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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 18, 2023

STATE OF TENNESSEE v. JAMES TYLER FUCCI

Appeal from the Circuit Court for Montgomery County
No. CC-2021-CR-139 Robert Bateman, Judge

No. M2022-01425-CCA-R3-CD

The defendant, James Tyler Fucci, appeals the denial of his request for judicial diversion of the six-year sentence imposed for his Montgomery County Criminal Court guilty-pleaded conviction of aggravated assault. Discerning no reversible error, we affirm. We remand for entry of a judgment on Count 2 reflecting that the charge was dismissed in accordance with the plea agreement.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed; Remanded

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and TIMOTHY L. EASTER, JJ., joined.

Chase T. Smith, Clarksville, Tennessee, for the appellant, James Tyler Fucci.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilber, Senior Assistant Attorney General; and Robert J. Nash, District Attorney General, for the appellee, State of Tennessee.

OPINION

In February 2021, the Montgomery County Grand Jury returned an indictment charging the defendant with two counts of aggravated assault by strangulation of Jenna Barazsu, his former girlfriend, on June 14, 2020. On June 9, 2022, the defendant entered an open guilty plea to one count of aggravated assault by strangulation whereby the trial court would determine the length, manner, and service of the sentence and the

propriety of judicial diversion. The State agreed to dismiss the second count of aggravated assault by strangulation.[1]

Prior to the sentencing hearing, the defendant filed a sentencing memorandum requesting judicial diversion. He argued that he was amenable to correction, did not have a significant prior criminal history, and had a positive social history, employment history, and history of mental health. He also argued that the granting of judicial diversion would not "damage the interest of the public." He acknowledged that following his arrest, he was arrested for and convicted of an offense as a result of his contacting the victim via text message from June 16 to July 27, 2020, but maintained that he contacted the victim in response to text messages that she sent to him.

During the September 8, 2022 sentencing hearing, the victim testified that she and the defendant were previously in a relationship for more than two years and that they had a child together. By June 16, 2020, the date of the offense, they had "amicably decided to part ways," and the victim was planning to move out of the residence. The victim stated that she originally planned to move to Texas at the end of June. However, on the night prior to the incident, the victim learned that the defendant had failed to keep "promises" that he had made to her, and she decided to move out of the residence at the end of the week.

During the early morning hours of June 16, the defendant's cell phone began "going off." She explained that the defendant was a member of "chat groups" on the stock market and that his cell phone would send various alerts to him before the stock market opened for the day. The defendant was unable to open a stock market application on his cell phone, and shortly after 3:00 a.m., he awakened the victim and asked her to reset the internet router. The victim told the defendant that he needed to learn to do tasks by himself because she was leaving at the end of the week. He responded that she was not leaving until the end of the month and could continue to complete such tasks until then. The victim stated that the defendant learned of her changed plans and "that's what made him angry."

The victim testified that as she was lying in bed, the defendant jumped on her, straddled her hips with his knees, grabbed her wrists, put them on top of her head, screamed in her face, and spit on her. When the victim begged him to stop, the defendant began punching her in her face with his fists and pulled her off the bed and onto the floor.

[1] We observe that the defendant failed to include a transcript of the guilty plea submission hearing in the record on appeal. Often, this omission would prevent plenary review of the defendant's challenge. *See State v. Caudle*, 388 S.W.3d 273, 279 (Tenn. 2012) (holding that "when a record does not include a transcript of the hearing on a guilty plea, the Court of Criminal Appeals should determine on a case-by-case basis whether the record is sufficient for a meaningful review"). In this case, however, the record contains adequate information for a meaningful review. *See id.*

The defendant struck the victim with a lamp that was on the nightstand and then kicked and "stomp[ed]" her stomach. He picked up the victim and put her in a "choke hold," and the victim testified, "I remember gasping for air, but I don't really recall until I came to consciousness." The defendant dragged her across the living room floor by her hair, which was in a ponytail, and he pulled some of her hair out of her head as a result. He dragged her to the router and instructed her to "[d]o this," while calling her names. The victim unplugged the router and then plugged it back into the electrical socket.

The victim stated that they returned to the bedroom where the defendant pushed her and continued punching her and screaming. The defendant stopped "for a short minute" upon realizing that it was the victim's birthday. He stated, "Well, we could have gone to dinner, but we can't now, because you made me do this to you." He said they would order "takeout" instead. The victim testified that she tried to be quiet as long as possible but that at around 5:30 or 5:45 a.m., she requested permission from the defendant to use the bathroom. As she was walking toward the bedroom door, she stepped on her cell phone, which had been thrown off the nightstand. She picked up the cell phone, hid it under her clothing, and went to the bathroom where she pressed "the panic app" on her cell phone. A representative from the application contacted her, and after communicating with the victim, the representative agreed to contact the police.

The victim testified that when she returned to the bedroom, the defendant asked for water. She went into the kitchen, hid her cell phone in a drawer, and returned to the bedroom with water. The defendant stated that the water was not cold and instructed the victim to get water from the refrigerator. The victim told him that there was no water in the refrigerator, and the defendant screamed at her for failing to stock the refrigerator with water. The victim ran from the bedroom, out of the house through the front door, and down the driveway where she flagged down two officers who were approaching the home. The victim told the officers that the defendant had three firearms, one of which was loaded, and that her nine-month-old daughter was sleeping in her bedroom located two rooms away from the master bedroom. The officers instructed the victim to hide behind one of the police vehicles. The defendant exited the home to search for the victim and ran into the officers, who arrested him.

The victim was transported by ambulance to a hospital, and after 12 to 18 hours, she was transported to a hospital with a higher trauma level. The victim suffered two brain bleeds, severe bruising to her stomach, bruising and lacerations to her face, and a partially detached retina in her left eye. After she was hospitalized, she began suffering severe pain in her abdomen, and scans showed that her stomach was "ruptured" and that stomach acid was leaking into her other organs. She had emergency surgery, was hospitalized for 11 days, and had a 10-inch scar from the surgery. Her left pupil remained severely dilated for six or seven months following the attack. Photographs of her injuries

were entered as exhibits during the hearing. The victim stated that her brain bleeds continued to require monitoring until her brain reabsorbed the blood, which could take months or years. The victim requested that the defendant receive the maximum sentence for the offense.

During cross-examination, the victim denied striking the defendant during the incident. She stated that due to a restraining order, the defendant was prohibited from seeing their child. She also stated that no order requiring the defendant to pay child support was in place.

The defendant, who was 29 years old at the time of the sentencing hearing, acknowledged that he inflicted the victim's injuries and referred to his actions as "a complete lapse of judgment." He apologized to the victim and stated, "I have pain and grief myself. I haven't seen my daughter in two plus years and that kills me every single day." He stated that following the incident, he became depressed upon realizing that he would be unable to see his daughter and that he sought therapy and counseling. He had completed "several" anger management courses and maintained that he had changed since the incident.

The defendant testified that he quit high school and obtained his GED. He served in the United States Army for more than three years, after which he was honorably discharged. He acknowledged that he was convicted of public intoxication at the age of 19. He had no other children and did not own any firearms. Since May 2021, he has lived in Florida where he owns a company that performs solar and roofing projects for residential and commercial buildings. The company operated in multiple states, and the defendant regularly traveled as part of his employment. The defendant testified that a felony on his record would "haunt me for the rest of my life" and cause him to "lose a lot of income pretty immediately." He stated that he was a member of the Chamber of Commerce and that they "turn people away that are on probation."

During cross-examination, the defendant maintained that he had accepted responsibility for his actions but stated, "I've my own version of events." He agreed that he entered a "best interest plea," explaining that he "didn't want to go through the hassle of a jury trial and to put [the victim] through that or put anybody through it." He said he was not "given [the] option" to plead guilty.

The defendant testified that he had not paid the victim any child support for their child because his former attorney advised him not to "file anything" as doing so could violate the order of protection against him. He acknowledged that he pleaded guilty in general sessions court to violating the conditions of the order of protection and explained that he responded to text messages that the victim had sent to him. He stated that he

purchased gifts for his daughter that his family sent to her. He did not have any money saved to pay back child support but stated that "I could make it work." He did not have any information with him at the sentencing hearing regarding the business income that he would lose as a result of a felony conviction.

According to the presentence report, which was entered as an exhibit, the defendant quit school in the 11th grade, obtained his GED in 2010, and attended college for a period of time. He served in the United States Army from May 2014 until September 2017 during which he earned multiple medals, and he was honorably discharged. He then worked at several car dealerships. Since June 2021, the defendant has been a co-partner at Solar Experts, LLC, which has 130 or more employees and operated in 39 states. He reported that he "brings home" $20,000 to $26,000 per month.

The defendant reported that he did not use illegal drugs and that he had not consumed alcohol in three or four years. In February 2012, when the defendant was 19 years old, he was convicted of public intoxication. In June 2021, he was convicted of two counts of criminal contempt. He reported that his physical health was good with the exception of issues with his back and knees resulting from his time in the military. He described his mental health as "good to excellent" and stated that he sought therapy following the incident. According to the risks-needs assessment, the defendant had a "moderate" risk to reoffend and had "high" needs in the area of mental health.

The presentence report included a statement from the defendant in which he expressed feeling "bad about everything that happened." He stated:

> I wish a million times over that this could have been the other way not only because it's hurting me, but it is hurting my family. It's took time away. My grandfather will never see his great granddaughter again and that hurts me pretty bad. It's hurt so many people, and I just wish this could have been handled so much better. I wish she would have gone to couple's therapy with me or parenting mediator or something. She always said "don't tell people our problems." I think I am eligible for a diversion and that would be ideal. I want to keep my rights. I want to be able to vote and I want to keep my business.

At the conclusion of the proof, the trial court found that the defendant entered a "no contest open plea" to aggravated assault by strangulation, a Class C felony, and that as a Range I offender, he was subject to a sentence of three to six years. The court also found that the defendant was statutorily eligible for judicial diversion. The court denied

the defendant's request for judicial diversion, stating, "The [c]ourt has considered all the other factors of the [*E*]*lectroplating* case and believes that the circumstances of this offense outweigh all the other factors and denies the request for judicial diversion." The court stated that the defendant did not have a long history of criminal conduct and determined that no other factors warranted a term of confinement. The court sentenced the defendant to six years of supervised probation.

In this timely appeal, the defendant asserts that the trial court erred in denying his bid for judicial diversion. He argues that the presumption of reasonableness generally afforded to the trial court's findings did not apply because the trial court failed to make adequate findings on the record establishing that the trial court weighed and considered all factors relevant to a determination of judicial diversion. The defendant urges this court to conduct a de novo review and conclude that judicial diversion is warranted. The State responds that the trial court's findings are sufficient to warrant a presumption of reasonableness and that, regardless, the trial court's decision to deny judicial diversion based upon the circumstances of the offense was justified.

"Judicial diversion" is a reference to the provision in Tennessee Code Annotated section 40-35-313(a) for a trial court's deferring proceedings in a criminal case. *See* T.C.A. § 40-35-313(a)(1)(A). Pursuant to such a deferral, the trial court places the defendant on probation "without entering a judgment of guilty." *Id*. To be eligible or "qualified" for judicial diversion, the defendant must plead guilty to, or be found guilty of, the offense for which deferral is sought; the offense must not be one that is excluded from deferral pursuant to Code section 40-35-313(a)(1)(B)(ii)(b) and (c); the defendant must not have previously been convicted of a felony or a Class A misdemeanor for which a sentence of confinement is served; and the defendant must not have previously been granted judicial diversion or pretrial diversion. *Id*. § 40-35-313(a)(1)(B)(i). Diversion requires the consent of the qualified defendant. *Id*. § 40-35-313(a)(1)(A). "[A] 'qualified' defendant is not necessarily entitled to diversion. Whether to grant judicial diversion is left to the discretionary authority of the trial courts." *State v. King*, 432 S.W.3d 316, 326 (Tenn. 2014). Following a determination that the defendant is eligible for 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 accused's physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice--the interests of the public as well as the accused.

Id. (quoting *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996)). "Further, the trial court must weigh the factors against each other and place an explanation of its ruling on the record." *Id*. (citing *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998)). The trial court need not provide a recitation of all the applicable "factors when justifying its decision on the record in order to obtain the presumption of reasonableness," but "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." *King*, 432 S.W.3d at 327.

Although judicial diversion is not a sentence, our supreme court has determined that the standard of review first expressed in *State v. Bise*, applies to "appellate review for a trial court's sentencing decision to either grant or deny judicial diversion." *King*, 432 S.W.3d at 325; *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012) (holding that the standard of review of the trial court's sentencing determinations is whether the trial court abused its discretion, but we apply a "presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act"). Importantly, the supreme court emphasized that the adoption of the *Bise* standard of review "did not abrogate the requirements set forth in *Parker* and *Electroplating*, which are essential considerations for judicial diversion." *King*, 432 S.W.3d at 326. Thus, when the trial court considers each of the factors enumerated in *Parker* and weighs them against each other, placing its findings in the record, as required by *Electroplating*, we "apply a presumption of reasonableness," per *Bise*, and will "uphold the grant or denial so long as there is any substantial evidence to support the trial court's decision." *King*, 432 S.W.3d at 326. When "the trial court fails to consider and weigh the applicable common law factors, the presumption of reasonableness does not apply and the abuse of discretion standard . . . is not appropriate." *Id*. Instead, "the appellate courts may either conduct a de novo review or, if more appropriate under the circumstances, remand the issue for reconsideration. The determination as to whether the appellate court should conduct a de novo review or remand for reconsideration is within the discretion of the reviewing court." *Id*. at 328.

The trial court stated that it considered the *Electroplating* factors in denying the defendant's request for judicial diversion. However, the trial court made specific findings only on the circumstances of the offense and did not place an explanation of its consideration of any other applicable factor on the record. Consequently, the ruling of the trial court is not entitled to a presumption of reasonableness, and the abuse of discretion standard of review is "not appropriate." *King*, 432 S.W.3d at 327. However, we conclude that the record is sufficient for de novo review, and we will address whether the denial of judicial diversion was appropriate, rather than remand the case for reconsideration by the trial court. *See id.* at 328.

The parties do not dispute that the defendant is qualified for judicial diversion. Further, the defendant established a good social history, which included some college and military service. He successfully obtained and maintained gainful employment. At the time of the sentencing hearing, he co-owned a business that employed numerous people and operated in several states. Thus, the defendant's social history weighed in favor of judicial diversion.

The record reflects nothing remarkable regarding the defendant's physical health other than his reported ongoing issues with his back and knees resulting from his prior military service. According to the presentence report, the defendant reported no mental health issues. However, the risk-needs assessment reflected "high" needs in the area of mental health. Regardless, this court has recognized that a defendant's physical and mental health "may weigh neutrally where no physical or mental health condition prevents the defendant from complying with probation conditions." *State v. Gavin Tyler Sheets*, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *11 (Tenn. Crim. App., Nashville, Apr. 12, 2023) (citing *State v. Dylan Ward Hutchins*, No. E2016-00187-CCA-R3-CD, 2016 WL 7378803, at *5 (Tenn. Crim. App., Knoxville, Dec. 20, 2016)), *no perm. app. filed*. Nothing in the record indicates that any of the defendant's physical or mental health conditions prevented him from complying with the conditions of probation. Thus, this factor weighs neutrally.

Regarding the defendant's criminal history and amenability to correction, we note that the defendant had a prior conviction for public intoxication at the age of 19 and that following the defendant's arrest in the instant case, he was arrested for and convicted of conduct that violated the victim's order of protection against him. Additionally, the risk-needs assessment found that the defendant was at a "moderate" risk of reoffending. *See Gavin Tyler Sheets*, 2023 WL 2908652, at *9 (considering the findings from the risk-needs assessment in determining the defendant's amenability to correction). However, more than one year passed between his conviction for conduct violating the order of protection and the sentencing hearing for the aggravated assault conviction during which time the defendant moved to Florida and became the co-owner of a company that employs a large number of workers and operates in multiple states. The defendant completed multiple anger management classes and expressed remorse for his actions.

The record includes evidence in support of and against the defendant's claim that he is amenable to correction. On appeal, the State does not argue that the defendant is not amenable to correction or that the denial of judicial diversion would provide an effective deterrent to the defendant or others. Rather, the State asserts that the circumstances of the offense were so egregious that the denial of judicial diversion was warranted on this factor alone.

"The denial of judicial diversion may be based solely on the nature and circumstances of the offense, so long as all of the other relevant factors have been considered, and this factor outweighs all others that might favorably reflect on the [defendant's] eligibility." *State v. Brian Carl Lev*, No. E2004-01208-CCA-R3-CD, 2005 WL 1703186, at *3 (Tenn. Crim. App., Knoxville, July 21, 2005) (citing *State v. Curry*, 988 S.W.2d 153, 158 (Tenn. 1999)). This court also has observed that "the circumstances of the offense as committed must be especially violent, horrifying, shocking, reprehensible, offensive or otherwise of an excessive or exaggerated degree, and the nature of the offense must outweigh all factors favoring a sentence other than confinement." *State v. Aaron Hatfield*, No. E2018-00041-CCA-R3-CD, 2019 WL 91542, at *3 (Tenn. Crim. App., Knoxville, Jan. 3, 2019) (quoting *State v. Trotter*, 201 S.W.3d 651, 654 (Tenn. 2006)).

The circumstances of the offense were above and beyond those necessary to establish the offense of aggravated assault by strangulation. *Cf. id.* (concluding that the circumstances of the offense of aggravated assault by strangulation were not particularly exaggerated when "the factual summary provided by the State established that offense"). The defendant not only strangled the victim but also repeatedly punched her, struck her with a lamp, stomped her in her stomach, and dragged her across the floor by her hair with such force that he pulled hair out of her head. The victim was not able to get away from the defendant and seek help until almost two hours after the attack began. As a result of the attack, the victim suffered a "ruptured" stomach, two brain bleeds, a partially detached retina in her left eye, severe bruising to her stomach, and bruising and lacerations to her face. She underwent emergency surgery on her stomach, remained hospitalized for 11 days, and had a 10-inch scar from the surgery. Her left pupil remained severely dilated for six or seven months, and her brain bleeds had not been resolved at the time of the sentencing hearing. We conclude that the circumstances of the offense were so violent, shocking, reprehensible, and exaggerated that they outweigh any factors supporting judicial diversion.

We also consider the nature of the victim's injuries in determining whether judicial diversion serves the interests of the public. *See Gavin Tyler Sheets*, 2023 WL 2908652, at *12-13. This court has recognized that "the interests of the public may not be served where granting diversion would depreciate the seriousness of the offense." *Id.* at *12 (citing *State v. Richard Ailey*, No. E2017-02359-CCA-R3-CD, 2019 WL 3917557, at *22 (Tenn. Crim. App., Knoxville, Aug. 19, 2019). Given the defendant's shocking and reprehensible conduct that was above and beyond that necessary to establish the elements of aggravated assault by strangulation and the resulting extensive injuries to the victim, we conclude that granting judicial diversion would depreciate the seriousness of the offense and, thus, would not serve the interests of the public. This factor weighs heavily against the granting of diversion.

Based on our de novo review of the record, we conclude that the circumstances of the offense and the interests of the public heavily outweigh the other factors supporting judicial diversion. Thus, the ends of justice would not be served by granting the defendant's request for judicial diversion. Although the trial court did not adequately consider all of the necessary factors, the record supports the trial court's denial of judicial diversion.

The appellate record does not include the judgment for Count 2, the second count of aggravated assault by strangulation, showing that the charge was dismissed in accordance with the plea agreement. Accordingly, we remand the case to the trial court for entry of a judgment on Count 2 reflecting dismissal of the charge in accordance with the plea agreement. We otherwise affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE