

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1997 SESSION

<p>FILED</p> <p>December 23, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,

Appellee,

V.

MICHELE WAYMAN,

Appellant.

)
) C.C.A. No. 03C01-9703-CC-00088
)
) Grainger County
)
) Hon. William R. Holt, Jr., Judge
)
) (Judicial Diversion)
)
)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

REVERSED AND REMANDED

PAUL G. SUMMERS,
 Judge

OPINION

In 1996 the appellant, Michele Wayman, was charged in Grainger County with theft over \$1,000, altering a vehicle identification number (VIN), and possession of a motor vehicle with an altered VIN. The appellant pled guilty to each charge. Pursuant to a plea agreement, the appellant received a sentence of eighteen months for altering a VIN, which is a class E felony; a sentence of three years for theft over \$1,000, which is a class D felony¹; and a sentence of eleven months and twenty-nine days for possession of a vehicle with an altered VIN, which is a class A misdemeanor. All three sentences were ordered to be served concurrently and to be served in the Community Corrections Program. At her plea hearing, the appellant requested judicial diversion; but the trial court denied the request.

The appellant's sole issue on appeal is whether the trial court properly denied judicial diversion. After a review of the record, we respectfully reverse and remand this cause to the trial court for proceedings consistent with this opinion.

Agents of the Tennessee Highway Patrol caught the appellant and her husband, who was also her co-defendant, in possession of a 1991 Ford Mustang that had been stolen. That car's VIN tag on the dashboard had been removed and replaced with the VIN tag from a 1987 Ford Mustang that was registered to the appellant under her maiden name, Michele Lovely. The appellant and her husband bought the car knowing that it had been stolen. They also knew that the VIN had been altered.

The appellant argues that she should have been granted judicial diversion. She asserts that the trial court's reason for denying diversion was

¹Although the judgment states that the appellant was convicted of theft over \$500, the appellant was actually convicted of theft over \$1,000.

insufficient. In denying diversion, the trial court stated:

That's a pretty good break. What you have----to the extent you have agreed is, she's not going to jail, she's not going to the penitentiary. You've got a Class D felony, Class E felony, and misdemeanor A. I understand what you say, and may have at her young age, and no previous record, and sometimes they're proper to be deferred. That was all considered, I think it should be denied. This was a---she's getting a good break on Community Corrections.

However, the state argues that the trial court properly denied judicial diversion because the appellant was "a willing participant" in the crime. Also, the state maintains that the trial court's findings were sufficient because it did consider the appellant's age and lack of criminal record. However, even if the trial court's findings were not sufficient, the state contends that judicial diversion for the appellant should still be denied because the appellant has failed to show that the trial court abused its discretion.

When an appellant challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d) (1990). However, judicial diversion encompasses not only the manner of serving a sentence but also the underlying conviction. 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 pretrial diversion. State v. Beverly, 894 S.W.2d 292 (Tenn. Crim. App. 1994). If any substantial evidence exists to support the denial of judicial diversion, the trial court's decision will be upheld. State v. Anderson, 857 S.W.2d 571 (Tenn. Crim. App. 1992). However, if the trial court denies judicial diversion to the accused, it "should clearly articulate and place in the record the specific reasons for its determination." State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993).

Tennessee Code Annotated § 40-35-313 (Supp. 1996) provides the eligibility criteria, such as the applicable classes of felonies, for judicial diversion. In determining whether to grant judicial diversion, the trial court should consider the following: (1) the likelihood that the defendant would become a repeat offender; (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 likelihood that diversion would deter not only the defendant but also others. Bonestel, 871 S.W.2d at 168.

The appellant is young, employed, and has no prior criminal record. She apparently supports her young child by herself. The appellant does not appear to have any substance abuse or psychological problems. The trial court did not clearly articulate and place in the record its reasons for denying diversion. Therefore, we respectfully reverse and remand this cause to the trial court for a hearing to determine whether judicial diversion is warranted pursuant to Tenn. Code Ann. § 40-35-313 (Supp. 1996).

PAUL G. SUMMERS, Judge

CONCUR:

JOSEPH B. JONES, Presiding Judge

J. CURWOOD WITT, JR., Judge