

IN THE COURT OF CRIMINAL APPEALS OF
TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, 1999

FILED

December 1, 1999

Cecil CROWS ON, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,
9902-CR-00057

Appellant,

VS.

JIMMY D. LACKEY,

Appellee.

) C.C.A. NO. 03C01-

)
)
) SCOTT COUNTY

) HON. E. SHAYNE SEXTON
) JUDGE

) (Direct Appeal - Voluntary Manslaughter)
)

FOR THE APPELLEE:

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OPINION FILED _____

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

OPINION

The appellant, Jimmy Dewayne Lackey, was convicted of one (1) count of voluntary manslaughter upon a bench trial in Scott County. The trial court sentenced him as a Range I, Standard Offender, to six (6) years in community corrections. On appeal, the appellant claims that the trial court erred in denying his request for judicial diversion pursuant to Tenn. Code Ann. § 40-35-313. After reviewing the record before this Court, we conclude that the trial court erred in failing to state on the record its reasons for denying judicial diversion; thus, we reverse the judgment of the trial court and remand for further proceedings.

I.

On the afternoon of October 4, 1997, the appellant, his cousin, Tommy Lackey, and his uncle, George Lackey, were walking around the Concord community in Scott County and were looking for some pigs that had run away. Because they believed that they might have to shoot the pigs, they brought a rifle with them. When they walked past the house of Billy Bowling, Bowling walked outside and, while waving a handgun, began yelling at them. Fearing that someone might get hurt, George convinced the appellant and Tommy to walk away from Bowling's property.

They went to a neighbor's home to ask if they could use the telephone to call the police; however, the neighbor would not allow them to use the telephone. George decided to walk home, but the appellant and Tommy continued to search for the pigs. They found the pigs running behind Bowling's house, and when they attempted to catch the pigs on Bowling's property, once again Bowling came outside and argued with them. The appellant and Tommy left shortly thereafter.

As he was walking home, George ran into his father, Harold Lackey, and they decided that they should pick up the appellant and Tommy. They drove by Bowling's

house and parked in a driveway across the street from his home. Meanwhile, Tommy and the appellant were walking through a field when they spotted their grandfather's truck. They approached George and Harold, and as the four (4) men conversed for a short time, Bowling walked outside of his home again.

Bowling waved his handgun at them and then told them that he needed a bigger gun with which to shoot them. Bowling walked back inside his home, and when he returned, the appellant shot him with the rifle. The appellant subsequently turned himself in to a Scott County Sheriff's Deputy who lived in the Concord community.

The Scott County grand jury returned an indictment charging the appellant with one (1) count of second degree murder.¹ After a bench trial, the trial court found the appellant guilty of voluntary manslaughter. The trial court sentenced the appellant as a Range I offender to six (6) years, to be served in community corrections. Further, the trial court denied the appellant's request for judicial diversion. From the trial court's ruling denying diversion, the appellant now brings this appeal.

II.

Tenn. Code Ann. § 40-35-313(a)(1)(A) (1997) provides:

If any person who has not previously been convicted of a felony or a Class A misdemeanor is found guilty or pleads guilty to . . . a Class C, D or E felony, the court may, without entering a judgment of guilty and with the consent of such person, defer further proceedings and place the person 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 . . . of the felony with which the person is charged.

. . .

¹ The appellant was sixteen (16) years old at the time of the offense. Pursuant to Tenn. Code Ann. § 37-1-134, the appellant was transferred to the Scott County Criminal Court to be tried as an adult.

If the trial court sentences the defendant pursuant to Tenn. Code Ann. § 40-35-313, at the completion of the probationary period, the defendant is discharged without an adjudication of guilt, and the records of the entire proceeding are subject to expungement. Tenn. Code Ann. § 40-35-313(a)(2) and (b) (1997). The procedure under this provision is commonly referred to as judicial diversion.

Judicial diversion is substantially similar to pretrial diversion; however, the decision to grant diversion rests with the trial court, not the prosecutor. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). The decision of whether to place a criminal defendant on judicial diversion is within the sound discretion of the trial court and that decision will not be reversed on appeal if there is any substantial record evidence to support it. State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993).

This Court has stated that in determining whether to grant judicial diversion, the trial court must consider:

(a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the status of the accused's physical and mental health, (f) the deterrence value to the accused as well as others, and (g) whether diversion will serve the public's and the accused's interests in the ends of justice.

State v. Bonestel, 871 S.W.2d at 168. Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. Id. The court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. Id.

III.

In the present case, the trial court did not make specific findings with regard to its decision to deny judicial diversion. In pronouncing the appellant's sentence, the court expressed its concern that the appellant's actions resulted in the loss of a life. However, with regard to judicial diversion, the trial court merely proclaimed, "any

sort of diversion is denied.” In State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989),² our Supreme Court stated:

If the application is denied, the factors upon which the denial is based must be clearly articulable and stated in the record in order that meaningful appellate review may be had. . . . This requirement entails more than an abstract statement in the record that the [trial court] has considered these factors. [The trial court] must articulate why [it] believes a defendant in a particular case does not meet the test. If the [trial court] bases [its] decision on less than the full complement of factors enumerated in this opinion [it] must, for the record, state why [it] considers that those [it] relies on outweigh the others submitted for [its] consideration.

Because the trial court did not specifically articulate its reasons for denying diversion, other than a general concern that a death occurred, this Court is unable to conduct a meaningful appellate review. Thus, this case must be remanded so that the trial court may make specific findings on the record regarding its decision to deny judicial diversion.

Accordingly, the judgment of the trial court is reversed, and the case is remanded for further proceedings consistent with this opinion.

JERRY L. SMITH, JUDGE

CONCUR:

GARY R. WADE, PRESIDING JUDGE

JAMES CURWOOD WITT, JR., JUDGE

² The Supreme Court’s opinion in Herron dealt with the assistant district attorney’s denial of pretrial diversion. *See Herron*, 767 S.W.2d at 152-56. However, due to the similarities between pretrial diversion and judicial diversion, this Court has frequently looked to case law governing pretrial diversion in analyzing cases involving judicial diversion. *See State v. Bonestel*, 871 S.W.2d at 168-69.