

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1996

FILED
AUGUST 2, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
Appellee)
)
vs.)
)
GLENN WATSON JAMERSON,)
)
Appellant)

No. 02C01-9512-CC-00388

MADISON COUNTY

Hon. Whit Lafon, Judge

(Sentencing)

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OPINION FILED: _____

AFFIRMED AS MODIFIED

David G. Hayes
Judge

OPINION

The appellant, Glenn Watson Jamerson, appeals, in essence, from the trial court's denial of judicial diversion.¹ The appellant, pursuant to a plea agreement, pled guilty in the Madison County Circuit Court to one count of possession of marijuana, a class E felony, two counts of statutory rape, also class E felonies, and four counts of contributing to the delinquency of a minor, class A misdemeanors. In accordance with the plea agreement, the trial court imposed a sentence of two years for each of the class E felonies and a sentence of 11 months and 29 days for each of the class A misdemeanors. The trial court ordered that the appellant serve the sentences concurrently. The court then suspended the sentences and placed the appellant on supervised probation. At a subsequent hearing, prior to the entry of the judgment of conviction, the court denied the appellant's application for "post-plea expungement."²

After reviewing the record, we remand this case in order that the appellant

¹In keeping with the policy of this court, we use the spelling of the appellant's name as reflected in the indictment. We note, however, the appellant's signature and judgment of conviction reflect the following spelling: "Glyn W. Jamerson."

²As authority for his application for "post-plea expungement," the appellant cites Tenn. Code Ann. § 40-35-313 (1990). Sentencing pursuant to this provision is more commonly referred to as judicial diversion. Under this statute, the court may, without entering a judgment of guilty and with the consent of [the defendant], defer further proceedings and place [the defendant] on probation upon such reasonable conditions as it may require and for a period of time not less than the period of the maximum sentence for the misdemeanor with which he is charged, or not more than the period of the maximum sentence of the felony with which he is charged ... If, during the period of his probation, such person does not violate any of the conditions of the probation, then upon expiration of such period, the court shall discharge such person and dismiss the proceedings against him. ... Upon the dismissal of such person and discharge of the proceedings ... such person may apply to the court for an order to expunge from all official records ... all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section.

Tenn. Code Ann. § 40-35-313(a)(1) and (2), -313(b).

be given the opportunity to withdraw his pleas of guilty and proceed to trial or other appropriate proceedings.

FACTUAL BACKGROUND

On May 24, 1995, the trial court conducted a guilty plea hearing. At the hearing, the State described the plea agreement, concluding:

It is also our agreement that we have a pre-sentence report done by adult probation and postpone this matter for a sentencing hearing to determine whether or not Your Honor allows his request for post-plea expungement, with the State arguing that he not get post-plea expungement.³

At this point, the appellant advised the court that he was confused about the State's recommendation. The court and the prosecutor informed the appellant that he was, in effect, receiving a suspended sentence of two years. With respect to "post-plea expungement," the appellant and the trial judge engaged in the following colloquy:

Trial Judge: And there'll be a sentencing hearing. At that time I'll determine whether or not you can apply for expungement. Now what that means is, I will sentence you, and if I allow you to apply, then I can either -- I'll allow it or deny it. And it would depend partially upon the fact, if you apply for post-plea expungement, during the two years, you'll be out on your good behavior, and if you foul up, of course, that would prevent that. But it would be up to me to determine whether or not you should be allowed post-plea expungement, which would be asking that it be removed from your record. Does that clear it up with you?

Appellant: So in other words, actually the two years would be taken off my record, correct?

Trial Judge: That isn't what I said. I said after two years it could be.

Appellant: Yes, sir.

...

Trial Judge: I can allow you to apply, and in two years you can ask for it, and I can then determine whether I'll allow it or not.

Appellant: Yes, sir.

³The appellant's request for judicial diversion is noted on the "Plea of Guilty and Waiver of Jury Trial and of Appeal" form, dated May 24, 1995, with the following entry: "Apply for Post Plea Expungement."

Trial Judge: Now you understand the situation?

Appellant: Yes, sir.

Following this exchange, the court announced that it was accepting the State's sentencing recommendation and declared, "You are now sentenced."

On July 19, 1995, the court conducted a hearing for the purpose of considering judicial diversion. The State, in opening remarks, announced, "Mr. Jamerson pled guilty, and we gave a recommended sentence. The only issue remaining was whether or not Your Honor allowed him to plead pursuant to the post-plea expungement statutes and would allow him deferred probation." The State introduced the testimony of the father of one of the victims and the presentence report. The appellant then testified. Again, he expressed confusion concerning the condition of his plea agreement relating to "post-plea expungement." The appellant asserted:

My understanding on this post-plea agreement with expungement was, -- Before we came back in the courtroom, Mr. Patterson told me that he would ask you for a post-plea agreement with an expungement, and that you accepted that. Then whatever time that the prosecuting attorney, you know, gave me, at the end of that time I would have no record as long as I hadn't gotten in any trouble. And so when we came back in here and he talked to the prosecuting attorney and he came over to me and he showed me what they offered me, I accepted that because I thought that the post-plea agreement and the expungement was in there with that.

The appellant offered no additional proof concerning the suitability of diversion.

At the conclusion of the hearing, the trial court announced "All right. You've applied and post-plea expungement is denied. I don't care for any arguments."

The judgments of conviction were entered on July 25, 1995.

ANALYSIS

Initially, we note that the State cites no authority for its proposition that judicial diversion pursuant to Tenn. Code Ann. § 40-35-313 (1990) does not constitute a "manner of service of [a] sentence" which a criminal defendant may

appeal under Tenn. Code Ann. § 40-35-401 (1990).⁴ Moreover, Tenn. Code Ann. § 40-35-401 (b)(1) provides that any sentence not imposed in accordance with the provisions of the Sentencing Act may be appealed. Clearly a denial of judicial diversion could fall within this category. Finally, this court has previously held that “an appeal may be taken after entry of judgment when the trial court denies judicial diversion.” State v. George, 830 S.W.2d 79, 80 (Tenn. Crim. App. 1992).

Additionally, Tenn. R. App. P. 3(b) provides that a defendant may appeal as of right “any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals ... on a plea of guilty ... if the defendant seeks review of his sentence and there was no plea agreement concerning his sentence.” The record indicates that the appellant's pleas of guilty were entered pursuant to the provisions of Tenn. R. Crim. P. 11(e)(1)(c). This rule provides that the district attorney general and the attorney for the defendant are in agreement “that a specific sentence is the appropriate disposition of the case.” Id. (emphasis added). Obviously, the appellant's pleas were not entered in conformity with this rule, as there was no agreement concerning the suitability of judicial diversion. Rather, that portion of the plea agreement relating to judicial diversion was an 11(e)(1)(b) agreement. Accordingly, the appellant, pursuant to Tenn. R. App. P. 3(b), could appeal an arbitrary denial of judicial diversion by the trial court.

⁴This court has held that “the presumption of being a favorable candidate for alternative sentencing does not apply in a judicial diversion analysis.” State v. Bingham, 910 S.W.2d 448, 456 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995). Moreover, judicial diversion is not included in the list of sentencing options set forth in Tenn. Code Ann. § 40-35-104 (1994 Supp.). However, Tenn. Code Ann. § 40-35-104 does not define the parameters of “manner of service” under Tenn. Crim. App. 40-35-401. See, e.g., Tenn. Code Ann. §40-35-104(d). See also State v. Porter, 885 S.W.2d 93, 95 (Tenn. Crim. App. 1994)(a defendant seeking judicial diversion is in a posture before the court similar to one seeking the probation provided by Tenn. Code Ann. § 40-35-303 (1994 Supp.)).

Generally, when reviewing the manner of service of a sentence imposed by the trial court, this court must conduct a de novo review on the record with a presumption that the determination made by the trial court is correct. Tenn. Code Ann. § 40-35-401(d). See also State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). Moreover, while judicial diversion is undoubtedly a manner of serving a sentence, it also entails more than this sentencing characteristic, i.e., it affects the underlying conviction as well. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). See also Bonestel, 871 S.W.2d at 167. Therefore, the granting of judicial diversion rests within the sound discretion of the trial court, subject only to the same constraints applicable to prosecutors in the context of pre-trial diversion. State v. Beverly, 894 S.W.2d 292, 293 (Tenn. Crim. App. 1994); Bonestel, 871 S.W.2d at 167; Anderson, 857 S.W.2d at 572. In order to find an abuse of discretion, this court must determine that no substantial evidence exists to support the denial. Anderson, 857 S.W.2d at 572.

In deciding whether to grant judicial diversion, a trial court should consider the circumstances of the offense; the defendant's criminal record; the defendant's social history; if appropriate, the defendant's physical and mental condition; the likelihood that diversion would serve the ends of justice and the best interests of both the public and the defendant; and any other factors tending to accurately reflect on whether the defendant would become a repeat offender. Bonestel, 871 S.W.2d at 168 (citing State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983)); State v. Ryans, No. 03C01-9503-CR-00071 (Tenn. Crim. App. at Knoxville, January 16, 1996). In any event, "[w]hen the trial court refuses to grant judicial diversion to the accused, the court should clearly articulate and place in the record the specific reasons for its determination." Bonestel, 871 S.W.2d at 168. The trial court failed to do so in this case. Nevertheless, the burden is first upon the defendant to present adequate evidence upon which the

trial court may make an informed decision regarding pre-trial diversion. Ryans, No. 03C01-9503-CR-00071. Accordingly, even when the trial court has not set forth the required findings, we have affirmed a denial of diversion. State v. Haltom, No. 01C01-9209-CC-00286 (Tenn. Crim. App. at Nashville), perm. to appeal denied, (Tenn. 1993).

In the instant case, the pre-sentence report reveals that, at the time of the sentencing hearing, the appellant was 41 years old and had no criminal history. He is paralyzed and confined to a wheel chair due to a past spinal cord injury. He is unemployed, divorced, and lives alone in rural Madison County. The appellant dropped out of high school in the tenth grade and joined the United States Marine Corps. He served in the Marine Corps from 1971 until 1974 and received an honorable discharge. He obtained his GED at the Jackson State Community College in 1974. The appellant maintains his innocence and claims that he pled guilty because “[his] nerves couldn’t take much more of this.”

The appellant’s pleas arose from allegations that he had provided alcohol and drugs to numerous minors and had engaged in sexual intercourse with two fifteen year old girls. The victims asserted in the victim impact statements that, due to the appellant’s actions, they have experienced considerable psychological distress. Similarly, the father of one of the victims testified at the sentencing

hearing that he was upset by the appellant’s involvement with his daughter. The circumstances of the offense alone may support a denial of diversion. State v. Kyte, 874 S.W.2d 631, 634 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993). We conclude that the record supports the trial court’s denial of judicial diversion.

However, the greater question is whether the appellant's guilty pleas were knowing and voluntary, i.e., "made with knowledge of the 'relevant circumstances and likely consequences.'"⁵ King v. Dutton, 17 F.3d 151, 153 (6th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 2712 (1994)(citing Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469 (1970)). See also State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977)("the record of acceptance of a defendant's plea of guilty must affirmatively demonstrate that his decision was both voluntary and knowledgeable, i.e., that he has been made aware of the significant consequences of such a plea"). In determining the validity of a plea, "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993)(citing North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970)). A defendant should be "fully aware of the direct consequences [of his guilty plea], including the actual value of any commitments made to him by the court, the prosecutor, or his own counsel." Brady, 397 U.S. at 755, 90 S.Ct. at 1472 (citation omitted). See also Advisory Commission Comments, Tenn. R. Crim. P. 11 (the defendant must have an understanding of those aspects of the plea agreement which are plea contingent and those that are not so that his plea is knowing).

It is apparent from the record that the appellant did not understand that his pleas were contingent only upon the trial court's consideration of judicial diversion rather than the trial court's granting of judicial diversion. The record demonstrates that the trial court's attempts to explain to the appellant the condition of his pleas relating to judicial diversion, including the court's

⁵Although the appellant does not challenge the validity of his guilty pleas in his brief, we address this issue in order to prevent needless litigation in the future and in the interests of justice. Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52 (b). See also State v. Adkisson, 899 S.W.2d 626, 636-642 (Tenn. Crim. App. 1994); State v. Maynard, 629 S.W.2d 911, 912-913 (Tenn. Crim. App. 1981).

statement, "I can allow you to apply, and in two years you can ask for it and I can then determine whether I'll allow it or not," did not alleviate the appellant's confusion. The court apparently intended to convey to the appellant that, if the court granted the appellant's application for judicial diversion, then, following the appellant's service of two years of supervised probation, the court would consider the appellant's application for expungement of his record. However, it is equally apparent that the trial court did not explain to the appellant the distinction between the application for judicial diversion and the application for expungement. Adding confusion to the situation, the court advised the appellant at the conclusion of the guilty plea hearing that he was sentenced. Yet, the court could not have sentenced the appellant if he had not yet considered judicial diversion. Judicial diversion is a sentencing option. As mentioned earlier, Tenn. Code Ann. § 40-35-313(a) requires that the court "without entering a judgment of guilty ... defer further proceedings and place [a defendant] on probation." Following a successful probationary period, a defendant may apply for expungement. Tenn. Code Ann. § 40-35-313(b).

Accordingly, we remand this case to the trial court. In view of the confusion surrounding entry of the guilty pleas, the appellant is granted the opportunity to withdraw his guilty pleas and proceed to trial or other appropriate proceedings, mutually agreeable to the appellant and the state. In the event the appellant chooses not to withdraw his pleas of guilty, the judgment of the trial court is affirmed.

DAVID G. HAYES, Judge

CONCUR:

JOE B. JONES, Presiding Judge

PAUL G. SUMMERS, Judge