IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs March 21, 2023

STATE OF TENNESSEE v. GAVIN TYLER SHEETS

Appeal from the Circuit Court for Maury County
No. 28975 Christopher V. Sockwell, Judge

No. M2022-00538-CCA-R3-CD

The Defendant, Gavin Tyler Sheets, pled guilty to the offenses of vehicular homicide by recklessness and reckless endangerment. Following a sentencing hearing, the trial court imposed a total effective sentence of six years to serve in the Tennessee Department of Correction. On appeal, the Defendant asserts that the trial court abused its discretion when it denied his request for judicial diversion. He also contends that the trial court abused its discretion in failing to order an alternative sentence to incarceration. We respectfully disagree and affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right;
Judgments of the Circuit Court Affirmed

TOM GREENHOLTZ, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JOHN W. CAMPBELL, SR., JJ., joined.

Brandon E. White (on appeal) and John S. Colley, III (at trial), Columbia, Tennessee, for the appellant, Gavin Tyler Sheets.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Brent A. Cooper, District Attorney General; and J. Victoria Haywood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On May 18, 2021, a Maury County grand jury returned a four-count indictment against the Defendant charging him with: (1) vehicular homicide by intoxication of Ms. Jillian Brown; (2) vehicular homicide by recklessness of Ms. Jillian Brown; (3) reckless

endangerment of Tyler Blalock; and (4) underage driving while intoxicated, all committed on October 20, 2020. On October 13, 2021, the Defendant entered an open guilty plea to vehicular homicide by recklessness and reckless endangerment, and the State dismissed the remaining charges. The Defendant's sentencing hearing was later held on April 4, 2022.

A. SENTENCING HEARING

1. State's Proof

At the sentencing hearing, the State called Jennifer Brown to testify. Ms. Brown was the mother of the victim, Ms. Jillian Brown. Ms. Brown testified that on October 20, 2020, the victim left the family home around 7:00 p.m. to go and "hang out" with friends. She recalled the night being "normal" and that "she didn't really have to worry about [the victim.]" Ms. Brown testified that her daughter's friend notified her that the victim had been involved in an accident. When recalling what she did after receiving the worrisome phone call, Ms. Brown stated she left her home and arrived at the scene of the crash, and it reminded her of something "like in movies." Ms. Brown described the current state of her life as "miserable." She testified that she "feel[s] like a prisoner" in her own home. She stated, "There's nothing to do that will fix it, but he needs to be sentenced to the max."

The victim's father, Jonathan Brown, also testified. Mr. Brown described his daughter as "beautiful, [an] angel, smart, funny, [a] good friend, [and a] good daughter. She had a lot going for her." He testified that when he arrived at the crash scene, a trooper approached him and his wife and told the two that their daughter was deceased. He recalled seeing the body bag containing his daughter being placed into an ambulance. When questioned about his life since his daughter's death, Mr. Brown testified, "[I]'m just trying to be strong for my kids. I don't want to be here anymore."

Next, the State called Trooper Ricky Alexander, Jr., to the stand. Trooper Alexander testified that he was assigned to the Critical Incident Response Team of the Tennessee Highway Patrol. Trooper Alexander was subsequently tendered without objection as an expert in crash reconstruction. He testified that on the night of October 20, 2020, he was dispatched to a "fatal crash" on Sheegog Lane in Maury County. He said that when he arrived at the scene, he saw a car "overturned on its side" about "487 feet off [of] the roadway."

Trooper Alexander determined that the Defendant was traveling west on Sheegog Lane. Based on this observation, the Defendant would have encountered a "straight stretch" before approaching the only "significant curve on that road." He testified that after documenting the scene, he determined the Defendant's vehicle "exited the left side of the

roadway, basically, straightening out the curve, went over a grass embankment and then went airborne. The vehicle rolled multiple times before coming to a final rest on its passenger side." The trooper stated that through his investigation, he was able to determine that the Defendant's vehicle "was traveling 112 [miles] per hour" two and a half seconds before impact, and "half a second prior to the airbag deployment signal the vehicle slowed down to [ninety-one] miles per hour." Trooper Alexander testified that the speed limit in the area was forty-five miles per hour.

The State then called Michael Barnick, a Columbia police officer, to testify. Officer Barnick testified that on July 19, 2020, he conducted a traffic stop of the Defendant around 7:00 a.m. on James Campbell Boulevard. The officer testified that when he first noticed the Defendant on the morning of July 19, he believed the Defendant to be traveling at about eighty miles per hour. However, using his radar, he determined that the Defendant was traveling ninety-two miles per hour. Officer Barnick cited the Defendant for reckless driving.

The trial court admitted the Defendant's presentence investigation report, and the State called Officer Monique Wells with the Tennessee Department of Correction to testify. She testified that she was responsible for completing the Defendant's admitted presentence investigation report. She stated that the Defendant was given an opportunity to speak on his version of events that occurred on October 20, 2020, but he chose not to. Regarding the Defendant's prior criminal record, Officer Wells testified that the Defendant had been convicted of reckless driving on September 23, 2020. The presentence investigation report identified the Defendant's sentence in that case as being six months suspended on unsupervised probation.

In testifying about the Defendant's social history, Officer Wells stated that the Defendant reported that he started drinking alcohol at the age of seventeen, although he was not a "heavy drinker." He also reported that he began smoking marijuana at eighteen. Additionally, Officer Wells stated that a "Strong-R" risk-and-needs assessment was completed for the Defendant, placing him "at a moderate risk of re-offending."

2. Defendant's Proof

Amanda Patrick, the Defendant's mother, was called on the Defendant's behalf. She testified that "[the Defendant] sustained a traumatic brain injury as a result of the crash." She stated that since the accident, she has "witnessed a lot of depression and anxiety and worry, restlessness" from the Defendant. Ms. Patrick testified that the Defendant's "whole demeanor ha[d] changed" and that he seemed "more like an adult, more responsible" since the accident. She testified that she was unaware of the Defendant's underage drinking or that he had smoked marijuana. Ms. Patrick confirmed that she would continue to support

the Defendant and would go "anywhere" to visit her son if he were sentenced to a period of confinement.

The Defendant also called Justin Findley, his direct supervisor at Lee Company, to testify. Mr. Findley testified that the Defendant always "show[ed] up" to work and that he "work[ed] hard and he's respectful[.]" When contemplating his testimony, Mr. Findley stated, "[T]here's very few [people] that I'd be here to speak on behalf of, and [the Defendant is] one of them." He stated that if the Defendant were placed on probation, he would still have employment with his company. In discussing the possibility of the Defendant's later working with the Lee Company if he were incarcerated, Mr. Findley testified that he would "make every effort to" hire the Defendant.

The Defendant's former neighbor, Norman Bryant, testified that he lived next door to the Defendant for about ten or eleven years. He described the Defendant as "an honest person" and "a person of his word." He testified that the Defendant ha[d] "suffered tremendously emotionally and spiritually" and that the Defendant "couldn't be more remorseful." Mr. Bryant testified, "It's my intention to be there for [the Defendant] and to offer my support in any way that I can."

In his allocution, the Defendant stated:

> My irresponsibility the night of the accident cost the life of a friend and changed many others. I have no explanation as to why I would be this stupid and senseless. I did not recognize the possibility of the outcome in this situation. I have now learned, and I am learning, this the hard way.
>
> I'm more sorry than I know how to express, and I feel the – and I will feel the guilt from this for the rest of my life. I mourn for the family that lost an amazing daughter. The pain I have caused the Brown family and friends will always be in my heart.

3. Parties' Arguments

After the proof, the State argued that it would have proposed a split-confinement sentence had Officer Barnick not stopped the Defendant in July 2020. However, the State argued that a six-year sentence was appropriate because the Defendant had been given a "shot" with probation with his prior reckless driving conviction.

The Defendant urged the court to consider "what he's done with the rest of his life." He stated that he had "led an almost exemplary life," apart from "the reckless driving ticket and then this horrible, horrible crash[.]" He requested that the trial court place him on

judicial diversion. Alternatively, he argued that "there's not any basis to give [him] the maximum [sentence] under his record and the life that he's been leading."

B. SENTENCE AND APPEAL

After the sentencing hearing, the trial court characterized the Defendant on October 20, 2020, as a "missile looking for something to hit, and the Brown family was it." The court determined that the Defendant was given a "second chance" and that he did not "take that chance or that second opportunity" when he was placed on probation for reckless driving on September 23, 2020. With respect to the Defendant's request for judicial diversion, the trial court stated as follows:

> The problem this Court has in making this consideration -- and I'll just be clear upfront, I'm not going to consider diversion. Now, that may be for the legislature to decide this was the right way to do it or not, but this Court cannot and will not do it. And that may be appropriate for the Court of [Criminal] Appeals to determine, but I will not do that.

As to whether it should grant an alternative sentence to incarceration, the trial court considered several factors in reaching its decision. The court stated it considered: the Defendant's presentence investigation report; the Defendant's physical and mental health condition; the Defendant's social history; the facts and circumstances surrounding the offense; the Defendant's prior criminal history; and the Defendant's amenability to rehabilitation. The court found the proof within the record "troubling." The court announced there "wasn't anything to indicate that [the Defendant] couldn't think logically, [or that the Defendant] couldn't make rational decisions." It determined that "there was no rationale for his behavior" on October 20, 2020. The court was also troubled by the Defendant's criminal history, stating his "driving at excessive speeds [was] the exact problem that led to why we are here today."

Regarding the Defendant's amenability to rehabilitation, the trial court stated, "I don't know that this [c]ourt can be convinced at this time that if he's out[,] that this type behavior has been corrected." The trial court found that the Defendant did not abide by the rules of probation by committing the present offenses, and it concluded that the interest of the public would not be protected from the Defendant's possible future conduct. The court found that less restrictive means of punishment were previously unsuccessful because "he was on probation and he continued with this behavior at even a higher level of recklessness, or gross recklessness."

The trial court determined that granting full probation would depreciate the seriousness of the offenses. In addition, the court found that confinement would serve as

an effective deterrent to others likely to commit the same or similar crimes. However, the court determined that the offenses were "particularly enormous, gross, or heinous," stating that "it was enormous in the loss that it implied, and it was gross in what it led to, to drive at that speed on that road at that time with two other lives in the balance."

After its announcement, the trial court imposed a sentence of six years for the vehicular homicide conviction and one year for the reckless endangerment conviction. In addition, the court ordered that the sentences be served concurrently in custody in the Department of Correction.

Following the announcement, the State's counsel revisited the issue of judicial diversion, noting for the trial court that "the appellate courts want to see on the record whether or not you've considered the grounds for diversion and have considered those before denying it rather than just making a blank statement." In response, the trial court stated that its consideration of the probation factors "should [have] and did" set forth its analysis on judicial diversion: "[I]t was my hope that going through the probation considerations would cover that [judicial diversion]. It may have, it may not, but I think it should and did. So that's the finding of this Court."

The judgments of conviction were entered on April 4, 2020, and the Defendant filed a timely notice of appeal on April 25, 2022. On appeal, the Defendant argues that the trial court abused its discretion when it denied his request for judicial diversion and alternative sentencing. For its part, the State asserts that the trial court acted within its discretion in imposing a sentence of confinement for six years and in denying the Defendant judicial diversion. We agree with the State and respectfully affirm the judgments of the trial court.

STANDARDS OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). In this case, the Defendant raises two issues: whether the trial court should have granted him judicial diversion, and, if not, whether the trial court should have imposed an alternative sentence to incarceration.

Both of these issues are related to sentencing. Our 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). This standard of appellate review applies to a trial court's decision to grant or deny judicial diversion. *See State v. King*, 432 S.W.3d 316, 324 (Tenn. 2014). It also applies to a trial court's decision to grant or deny probation or alternative sentencing. *See State v. Caudle*, 388 S.W.3d 273, 279 (Tenn. 2012).

In each of these contexts, however, this deferential standard of review is subject to an important caveat: the trial court must "place on the record any reason for a particular sentence." *Bise*, 380 S.W.3d at 705. In *Bise*, the supreme court recognized that "appellate courts cannot properly review a sentence if the trial court fails to articulate in the record its reasons for imposing the sentence." *Id.* at 706 n.41.

As such, 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 is true for alternative sentencing decisions. *Caudle*, 388 S.W.3d at 279. Of course, trial 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 decisionmaking authority." *Id.*

In this case, the trial court extensively discussed the parties' arguments and why it denied an alternative sentence to incarceration. As such, we grant a presumption of reasonableness to the trial court's decision to deny alternative sentencing.

However, the same is not true with the trial court's decision on judicial diversion. The trial court seems to have denied judicial diversion after considering the alternative sentencing factors, but it did not identify and weigh the relevant factors in making its decision.

It is true that the factors that a trial court considers in deciding issues of judicial diversion and alternative sentencing can overlap substantially. *See State v. Trent*, 533 S.W.3d 282, 291 (Tenn. 2017). However, these concepts and their underlying purposes are distinct, and we have recognized that a trial court should analyze the issues separately and differentiate between judicial diversion and alternative sentencing. *See State v. John Edward Wilson, Jr.*, No. W2019-01550-CCA-R3-CD, 2020 WL 6828966, at *6 (Tenn. Crim. App. Nov. 19, 2020), *no perm. app.* A trial court's failure to place this separate analysis on the record will remove the presumption of reasonableness from any review on appeal. *See id.* at *4 ("If the trial court fails to consider and weigh the factors [in its judicial diversion analysis], the deferential standard of review does not apply.").

The appellate court has two options where the record does not reveal the trial court's findings or reasoning. It may conduct a de novo review to determine whether an adequate basis for the sentencing decision exists. Or, it may remand the case for the trial court to consider the relevant factors in determining an appropriate sentence. *See State v. Noah Cassidy Higgins*, No. M2021-00281-CCA-R3-CD, 2022 WL 1207759, at *6 (Tenn. Crim. App. Apr. 25, 2022) (citing *State v. Pollard*, 432 S.W.3d 851, 864 (Tenn. 2013), *no perm. app.* In choosing between these alternatives, the appellate court may consider "the

adequacy of the record, the fact-intensive nature of the inquiry, and the ability of the court to request supplementation of the record." *King*, 432 S.W.3d at 328.

In this case, the record is well developed and is sufficient for this Court to conduct a de novo review on issues related to judicial diversion. As such, we elect to conduct our own review rather than remand the case for the trial court's further consideration. *See King*, 432 S.W.3d at 328; *State v. Jayme Lynn Shaffer*, No. E2017-02432-CCA-R3-CD, 2019 WL 328482, at *5 (Tenn. Crim. App. Jan. 24, 2019) (conducting de novo review of a trial court's denial of judicial diversion where the record was sufficient to conduct review).

ANALYSIS

A. JUDICIAL DIVERSION

The Defendant first challenges the trial court's denial of his request for judicial diversion, and it requests that this Court grant him judicial diversion on de novo review. For its part, the State argues that, even with a de novo review, the judicial diversion factors weigh against the Defendant. We agree with the State.

1. General Background

Our supreme court has described judicial diversion as a "legislative largess" available to a qualified defendant. *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999). Under the judicial diversion statute, a defendant enters a guilty or nolo contendere plea to an offense that is otherwise eligible for diversion. The plea or verdict is then "held in abeyance and further proceedings are deferred under reasonable conditions during a probationary period established by the trial court." *Rodriguez v. State*, 437 S.W.3d 450, 455 (Tenn. 2014).

If the defendant completes this diversionary period, the trial court will discharge the defendant and dismiss the case without any finding of guilt or the entry of a judgment of guilt. *See, e.g.*, *State v. Judkins*, 185 S.W.3d 422, 425 (Tenn. Crim. App. 2005); Tenn. Code Ann. § 40-35-313(a)(2). The defendant may then seek to have expunged "all 'official records' any recordation relating to 'arrest, indictment or information, trial, finding of guilty, and dismissal and discharge.'" *State v. Parsons*, 437 S.W.3d 457, 495 (Tenn. Crim. App. 2011) (quoting *Schindler*, 986 S.W.2d at 211). This expunction "restore[s] the person, in the contemplation of the law, to the status the person occupied before the arrest or indictment or information." Tenn. Code Ann. § 40-35-313(b).

In this way, 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. *King*, 432 S.W.3d at 324-25. As the supreme court has recognized, "[j]udicial diversion stands in stark contrast to traditional criminal proceedings and by its plain language permits a qualified defendant a second chance without the stigma of a conviction." *Rodriguez*, 437 S.W.3d at 456; *see State v. Johnson*, 980 S.W.2d 410, 413 (Tenn. Crim. App. 1998) (stating that the "purpose of judicial diversion is to avoid placing the stigma and collateral consequences of a criminal conviction on the defendant, in addition to providing the defendant a means to be restored fully and to useful and productive citizenship").

2. Qualified Defendant

The process of considering judicial diversion consists of two steps. First, a trial court must determine whether the defendant is a "qualified defendant" for diversion. Tenn. Code Ann. § 40-35-313(a)(1)(A), (a)(1)(B)(i). A defendant is considered to be a "qualified defendant" when he or she:

> (a) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
>
> (b) Is not seeking deferral of further proceedings for any offense committed by any elected or appointed person in the executive, legislative or judicial branch of the state or any political subdivision of the state, which offense was committed in the person's official capacity or involved the duties of the person's office;
>
> (c) Is not seeking deferral of further proceedings for a sexual offense, a violation of § 39-15-502, § 39-15-508, § 39-15-511, or § 39-15-512, driving under the influence of an intoxicant as prohibited by § 55-10-401, vehicular assault under § 39-13-106 prior to service of the minimum sentence required by § 39-13-106, or a Class A or B felony;
>
> (d) Has not previously been convicted of a felony or a Class A misdemeanor for which a sentence of confinement is served; and
>
> (e) Has not previously been granted judicial diversion under this chapter or pretrial diversion.

Tenn. Code Ann. § 40-35-313(a)(1)(B)(i).

In this case, the Defendant meets the criteria to be considered for judicial diversion. He pled guilty to the offenses for which he is seeking diversion; he is not a public official; and he has not committed an offense involving the duties of a public office. Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(a)-(b).

In addition, the Defendant has not been previously convicted of a disqualifying offense, *id.* § 40-35-313(a)(1)(B)(i)(d), and he has not previously received judicial or pretrial diversion, *id.* § 40-35-313(a)(1)(B)(i)(e). Moreover, as charged here, the offenses of vehicular homicide by recklessness and reckless endangerment are Class C and Class E felonies, respectively, and they are each eligible for judicial diversion based on their offense classifications. *See, e.g.*, *State v. Sherry Ann Claffey*, No. W2016-00356-CCA-R3-CD, 2016 WL 7239018, at *6 (Tenn. Crim. App. Dec. 14, 2016) (granting judicial diversion in vehicular homicide case); *State v. Palikna Tosiwo Tosie*, No. M2019-00811-CCA-R3-CD, 2020 WL 3266569, at *5 (Tenn. Crim. App. June 17, 2020) (recognizing diversion eligibility for felony reckless endangerment), *no perm. app.*

The Defendant reads the trial court's statements on diversion as expressing a view that the offense of vehicular homicide should not be an eligible offense for diversion. We do not read the trial court's statement the same way. But to be clear, "[i]t is within the General Assembly's discretion to determine which offenses it deems ineligible for diversion," and the courts "cannot, and will not, read into the statutes an exclusion not specifically stated therein." *State v. Dycus*, 456 S.W.3d 918, 929 (Tenn. 2015).

In the first step of the judicial diversion analysis, we find that the Defendant is a qualified candidate for judicial diversion pursuant to Tennessee Code Annotated section 40-35-313.

3. *Parker*/*Electroplating* Factors

The second step of the judicial diversion analysis is to determine whether the qualified defendant is a favorable candidate for judicial diversion. Importantly, "[t]here is no presumption that a defendant is a favorable candidate for judicial diversion," *Dycus*, 456 S.W.3d at 929, and one's statutory eligibility does not "constitute entitlement to judicial diversion." *King*, 432 S.W.3d at 323. In other words, satisfaction of the eligibility criteria "simply allows the trial court to grant diversion in appropriate cases." *State v. Michael Andrew Burrows*, No. M2019-00367-CCA-R3-CD, 2019 WL 5618823, at *4 (Tenn. Crim. App. Oct. 31, 2019).

The judicial diversion statute itself does not identify the criteria by which trial courts should consider whether a qualified defendant is a favorable candidate for judicial diversion. However, in two cases, *State v. Parker*, 932 S.W.2d 945 (Tenn. Crim. App. 1996) and *State v. Electroplating, Inc.*, 990 S.W.2d 211 (Tenn. Crim. App. 1998), this

Court identified seven common-law factors that a trial court must weigh and consider in this analysis:

> The criteria that the trial court must consider in deciding whether a qualified accused should be granted judicial diversion includes: (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.

Parker, 932 S.W.2d at 958 (footnote omitted); *Electroplating*, 990 S.W.2d at 229. Our supreme court has affirmed the use of these common-law factors, *see Trent*, 533 S.W.3d at 291; *Dycus*, 456 S.W.3d at 929, and it has required that "the trial court must weigh the factors against each other and place an explanation of its ruling on the record," *King*, 432 S.W.3d at 326. Accordingly, as part of our de novo review, we address each of the *Parker*/*Electroplating* factors in turn.

a. Amenability to Correction

The first factor in the diversion analysis considers "the accused's amenability to correction." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. In analyzing a defendant's amenability to correction, the trial court may consider several factors. For example, a trial court may consider the defendant's acceptance of responsibility and remorse. *State v. Ronald Ailey*, No. E2017-02359-CCA-R3-CD, 2019 WL 3917557, at *22 (Tenn. Crim. App. Aug. 19, 2019). It may also consider a defendant's compliance with release orders, including bail and probation conditions. *See, e.g.*, *State v. Johnthony K. Walker*, No. E2018-00936-CCA-R3-CD, 2019 WL 4447559, at *6 (Tenn. Crim. App. Sept. 17, 2019). The court may consider objective indicators such as the results of a validated risk and needs assessment or a psychosexual evaluation. *See, e.g.*, *State v. Willard Hampton*, W2018-00623-CCA-R3-CD, 2019 WL 1167807, at *16 (Tenn. Crim. App. Mar. 12, 2019); *State v. Rashida Tyquisha Groomster*, No. M2018-00579-CCA-R3-CD, 2019 WL 4132686, at *8 (Tenn. Crim. App. Aug. 30, 2019). And, it may consider whether the defendant has sought treatment for a substance use addiction. *See State v. Martin Hubert White*, No. M2021-00118-CCA-R3-CD, 2022 WL 570136, at *5 (Tenn. Crim. App. Feb. 25, 2022), *no perm. app.*

Some of these factors are relevant in this case. Here, the Defendant addressed the court during his allocution, stating,

> My irresponsibility the night of the accident cost the life of a friend and changed many others. I have no explanation as to why I would be this stupid and senseless. I did not recognize the possibility of the outcome in this situation. I have now learned, and I am learning, this the hard way.
>
> I'm more sorry than I know how to express, and I feel the – and I will feel the guilt from this for the rest of my life. I mourn for the family that lost an amazing daughter. The pain I have caused the Brown family and friends will always be in my heart.

The trial court did not discredit this allocution, and, as such, we give the Defendant the benefit of the doubt that his words during his allocution were genuinely remorseful. Thus, while this factor weighs in favor of finding that the Defendant is amenable to correction, other factors do not.

For example, the Defendant has been previously unable to abide by probation conditions while serving an alternative sentence. The Defendant was convicted of reckless driving in September 2020, and he was placed on unsupervised probation for six months. Less than a month later, the Defendant was involved in the crash that gave rise to this case, showing that he was unable or unwilling to obey the law and the court's orders. *Higgins*, 2022 WL 1207759, at *5. This circumstance weighs strongly against his argument that he is amenable to correction.

In addition, the results of the Defendant's risk and needs assessment do not comfortably support a finding that the Defendant is amenable to correction. Before the hearing, the Department of Correction conducted a risk and needs assessment as part of the presentence investigation. This assessment found that the Defendant was at a "moderate" risk of re-offending "when compared to those with a similar history of offending, absent any intervention." Given the Defendant's history of reckless driving and substance use, we find that the Defendant has a likelihood to re-offend.

The Defendant has accepted responsibility and shown remorse, but other factors show a lesser amenability to correction. We, therefore, find that this factor weighs against granting judicial diversion to the Defendant.

b. Circumstances of the Offenses

The second factor in the diversion analysis relates to "the circumstances of the offense." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. This Court has determined that "the circumstances of the offense may alone serve as the basis for denial" of judicial diversion. *State v. Kyte*, 874 S.W.2d 631, 634 (Tenn. Crim. App. 1993); *see*

State v. Conner Lewis Bell, No. E2021-01120-CCA-R3-CD, 2022 WL 3714613, at *5 (Tenn. Crim. App. Aug. 29, 2022), *perm. app. denied* (Tenn. Jan. 11, 2023).

As we noted earlier, where the legislature has not excluded from diversion eligibility an offense that involves a death, a trial court may not deny diversion simply because a death has occurred. *State v. Teresa Turner*, No. M2013-00827-CCA-R3-CD, 2014 WL 310388, at *6 (Tenn. Crim. App. Jan. 29, 2014). However, the trial court may consider and weigh the "circumstances leading to death." *State v. Destiny White*, No. W2017-01649-CCA-R3-CD, 2018 WL 3239629, at *4 (Tenn. Crim. App. July 3, 2018); *State v. Jared Booth Spang*, No. M2014-00468-CCA-R3-CD, 2015 WL 510921, at *4 (Tenn. Crim. App. Feb. 6, 2015). A trial court may also consider "a victim impact statement as it reflects on the circumstances of the offense." *State v. Edward Earl Killgo*, No. E2020-00996-CCA-R3-CD, 2022 WL 2286935, at *8 (Tenn. Crim. App. June 24, 2022), *no perm. app.*

At the time of the crash, the Defendant was traveling with two other passengers in his car. As part of law enforcement's investigation, Trooper Thompson interviewed the second passenger in the Defendant's vehicle, Mr. Blalock. In this statement, Mr. Blalock said that he and the Defendant had driven "at a high rate of speed multiple times on Sheegog road prior" to October 10, 2020. On the day of the crash, however, Mr. Blalock said that the Defendant was traveling at "100 mph" and that Defendant knew that "a curve and ditch [were] coming up." The posted speed limit on Sheegog Lane was forty-five miles per hour, and the crash occurred at night in a rural area that was not well-lit.

Mr. Blalock's observation of the speed was consistent with the other aspects of the investigation. Trooper Alexander testified that he analyzed the crash data from the Defendant's vehicle. The data showed that the car was traveling at 112 miles per hour some two seconds before the crash and was still traveling ninety-one miles per hour at the time of the crash. The Defendant's speed was such that the car came to rest some 487 feet off the roadway—significantly longer than a football field away—after rolling "multiple times before coming to final rest on its passenger side."

With two passengers in his car, the Defendant drove more than twice the posted speed limit on a two-lane road at night and in an area that was not well-lit. Although the Defendant was actually aware from previous travels that the rural road contained a curve, he nevertheless careened down the road apparently without regard for the lives and safety of his passengers or any other possible drivers on Sheegog Lane. The circumstances of the offenses weigh heavily against the request for judicial diversion. *Cf. State v. William Blake Kobeck*, No. W2018-02234-CCA-R3-CD, 2019 WL 5448701, at *2 (Tenn. Crim. App. Oct. 23, 2019) (affirming denial of judicial diversion, in part, when the defendant was traveling 126 miles per hour on a two-lane road at night).

c. Criminal Record

The third factor in the diversion analysis examines "the accused's criminal record." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. In weighing this factor, a trial court may consider convictions and unconvicted criminal behavior, such as unlawful substance use. *See State v. Demarius Jerome Pitts*, No. M2019-00866-CCA-R3-CD, 2020 WL 4577194, at *4 (Tenn. Crim. App. Aug. 10, 2020), *no perm. app*. The trial court may also consider the proven facts from a charge that was otherwise dismissed. *See State v. Henri Brooks*, No. W2015-00833-CCA-R3-CD, 2017 WL 758519, at *13 (Tenn. Crim. App. Feb. 27, 2017).

The Defendant had a prior criminal record consisting only of a single conviction for reckless driving. Although minimal, this criminal record is significant for a few reasons. First, the Defendant's prior conviction was of the same behavior that led to the current offenses before this Court. *See Higgins*, 2022 WL 1207759, at *5. In addition, the previous conviction occurred only a month before the instant crimes, and the new crimes represent an increased risk of harm to others. In both cases, the Defendant's criminal conduct presented a risk of harm to himself and other possible drivers on the road. In October, though, he also actively endangered the lives of his two passengers. It is clear that the law, its enforcement, and the trial court's probationary orders had little, if any, effect on the Defendant's conduct.

In addition, the presentence investigation report indicates that the Defendant unlawfully smoked marijuana for a year before the crash and that he engaged in underage drinking of alcohol. Indeed, there is an indication that the Defendant had consumed some alcohol on the evening of the crash, though the State did not present proof that alcohol played a part in the crash itself.

Although a minimal criminal record may often favor diversion, it does not do so here. On the contrary, we find that the Defendant's criminal history weighs heavily against a grant of judicial diversion.

d. Social History

The fourth factor in the diversion analysis considers "the accused's social history." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. In weighing this factor, trial courts may consider, among other things, the defendant's age, general reputation, education, employment, home environment, community involvement, and family relationships and responsibilities. *Id.*; *King*, 432 S.W.3d at 328; *State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). The law generally views these considerations as a proxy for stability to assess whether effective rehabilitation is likely. Apart from these

considerations, though, these factors should not be used to favor those who may come from certain backgrounds or to condemn those who may not. Tenn. Code Ann. § 40-35-103(3).

In this case, the Defendant was nineteen years old at the time of the crimes. He is a high school graduate and has been consistently employed since 2017. Based on our review of the record, the Defendant has the support of his family and his former neighbor, Mr. Bryant. In addition, the Defendant's current employer supports him, and the employer testified that there were "very few that I'd be here to speak on behalf of," but the Defendant was one of them. Overall, we find that the Defendant's social history weighs in favor of granting diversion, but its weight is insignificant in the overall context of the case.

e. Physical and Mental Health

The fifth factor in the diversion analysis examines "the accused's physical and mental health." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. This factor weighs neutrally where nothing in the record "reflects anything of note regarding the Defendant's mental and physical health." *Dycus*, 456 S.W.3d at 931; *King*, 432 S.W.3d at 328. It also may weigh neutrally where no physical or mental health condition prevents the defendant from complying with probation conditions. *See State v. Dylan Ward Hutchins*, No. E2016-00187-CCA-R3-CD, 2016 WL 7378803, at *5 (Tenn. Crim. App. Dec. 20, 2016).

In this case, the record shows that the Defendant was in good physical and mental health. Although the Defendant's mother testified that the Defendant was experiencing depression and anxiety since the crash, the Defendant did not report any mental health issues or diagnoses to Officer Wells during his presentence investigation. He told Officer Wells he had never sought treatment from a mental health professional. The Department's risk and needs assessment scored the Defendant "low" for any needed intervention for mental health issues.

In the presentence investigation report, the Defendant identified that he suffers from a "brain injury" due to the crash, and he said that the symptoms manifest in occasional memory loss and headaches. However, the record does not support a finding that the crash left the Defendant incapable of performing day-to-day tasks, and we note that he has been gainfully employed as a plumber's apprentice since the crash.

The Defendant has the demonstrated physical and mental ability to comply with the conditions of probation and sentencing. As such, we find this factor weighs neutrally in the analysis.

f. Deterrence

The sixth factor in the diversion analysis examines "the deterrence value to the accused as well as others." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. Although this factor echoes the similar consideration analyzed in an alternative sentencing context, Tenn. Code Ann. § 40-35-103(1)(B), our supreme court has not addressed the extent to which its decision in *State v. Hooper*, 29 S.W.3d 1, 12 (Tenn. 2000), applies in a diversion context. However, we have recognized that a trial court is not required to consider the *Hooper* factors where other factors also support denying judicial diversion. *See, e.g.*, *State v. Garet Myers*, No. E2021-00841-CCA-R3-CD, 2022 WL 2903266 (Tenn. Crim. App. July 22, 2022) ("The court here likewise relied on the circumstances of the offense as well as the need for deterrence in its decision to deny diversion, and accordingly, *Hooper* does not apply."), *no perm. app.*; *State v. Joshua Michael Ward*, No. E2018-01781-CCA-R3-CD, 2019 WL 3244991, at *7 (Tenn. Crim. App. July 19, 2019).

The Defendant argues that the State presented no proof at the sentencing hearing that denying the Defendant judicial diversion "would provide an effective deterrent to others likely to commit similar offenses." Respectfully, the Defendant's argument focuses only on general deterrence, or deterrence to others. However, in the diversion context, concepts of specific deterrence, or "the deterrence value to the accused," are at least of equal importance. *See Electroplating*, 990 S.W.2d at 229 (examining "the deterrence value to the accused"); *cf. also Hooper*, 29 S.W.3d at 12 (stating that "[a]lthough the [Sentencing Act] speaks in terms of general deterrence, it has been recognized that general deterrence is possible only after specific deterrence has first been achieved").

Moreover, *Hooper* recognized some attributes of deterrence that may be present in this case. For example, *Hooper* expressly recognized that "[a]ctions that are the result of intentional, knowing, or *reckless* behavior . . . are probably more deterrable than those which are not the result of a conscious effort to break the law." *Hooper*, 29 S.W.3d at 11 (emphasis added). *Hooper* also observed that deterrence was "particularly suited" for cases in which "the defendant has previously engaged in criminal conduct of the same type as the offense in question." *Id.* at 12. In that circumstance, "[r]epeated occurrences of the same type of criminal conduct by a defendant generally warrant a more emphatic reminder that criminal actions carry consequences." *Id.*

Here, the Defendant has a history of driving recklessly at excessively high speeds. The Defendant's previous conviction for reckless driving less than a month before this crash had seemingly no deterrent effect on his future decisions and conduct. We conclude that the record warrants the "more emphatic reminder" to the Defendant that his reckless actions carry consequences. As such, we find that this factor weighs significantly against granting judicial diversion.

g. The Interests of the Public and the Defendant

The final factor in the diversion analysis examines whether judicial diversion will serve "the interests of the public as well as the accused." *Parker*, 932 S.W.2d at 958; *Electroplating*, 990 S.W.2d at 229. This factor encompasses a wide variety of considerations. For example, a trial court may consider diversion as advancing the interests of the accused when a felony conviction may impair future employment, *see State v. Rad Mandela Kellar*, No. E2018-00313-CCA-R3-CD, 2019 WL 1493641, at *4 (Tenn. Crim. App. Apr. 3, 2019), or when necessary to avoid the stigma of a felony conviction, *see State v. Jashun Yance Robertson*, No. W2020-00439-CCA-R3-CD, 2020 WL 6821702, at *5 (Tenn. Crim. App. Nov. 20, 2020), *no perm. app.* However, where a defendant has previous misdemeanor convictions, but now has committed felony offenses, the defendant's interest in avoiding further convictions may be lessened. *See State v. Aaron Long*, No. W2018-01387-CCA-R3-CD, 2019 WL 1552577, at *4 (Tenn. Crim. App. Apr. 9, 2019).

On the other hand, the interests of the public may not be served where granting diversion would depreciate the seriousness of the offense, *see Ailey*, 2019 WL 3917557, at *22, or where the collateral consequences of a conviction would protect the public, *see, e.g.*, *State v. Bragg Lampkin*, No. W2019-00885-CCA-R3-CD, 2020 WL 1875238, at *4 (Tenn. Crim. App. Apr. 15, 2020), *no perm. app.* We have also considered the nature of the victim's injuries in this category, though it could also be weighed as part of the circumstances of the offense. *See White*, 2022 WL 570136, at *5.

As virtually all defendants would, the Defendant here would benefit from receiving diversion in that he would avoid felony convictions. Beyond this benefit, however, the record does not show that the felony convictions would prevent the Defendant from obtaining employment in his chosen career as a journeyman plumber. In fact, Mr. Findley testified that he would do whatever he could to assist the Defendant in returning to his position if he were sentenced to a period of confinement. While a felony conviction may affect future employment in many cases, nothing in the record shows this concern to carry significant weight here.

On the other hand, granting judicial diversion would depreciate the seriousness of the offenses. The offenses involved excessive speed of over 100 miles per hour and more than two times the applicable speed limit. The Defendant engaged in the conduct despite being on probation from a similar conviction less than a month before. The offenses occurred at night on a rural road familiar to the Defendant, and the offenses involved multiple victims.

In addition, the statements from Jillian Brown's family contained as part of the presentence investigation report show the terrible impact of the Defendant's actions on

these innocent third parties. In this opinion, we cannot adequately express the extent of the family's loss. However, Ms. Brown's mother described her daughter's loss as being "the worst ongoing pain ever," including feelings of "loneliness, embarrassment, feeling of abandonment" and resentment. Her father noted the impact of his daughter's loss on his health, on the family business at which Mr. Brown worked, and on her brother and sister. While the loss of a family member is always terrible, the loss appears to be crippling in this case.

We find the public's interests will not be served if the Defendant is granted judicial diversion. Accordingly, this factor weighs against the grant of diversion.

4. Conclusion

On our de novo review, we find that several factors weigh against granting judicial diversion, including the Defendant's amenability to correction, the circumstances of the offense, his criminal history, the deterrent value to him and others, and the interests of the public. We also find that while the Defendant's social history weighs in favor of granting judicial diversion, the remaining factors weigh neutrally in the analysis. Finally, we find that the factors weighing against diversion significantly outweigh all other factors. As such, we respectfully affirm the trial court's denial of judicial diversion.

B. ALTERNATIVE SENTENCING

The Defendant next argues that the trial court abused its discretion when it denied his request for an alternative sentence to incarceration. Asserting that he is a "prime candidate" for alternative sentencing, the Defendant asks this Court to fully suspend the trial court's imposed sentence and place him on supervised probation. For its part, the State argues that the trial court properly weighed the applicable considerations to the Defendant's case and appropriately found that the Defendant was not a suitable candidate for alternative sentencing. We agree with the State.

Of course, "[a]ny sentence that does not involve complete confinement is an alternative sentence." *State v. Kellye Rhea Crabtree*, No. M2021-01154-CCA-R3-CD, 2023 WL 2133831, at *19 (Tenn. Crim. App. Feb. 21, 2023) (citation omitted). "There is no bright line rule for determining when probation should be granted," and "[e]ach sentencing decision necessarily involves a case-by-case analysis." *State v. Bingham*, 910 S.W.2d 448, 456 (Tenn. Crim. App. 1995).

"The Sentencing Act encourages trial courts to utilize alternative sentences." *Ray v. Madison Cnty.*, 536 S.W.3d 824, 833 (Tenn. 2017). Nevertheless, pursuant to Tennessee

Code Annotated section 40-35-103(1), sentences involving confinement may be ordered if they are based on one or more of the following considerations:

(A) whether "[c]onfinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct";

(B) whether "[c]onfinement is necessary to avoid depreciating the seriousness of the offense[,] or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses"; or

(C) whether "[m]easures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant."

Our supreme court has also recognized that "'[t]he guidelines applicable in determining whether to impose probation are the same factors applicable in determining whether to impose judicial diversion.'" *Trent*, 533 S.W.3d at 291 (quoting *State v. Jeremy Brandon Scott*, No. M2010-01632-CCA-R3-CD, 2011 WL 5043318, at *11 (Tenn. Crim. App. Oct. 24, 2011)).

The trial court imposed an effective sentence of six years, and it ordered that the sentence be served in confinement in the Department of Correction. In so doing, the trial court considered the Defendant's presentence report and his physical and mental health. In addition, it considered the facts and circumstances surrounding the offense and the nature of the criminal conduct involved in the case. Finally, it also considered the Defendant's prior criminal history and potential for rehabilitation, including his failure to abide by probation conditions.

The record shows that the Defendant could be considered for probation because his crimes were eligible for alternative sentencing and the trial court imposed a sentence for each crime of ten years or less. Tenn. Code Ann. § 40-35-303(a). The trial court also addressed the relevant statutory factors in deciding to impose a sentence of confinement. For example, the trial court considered that measures less restrictive than confinement had been recently applied unsuccessfully. Tenn. Code Ann. § 40-35-103(1)(C). As the trial court found, "He was on probation, and he continued with this behavior at even a higher level of recklessness, or gross recklessness." The court also found that the prior conviction for reckless driving and probationary term reflected poorly on the Defendant's potential for rehabilitation, stating that "there was a second chance for [the Defendant], and he did not take that chance or that second opportunity."

The trial court also found that an alternative sentence would unduly depreciate the seriousness of the offense and that confinement "should" provide an effective deterrent to

others. *Id.* Although the trial court did not expressly identify the reasons for this conclusion, the trial court emphasized the excessive speed, the prior conviction for reckless driving and probation status, the endangering of two lives, and the increasingly reckless conduct in the Defendant's recent driving behavior. As the trial court observed,

> I can't say that [the crime] was reckless because it far exceeded recklessness. [Defendant], at that point in his life, was a missile looking for something to hit, and the Brown family was it. That's where it came to a stop, 487 feet from Sheegog Road. And they have to pay the price for it.

Having thoroughly reviewed the record in this case, we agree that the trial court considered the relevant statutory considerations in weighing whether to impose an alternative sentence. We, therefore, hold that the court acted within its discretion in ordering a sentence of full confinement.

CONCLUSION

In summary, we affirm the trial court's denial of the Defendant's request that he be placed on judicial diversion. We also hold that the trial court acted within its discretion when it imposed an effective sentence of six years in confinement. Accordingly, we respectfully affirm the judgments of the trial court.

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TOM GREENHOLTZ, JUDGE