

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs August 1, 2023

FILED

10/04/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. ZION ROBINSON**

**Appeal from the Criminal Court for Shelby County**  
**Nos. 20-02734      Jennifer Johnson Mitchell, Judge**

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**No. W2022-01460-CCA-R3-CD**

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The Shelby County Grand Jury indicted Defendant, Zion Robinson, for rape of a child, a Class A felony. Pursuant to a negotiated plea agreement, Petitioner entered an open guilty plea to the substantially reduced offense of sexual battery, a Class E felony. Following a sentencing hearing, the trial court denied Defendant's requests for judicial diversion and probation and sentenced Defendant to serve two years incarcerated. Additionally, the trial court ordered Defendant to register with the Sex Offender Registry. Defendant appeals, arguing that the trial court abused its discretion in denying judicial diversion. We conclude that Defendant has waived appellate review of his sentence by failing to prepare an adequate record and we therefore affirm the judgment of the trial court. We remand this case, however, for the entry of a corrected judgment form reflecting the indicted offense of rape of a child.

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

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

J. Jeffrey Lee, Memphis, Tennessee, for the appellant, Zion Robinson.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Devon Dennis and Lessie Rainey, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

***Factual Background***

The record on appeal does not include a transcript of Defendant's guilty plea hearing. At the October 6, 2022 sentencing hearing, Defendant agreed that he was being sentenced for a lesser offense than originally charged and acknowledged that this was "still a very serious matter." He testified that he was 19 years old when the 12-year-old victim, who was a friend of his sister, began sending flirtatious text messages to him. Defendant said he thought the text messages were "a prank."

According to Defendant, the victim came into his room one night while he was sleeping. The victim was spending the night with Defendant's sister. Defendant testified:

I don't know how long I was [a]sleep, I just know when I woke up, my genitals was in her mouth and I pushed her off of me, told her, you can't, excuse my language too, Judge, but I told her, "Get the f--- off of me. I cannot and will not condone this and if you do it again, I will tell your parents."

Defendant then testified that was "a generalization" of what he actually said to the victim.

Two days after the incident, Defendant told his 17-year-old sister about the incident and they had "a family meeting" with his siblings, his uncle, and the victim's mother. Defendant testified that the victim's account of the incident was "false," but he agreed that "things went too far[.]" Defendant apologized and accepted responsibility as the adult in the situation but also testified that he and the victim were "both to blame."

The trial court rejected Defendant's story as "less than truthful" and stated, "You're telling the [c]ourt that you woke up and when you woke up, your penis was in her mouth. Come on. . . . I was born at night, but not last night."

The State noted that Defendant had served only one day in pretrial custody, and defense counsel suggested that the trial court order Defendant to serve up to 30 days if the court decided to grant judicial diversion. The trial court declined to grant Defendant's request for either judicial diversion or probation and sentenced him to serve two years as a Range I offender.

The trial court noted that Defendant was originally charged with rape of a child, a Class A felony with a sentencing range of 25 to 40 years to be served at 100 percent. The court believed the rape of a child charge was justified based on Defendant's "own words."

Based on the victim’s account,<sup>1</sup> the trial court described the incident as “a pretty violent act” and “a horrible situation.” The court stated, “based on just the facts I’ve heard, I would be hard-pressed to give him anything less than 30, 35 years if he had gone to trial and been convicted of this.”

The trial court found that granting probation would “depreciate the seriousness of this event.” The court also found that Defendant was not amenable to treatment because, according to the court, although Defendant gave the psychosexual examiner “all the right answers and responses,” the examiner “must have seen something that was disturbing.”<sup>2</sup>

### *Analysis*

On appeal, Defendant asserts that the trial court abused its discretion by denying his request for judicial diversion, arguing that the trial court failed to weigh the diversion factors and gave undue consideration to irrelevant factors. The State asserts that Defendant has waived consideration of the issue by failing to include the presentence report, psychosexual evaluation, and petition for judicial diversion. The State further argues that the limited record supports that the trial court acted within its discretion in denying judicial diversion and sentencing Defendant to confinement.

A defendant is eligible for judicial diversion if he or she is found guilty or pleads guilty or nolo contendere to a Class C, D, or E felony, has not been previously convicted of a felony or Class A misdemeanor, has not been previously granted judicial or pretrial diversion, and is not seeking deferral for certain sexual offenses. *See* T.C.A. § 40-35-313(a)(1)(B)(i). Defendant is eligible to be considered for judicial diversion because he pleaded guilty to sexual battery, a Class E felony, which is not one of the enumerated sexual offenses excluded from eligibility for diversion. *See id.* § (a)(1)(B)(ii) (listing sexual offenses that are not eligible for diversion). “Eligibility under the statute does not, however, constitute entitlement to judicial diversion; instead, the decision of whether to grant or deny judicial diversion is entrusted to the discretion of the trial court.” *State v. King*, 432 S.W.3d 316, 323 (Tenn. 2014). The trial court must consider several common law 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,

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<sup>1</sup> The trial court appeared to be referencing the presentence investigation report, which was not made an exhibit to the sentencing hearing and is not included in the record before us, despite the prosecutor’s comment during the sentencing hearing, “We have reset it a number of times for the presentence report and psychosexual. We have both now.”

<sup>2</sup> The psychosexual evaluation was also not admitted as an exhibit to the sentencing hearing and is not included in the record on appeal.

(e) the accused’s physical and mental health, and (f) the deterrence value to the accused as well as others. The trial court should also consider whether judicial diversion will serve the ends of justice—the interests of the public as well as the accused.”

*Id.* at 326 (quoting *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996)). “[T]he trial court must weigh the factors against each other and place an explanation of its ruling on the record.” *Id.* (citing *State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998)).

When the trial court considers the common law factors, “specifically identifies the relevant factors, and places on the record its reasons for granting or denying judicial diversion,” then this Court will “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.” *Id.* at 327. Our supreme court has explained:

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.

*Id.* Failure to consider the common law factors results in a loss of the presumption of reasonableness, and this Court will either conduct a de novo review or remand the case to the trial court for reconsideration. *Id.*

We do not reach the issue of whether the trial court properly considered all of the relevant factors, however, because the record here is insufficient to review the trial court’s decision. *See State v. Trent*, 533 S.W.3d 282, 295 (Tenn. 2017) (“While we recognize that an appellate court may undertake an independent review of the record in cases in which the trial court fails to make sufficient findings in a case, the record must be sufficient to allow meaningful appellate review.”). In order to allow for meaningful appellate review, the appellant must provide a full and fair record of what transpired in the trial court, including the components relied upon by the trial court in determining the sentence; this burden clearly rests upon the appellant. Tenn. R. App. P. 24(b).

Our supreme court has held:

[A]ny matter that the trial court has appropriately considered is properly includable in the appellate record pursuant to Rule 24(g) of the Tennessee Rules of Appellate Procedure when the matter is “necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.”

*State v. Smotherman*, 201 S.W.3d 657, 661 (Tenn. 2006) (quoting *State v. Housler*, 167 S.W.3d 294, 298 (Tenn. 2005)). The transcript of the sentencing hearing makes clear that the presentence report and the psychosexual evaluation were presented and that the trial court relied on both in making its sentencing determination. At the outset of the sentencing hearing, the prosecutor noted that the case had been reset “a number of times” to allow for the preparation of “the presentence report and psychosexual.” The prosecutor continued, “We have both now.” The trial court referenced both reports at the sentencing hearing.

The burden of providing a complete and accurate record in this appeal rests on Defendant as the appealing party. See Tenn. R. App. P. 24(b). Typically, “[t]he failure to place the pre-sentence report in the record prevents this court from reviewing sentencing issues.” *State v. Cannady*, No. W2016-00494-CCA-R3-CD, 2017 WL 192691, at \*3 (Tenn. Crim. App. Jan. 17, 2017) (quoting *State v. Banner*, No. 03C01-9701-CR-00039, 1997 WL 789948, at \*1 (Tenn. Crim. App. Dec. 23, 1997)), *no perm. app. filed*. “In the absence of a record adequate for review, this court must presume that the trial judge ruled correctly.” *State v. Ivy*, 868 S.W.2d 724, 728 (Tenn. Crim. App. 1993). Thus, we must presume that the judgment of the trial court is correct.

To the extent that Defendant argues that the trial court abused its discretion by denying probation and ordering him to serve two years in confinement, Defendant has waived these issues by failing to cite any authority. Defendant’s brief contains a one-paragraph argument that “the sentence entered by the trial court was excessive considering the facts and circumstances of this case.” Defendant fails to cite any authority, however, and offers no argument as to why he should have received a sentence of less than two years or why a sentence of confinement was improper. Tennessee Rule of Appellate Procedure 27(a)(7) requires that the appellant set forth an argument for each issue, along with “the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on[.]” Tenn. R. App. P. 27(a)(7). Similarly, Rule 10(b) of the Rules of this Court states plainly that “[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.” Tenn. Ct. Crim. App. R. 10(b). Accordingly, Defendant’s challenge to his sentence as excessive is waived.

We note that the judgment form states that both the indicted offense and the conviction offense are sexual battery, a Class E felony, in violation of Tennessee Code Annotated section 39-13-505. Defendant was indicted for rape of a child, a Class A felony, in violation of Tennessee Code Annotated section 39-13-522. We remand for entry of a corrected judgment to accurately reflect the indicted offense.

***Conclusion***

Accordingly, we affirm the judgment of the trial court and remand for entry of a corrected judgment to accurately reflect the indicted offense of rape of a child.

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TIMOTHY L. EASTER, JUDGE