

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on briefs November 14, 2013

STATE OF TENNESSEE v. JAMES LOUIS RHODES, II

**Appeal from the Circuit Court for Lawrence County
No. 29360 Robert Lee Holloway, Jr., Judge**

No. M2013-00622-CCA-R3-CD - Filed March 13, 2014

CAMILLE R. McMULLEN, J., dissenting opinion.

I respectfully dissent from the conclusion reached by the majority in this case. In my view, the trial court abused its discretion in denying judicial diversion. The only mention of judicial diversion by the trial court was after the court imposed the sentence in this case. In somewhat of an afterthought, the trial court stated, “I guess, I didn’t state it, but the application for diversion is denied.” Unlike judicial diversion cases in which this court has reversed and remanded due to the trial court’s failure to fully consider, explain or weigh the judicial diversion factors, see e.g., State v. Lewis, 978 S.W.2d 558, 567 (Tenn. Crim. App.1997); State v. Sean Nauss, No. E2011-00002-CCA-R3-CD, 2012 WL 988139 at * 4 (Tenn. Crim. App. Mar 22, 2012) (collecting cases), the trial court here failed even to consider the Defendant for judicial diversion. State v. Cutshaw, 967 S.W.2d 332, (Tenn. Crim. App. 1997) (concluding that “the trial judge abused his discretion by failing even to consider the defendant’s personal eligibility for judicial diversion”). On this meager record, the trial court’s denial of diversion cannot be cloaked with a presumption of reasonableness. Moreover, the record hardly assists this court in determining the appropriateness of the trial court’s denial of diversion as there was no proof other than the presentence report at the sentencing hearing. To uphold the denial of judicial diversion in this case would render consideration of the judicial diversion factors in all future cases a complete nullity. Accordingly, I would reverse the trial court’s denial of judicial diversion and remand the case for a new sentencing hearing.

CAMILLE R. MCMULLEN, JUDGE