

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

FILED
January 16, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

DONALD RYANS,

Appellant.

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C.C.A. NO. 03C01-9503-CR-00071

ROANE COUNTY

HON. E. EUGENE EBLEN,
JUDGE

(Denial of Judicial Diversion)

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant was charged in the indictment with aggravated child abuse. On October 11, 1994, he pled guilty to child abuse, a class A misdemeanor under T.C.A. § 39-15-401(a). At the sentencing hearing on December 16, 1994, the defendant requested that the trial court place him on what is commonly known as "judicial diversion" under T.C.A. § 40-35-313. The trial court denied the defendant's request and instead sentenced him to eleven months and twenty-nine days with a community corrections program. In this appeal as of right, the defendant challenges the trial court's denial of his request for judicial diversion. We find that the defendant's issue lacks merit, and his sentence is therefore affirmed.

The facts of this case are not in serious dispute. According to statements made by the defendant to the investigating officer and information contained in the defendant's application for diversion, the offense occurred on October 9, 1993. The defendant had been out drinking the previous night and had also taken "a couple of Lorecet pain pills." On the morning of October 9, the defendant's mother was taking care of the defendant's daughter at his house. At approximately 2:00 p.m. the defendant's mother had to leave. According to the application for diversion, the defendant's daughter, who was about fourteen months old at the time, picked up a glass object and threw it. In response to his daughter's actions, the defendant spanked her on her bottom area. According to statements made to the investigating officer, however, the defendant spanked his daughter because she would not stop crying. In either case, the defendant realized that he had spanked his daughter too harshly and called his mother. They then took the child to Rockwood Emergency Room for treatment. An examination of the child revealed serious bruising but no permanent physical injuries.

To support his request for judicial diversion, the defendant focused heavily

at the sentencing hearing on his lack of a prior criminal record. The defendant also pointed out to the trial court that he was very young (eighteen years old) at the time of the offense and that he had already paid most of the court costs for the case. In addition, the defendant contended that he had clearly accepted responsibility for his actions by pleading guilty. Moreover, he argued that although both the description of the offense and the pictures of the child's injuries were disturbing, the offense was nevertheless only a misdemeanor. At the conclusion of the sentencing hearing, the trial court denied the defendant's request for judicial diversion, stating simply that "[t]he Court does not feel diversion would be appropriate in this case."

In his appeal, the defendant complains that the trial court abused its discretion by denying his request for judicial diversion. In analyzing matters of judicial diversion, prior case law has gleaned much from the procedures governing pretrial diversion. For example, a district attorney faced with deciding whether to grant pretrial diversion 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 pretrial diversion would serve the ends of justice and the best interests of both the public and the defendant; and any other factors tending to reflect accurately on whether the defendant would become a repeat offender. See State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). A trial court should consider the same factors when deciding whether to grant or to deny judicial diversion. See State v. Bonestel, 871 S.W.2d 163, 167 (Tenn. Crim. App. 1993); State v. Anderson, 857 S.W.2d 571, 572-573 (Tenn. Crim. App. 1992).

Furthermore, this Court has held that the trial court may not simply state that it has considered the appropriate factors but must also state the specific reason(s) why the defendant is denied diversion, explaining why those factors applicable to the

denial of diversion outweigh other factors for consideration. See Bonestel, 871 S.W.2d at 168.

Judicial diversion and pretrial diversion are likewise similar in that this Court applies "the same level of review as that which is applicable to a review of a district attorney general's action in denying pre-trial diversion." State v. George, 830 S.W.2d 79, 80 (Tenn. Crim. App. 1992); see also, Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572. To be successful on appeal, a defendant must show an abuse of discretion by the trial court. See Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572; George, 830 S.W.2d at 80. In order to find an abuse of discretion, this Court must determine that no substantial evidence to support the refusal of diversion exists in the record. See Bonestel, 871 S.W.2d at 168; Anderson, 857 S.W.2d at 572; cf. Hammersley, 650 S.W.2d at 356.

The trial court in this case did not state its reasons for denying judicial diversion. Given the mandate of Anderson and Bonestel for trial courts to place on the record the specific reasoning underlying a denial of judicial diversion, the trial judge's cursory decision to deny judicial diversion in this case is clearly inadequate. The inadequacy of the trial court's ruling, however, appears to result partially from another deficiency, namely the failure of the defendant to provide the trial court with sufficient information to allow it to make a reasoned decision. The burden is first upon the defendant to present adequate evidence upon which the trial court may make an informed decision regarding judicial diversion. Cf. State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993); State v. Baxter, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993).

In the present case, the defendant relied solely on the application for

diversion and the presentence report. He did not testify at the sentencing hearing, nor did he offer any witnesses to testify on his behalf. The only information favorable to the defendant contained in the presentence report is that the defendant has no prior criminal record. The application for diversion contains mostly rudimentary information, from which we can gather that the defendant was eighteen years old at the time of the offense and, according to the defendant's recitation of the facts, he committed the offense impulsively. Although the application lists five individuals who apparently would have testified as to the defendant's good behavior, these individuals were not called to testify at the sentencing hearing. If the defendant had information concerning his social history, mental or physical condition, or any other fact which would have reflected favorably upon his request for diversion, he should have presented that evidence to the trial court at the sentencing hearing. If, on the other hand, the application for diversion and the presentence report contain all the information favorable to the defendant's request, we can only conclude that there is substantial evidence in the record to support the decision of the trial court.

The application for diversion reveals that the defendant has an inconsistent work record and that he has had alcohol and drug addiction problems. Although the defendant correctly asserts that his conviction is a misdemeanor, the circumstances of the offense are grave. The defendant abused a position of trust by striking his fourteen-month-old daughter with sufficient force to cause serious bruising over her lower back and bottom. Furthermore, we are cognizant of the issue of deterrence in this case, both with regard to this specific defendant, who has many more years to invest in raising this child, and with regard to the general public.

From a review of the sparse record before us, we find that the trial court did not abuse its discretion in denying the defendant's request for judicial diversion. We

reiterate that the trial court's denial of the defendant's request for judicial diversion without clearly stating its reasoning is inadequate in light of the appropriate procedures set forth in Bonestel and Anderson. For the reasons set out above, however, the judgment of the trial court is affirmed.

JOHN H. PEAY, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

DAVID G. HAYES, Judge