IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 15, 2023 Session

STATE OF TENNESSEE v. SARAH N. EAKES

Appeal from the Criminal Court for Davidson County
No. 2015-C-2065 Monte D. Watkins, Judge (Ret.)

No. M2022-01275-CCA-R3-CD

The Defendant, Sarah N. Eakes, pleaded guilty to one count of child neglect, and the trial court sentenced her to serve eighteen months in confinement and denied her request for both an alternative sentence and judicial diversion. On appeal, the Defendant contends that the trial court erred when it denied her requests for an alternative sentence and judicial diversion, and she asks this court to enter an order granting both. The State concedes that the trial court failed to consider or weigh the relevant factors in its denial, but it asks this court to remand the case for a new sentencing hearing. After review, we reverse the trial court's judgment and grant judicial diversion. The matter is remanded to the trial court for the imposition of the conditions, and term of judicial diversion, with the term not to exceed eighteen months.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Reversed and Remanded

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and J. ROSS DYER, JJ., joined.

Patrick T. McNally (on appeal), Jim Todd (at plea hearing and sentencing), Nashville, Tennessee, for the appellant, Sarah N. Eakes.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Glenn Funk, District Attorney General; and Ronald J. Dowdy, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts

This case arises from injuries sustained by a seven-month-old infant, B.S.[1], on May 14, 2014, while he was in the Defendant's care. For her actions in these events, a Davidson County grand jury indicted the Defendant in September 2015 for aggravated child abuse and aggravated child neglect, both Class A felonies. After a series of delays, some due to COVID-related closures, on April 13, 2022, the Defendant pleaded guilty to the reduced charge of child neglect, a Class E felony. The State dismissed the child abuse charge.

During the plea hearing, the State articulated the facts it would have proven had the case gone to trial as follows:

> [I]f this case were to go to trial, the State's proof would be that, on May 14th, 2014, the Defendant was babysitting victim [B.S.] in her home. . . . [T]he Defendant and [B.S.'s] mother were close friends at the time, had been for many years. [B.S.] was approximately seven months old at the time of this incident.
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> According to [B.S.'s] mother, . . . when she dropped him off at approximately 7:45 a.m., he was fine without any issues. At approximately 11:40 a.m., she had communication with the Defendant in which the Defendant reported that [B.S.] was fine at the time and he was napping.
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> At some point in time around 3:00 p.m. approximately, the Defendant began to contact [B.S.'s mother] to let her know that [B.S.] was not normal. He was napping, but he should have already woken up at that time, and he seemed to be having some issues.
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> [B.S.'s mother] did not immediately respond to those attempts to reach out to her, but eventually when they did get in contact, some time had passed and . . . the Defendant agreed to meet [B.S.'s mother] at a Kroger location here in Nashville where she exchanged custody of [B.S.].
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> When . . . at the Kroger, what [B.S.'s mother] noticed was that [B.S.] appeared to be ashen and he appeared to be having a seizure. He was immediately rushed . . to Vanderbilt Hospital where he had to be intubated and he was treated for an emergency craniotomy. Eventually, he was diagnosed with having a large epidural hematoma that required surgery.
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> As part of the investigation, initially the . . . State's expert witness, Dr. Verena Brown who worked at Vanderbilt Hospital, diagnosed [B.S.] as .

[1] It is the policy of the court to refer to minor victims by their initials.

. . being the victim of child abuse. After this case was indicted, . . . upon reviewing further evidence, she stated that she could no longer sustain her diagnosis of child abuse.

However, because of the delay in time between when . . . the Defendant became aware of when [B.S.] was not doing right and when he was finally handed over to his mother to get medical care, . . . that is the factual basis for this plea as the child neglect. So that would be the State's proof if it went to trial.

The trial court ordered a sentencing hearing be held on July 15, 2022. At the sentencing hearing, the parties presented the following evidence: The State offered, and the trial court accepted both the victim impact statement and the presentence report. The victim coordinator read B.S.'s mother's victim impact statement into the record as follows:

[The Defendant] and I went from being best friends to complete strangers. She was someone that I believed I could trust with everything, but she wasn't the person I thought she was.

[B.S.] has had numerous surgeries and hospital stays. He may have more surgeries in the future. It is not fair that my son has gone through so much. The doctors that saved [B.S.'s] life are amazed by him. They didn't think that he would live, walk or talk. He is a miracle. [B.S.] may never be normal. He went from being the happiest baby to the saddest child. [B.S.] now has learning disabilities and lives with a huge scar on his head. Kids are mean to him and treat him differently. He also lives in constant fear that his plate is going to break.

I feel like my son was robbed of the childhood that he deserved. I will never understand why my child was hurt the way that he was. I will never understand how anyone could hurt someone so precious. I want you to know that [B.S.] is a fighter. He has overcome so much in his short life. [B.S.] may not ever have a normal life, but he tries to everyday.

Our family will move forward and continue to help [B.S.] overcome any obstacles that may get in his way. I will make sure that my son never feels like something is wrong with him and that my son never feels different because of what happened.

> What happened at [the Defendant's] house changed my son's life forever. My family may never get the answers to what happened to [B.S.] that day, but I pray that [B.S.] gets the justice that he deserves.
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> How could you live with what you had done to my child. Why didn't you take him to the hospital. Why did I have to meet you while you were pumping gas and acting like nothing was wrong. Why can't you pass a polygraph test. Why can't you just tell the truth.
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> It is hard to explain to an eight-year-old why nothing has happened to the person that hurt him. It hurts my mommy heart to see the disappointment on his face. He wants her to be locked up for life so that she can never hurt anyone again. [B.S.] has to live with this for the rest of his life. He wants justice for what has happened to him.
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> What happened to [B.S.] should never happen to any child. Our family is thankful to God every day that [B.S.] is still here. God has big plans for [B.S.] and [the Defendant] will have to go before the Lord someday. Thank you.

The Defendant testified at the sentencing hearing on her own behalf. She said that she was a high school graduate and was twenty-four at the time this incident occurred in May 2014. At that time, she had a two-year-old, and she regularly cared for B.S. and his sibling, as well as her own child.

The Defendant described the events of the day at issue. She said that B.S.'s mother arrived to her home two hours late that day, saying that she overslept. She dropped off B.S. and left his things by the door. Later, while B.S. was on the couch eating and watching television, she left to retrieve his belongings from by the door so she could change his diaper. While she was gone, B.S. fell off the couch. The Defendant returned, and B.S. cried for "a second," and she picked him up. She said that he was fine and everything was good; B.S. continued eating. Later, she put him down for a nap.

When B.S. awoke from his nap, his eyes were "kind of in a daze" and would not "really move." At first, the Defendant assumed that he was groggy, but she began calling B.S.'s mother, who did not answer. She then texted his mother, but not frantically, because she did not know what was wrong and she just wanted B.S.'s mother to return her call. The Defendant said that she then called her own mother, who told her to take B.S. to the hospital. The Defendant loaded her own son and B.S. into her vehicle and headed for the hospital.

The Defendant said that someone from B.S.'s mother's workplace called her, and the Defendant informed her that she was taking B.S. to the hospital and to get B.S.'s mother on the phone. The woman from the workplace told the Defendant to meet B.S.'s mother at a gas station, so she proceeded to the gas station. The Defendant said B.S.'s only symptoms still were his eyes not focusing. She did not see him having any seizures or convulsions. When B.S.'s mother arrived at the gas station, she grabbed B.S. and began yelling at the Defendant.

The Defendant dropped her son off with his father and then proceeded to the hospital. Hospital staff asked the Defendant to leave at the request of B.S.'s mother. She said that B.S.'s mother was her best friend, and she viewed B.S. as her nephew. The Defendant testified that, when she spoke with police, she told them that B.S. had fallen off the couch, and they informed her that the fall would not have caused his injuries.

The Defendant said that she was arrested, charged, and released on bond. Her son was immediately taken from her custody, and she lost custody of him for eighteen months. She completed parenting classes and other requirements in order to have her son returned to her custody, where he remained. The Defendant said that she had been on bond for approximately eight years.

The Defendant recounted that she had worked at Sonic Drive-In for sixteen years and said that she lived with her parents. She had been unable to secure more lucrative employment because of the pending child abuse charges against her. The Defendant said that she had no criminal record and no history of mental health issues. The Defendant admitted that she smoked marijuana daily, and agreed that she understood that she would be unable to do so if she were on probation.

The Defendant testified that she had taken and passed a polygraph test. She said that she also took a voice stress test, which was inconclusive. The Defendant stated that she loved B.S. like he was her own child and apologized for anything that she did that hurt him.

During cross-examination, the Defendant said that she had recently seen B.S. and that she knew he had a metal plate in his head and a disfiguring scar "down his face." She was unaware that the sides of his face were uneven. The Defendant testified that she believed that B.S. hit his head on the floor when he fell off the couch at around 1:30 p.m. She also agreed she told police that he could have hit his head on the wall while he was napping. She then said that he may have hit his head both on the floor and on the wall.

The Defendant agreed that she was pumping gas when B.S.'s mother arrived to retrieve him.

The State asked the trial court to consider that the victim's injuries were great and that he was particularly vulnerable based upon his age. The State asked that the Defendant not be given probation.

The Defendant's counsel reminded the court that the basis for the plea was the Defendant's delay in seeking medical treatment for B.S. He stated that there were several mitigating factors, including the unusual circumstances of this case. The Defendant's counsel asked that she be given the one year minimum sentence and an alternative sentence. Additionally, the Defendant sought judicial diversion.

Based upon this evidence, the trial court made the following findings.

> [T]his is one of those difficult cases, and I do want to start by saying that I don't believe [the Defendant] is a bad person. That's not the important thing about a case such as this. [The Defendant] was originally charged with two A felonies, aggravated child abuse and aggravated child neglect, each of which carries fifteen to twenty-five years. After all of the facts and circumstances were sorted out, she ended up entering a best interest plea to child neglect, which is an E felony, which carries one to two years.
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> But it's still predicated upon one area in criminal law. You know, criminal law is basically sort of like tort law in a way because tort law is based upon the premise of intent, neglect and strict liability. So is criminal law in many respects, primarily intentional acts, but also negligent acts. So you have misfeasance as well as malfeasance, and I don't think malfeasance came into play in this particular case. It's misfeasance or neglect. And that is what she pled to was child neglect under best interest.
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> And having said all of that, the Court still has to consider what effect has this had on the child. And as brought out in this sentencing hearing, this child will be affected by this non-action for the rest of his life. From the time he was seven or eight months old, now at age eight, he is still affected. He will be affected as long as he lives. And the Court really has to consider that.
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> The Court also has a strong inclination, in ninety-nine percent of cases, to allow 40-35-313 [judicial diversion], but there are some exceptions. And one of those exceptions is the injury to the victim in the particular case. And I think that exception is appropriate here, that because of the nature of the injury of this minor child, I don't think 40-35-313 is appropriate. It's because he's going to be affected as long as he lives. I know [the Defendant]

> is going to be affected by this, but if I were to grant her 40-35, in one or two years, she would be free. She would have no responsibility. She could tell the world I never did anything wrong in my life, I have no criminal record. And we would all know that this child would continue to suffer.
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> As such, the Court believes that [the Defendant] should, based upon all that the Court has heard – and I guess I should point out that the Court has considered the mitigating circumstances . . . one mitigating circumstance[] in particular, and that is no sustained intent to violate the law, but also, the Court has considered the enhancement factor of the serious injury that this child suffered. The Court believes that [the Defendant] should serve eighteen months, and the Court is not going to grant [probation and judicial diversion]. That will be the judgment of the court.

On August 30, 2022, the Defendant filed a motion and asked to remain on bond pending her appeal. On September 14, 2022, her report date, the Court heard the Defendant's appeal bond motion and then took the matter under advisement, ordering that she remain on bond until it reached a decision. On September 28, 2022, the trial court denied the Defendant's motion and ordered her to commence service of her sentence. The trial court ruled as follows:

> This Court gives great weight and deference to the findings and credibility determinations made by its successor, Judge Watkins. Judge Watkins had the opportunity to assess the Defendant in person during her testimony, and to listen to the victim impact statement provided by the victim's mother, before he issued his ruling. The Defendant did not request an appeal bond at the conclusion of the sentencing hearing and Judge Watkins allowed the Defendant 30 days to report.
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> This case is eight years old. It has been set for trial more than 10 times due to expert witness issues and pandemic issues. The victim was seven months old at the time of injury, and today he is almost nine. The victim's family has been adamant in their desire to see the [D]efendant begin serving her sentence. This Court gives that great weight. It is this Court's judgment that the Defendant shall begin serving her sentence today. The Defendant's motion is hereby denied.

The Defendant appealed to this court, and we issued an order remanding the matter for the trial court to consider the relevant factors, including whether she was a flight risk

or a danger to her community, and to determine whether the Defendant would be allowed bail pending appeal and, if so, what the bond amount would be.

On November 9, 2022, at a hearing after the remand, Amber Martin testified that she worked in loss prevention at Walmart. She said that her son was best friends with the Defendant's son and had been for several years. She and the Defendant had been close friends for about six years, and Ms. Martin felt safe leaving her son with the Defendant. Ms. Martin described the Defendant as a "wonderful mother."

Ms. Martin said that the Defendant had anxiety related to her pending charges, and she opined that the Defendant was not a flight risk, as she had appeared at all her court dates.

The Defendant testified that she was now thirty-two years old, and she identified multiple individuals present at the hearing in support of her. She recalled that she had first been arrested in 2015 on the charges related to this case. The Defendant made a $25,000 bond on September 17, 2015, and had been released from custody until the time of her sentencing hearing. She said that the bonding company was willing to continue her bond while her appeal was pending, if the trial court so allowed.

The Defendant recounted her work history, saying that she began working at Sonic when she was sixteen years old, which was in 2006. She had been promoted and offered a letter from her manager, for whom she had worked for twelve years, stating that the he and the Defendant had worked together "in three highly successful businesses" and that he could not have "succeeded without her dedication and hard work." Her manager expressed how much he had seen the Defendant grow from the time she had a child until the time she began to run her own restaurant. The Defendant said that Sonic held her position of assistant manager for her while she was in custody. The Defendant's manager also expressed his trust in the Defendant and his observation of her love for her family.

The Defendant's former manager also wrote a letter on her behalf expressing similar feelings about the Defendant. She said that the Defendant was a "huge part of" the Sonic franchises' success.

The Defendant stated that she had been on the same bond for the duration of the time her case was pending, until she was taken into custody. When she was re-released from custody, she was back on that bond.

The Defendant said that she was not a risk to children and that she was responsible and would appear at her court dates. She said that she was only appealing her sentence, which was eighteen months, to be served at thirty percent.

During cross-examination, the Defendant testified that, before entering her plea, she understood that she was pleading guilty to a reduced charge and that she could receive jail time when sentenced. The sentence she received, in fact, was within the perimeters of her agreement with the State. She agreed that she wanted to be released with no restrictions pending her appeal because she "ha[d] been a legitimate individual in going to work, providing for my child and staying on the right path."

Upon questioning by the trial court, the Defendant testified that she did not have any open Department of Children's Services investigations and that she had successfully completed parenting classes in order to have her son returned to her custody.

The Defendant's attorney then argued that the Defendant was not a flight risk. He noted that the Defendant would likely serve four-and-a-half to five months of incarceration and she would likely serve all of this time before her appeal was decided.

The State countered that the Defendant had received a considerable reduction in culpability by pleading guilty to child neglect and not aggravated child neglect, which is a Class A felony. It asked that the trial court not extend her even more leniency and remand her to custody.

In an order entered November 30, 2022, the trial court then allowed the Defendant to remain on bond. It found that she was not likely to flee while the case was pending appeal and that she did not pose a danger to any other person in the community while the case was pending appeal.

The Defendant appeals the trial court's order denying her judicial diversion and an alternative sentence.

II. Analysis

On appeal, the Defendant contends that the trial court erred when it denied her request for judicial diversion because it failed to weigh all requisite factors before denying her application for judicial diversion. She further contends that the trial court erred when it denied her an alternative sentence. The Defendant asks this court to grant her an alternative sentence or to order judicial diversion. The State concedes that the trial court did not consider the requisite factors concerning judicial diversion and asks this court to remand the case for a new sentencing hearing.

The Tennessee Supreme Court has recognized that "sentences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion

standard with a 'presumption of reasonableness.'" *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012). Our supreme court has stated that "the abuse of discretion standard of appellate review accompanied by a presumption of reasonableness applies to all sentencing decisions." *State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014) (citing *State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013)). This includes questions related to probation or any alternative sentence and also whether to grant or deny judicial diversion. *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012) (applying standard to probation and alternative sentence; *King*, 432 S.W.3d at 324 (applying standard to judicial diversion).

To be afforded deference on appeal, however, the trial court must "place on the record any reason for a particular sentence." *Bise*, 380 S.W.3d at 705. In the context of judicial diversion, the presumption of reasonableness does not apply when "the trial court fails to consider and weigh the applicable common law factors[.]" *King*, 432 S.W.3d at 327-28. The same holds true for alternative sentencing decisions. *Caudle*, 388 S.W.3d at 29. But as this court has observed:

> [T]rial courts need not comprehensively articulate their findings concerning sentencing, nor must their reasoning be "particularly lengthy or detailed." *Bise*, 380 S.W.3d at 706. Instead, the trial court "should set forth enough to satisfy the appellate court that [it] has considered the parties' arguments and has a reasoned basis for exercising [its] own legal decision making authority." *Id.*

State v. Sheets, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *4 (Tenn. Crim. App., at Nashville, Apr. 12, 2023) (alterations in original), *no perm. app. filed.* A defendant bears the burden of proving the sentence is improper. T.C.A. § 40-35-401, *Sentencing Comm'n Cmts; see also State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

In determining the proper sentence, the trial court must consider: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the mitigating and enhancement factors set out in Tennessee Code Annotated sections 40-35-113 and 114; (6) any statistical information provided by the administrative office of the courts as to sentencing practices for similar offenses in Tennessee; (7) any statement the defendant made in the defendant's own behalf about sentencing; and (8) the result of the validated risk and needs assessment conducted by the Department of Correction and contained in the presentence report. *See* T.C.A. § 40-35-210(b); *State v. Taylor*, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001). The trial court must also consider the potential or lack of potential for rehabilitation or treatment of the defendant in

determining the sentence alternative or length of a term to be imposed. T.C. A. § 40-35-103.

The Defendant's primary contention herein is that the trial court failed to properly weigh all required factors and articulate the specific reasons for its determination that the Defendant should not be granted judicial diversion. Further, she contends that the trial court placed undue weight on an irrelevant factor that tainted its decision-making process.

"Judicial diversion" occurs when, following a determination of guilt by plea or trial, a trial court, in its discretion, defers further proceedings and places a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A); *State v. Dycus*, 456 S.W.3d 918, 925 (Tenn. 2015). "Upon successful completion of the probationary period under judicial diversion, 'the court shall discharge the person and dismiss the proceedings against the person.'" *Dycus*, 456 S.W.3d at 925 (quoting T.C.A. § 40-35-313(a)(2)). Following such dismissal, the defendant may seek expungement of the defendant's criminal record. *Id.* (citing T.C.A. § 40-35-313(a)(1)(A) and *King*, 432 S.W.3d at 323). As such, "judicial diversion is not a sentence; rather, the grant or denial of judicial diversion is simply a decision to defer a sentence or to impose one." *Sheets*, 2023 WL 2908652, at *6 (citing *King*, 432 S.W. 3d at 324-25). "Our supreme court has described judicial diversion as a 'legislative largess' available to a qualified person." *Id.* (citing *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999)).

A defendant may qualify for diversion if the defendant is found guilty of, or pleads guilty or *nolo contendere* to, an offense that is not "a sexual offense or a Class A or Class B felony," and the defendant does not have a prior conviction for a felony or Class A misdemeanor. T.C.A. § 40-35-313(a)(1)(B)(i)(b), (c). In this case under submission, the Defendant was eligible for judicial diversion. She pleaded guilty to a Class E felony, which was not a sexual offense, and she does not have a prior conviction for a felony or a Class A misdemeanor.

A defendant eligible for judicial diversion is not entitled to diversion as a matter of law. *See State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000). As stated above, a trial court's decision to grant or deny judicial diversion is reviewed for an abuse of discretion with a presumption of reasonableness. *See King*, 432 S.W.3d at 329.

In determining whether to grant diversion, the trial court is to consider the following factors: (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 accused's physical and mental health, (f) the deterrence value to the accused as well as others and (g) whether judicial diversion will serve the interests of the public as well as the accused. *State v.*

Electroplating, 990 S.W.2d 211, 229 (Tenn. Crim. App 1998) (citing *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996), and *Bonestel,* 871 S.W.2d at 168). Our supreme court has observed:

> Under the *Bise* standard of review, when the trial court considers the *Parker* and *Electroplating* factors, specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion, the appellate court must apply a presumption of reasonableness and uphold the grant or denial so long as there is any substantial evidence to support the trial court's decision. Although the trial court is not required to recite all of the *Parker* and *Electroplating* factors when justifying its decision on the record in order to obtain the presumption of reasonableness, the record should reflect that the trial court considered the *Parker* and *Electroplating* factors in rendering its decision and that it identified the specific factors applicable to the case before it. Thereafter, the trial court may proceed to solely address the relevant factors.

King, 432 S.W.3d at 327 (footnote omitted). If the trial court decides to deny judicial diversion, "the court should clearly articulate and place in the record the specific reasons for its determinations. *Parker*, 932 S.W.2d 958-959. "If, however, the trial court fails to consider and weigh the applicable common law factors[,] . . . the appellate courts may either conduct a *de novo* review or, if more appropriate under the circumstances, remand the issue for reconsideration." *King,* at 327-28. Such a decision "is within the discretion of the reviewing court." *Id.* at 328.

In the case before us, as previously stated, the Defendant was eligible for judicial diversion. The trial court denied her request for judicial diversion, but, as stated in the State's brief:

> [T]he trial court did not discuss or weigh the *Electroplating* factors, aside from arguably the circumstances of the offense, when denying judicial diversion. Instead, the trial court cited only the effect of the offense on the victim, found that it outweighed the defendant's lack of sustained intent (which is not an Electroplating factor), and denied judicial diversion. The court did not make factual findings or credibility findings. It did not discuss the [D]efendant's amenability to correction, social history, physical or mental health, or the deterrence value of diversion. Likewise, the trial court did not weigh these factors, either in favor or against judicial diversion.

The State concedes that the trial court's failure to address these factors amounts to an abuse of discretion, and it asks this court to remand this case back to the trial court for another review and to make findings regarding an alternative sentence and judicial diversion.

As previously stated, when a trial court has abused its discretion in this regard, we can remand the case for rehearing or conduct a *de novo* review if appropriate under the circumstances. *King,* at 327-28. Relevant considerations include the adequacy of the record, the fact-intensive nature of the inquiry, and the ability of the court to request supplementation of the record. *Id.* at 328 (citing *Pollard*, 2013 WL 6732667, at *11 (remanding based on the fact-intensive nature of the inquiry); *Bise*, 380 S.W.3d at 705 n. 41 (recognizing that remanding for reconsideration is more appropriate when the trial court fails altogether to articulate the reasons for its sentencing decision); *Caudle*, 388 S.W.3d at 279-80 (conducting a *de novo* review after requesting a supplementation of the record); *see also Electroplating*, 990 S.W.2d at 229-30 (conducting a *de novo* review when the trial court failed to provide an adequate explanation for denying the request for judicial diversion)).

We are persuaded that the circumstances of this case are appropriate for *de novo* review. The facts are not in dispute, and there have been adequate hearings, all transcribed in the record, from which we can consider the relevant factors. Further, the charges in this case stemmed from a negligent act that occurred in September 2015, almost eight years ago. The delays, related to expert witness testimony and COVID, have been numerous and lengthy. In consideration of all the circumstances, including finality for all of the parties involved, we will conduct a *de novo* review.

The record clearly evinces that the Defendant is amenable to correction. In the almost eight years since this incident, and while out on bond, she has not had a single additional criminal charge. During that time, she also has maintained employment, continually surpassing expectations of her employers, complied with requirements for regaining custody of her son, and maintained safe housing. She has the strong support of her family, friends, and co-workers. The Defendant accepted responsibility for her actions, expressed remorse, and pleaded guilty to her offense. These factors weigh in favor of judicial diversion.

The circumstances of this offense involved a negligent act. She left a child unattended on a couch while going to retrieve a diaper for him, and he fell off, hitting his head. The infant tragically suffered serious injuries as a result of this fall. The Defendant did not immediately see signs of injury, put the child down for a nap, and then noticed signs of injury when he awoke, but those signs only included failure to focus his eyes and a dazed expression. The Defendant immediately called the infant's mother, but could not reach her. She then called her own mother, who told her to seek medical care. While on her way

to seek medical care, the child's mother returned her phone call and asked her to go to a gas station to meet her. Upon her arrival, the mother found her infant ashen and seizing. She sought immediate medical treatment for him, and he underwent emergency surgery. Experts could not rule that this was an act of child abuse.

While these circumstances are tragic, the Defendant's actions were not intentional. She does not pose a danger to others. She acted with negligence when she failed to contact 911 when she discovered the infant's failure to focus, but she did not intentionally hurt the child. This factor weighs in favor of judicial diversion.

The Defendant has no criminal history. She admitted to using marijuana, an act that she will be required to cease, but she has no criminal record. This factor weighs in favor of judicial diversion.

Similarly, the Defendant's social history weighs in favor of judicial diversion. She has family support, she has maintained employment, her employers speak extremely highly of her, she has been involved in the community and has maintained good long-term friendships, and she had by all accounts been a good mother to her own son in the eight years since this incident.

The other appropriate factors also weigh in favor of judicial diversion: The Defendant stated that she is in good physical and mental health, other than stress caused by this ongoing litigation. There is little to no deterrent value to her being denied judicial diversion as this was a negligent act, there is no indication of any similar negligent acts in the time since this incident, and this negligent act is unlikely to occur again. Finally, judicial diversion will serve the interests of the public and the Defendant in that the public has an interest in confining criminals who are a danger to society, which clearly the Defendant is not, and in that Defendant has an interest in being able to move forward with her life in a law-abiding and constructive manner.

Our decision today in no way negates or diminishes the injury and suffering B.S. and his family have gone through and will continue to go through. That said, the factors the courts are required to consider when granting or denying judicial diversion all weigh in favor of the Defendant being granted judicial diversion. Accordingly, we reverse the trial court's judgment and grant judicial diversion. The matter is remanded to the trial court for an order of judicial diversion with appropriate conditions and for an appropriate term, which should not exceed eighteen months, which is the length of her original sentence.

III. Conclusion

For the foregoing reasons, we reverse the trial court's judgment and grant judicial diversion. The matter is remanded for entry of an order of judicial diversion and for imposition of the conditions and term of judicial diversion, with the term not to exceed eighteen months.

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ROBERT W. WEDEMEYER, JUDGE