

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs May 20, 2015

STATE OF TENNESSEE v. ROBIN ANNETTE HARLESS

**Appeal from the Criminal Court for Johnson County
No. 2013CR163 Robert E. Cupp, Judge**

No. E2014-01939-CCA-R3-CD – Filed September 21, 2015

Defendant, Robin Annette Harless, was indicted by the Johnson County Grand Jury for two counts of Class D felony theft. Defendant was a housekeeper for each of the victims and committed the thefts of jewelry, collectible knives, and cash over a period of time while at work. She entered guilty pleas to the charges and requested the trial court to grant judicial diversion. Following a hearing where Defendant and both victims testified, the trial court denied judicial diversion and sentenced Defendant to sentences of three years, concurrent, for each offense, with periodic confinement requiring incarceration of fifty days. In her sole issue on appeal, Defendant asserts that the trial court erred by denying her request for judicial diversion. After review, we affirm pursuant to Rule 20 of the Rules of the Court of Criminal Appeals of Tennessee.

**Tenn. R. App. P. 3 Appeal as of Right, Judgments of the Criminal Court Affirmed
Pursuant to Rule 20 of the Rules of the Tennessee Court of Criminal Appeals**

THOMAS T. WOODALL, P.J., delivered the opinion of the Court, in which D. KELLY THOMAS, JR., and CAMILLE R. MCMULLEN, JJ., joined.

H. Randolph Fallin, Mountain City, Tennessee, for the Appellant, Robin Annette Harless.

Herbert H. Slatery III, Attorney General and Reporter; Clarence E. Lutz, Senior Counsel; Anthony Wade Clark, District Attorney General; and Matthew Roark, Assistant District Attorney General, for the Appellee, State of Tennessee.

MEMORANDUM OPINION

The victims, neighbors who reside in Mountain City, are Elizabeth Cornett and Rose Rasmussen. Defendant first worked in Ms. Cornett's home. Upon Ms. Cornett's high recommendation, Ms. Rasmussen also employed Defendant. Ms. Rasmussen first

noticed that items were missing after Defendant's employment. Ms. Cornett also found items missing after being alerted by Ms. Rasmussen. Defendant's guilty pleas included her agreement to make restitution for the items she had unlawfully taken in the amount of \$5,350.00 from Ms. Cornett and \$5,798.00 from Ms. Rasmussen. Ms. Rasmussen testified that a portion of her loss was \$2,000.00 in \$100.00 bills stored in envelopes inside a desk drawer. Defendant testified at the hearing that she had taken only \$300.00 in cash from Ms. Rasmussen.

The record reflects that Defendant was 44 years old at the time she pled guilty. She was employed as a sales representative for Little Debbie cakes. She had dropped out of high school in her senior year because of a car accident, but obtained a GED the following year. She had never used illegal drugs or alcohol and was in excellent physical health. She was not mentally disabled and no other mental health issues were noted. Defendant had no record of prior convictions or arrests.

“[W]hen the trial court places on the record its considerations for the grant or denial of judicial diversion, the determination should be given a presumption of reasonableness on appeal and reviewed for an abuse of discretion.” *State v. King*, 432 S.W.3d 316, 319 (Tenn. 2014). However, the trial court must still consider and discuss each of the seven common law factors that have long been required in judicial diversion determinations by *State v. Electroplating, Inc.*, 990 S.W. 2d 211 (Tenn. Crim. App. 1998) and *State v. Parker*, 932 S.W.2d 945 (Tenn. Crim. App. 1996). *King* at 327. A trial court is not required to *recite* each of the seven common law factors. *Id.* However, the record “should reflect” that the trial court considered all the factors in order for its decision to have the presumption of reasonableness on appeal. *Id.* If the trial court does not consider and weigh all the applicable common law factors, the presumption of reasonableness does not apply, and the abuse of discretion standard is not appropriate. *Id.* In such case it is within the appellate court's sole discretion as to whether it should conduct a de novo review or remand the case for reconsideration in the trial court.

Our review of the record in the case *sub judice* shows that the trial court did not consider two common law factors from *Electroplating, Inc.* and *Parker*: (1) Defendant's social history and (2) Defendant's physical and mental health. Also, despite the fact that the record was void of any proof of prior thefts from other persons, the trial court stated that he liked what one victim said, that Defendant had “probably been doing it for some period of time and just now got caught, finally got caught, and that's what I believe, too, that happened.” Thus, concerning a third common law factor, Defendant's criminal record, the evidence contradicts the factual finding of the trial court that Defendant had prior similar criminal conduct. A finder of fact cannot find facts that will be accepted on appeal if they are based solely upon a lay witness's unfounded opinion.

The record does reflect that the trial court considered and made relevant factual findings concerning the other four common law factors.

As to Defendant's amenability to correction, the trial court specifically accredited the testimony of Ms. Rasmussen about the amount of cash stolen being \$2,000.00. The trial court found that Defendant presented untruthful testimony when she said she took only \$300.00. Regarding the circumstances of the offenses, the trial court found that they weighed against judicial diversion because Defendant violated two positions of private trust and made multiple thefts over a period of time. The trial court found that as to deterrence value to Defendant and others, that denial of judicial diversion would be a deterrence to others likely to commit similar offenses. However, there was no evidence in the record that similar offenses were a problem within the county. Finally, regarding whether the grant of judicial diversion would serve the ends of justice, that is, the interest of the public as well as Defendant, the trial court concluded this factor weighed against judicial diversion. The trial court concluded that although Defendant was clearly statutorily eligible for judicial diversion, it would be an injustice to grant judicial diversion in a situation where Defendant had a scheme over a period of time to steal various items from two victims who entrusted her to do work at their homes.

The trial court's failure to consider the Defendant's social history and mental and physical health and the trial court's conclusion that the Defendant had committed the thefts against other persons, which was not supported by the evidence, results in the presumption of reasonableness on appeal with a review for an abuse of discretion not being applicable. *King* at 327.

We conclude that de novo review is the appropriate option rather than remand for reconsideration. *See King* at 328. In our opinion the factual finding of the trial court that Defendant did not testify truthfully at the hearing reflects extremely poorly on her amenability to correction. The trial court determines the credibility of the witnesses. The trial court concluded that Ms. Rasmussen was truthful when she testified that \$2,000.00 in cash was missing. The trial court determined that Defendant was untruthful when she testified that she took only \$300.00. This factor alone, even without the other factors addressed by the trial court, outweighs Defendant's lack of a prior criminal record or behavior, Defendant's good social history, and Defendant's excellent physical and mental health. The judgments are affirmed.

Accordingly, we affirm the judgments of the trial court pursuant to Rule 20 of the Rules of the Court of Criminal Appeals of Tennessee.

THOMAS T. WOODALL, PRESIDING JUDGE