

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

FILED
July 26, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 DEBRA L. LAIZURE,)
)
 Appellant)

NO. 01C01-9509-CC-00307
RUTHERFORD COUNTY
HON. J. S. DANIEL
JUDGE
(Fraudulent Use of a Credit Card)

FOR THE APPELLANT:

Gerald Melton
Public Defender

Jeannie Kaess
Assistant Public Defender
201 West Main Street
Suite 101
Murfreesboro, Tennessee 37129

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Charlotte H. Rappuhn
Assistant Atty. Gen. & Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

William C. Whitesell, Jr.
District Attorney General
3rd Floor, Judicial Building
Murfreesboro, Tennessee 37130

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Debra L. Laizure, was charged in a two count indictment with 1) the unlawful and unauthorized use of a credit card, and 2) the unlawful and knowing possession and control of a credit card. In a negotiated plea, the appellant pled guilty to count one (1), the unlawful and unauthorized use of a credit card. Count two (2) was dismissed. She was sentenced to one (1) year as a standard Range I offender to be served on supervised probation. She was ordered to pay restitution in the amount of \$868.65 to be paid at the rate of \$75 a month, and to serve one hundred hours of community service. On appeal she contends that the trial court abused its discretion when it refused to grant judicial diversion. We affirm the trial court.

Mr. Charles Howard, the victim in this case, made a purchase with his BP credit card at a convenience store where the appellant was a cashier and then forgot to take his card back. The appellant proceeded to use Mr. Howard's credit card over the next month to purchase goods and receive cash advances. The total charges were \$868.65. The appellant used the card on four (4) occasions and forged her co-employees' signatures on the credit card receipts.

The appellant is a thirty-six-year old mother of two who has been married for eighteen years. She graduated from high school and has demonstrated a stable employment history. Prior to being arrested on the stolen credit card charges, the appellant worked at the BP station in La Vergne, Tennessee, for three years. The appellant testified at her probation hearing that she knew that what she had done was "stupid" and wrong. She explained that at the time she committed the crimes her husband was out of work and her family was having difficulty meeting its basic needs for housing and electricity. Two letters were introduced into evidence on the appellant's behalf. One was from the owner of a Po Folks restaurant where the appellant was employed after being fired from the BP station. The owner knew about the appellant's conviction; however, he had full faith in her honesty and integrity and

found her to be a good and hard worker. The second letter was from the Operations Manager of Ryan's Steak House where the appellant was employed at the time of the probation hearing. The Operations Manager affirmed the view that the appellant is a good worker. The appellant has no prior record of criminal conduct. However, she apparently admitted to the probation department that she occasionally used marijuana up until 1994; however, she reported no alcohol problems.

The trial court denied judicial diversion in this case because "other employees' signatures were forged by this defendant in this theft scheme" and because the appellant used the card more than once. Finding that there was no prior criminal record for the appellant, the trial court ordered the appellant to serve her entire sentence on supervised probation.

Tennessee Code Annotated section 40-35-313 allows a trial court, upon a finding of guilt either by plea or trial, to place a defendant on probation without the imposition of a judgment of conviction. This is commonly referred to as judicial diversion. "Following successful completion of probation, the underlying criminal charge is dismissed. The granting of judicial diversion rests within the discretion of the trial court" State v. Beverly, 894 S.W.2d 292, 293 (Tenn. Crim. App. 1994). The trial court's discretion is "subject only to the same constraints applicable to prosecutors in applying pretrial diversion" State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

In order for this Court to find that the trial court abused its discretion in refusing to grant judicial diversion, we must find that there exists no substantial evidence to support the denial of judicial diversion. Cf. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983)(citing standard of review for pretrial diversion).

When reviewing a request for a judicial diversion, the trial courts of this state should consider the same factors used by district attorneys general when considering

pretrial diversion. State v. Bonestel, 871 S.W. 2d 163, 168 (Tenn. Crim. App. 1993).

Those are:

1. The circumstances of the offense;
2. The defendant's criminal record;
3. The defendant's social history;
4. The defendant's physical and mental condition;
5. The likelihood that diversion would serve the ends of justice and the best interest of both the public and the defendant; and
6. Any other factors tending to accurately reflect on whether the defendant would become a repeat offender.

Id.; see also Hammersley, at 355.

This Court has held that a trial court may not simply state that it has considered the appropriate factors for diversion but must state the specific reasons why the defendant is denied diversion, explaining why the factors applicable to the denial of diversion outweigh the other factors for consideration. Bonestel at 168.

When reaching its decision to deny diversion the trial court did not place on the record how it balanced the appropriate factors in this case. Instead, the court merely stated its reasons for denying diversion. The court should have placed on the record how it balanced the factors against diversion together with those factors favoring diversion. However, our de novo review of the record leads us to conclude that there is substantial evidence supporting the trial court's decision to deny diversion in this case. See State v. Patricia Haltom, No 01-C-01-9209-CC-00286 (Tenn. Crim. App., at Nashville, July 15, 1993) perm. to appeal denied (Tenn. 1993). While we agree that the appellant's lack of criminal history, stable social and employment history as well as her remorse for the offense all militate in favor of diversion, the trial court's finding that the circumstances of the offense were such that diversion was inappropriate is supported by the record.

The appellant contends that the trial judge denied diversion on the basis of the nature of the offense and argues that this is inappropriate because the legislature has deemed the instant offense as one amenable to judicial diversion. After a careful review of the comments of the trial court, we are satisfied that the judge did not deny judicial diversion solely on the basis of the nature of the offense. Rather, we conclude that the trial judge denied judicial diversion in this case because of the manner of the commission of the theft. The court found that the theft took place over a period of time and was not a single incident but that the stolen card was used on four different occasions. As in Haltom, this fact demonstrates that although the appellant had the “opportunity to reflect on her actions . . . [she] elected to continue the course of action she had chosen.” Id. The trial court also gave significance to the fact that the appellant forged the signatures of her co-employees in an attempt to keep from getting caught. Because there was substantial evidence upon which the trial court denied diversion, the judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JOSEPH M. TIPTON, JUDGE