cannot in good conscience give anyone diversion on any kind of a sex crime simply because it is a sex crime. I may or may not be overturned by the Court of (Criminal) Appeals on that, but that's going to be the ruling of this Court." (Emphasis added) The court then voiced as a reason for denying diversion his opinion that the Defendant had been untruthful with the court when he denied that he had set out to seduce the victim. The trial judge had already stated that the youthfulness of the victim and the fact that the rape was committed to gratify the Defendant were enhancing factors.

The Defendant contends that the trial court's denial of his application for judicial diversion was improper because, as a sex offender, he was categorically excluded from consideration for diversion. We agree. In a similar case where an assistant district attorney declined to grant pre-trial diversion to a statutory rape defendant, this court stated:

We accept as true the prosecutor's conclusion that statutory rape is 'offensive to the public.' It does not follow, however, that pretrial diversion may be denied on this basis. To hold otherwise would permit individual prosecutors to act as mini-legislatures in deciding which offenses are divertible and thus would amount to a violation of public policy.

State v. Kenny Williams, Tenn. Crim. App., opinion filed at Nashville, November 20, 1985 (citing State v. Watkins, 607 S.W.2d 486, 489 (Tenn. Crim. App. 1980)). See also Blackwell v. State, 605 S.W.2d 832, 833-34 (Tenn. Crim. App. 1980) (where the court found the individual prosecutor's philosophical

disagreement with pre-trial diversion an invalid basis for denial of diversion).

As stated above, it is within the trial court's discretion to grant or to deny judicial diversion. As long as there is any substantial evidence supporting the judge's decision, it will be upheld. In this case, the trial judge did state his belief that the Defendant had been untruthful to the court. The judge also noted that the vast age difference between the Defendant and the victim was a negative circumstance surrounding this crime. Certainly, those are legitimate factors in the determination of whether judicial diversion is appropriate. However, it seems clear from the trial judge's language that he would not consider judicial diversion as a viable alternative for this Defendant or anyone else convicted of a sex crime. Because our legislature has deemed the offense of statutory rape one for which judicial diversion is potentially available, the trial judge cannot exclude anyone found guilty of statutorily eligible crime from consideration for judicial diversion. We, therefore, reverse and remand for a sentencing hearing at which the Defendant's request for judicial diversion shall be fully considered. In light of our decision that the Defendant will receive another sentencing hearing, it is unnecessary to address the remaining sentencing issues raised in this appeal.

Reversed and remanded.

JERRY SCOTT, PRESIDING JUDGE

CONCUR:

JOSEPH B. JONES, JUDGE

PAUL G. SUMMERS, JUDGE