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

**STATE OF TENNESSEE v. CLIFTON WEATHERS HORN, II**

**Appeal from the Circuit Court for Robertson County**
**No. 74CC2-2019-CR-188 William R. Goodman, III, Judge**

---

**No. M2022-00615-CCA-R3-CD**

---

Defendant, Clifton Weathers Horn, II, pleaded guilty to eight counts of unlawful photography in violation of privacy (with dissemination), one count of attempted tampering with evidence, and fourteen counts of facilitation of sexual exploitation of a minor. Following a sentencing hearing, the trial court sentenced him to a term of four years in the Department of Correction, followed by one year of supervised probation. On appeal, Defendant argues the trial court erred in denying judicial diversion or other forms of full alternative sentencing. After review, we affirm the judgments of the trial court.

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

MATTHEW J. WILSON, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and KYLE A. HIXSON, J., joined.

Peter J. Strianse, Nashville, Tennessee, for the appellant, Clifton Weathers Horn, II.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Robert Nash, District Attorney General; and Jason White and Kayla Browning, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

### I. Procedural History

On March 20, 2019, the Robertson County Grand Jury indicted Defendant, formerly a teacher and head coach of the girls' volleyball team at East Robertson High School, on eight counts of attempted especially aggravated sexual exploitation of a minor, one count

of unlawful photography in violation of privacy, seven counts of attempted unlawful photography in violation of privacy, fifty counts of sexual exploitation of a minor, and one count of tampering with evidence. The sexual exploitation of a minor counts related to images of child pornography found on Defendant's computer, while the other offenses resulted from Defendant's covert recording of members of his volleyball team inside their locker room over a two-year period (and his attempt to destroy the resulting videos).

On November 1, 2021, Defendant entered guilty pleas pursuant to a plea agreement.[1] In the eight counts charging attempted especially aggravated sexual exploitation of a minor, Defendant pleaded guilty to eight counts of the amended offense of unlawful photography in violation of privacy, with dissemination, a Class E felony. *See* Tenn. Code Ann. § 39-13-605(d)(2). In the count charging Defendant with tampering with evidence, he pleaded guilty to the amended offense of attempted tampering with evidence, a Class D felony. *See* Tenn. Code Ann. §§ 39-16-503 (tampering with evidence), -12-101 (attempt). In the sexual exploitation of a minor counts, Defendant pleaded guilty to fourteen counts of the amended offense of facilitation of sexual exploitation of a minor, a Class E felony. *See* Tenn. Code Ann. §§ 39-17-1003 (sexual exploitation of a minor), -11-403 (facilitation of a felony). All other counts were dismissed.

Per the terms of the plea agreement, Defendant agreed to be sentenced to two years for the attempted tampering with evidence conviction, and the trial court would set the lengths of the sentences for the other offenses. The sentences for the facilitation of sexual exploitation of a minor counts (relating to child pornography found on Defendant's computer) would run concurrently with each other, and the sentences for the unlawful photography counts (relating to video recorded at East Robertson High School) would also run concurrently with each other. However, the total effective sentence for the child pornography-related counts, the total effective sentence for the video recording-related counts, and the two-year sentence for attempted tampering evidence would run consecutively. The resulting total sentence would be between four to six years as a Range I, standard offender,[2] with the trial court determining the manner of Defendant's sentences. Defendant also was required to register as a sex offender.

The trial court held the sentencing hearing April 8, 2022.

[1] The transcript of the plea hearing was not submitted as part of the appellate record.

[2] Defendant had no criminal history before committing the offenses in this case.

## II. Sentencing Hearing

### A. Evidence Presented

One of Defendant's former volleyball players, referenced here as "Victim A" to protect her privacy, testified that on September 27, 2018, Defendant drove her and two other players back to East Robertson High School after a volleyball match in Hendersonville. Upon returning to the school, Defendant retrieved a bag from the trunk of his car and then unlocked a gym door "where he could get in and go inside but [the players] could not." Victim A described the bag as an East Robertson volleyball bag, with team and manufacturer logos and "a specific slot in the front with mesh for our shoes to go in." About five minutes later, Defendant exited the gym and Victim A and another player went inside. Victim A went to use the bathroom inside the volleyball team's locker room inside the gym. The toilet inside the locker room did not have a door in front of it. Victim A testified that while sitting on the toilet, she saw a volleyball bag, which she suspected to be Defendant's, approximately five to ten feet away from her. Victim A testified she saw "something like a phone or an [iPad] or . . . some sort of electronic device in the front pocket where the mesh was with a small specific hole cut out where the camera could see perfectly through." Victim A recalled seeing this volleyball bag in the locker room before, specifically on a particular bench, and she acknowledged hearing rumors about the bag being used to record players in the locker room. This was the first time Victim A had seen the bag in the bathroom, however.

After Victim A finished using the locker room, she and her teammate grabbed the bag and saw a cellular phone actively recording. The teammates stopped the recording and watched the resulting video; Victim A testified "we noticed that it was our coach putting it specifically in that spot, right directly in front of the toilet." Victim A used her cell phone to record the video from the phone they had found in the volleyball bag. While she was recording, Defendant was "knocking on the bathroom door, telling us to hurry up." The teammates looked through some of the other pictures on the phone, and upon seeing a picture Defendant had sent the team earlier that day in a volleyball team group chat, the teammates had no doubt the phone belonged to Defendant. After a while, the teammates left the locker room. Victim A was "shaky and scared," and all she "wanted to do was just run away from the school as fast as [she] could." The teammates' respective mothers came to pick them up, and when Victim A saw her mother, she told her what she had seen.

Victim A had trusted Defendant before this incident and had viewed him as a type of father figure. After news of this incident broke, Victim A began to hear rumors that she was sleeping with Defendant to help her grades or secure more playing time. Eventually, Victim A "didn't feel like [she] had anyone, including teachers or friends," so she transferred to another school, but it was not any easier. She then transferred to a third high

school. She had been seeing a counselor since this incident, and she testified that she constantly "feel[s] like somebody has their phone up at me . . . when I am in a big crowd and I see phones, just people taking pictures and pictures, it will send me into a panic attack and I will start hyperventilating." Victim A testified she suffered from depression and anxiety since the incident. She also said that the incident had affected her relationships with men negatively and claimed the "stigma" from this incident led teams at her subsequent schools to cut her from sports teams.

Another former East Robertson volleyball player, referenced here as "Victim B," testified that in fall 2016, Defendant removed her from class several times so she could try on potential new uniforms for the team. These episodes occurred in what Victim B described as Defendant's "old" portable classroom building, which had a bathroom. She testified, "[e]ach time that I went and changed, there was a backpack in the room. I had to go twice in one day one time and the bag was moved around in the bathroom two different spots, like two different angles." Victim B said this backpack was an East Robertson volleyball team bag, with a mesh portion in front. She acknowledged she saw Defendant with a similar bag frequently. Victim B claimed Defendant had her try on at least ten different volleyball uniforms. This was odd and frustrating to her, given that Defendant knew her size and which materials would be sufficient for a volleyball uniform.

Victim B also recalled seeing the volleyball bag in the team's locker room on one occasion in spring 2017 while she and other teammates changed clothes. She said that on this occasion, Defendant was inside a storage room inside the locker room, which Victim B found "strange" and "uncomfortable," and "really weird." She also described another incident in which she and a teammate tried on new uniforms in the team locker room, where they saw Defendant's volleyball bag. These incidents led Victim B to stop playing volleyball because she "kind of lost . . . interest in playing volleyball, the feeling that [she] got from it[.]" The incidents made her feel "[d]isgusted, very disgusted."

Victim B testified that Defendant's actions had made her lose confidence in herself and affected her relationships with others. She said that these incidents had made her question her trust in others, even her family and close friends. After this, Victim B had trouble trusting male "family friends that have been around . . . since [she] was little[.]"

Detective Terry Morris with the Robertson County Sheriff's Office ("RCSO") stated that on the evening of September 27, 2018, fellow RCSO Detective Jake Ryan[3] met with Victim A and her family at their home. According to Det. Morris, Det. Ryan viewed the video Victim A had recorded from Defendant's phone. The two detectives then met at

[3] Detective Ryan was a Sergeant in September 2018, but we will reference him as "Detective Ryan," the rank which he held as of the sentencing hearing.

East Robertson High School, and Det. Ryan described the video to Det. Morris. When the detectives searched the volleyball locker room, they found Defendant's volleyball bag in the locker room storage room described in Victim B's testimony. Det. Morris' description of the bag was consistent with the descriptions provided by the testifying victims, and his description of holes in the bag was consistent with Victim A's description.

Det. Morris then executed a search warrant of Defendant's classroom and house, which included a search of Defendant's electronic devices. On Defendant's iPhone 7, the detective found two videos in which Defendant set up the device to record inside the locker room but which did not depict any of Defendant's players. Det. Morris determined one video was taken November 9, 2016, and the other video was taken August 1, 2017. The detective also saw evidence of Defendant's deleting a file on his iPhone 7 which contained about 700 images and videos. The sheriff's office sent the phone to the United States Department of Homeland Security in an attempt to recover the lost files, but this attempt proved unsuccessful. Additionally, investigators found images of child pornography on a computer in Defendant's home. Det. Morris testified the images had been on Defendant's computer since 2012. The images did not depict students from Defendant's school.

As part of his investigation, Det. Morris reviewed three previous criminal cases in which persons affiliated with East Robertson High School had been convicted of sex-related offenses. One case was that of Charles Abernathy, a school resource officer who committed his offenses between August and December 2016; another involved Patrick Pendleton, a school bus driver; and the third involved Jennifer Turns, a teacher at East Robertson. The State entered the indictments and judgments of conviction from these cases into the record, as well as records in similar cases from Sumner County, Tennessee, and Logan County, Kentucky (which shares a border with Robertson County). On cross examination, the detective acknowledged these cases all involved "active touching," which Defendant's case did not, and none of the referenced cases involved unlawful photography or evidence tampering.

Mary Cook, the East Robertson High School principal, testified she had known Defendant since she began working at the school in 2010. She was principal at the school in 2016 when Mr. Abernathy, the school resource officer, had a sexual relationship with a student. In response to this incident, teachers, staff, and administrators underwent training addressing such relationships, and administrators within Robertson County "talked specifically about cell phones and text messaging and social media[.]"

Ms. Cook denied having any idea Defendant was videotaping players in the locker room. She said she was "disgusted that somebody that the school placed in the position of an authoritative figure for these girls" had created a sense of mistrust throughout the school and Robertson County. Ms. Cook added that she was "disgusted that [Defendant's ex-

players'] lives will never be the same. They will never trust again. I don't blame them." She also said her school's volleyball program, which had been successful when coached by Defendant, was struggling, having gone through three head coaches in a four-year stretch. In short, Ms. Cook said Defendant's actions "tore my school apart."

Another of Defendant's victims read a victim impact statement in which she bluntly said Defendant "ruined my last year of high school." She recounted the many ways in which Defendant's actions affected her negatively and said that she suffered an ongoing "deep amount of pain and trauma[.]"

Amanda Horn, Defendant's mother, testified that after these offenses, Defendant, his wife, and their young child moved into her home before they built a separate home on Ms. Horn's property. She recalled that Defendant was active in his church growing up, and that after the incident, he became active in the church again. Ms. Horn testified that Defendant's church had been very supportive of him, and she acknowledged that about eleven members of the church had submitted letters asking for leniency for Defendant.

Ms. Horn testified she believed her son had accepted responsibility for his actions. She said that Defendant "would never have intentionally hurt anybody and I don't think that he thought . . . that he was hurting anybody." Ms. Horn testified Defendant had maintained stable employment following these offenses, as church members had helped him find another job. She testified that her son had already lost a lot as a result of his actions, noting that Defendant did not go out with friends and was unable to attend local sporting events. Essentially, Defendant's mother testified, Defendant "goes to work, he comes home, he works on his home . . . and spends that time with his wife and daughter." Ms. Horn acknowledged Defendant committed the offenses involving his volleyball team after his daughter was born and that he had not sought help for his issues until after he was arrested in this case.

Defendant's mother acknowledged Defendant was required to register as a sex offender. She observed that a professionally-printed banner outside the courthouse the day of the sentencing hearing featured Defendant's face and the phrase "sex offender registry."

Between 2000 and 2006, James Hewgley, a retired United Methodist Church elder living in Owensboro, Kentucky, had been a pastor at the church Defendant attended. At the sentencing hearing, Mr. Hewgley testified he knew Defendant before his time as a pastor; Mr. Hewgley had met Defendant while Mr. Hewgley served as a youth pastor. Mr. Hewgley "never had any disciplinary problems with [Defendant]," and Mr. Hewgley testified Defendant may have been the "most exemplary" youth Mr. Hewgley had encountered in the ministry.

Mr. Hewgley testified that Defendant sought him out for counseling after Defendant was arrested in this case. Mr. Hewgley testified Defendant "completely admitted everything. He said he didn't want to fight it[.]" Defendant purportedly acknowledged a pornography addiction that had begun in college and admitted he wanted professional help. Like Defendant's mother, Mr. Hewgley acknowledged Defendant had not come to him seeking help until after Defendant was arrested.

Mr. Hewgley asked the Court to impose an alternative sentence, stating, "[W]hat is . . . putting him in jail going to do to solve [the victims'] situation? What's it going to do to help him?" The witness said Defendant was "in a community with a church that supports him, neighbors around him to support him, his family. He's got a wife, a little girl. They need his support." Given Defendant's support systems, Mr. Hewgley asserted Defendant would be able to abide by the terms of an alternative sentence; specifically, he said, "I don't think [Defendant] would ever violate it again. I think it broke him."

Defendant offered an unsworn allocution in which he stated he was "sorry, deeply remorseful, [and] ashamed" of his actions. He "accept[ed] full responsibility for [his] actions," which he called "highly inappropriate and indefensible." He acknowledged the "immeasurable pain and disappointment" he had caused the victims and others in the community, and he expressed "hope that everyone involved can begin to move on as they heal from this moment."

Defendant presented twenty-one letters of support from persons who knew Defendant, pleading for leniency. The Strong-R risk assessment completed as part of the presentence report placed Defendant at a "low" risk level. Before the sentencing hearing, Defendant also underwent a psychosexual evaluation (or as the examiner labeled it, an "Empirical Guided Actuarial Risk Assessment"); the report from this evaluation was also admitted into evidence.

As part of the psychosexual evaluation, Defendant completed several sex offender risk assessments. Some of these assessments labeled Defendant as a "low" risk to reoffend, but the evaluation also raised several areas of concern. For example, Defendant's score in the STABLE-2007 assessment, which according to the report "measures dynamic and empirical risk factors that are routinely addressed as part of correctional rehabilitation (i.e., criminogenic needs) for adult males convicted of sexual offen[s]es against a child or non-consenting adult," placed Defendant "in the Moderate Category for another offense."

The psychosexual examiner's report also stated that in reviewing Defendant's "dynamic risk factors," which the examiner described as "offender characteristics that are related to risk" such as "antisocial attitudes, low self-control, and poor social relationships," Defendant "exhibit[ed] some dynamic risk factors associated with

recidivism for another sex offense. He may have an Emotional Identification with Children, he admits to having sexual interests in minor females, and he is Impulsive." The examiner's report also stated Defendant "admit[ted] to being sexually attracted to female children. He said the age group he prefers is [fifteen] years and up." However, in another assessment which measured Defendant's "visual reaction time" when being shown 160 different images of males and females in varying age groups, Defendant's "greatest sexual interest [was] in females ages [six] to adult." In another portion of the report, the examiner observed that Defendant "admitted his sex offense but had some minimizing."

B. Arguments and Sentencing

Defense counsel argued for alternative sentencing based on several factors. Counsel noted Defendant's strong ties to the community, based on the twenty-one letters of support referenced above and Defendant's living next door to his parents on their property. Defense counsel emphasized that Defendant was active in his church and maintained stable employment since losing his job after his arrest. Defense counsel noted that Defendant was eligible for judicial diversion and was amenable to supervision and correction. Counsel noted that were the court to impose an alternative sentence, Defendant

> would be under those very burdensome, onerous, specialized sexual offender probation conditions for the full term of his probation. He would have to be undergoing sex offender treatment. He is already on the sex offender registry and will be there for at least ten years beyond whatever sentence the [c]ourt imposes. So, I don't know how anybody could view this from the outside and think that there would be no deterrent effect to all the harsh collateral consequences that flow from having this type of alternative sentence.

The trial court sentenced Defendant to two years on each of the unlawful photography counts; per the terms of the plea agreement, these sentences were concurrent with each other. The court sentenced Defendant to one year on each of the facilitation of aggravated exploitation of a minor count; per the terms of the plea agreement, these sentences were concurrent with each other. The trial court denied Defendant's request for judicial diversion and ordered the two two-year terms to be served in the Department of Correction and the one-year term to be served on state probation. The trial court further ordered the sentences for the two "groups" of offenses and the evidence tampering conviction to be served consecutively, per the parties' agreement. Thus, the trial court imposed a total effective sentence of four years in the Department of Correction, as a Range I, standard offender, to be followed by one year on state probation. Defendant does not challenge the lengths of the imposed sentences on appeal.

## III. Analysis

Defendant argues the trial court erred by refusing Defendant's request for judicial diversion or other forms of alternative sentencing. We disagree.

### A. Standard of Review

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)). Specifically, our supreme court has stated this standard also applies to "questions related to probation or any other alternative sentence." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). The court has also stated this standard of appellate review applies to a trial court's decision to grant or deny judicial diversion. *See King*, 432 S.W.3d at 324.

However, to be afforded deference on appeal, 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 decisionmaking authority." *Id.*

*State v. Sheets*, No. M2022-00538-CCA-R3-CD, 2023 WL 2908652, at *4 (Tenn. Crim. App. Apr. 12, 2023) (alterations in original), *no perm. app. filed*.

In short, the trial court's sentencing decision will be upheld on appeal "so long as it is within the appropriate range and the record demonstrates that the sentence is otherwise in compliance with the purposes and principles listed by statute." *Bise*, 380 S.W.3d at 709-10. A defendant bears the burden of proving the sentence is improper. Tenn. Code Ann.

§ 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* Tenn. Code Ann. § 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. Tenn. Code Ann. § 40-35-103.

B. Judicial Diversion

Following a determination of guilt by plea or trial, a trial court may, in its discretion, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. Tenn. Code Ann. § 40-35-313(a)(1)(A); *State v. Dycus*, 456 S.W.3d 918, 925 (Tenn. 2015). The trial court's deferral of proceedings under section 40-35-313 is commonly referenced as "judicial diversion." "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 Tenn. Code Ann. § 40-35-313(a)(2)). Following such dismissal, the defendant may seek expungement of the defendant's criminal record. *Id.* (citing Tenn. Code Ann. § 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. Tenn. Code Ann. § 40-35-313(a)(1)(B)(i)(b), (c). In this case, Defendant was eligible for judicial diversion. However, 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, 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." *Id.* at 327-28. Such a decision "is within the discretion of the reviewing court." *Id.* at 328.

In its ruling from the bench, the trial court stated the following in denying Defendant's request for judicial diversion:

> In making a decision in this case, the [c]ourt has considered the presentence report, psych[o]sexual evaluation, the exhibits that have been introduced and the testimony of witnesses. The first thing—the issue to be addressed is whether in this case, [Defendant] is to be afforded the opportunity for post-trial diversion? As has been stated by the attorneys for

> each of the parties, diversion is described by case law as the largess granted by the General Assembly. Factors to be considered are the accused's amenability to correction. It would appear based on the testimony of Brother Hewgley that this individual is one that is amenable to correction. Number two, the circumstances of the offense, and that causes pause. Number three, the accused's criminal record. In this instance, the accused has no criminal record. The accused's social history. He has a positive social history. The accused's physical and mental health. The deterrence value to the accused as well as others. This likewise, gives pause. This is conduct which cannot be tolerated in schools.
>
> Further, case law directs in the [s]tatute that the [t]rial [c]ourt is to consider whether diversion will serve the ends of justice and the interest of the public as well as the accused.
>
> Considering all of these factors, I am going to deny the request for judicial diversion.

The trial court did identify the *Electroplating*/*Parker* factors, but the trial court's findings of fact regarding its judicial diversion decision could have been more robust. The trial court did make more detailed findings in its decision denying Defendant probation, and the State argues this court should use the trial court's findings regarding probation to affirm the trial court's denial of judicial diversion. "It is true that the factors that a trial court considers in deciding issues of judicial diversion and alternative sentencing can overlap substantially." *Sheets*, 2023 WL 2908652, at *5 (citing *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." *Id.* (citing *State v. Wilson*, No. W2019-01550-CCA-R3-CD, 2020 WL 6828966, at *6 (Tenn. Crim. App. Nov. 19, 2020)). Given these prior decisions, we are constrained to conclude the trial court's findings of fact and conclusions of law regarding diversion cannot be afforded deference. We will therefore conduct a de novo review of the diversion issue based on the ample evidence contained in the record. After doing so, we affirm the trial court's ruling denying judicial diversion.

The first *Electroplating*/*Parker* factor is the accused's amenability to correction. The trial court cited to the testimony of Mr. Hewgley in concluding this factor weighed in Defendant's favor. This court acknowledges that in addition to this testimony, several members of Defendant's church wrote letters supporting him, and several of the assessments Defendant completed before the sentencing hearing suggested Defendant may be a low risk to reoffend. However, one of the assessments completed as part of the

psychosexual evaluation labeled Defendant as a "moderate risk" to reoffend, and the psychosexual evaluation indicated the Defendant's tendency to minimize his past behaviors and his continued attraction to underage girls—the Defendant stated he was attracted to girls as young as age fifteen, while one of the assessments Defendant completed suggested he may be attracted to girls as young as age six. Thus, in our de novo review we depart from the trial court's finding and conclude that Defendant is not amenable to correction.

In reviewing the second *Electroplating/Parker* factor, we conclude the circumstances surrounding Defendant's actions in this case were particularly aggravated. Over a two-year period, Defendant, who held a significant position of trust at his school as a teacher and head volleyball coach, and who Victim A considered a father figure to his players, invaded their privacy by surreptitiously recording them in the locker room and restroom, where they were undoubtedly in various states of undress. Defendant's actions likely would have persisted had Victim A and her teammate not found Defendant's backpack and iPhone. The testimony of the two former players and East Robertson High School principal at the sentencing hearing and the victim impact statement of a third former player made clear the emotional damage Defendant's actions caused to his victims. Furthermore, Defendant was found in possession of child pornography. Given these facts, this factor weighs overwhelmingly against granting judicial diversion.

Regarding the third factor, the accused's criminal record, the trial court correctly observed Defendant had no prior criminal record before these offenses. Regarding the fourth factor, Defendant's social history, the proof from the sentencing hearing showed Defendant had maintained stable employment since his arrest and was supported by his family and church community. The trial court made no findings as to the fifth factor, Defendant's physical and mental health, but the proof showed Defendant's physical health was good and he was not experiencing any significant mental health problems as of sentencing. Thus, Defendant had "the demonstrated physical and mental ability to comply with the conditions of probation and sentencing." *Sheets*, 2023 WL 2908652, at *11. These three factors are favorable to Defendant, but they carry little to no weight in favor of granting judicial diversion.

The sixth factor, that of deterrence to the accused and others, weighs solidly against granting diversion. "Although this factor echoes the similar consideration in 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),[4] applies in a diversion context." *Sheets*, 2023 WL 2908652, at *11. But this court's past decisions suggest *Hooper* does not apply when other factors support the trial

[4] This court will examine *Hooper* in detail below.

court's denial of judicial diversion. *Id.* (citing *State v. Myers*, No. E2021-00841-CCA-R3-CD, 2022 WL 2903266 (Tenn. Crim. App. July 22, 2022), *no perm. app, filed*; *State v. Ward*, No. E2018-01781-CCA-R3-CD, 2019 WL 3244991, at *7 (Tenn. Crim. App. July 19, 2019)).

In this case, Defendant's covert filming of his volleyball players continued nearly two years before he was caught, and the psychosexual report suggests the underlying causes which led to Defendant's actions are still present. Accordingly, the trial court's denial of judicial diversion in this case was appropriate to deter Defendant from committing similar offenses in the future. *See Hooper*, 29 S.W.3d at 12 ("Repeated occurrences of the same type of criminal conduct by a defendant generally warrant a more emphatic reminder that criminal actions carry consequences"). Furthermore, considering the prior sexual offenses involving students at both East Robertson High School and schools in surrounding communities, at the time of sentencing "a need to deter similar crimes [was] present in the particular community, jurisdiction, or in the state as a whole[.]" *Id.* at 10. Denying Defendant judicial diversion, therefore, would deter persons inclined to commit similar offenses and make clear that, as the trial court stated, Defendant's offenses are "conduct that cannot be tolerated in schools," or anywhere else.

Finally, the trial court's ruling on diversion referenced, but did not address specifically, the final factor: whether diversion would serve the interests of the public and the accused. Regarding the defendant's interests, "a trial court may consider diversion as advancing the interests of the accused when a felony conviction may impair future employment" or if "necessary to avoid the stigma of a felony conviction." *Sheets*, 2023 WL 2908652, at *12 (citing *State v. Kellar*, No. E2018-00313-CCA-R3-CD, 2019 WL 1498641, at *4 (Tenn. Crim. App. Apr. 3, 2019), and *State v. Robertson*, No. W2020-00439-CCA-R3-CD, 2020 WL 6821702, at *5 (Tenn. Crim. App. Nov. 20, 2020)). In addressing the public's interests, the trial court may consider such factors as the victim's injuries, the seriousness of the offense, and whether the collateral consequences of a conviction would protect the public. *Sheets*, 2023 WL 2908652, at *12 (citations omitted).

In this case, despite the egregious abuse of his position of trust within his school, Defendant continued to receive support from his church, friends, and family. As of the sentencing hearing he was still married and employed. Defendant did not present proof suggesting such support or employment would be affected were Defendant denied diversion. The nature and circumstances of Defendant's offenses are quite stigmatizing, and that stigma will exist regardless of the manner of Defendant's sentence. Judicial diversion may allow Defendant to have his criminal record expunged, but the memories of those aware of and affected by Defendant's behavior will not be erased. Thus, diversion would not serve Defendant's interests.

Nor would diversion serve the public's interest. At the sentencing hearing, the State presented evidence of numerous criminal cases in Robertson County and surrounding counties involving sexual offenses committed by school employees against child victims. Three of the cases involved defendants associated with East Robertson High School; Defendant was employed at the school when these other offenses occurred. As stated throughout the opinion, the Defendant's victims suffered emotionally through his actions, and East Robertson's principal testified regarding the emotional pain and disappointment she and her school community felt after the Defendant became the fourth person from the school to be convicted of a sex-related offense.

In this case, the parties negotiated a plea agreement with terms that were highly favorable to Defendant. Had the case gone to trial or had Defendant entered an open plea regarding the terms of sentencing, Defendant could have faced a considerably longer period of incarceration. However, the parties agreed to a sentencing scheme that would have made Defendant eligible for a term of no more than six years of incarceration; as a Range I, standard offender, he is eligible for release after serving 30% of his sentence. Defense counsel certainly had the responsibility of securing the most favorable sentence possible for Defendant, and the State's agreement to the plea terms and the trial court's accepting the agreement saved the victims who testified at sentencing from the torment of a jury trial. However, in deciding whether judicial diversion is appropriate, these considerations must be balanced against the public's interest. In this case, had the trial court imposed judicial diversion and given the Defendant an even more favorable outcome than the one he received, it would have depreciated the seriousness of Defendant's offenses. Consequently, the interests of the public weigh strongly against granting diversion.

In sum, after reviewing the *Electroplating/Parker* factors, we find the proof in this case did not support granting judicial diversion. Therefore, we affirm the trial court's decision denying judicial diversion.

C. Probation

In its ruling denying Defendant's request for full probation or other forms of alternative sentences, the trial court stated the following:

> Now, we address the issue of manner of service. The [s]tatute directs under TCA 40-35-103 sets forth considerations that the sentences—reading from the [s]tatute, "Sentences involving confinement should be based on the following considerations": (a) "Confinement is necessary to protect society by restricting the defendant who has a long history of criminal conduct." That does not apply to [Defendant]. (b) "Confinement 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," I find (b) to be applicable. (c) "Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant."

As relates to the issue of the deterrence, the case law in Tennessee, and I am referring to *State v. Hooper*, which holds that deterrence is needed in the community, jurisdiction or state and where there have been other incidents of the charged offenses are increasingly present in the community jurisdiction or in the state as a whole.

It is unfortunate that East Robertson, specifically, more than any other high school in Robertson County has had offenses of this nature. As the proof has been, incidents arise also in this eastern part of the county and the western part, going on over into Sumner County as well as an incident in Logan County, Kentucky.

Based on the fact of sub-section (b), in order to depreciate the seriousness of the offense or confinement is to provide an effective deterrence, I am going to order that the Defendant serve the sentence imposed in [the unlawful photography counts] and in those the Defendant is sentenced to a term of two years as a range one standard offender to the Tennessee Department of Corrections.

Count three [the attempted tampering with evidence charge] is a D Felony and it was agreed that the sentence would be two years; likewise, the Defendant is ordered to serve the sentence of two years in Count three, to the Tennessee Department of Correction.

As it relates to [the facilitation of sexual exploitation of a minor counts], the sentence will be suspended and the Defendant will be subject to the terms and conditions of probation. Be required, pursuant to the [s]tatute to be placed on the sex offender registry. The sentence in Count three will run consecutive or on top of the sentence in Count one. The sentences for the third segment; that is, on the facilitation of sexual exploitation of a minor, likewise will run consecutive.

Under this state's advisory sentencing guidelines, a defendant "who is an especially mitigated or standard offender convicted of a Class C, D or E felony, *should be considered* as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6) (emphasis added). However, no defendant

is presumed to be a favorable candidate for alternative sentencing. *See State v. Carter*, 254 S.W.3d 335, 343 (Tenn. 2008) (citing Tenn. Code Ann. § 40-35-102(6)). Specifically, no criminal defendant is automatically entitled to probation as a matter of law. *State v. Davis*, 940 S.W.2d 558, 559 (Tenn. 1997). The defendant must prove his suitability of alternative sentencing options. *Carter*, 254 S.W.3d at 347 (citing Tenn. Code Ann. § 40-35-303(b)).

In determining whether incarceration is an appropriate sentence, the trial court should consider whether

> (A) Confinement is necessary to protect society by retraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement 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) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Tenn. Code Ann. § 40-35-103(1)(A)-(C).

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. Tenn. Code Ann. § 40-35-103. The sentence imposed should be "no greater than that deserved for the offense committed" and "the least severe measure necessary to achieve the purposes for which the sentence is imposed." Tenn. Code Ann. § 40-35-103(2), (4). Furthermore, as stated above, the Tennessee Supreme Court has observed that the *Electroplating*/*Parker* judicial diversion guidelines are the same ones a court considers in deciding whether to impose probation. *See Trent*, 533 S.W.3d at 291.

In addressing probation, the trial court cited to the Tennessee Supreme Court's opinion in *Hooper*, cited above. In *Hooper*, the Tennessee Supreme Court stated, "[T]he trial courts should be given considerable latitude in determining whether a need for deterrence exists and whether incarceration appropriately addresses that need." *Hooper*, 29 S.W.3d 10. The court in *Hooper* added,

> Accordingly, we will presume that a trial court's decision to incarcerate a defendant based on a need for deterrence is correct so long as any reasonable person looking at the entire record could conclude that (1) a need to deter similar crimes is present in the particular community, jurisdiction, or in the

> state as a whole, and (2) incarceration of the defendant may rationally serve as a deterrent to others similarly situated and likely to commit similar crimes.

*Id.* However, the Tennessee Supreme Court has observed that "*Hooper* addresses the issue of whether deterrence *alone* may support a denial of alternative sentencing and articulates the criteria for such circumstances. *State v. Trotter*, 201 S.W.3d 651, 656 (Tenn. 2006). If a probation decision is based in whole or in part on a factor other than deterrence, the trial court need not consider *Hooper*. *See, e.g., id.* (reflecting that in probation decision based on both deterrence and avoiding depreciating seriousness of offense, the supreme court did not address *Hooper*).

In this case, although somewhat unclear, it appears the trial court granted probation for one of Defendant's convictions and denied it as to the other two convictions based on both parts of Tennessee Code Annotated section 40-35-103(1)(B)—deterrence and avoiding depreciating the seriousness of the offense. But even if the trial court based the denial of full probation solely on deterrence, this court would afford the trial court's ruling deference in affirming the decision. In denying full probation, the trial court referenced the increasing number of convictions of sex offenses committed by school employees against children in Robertson County and surrounding counties. The proof presented at the sentencing hearing was sufficient for a reasonable person to conclude there was a need for deterrence in Robertson County and surrounding counties generally and within the East Robertson High School community in particular, and that incarcerating Defendant would serve to deter those likely to commit similar offenses. The evidence in the record also supports a conclusion that Defendant's incarceration on two of his convictions was necessary to avoid depreciating the seriousness of these offenses. These were serious crimes. Even if the trial court's findings were insufficient, the record would be sufficient to support this court's affirming the denial of full probation after a de novo review, based on the evidence discussed in our earlier discussion of judicial diversion. Defendant is not entitled to relief on this issue.

## IV. Conclusion

For the reasons stated above, we affirm the judgments of the trial court.

_____

MATTHEW J. WILSON, JUDGE