IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 20, 2016 Session

STATE OF TENNESSEE v. DYLAN WARD HUTCHINS

Appeal from the Criminal Court for Washington County
No. 40304 Stacy L. Street, Judge

No. E2016-00187-CCA-R3-CD – Filed December 20, 2016

The defendant, Dylan Ward Hutchins, appeals the Washington County Criminal Court's denial of his request for judicial diversion from his mitigated statutory rape conviction, arguing that the trial court failed to consider and properly weigh all relevant factors and improperly considered facts outside the record in rendering its decision. Following our review, we affirm the judgment of the trial court denying diversion. However, we remand to the trial court for entry of a corrected judgment reflecting the conviction offense as mitigated statutory rape.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

David L. Robbins, Johnson City, Tennessee, for the appellant, Dylan Ward Hutchins.

Herbert H. Slatery III, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Anthony Wade Clark, District Attorney General; and Frederick M. Lance, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The defendant, who at the time of the offense was a twenty-two-year-old college student at Western Carolina University, was indicted for one count of rape, a Class B felony, and one count of statutory rape, a Class E felony, based on his November 9, 2014 sexual assault of a seventeen-year-old sorority member at a Johnson City college party.

According to the affidavit of complaint, the victim stated that the defendant, whom she had met at the house party hosted by the East Tennessee State University ("ETSU") rugby team and the opposing Western Carolina team, followed her outside after they had partnered in a game of "water pong" and asked her to walk with him. When other individuals left the area, the defendant pulled the victim's pants down, bent her over a wall, and began to have sexual intercourse with her, in the process forcing her to the ground and her face into the dirt. The victim stated that when the defendant stopped for a moment, she pulled her pants up and walked toward the porch of the house, where she reported what had happened to an individual who noticed her crying and asked what was wrong. The defendant was arrested that night and gave a statement containing "a different sequence of events" but admitting he had digitally penetrated the victim's vagina.

On October 16, 2015, the defendant pled guilty to mitigated statutory rape in exchange for a one-year sentence at 30% and the dismissal of the rape count of the indictment. The prosecutor explained in his recitation of the factual basis for the plea that potential inconsistencies in the victim's account led the State to believe it would have had difficulty in proving the force element of the rape charge:

> Judge, on or about the 9th day, . . . of November, the Year of 2014, this defendant was in Johnson City, Washington County, as part of a rugby team that had a meet with the rugby team associated through the university in Johnson City and there was subsequently a party at a house on Buffalo Street, again in Washington County, Tennessee. He was in attendance along with other members of his team . . . .
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> The victim was 17 years of age and the defendant on that date was 22 years of age. He was over four years older than she, although, less than five, and he was an adult and she was a minor at the time. She is now 18. There was a party. They apparently began talking to each other. There were games inside. At some point his teammates were going to return to a motel in Johnson City. He went outside and she apparently with him. At some point, or at the last minute, he did not return to the motel with his teammates. Instead he and the victim were together there outside of the house. They engaged in activity which became sexual in nature. At some point in time the defendant here sexually penetrated the victim. He says I think in the statement, perhaps, digitally, which would constitute the offense of statutory rape in that incident. The [S]tate after reviewing the facts, meeting with the victim on a number of occasions is asking -- or

> seeking from the court to dismiss the rape charge. The rape which would have allegedly involved coercion, or force in which the victim indicates occurred while they were spending time outside of this home, or house, party house I would guess in Johnson City. She alleged that he not only sexually penetrated that . . . he did it with force, not letting her go. That the incident occurred over several minutes, that she not only did not give consent, or legally incapable of doing so, she did not give any consent to him, that he forced himself upon her. The [S]tate has looked at this in terms of being able to prove the case beyond a reasonable doubt. Some indications during the time they were outside and this was beside the house that people from inside the house, by the way . . . she was a member of a sorority group that had come to this residence. That they actually came outside and -- or, at least, one of them did and others, perhaps, checking on her well-being and what was going on. At some point it was asked if everything was okay, or words to that effect. This defendant reportedly said, yeah, we're just making out. The victim did not say anything at that point. The victim indicates that during this incident she was basically in fear, too afraid to speak out. The [S]tate is concerned in terms of what a jury might . . . accept as the facts. This . . . defendant does admit basically that they had sexual contact. The ability of the [S]tate to . . . prove force, or coercion in our opinion could well fall short of exceeding a reasonable doubt, which is why we are dismissing the rape charge itself.

At the January 6, 2016 alternative sentencing hearing, the defendant testified that he was an entrepreneurship major with a minor in sports management at Western Carolina University in Cullowhee, North Carolina, and expected to graduate with a bachelor's degree in December of the current year. He said his original graduation date had been December of the previous year, but he had been suspended by his university when the allegations in the instant case arose. According to his testimony, the university "found [him] not responsible for the . . . sexual assault charges" and lifted his suspension that same spring, but he had opted to take the entire spring semester off. The university had punished him for the incident by requiring him to write an essay on the dangers of alcohol consumption and to complete ten hours of community service, which he had performed with his home church in High Point, North Carolina.

The defendant testified that he attended church regularly, was active with youth and children's ministry groups, and participated in mission trips through his church. He said he worked at A.M. Haire Truck Manufacturing in Thomasville, North Carolina, during his breaks from school and at High Hampton Country Inn in Cashiers, North Carolina, when he was in school. He testified that he had a tremendous amount of support at home and identified character reference letters written by two of his

supervisors at A.M. Haire, an ex-girlfriend, a childhood friend, his best friend, his uncle, the former pastor of his church, and one of his mother's best friends, all of which were introduced as exhibits to the hearing.

The defendant testified that he began playing rugby for Western Carolina University his sophomore year and had played for them "until last November." He had since entered into a settlement agreement with "U.S.A. Rugby" in which he agreed to stop participating in the sport as a result of the incident in the case at bar. During the time he was on the team, he had participated in eighteen to twenty out-of-town rugby matches and the after-game "socials," which were commonly held at a sponsoring bar or restaurant. The ETSU after-game "social" was the first one he had ever attended at a house, and the incident that occurred was the first time anything similar had ever taken place.

The defendant testified that he cooperated with the police and gave a statement admitting what he had done, even after learning that it constituted a crime in Tennessee. He said news of the incident "beat [him] home[,]" having already been "on any social media outlet, newspapers back home," and "news stations." He testified that he felt regret for his actions and acknowledged that it had occurred as the result of his "bad decision." He said, however, that he had no prior history with drugs or alcohol and that alcohol had not played a factor in the incident.

On cross-examination, the defendant testified that he concurred in his university's findings that he was not responsible for "what [he] was accused of." When asked if he was responsible for "having sex with an underage female," he corrected that he had pled guilty to "digital penetration that's what they -- that's what I -- that from day one that's what I've admitted to." He stated that he had had a few alcoholic drinks that night but was not drunk and that he was "[d]efinitely not a heavy drinker."

As for the circumstances surrounding the offense, he testified that when he was leaving the party, the victim followed him outside and asked him to stay with her a little longer. He said the two of them spent more time talking on the porch of the house before he digitally penetrated her. She did not appear to be drunk, and he did not know she was seventeen. He blamed the incident on their "mutual decision to both put [themselves] there" and stated that the same sort of thing would never happen again.

Upon questioning by the trial court, the defendant agreed that his testimony was that the victim, despite being unable to legally give consent, had "fully engaged" in their sexual activity. He said the victim did not cry, and her mood appeared to change only after a man came out on the porch and "caught" her with the defendant:

> What happened, during us there -- a guy walked out on the front porch and as soon as she seen whoever that was to her that's when her mood changed. Whether it was because she got caught with another guy, whether that was her boyfriend, guy that she was talking to, or . . . whatever I don't know the relationship between those two, but it was only when she got caught.

The defendant denied that the incident occurred in the woods or that he bent the victim over a wall, pulled off her panties, and pushed her face into the dirt, as the victim claimed in her allegations against him. On redirect examination, the defendant reiterated that his digital penetration of the victim occurred as part of a "mutual encounter" between himself and the victim, which had followed more than an hour's conversation at the college party and their "kissing" and "hugging[.]" He agreed, however, that it was a situation in which he should never have put himself.

The defendant's father, James Scott Hutchins, testified that the defendant was "[b]roken" and "regretful" when he picked him up from jail and continued "from day one" to express his regret and remorse for his actions. The defendant's account to him of the incident had never changed and was the same as his courtroom testimony. Mr. Hutchins expressed his opinion that the defendant's actions that night were inconsistent with his character and said that he attributed them to "just a misjudgment" or "bad decision" on the defendant's part. He said that no similar allegations had ever been made against the defendant.

Mr. Hutchins testified that he worked at A.M. Haire, where the defendant was also employed, and that the defendant had a very good work ethic and a reputation as a "good kid." He said the defendant performed volunteer work at their church, had no physical or mental health problems, was a "home body," and had no problems with drugs or alcohol.

With the permission of the court, Mr. Hutchins then read aloud a letter he had prepared about the defendant, in which he stated, among other things, that he and his wife worried about the defendant when he joined the college rugby team because they were aware of "the rugby culture." He said they began to notice over "the next couple of years" that the defendant was "drifting away from how he was brought up," and that they consequently prayed to God "to do whatever it t[ook] to bring [the defendant] back in . . . right relationship with God."

Mr. Hutchins went on to state in the letter his belief that God had answered their prayers by the defendant's statutory rape arrest in the instant case. He said that although they did not initially know any of the details, they "knew without a shadow of a doubt that [the defendant] did not rape a girl" and "would not in any way force himself on a girl" because the defendant "ha[d] a protective nature and would never harm a woman."

He stated that the defendant had been "upfront and honest with everyone about what happened" and that his account had never changed.

Mr. Hutchins stated that the story had been released by the Johnson City Press on November 10 and "was picked up by many other news agencies," including at least two television stations in their hometown. In addition, his younger son received a 2:30 a.m. text message directing him to a Facebook posting showing that the article "had already spread to social media and [been] shared over forty-eight hundred times." Mr. Hutchins stated that almost everyone in their circle of friends knew about the charges. He said that after news broke about the defendant's arrest, they began noticing a number of unfamiliar vehicles driving slowly past their home in their quiet neighborhood, which made him so concerned for his family's safety that he felt compelled to purchase a gun.

Mr. Hutchins stated that the defendant's university had found by a preponderance of the evidence that the defendant was not responsible for the alleged sexual assault but was "responsible for playing a game of rapid consumption of alcohol[.]" He said that he and his wife had been in court in January 2015 for a hearing at which only the victim was allowed to give testimony, and where they sat in initial shock, which turned to anger, as they listened to the victim "dramatically" change the initial account she had given to police to one that he characterized as "a horrific and violent story." Mr. Hutchins said his wife had a panic attack, broke down in tears, and had to start taking anti-anxiety medication when they returned home in order to deal with "everything that was going on in [their] lives."

Mr. Hutchins stated in the letter that the defendant was "not innocent in this case." He went on to state that "[t]hese were two young adults that got caught up in an immoral act[,]" but "[t]hankfully [the defendant] stopped it before it could go any further than the digital penetration." He said the defendant had grown over the past year and "persevered through this horrible situation with integrity." Finally, he asked the court for mercy for the defendant, stating that the defendant's future and his ability to use his college degree would be "greatly . . . impacted" by the court's decisions in the case.

On cross-examination, Mr. Hutchins testified that the defendant was "not the type of person that drinks to the point of getting drunk" and implied that he believed the defendant's account that he had had only two or three alcoholic drinks on the night of the incident. He said he thought the defendant "made a bad judgment . . . making out with this girl," but he was not saying that the victim was equally to blame because "it was [the defendant's] responsibility as the man," although he agreed with the defendant that "there was some confusion on [the victim's] age."

At the conclusion of the hearing, the trial court denied the defendant's request for judicial diversion and sentenced him to serve his one-year sentence on probation. The trial court did not require the defendant to register as a sex offender. Thereafter, the defendant filed a timely notice of appeal to this court, challenging the trial court's denial of judicial diversion.

ANALYSIS

The defendant contends that the trial court erred in denying his request for judicial diversion by failing to consider his lack of a criminal record, not adequately considering the circumstances of the offense, finding without any supporting statistical evidence or testimony that denying diversion would serve as a deterrence to the public, and improperly considering matters that were within the court's own personal knowledge. The State responds by arguing that the trial court properly considered the appropriate factors in denying diversion and that substantial evidence supports its decision. We agree with the State.

Following a determination of guilt by plea or by 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). A qualified defendant is one who is found guilty or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought, is not seeking deferral of further proceedings for a sexual offense, a violation of section 71-6-117 or section 71-6-119, or a Class A or Class B felony, and who has not been previously convicted of a felony or a Class A misdemeanor. Id. § 40-35-313(a)(1)(B)(i). If the defendant successfully completes the period of probation, the trial court is required to dismiss the proceedings against him, and the defendant may have the records of the proceedings expunged. Id. § 40-35-313(a)(2), (b).

Mere eligibility does not entitle a defendant to judicial diversion. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). Instead, the decision to grant or deny a qualified defendant judicial diversion "is entrusted to the trial court." State v. King, 432 S.W.3d 316, 326 (Tenn. 2014) (citation omitted) 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, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998).

A trial court's decision regarding the grant or denial of judicial diversion is reviewed under the State v. Bise, 380 S.W.3d 682 (Tenn. 2012), presumption of reasonableness standard so long as there is evidence the trial court considered and identified the relevant Electroplating factors in rendering its decision:

> Under the Bise standard of review, when a 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).

The record reveals that the trial court considered and weighed each of the Electroplating factors in its decision to deny the defendant's request for judicial diversion. The court found that the defendant had "a high amenability to correction" based on the defendant's history, the testimony presented at the hearing, and the character letters received into evidence. The court, therefore, found that this factor weighed in favor of diversion.

Although the defendant contends that the trial court failed to make any findings that the defendant lacked a criminal record or how the court considered that factor in its determination to deny judicial diversion, the record reveals that the trial court specifically noted that the defendant had no criminal history and found that this factor weighed in favor of diversion. The trial court also found that the defendant's social history weighed in favor of diversion, noting that the defendant was on the path to graduate from college, was employed, and attended church.

The trial court found that the defendant's physical and mental health weighed neither for nor against the granting of diversion, noting that there was nothing that would physically or mentally prevent the defendant from adhering to any conditions of sentencing, but also "nothing . . . wrong with him that would cause the court to feel some sorrow, or take a different path."

On the negative side, the court found that the circumstances of the offense weighed heavily against the granting of diversion, observing that both the defendant and his father appeared in their testimony to be attempting to cast blame on the victim and pointing out that, contrary to the father's belief, this was not a case of two young adults mutually engaging in immoral activity but instead a case of an adult and a minor who was unable to give her consent.

The court also found that the deterrence value to the defendant and others weighed against the granting of diversion. The trial court's ruling on this factor states in pertinent part:

> But, there has to be some consequences for your action, and there has to be consequences to you and those consequences have to be known to other people looking to this case. You're right. I remember the night this happened just because I watched the news to see . . . what the weather was going to be, and . . . the tag line is the same as it is in . . . the Johnson City Press . . . . That's the . . . issue and that's . . . a big focus now is rape on campus. Rape on campus being swept under the rug[,] . . . [are] the allegations true, are they false, are they fueled by alcohol, is it a bunch of promiscuous females running around asking for it, or the girl -- or the guys chasing it? I . . . don't have the answers to that. All I have before me is a young man who pled guilty to statutory rape, of penetrating a female. That's what I'm dealing with and there's going to be a consequence of that and other people will look to that to see what I do in this case. And because of that that factor weighs against the granting of judicial diversion.

As for the final factor, the court found that judicial diversion would greatly serve the interest of the defendant, but it would not serve the interest of the public "to grant [the defendant] judicial diversion on a statutory rape on campus." The trial court, therefore, found that this last factor weighed slightly against the granting of diversion.

We conclude that the record supports the findings of the trial court. We agree that the factors in favor of granting diversion -- the defendant's lack of a criminal record, the defendant's positive social history, and the defendant's amenability to correction -- are outweighed by the circumstances of the offense, the deterrence value to the defendant and others, and the best interest of the public. This is far different from a case in which a victim, too young to legally consent, does not contest that she willingly engaged in a sexual encounter with an older defendant.

The defendant cites State v. Hooper, 29 S.W.3d 1, 11 (Tenn. 2000), and State v. Fields, 40 S.W.3d 435, 442 (Tenn. 2001), to argue that the trial court erred by finding

without any supporting statistical evidence or testimony that a denial of diversion would serve as a deterrence to the public.

Neither of these cases involves the denial of judicial diversion. In Hooper, 29 S.W.3d at 9, our supreme court "re-emphasize[d] that the record must contain some proof of the need for deterrence before a defendant, who is otherwise eligible for probation or other alternative sentence, may be *incarcerated*." Id. at 9 (emphasis added). The court, therefore, created a non-exhaustive list of factors to consider in the determination of whether a trial court's order of confinement based solely on a need for deterrence is proper: (1) whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole; (2) whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit or gain from the criminal behavior; (3) whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case; (4) whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective; and (5) whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions. Id. at 10-12. The court noted under the first factor that the "use of statistics" might "be helpful in establishing the increasing level of a particular crime" but that it was not required and that "testimony by someone with special knowledge of the level of a particular crime will generally be sufficient to establish the presence of this factor." Id. at 11.

In Fields, 40 S.W.3d at 442, the supreme court, again addressing whether a trial court's denial of alternative sentencing and order of incarceration was supported by the need for deterrence, concluded that "[t]he trial court's observation and general reference to the docket cannot serve as a substitute for factual findings containing comparisons to indicate increased drug use in Greene County that would require a need for deterrence."

Here, by contrast, the trial court granted the defendant probation but denied his request for judicial diversion after considering and weighing each of the appropriate Electroplating factors and finding that the factors weighing against diversion, only one of which was the deterrence value to the defendant and others, outweighed the factors in favor of diversion. Moreover, the court's finding that the deterrence value would not be served by granting judicial diversion was not based on its finding that there were increasing levels of statutory rape in the community, but instead that there was a greater awareness of sexual assaults on college campuses and increased public sentiment about not having the crime minimized or "swept under the rug."

The defendant cites the following statements the trial judge made in his ruling to argue that the trial court improperly considered extrajudicial facts in reaching its determination: that the judge "k[n]ew for a fact," having taught at ETSU and having been on other college campuses, that there were numerous signs on campus that read "no means no" and "eighteen means eighteen"; that the judge remembered the night the incident happened because he was watching the news and saw the tag line about the crime; that "the big focus now is rape on campus" and "rape on campus being swept under the rug"; that people would be watching to see what the judge did in the case; and that it would not serve the interest of the public for the judge to grant the defendant judicial diversion "on a statutory rape on campus." The State responds by arguing that the trial court was entitled to take judicial notice of some facts necessary to establish a need for deterrence, particularly in the area of publicity and that substantial evidence supported the trial court's denial of diversion, aside from the court's reference to those few facts within its personal knowledge.

We agree with the State. The State is correct that the trial court was entitled to take judicial notice of the publicity surrounding the individual case and the greater issue of sexual assault on campus. See Hooper, 29 S.W.3d at 13. That the defendant's case generated a great deal of publicity was made evident by the defendant's, as well as his father's, testimony about the extensive news and social media reports about the incident. As for the greater issue of the increased scrutiny and awareness of the punishments for sexual assault on campus, one would have to purposefully avoid watching television or reading any newspapers or news periodicals to escape the knowledge that the topic is, as the trial court stated, currently a "big focus." We agree with the State that the fact that the incident here did not technically occur "on campus" does not detract from its implicating the college culture and college milieu. In sum, we conclude that substantial evidence supports the trial court's denial of diversion and, accordingly, affirm the trial court's judgment. The judgment in this case reflects that the conviction offense is statutory rape. However, from the facts recited at the guilty plea hearing and the statements of the prosecutor, the conviction offense is actually mitigated statutory rape. See Tenn. Code Ann. § 39-13-506(a). Accordingly, we remand to the trial court for entry of a corrected judgment to reflect the correct conviction offense.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the trial court and remand for entry of a corrected judgment.

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ALAN E. GLENN, JUDGE