

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
October 25, 2005 Session

**STATE OF TENNESSEE v. FRANK MCDONNELL**

**Appeal from the Circuit Court for Humphreys County  
No. 10544 George C. Sexton, Judge**

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**No. M2004-03039-CCA-R3-CD - Filed December 19, 2005**

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A Humphreys County Circuit Court jury convicted the defendant, Frank McDonnell, of reckless endangerment committed with a deadly weapon, a Class E felony. *See* Tenn. Code Ann. § 39-13-103(b) (2003). The trial court sentenced the defendant as a standard offender to one year in confinement, suspended the sentence, and placed the defendant on probation for a term of one year, which the defendant has completed. In the instant appeal, the defendant claims that the trial court erred in denying judicial diversion pursuant to Tennessee Code Annotated section 40-35-313. *See* Tenn. Code Ann. § 40-35-313 (Supp. 2004). Discerning no error, we affirm.

**Tenn. R. App. P. 3; Judgment of the Circuit Court is Affirmed.**

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and ROBERT W. WEDEMEYER, JJ., joined.

Michael J. Flanagan, Nashville, Tennessee, for the Appellant, Frank McDonnell.

Paul G. Summers, Attorney General & Reporter; David H. Findley, Assistant Attorney General; Dan Mitchum Alsobrooks, District Attorney General; and Lisa Donegan, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

This case relates to an emotion-steeped, family-type altercation on June 7, 2003, during which the defendant brandished and discharged a firearm. At trial, the witnesses' and the defendant's accounts of what occurred differed considerably, with the defendant insisting that he was trying to protect himself and his family from Tyler Smith, who was involved with the defendant's stepdaughter, Kendall Dean. The jury was unable to reach a verdict on the charge of aggravated assault but did find the defendant guilty of reckless endangerment.

Following trial, the defendant filed a petition requesting that he be granted judicial diversion pursuant to provisions of Tennessee Code Annotated section 40-35-313. *See* Tenn. Code

Ann. § 40-35-313 (Supp. 2004). On June 15, 2004, the trial court conducted a sentencing hearing at which time Kendall Dean's natural father, Dewayne Dean, testified that he was shocked that, due to the defendant's actions, Ms. Dean was "within inches almost killed or seriously injured." Mr. Dean expressed concern that "another daughter is still in the household." He testified that Kendall Dean now "has no relationship with her mother, her sister, no contact, upset normally on a daily basis." Mr. Dean acknowledged that the defendant had never harmed Kendall Dean in any way and that the two of them had "a close, close relationship."

Darrell Dean, Dewayne Dean's brother, testified that one night several years before the shooting incident, Dewayne Dean, who was out of town, called him late at night, said that his daughters, who were ages eight and 12, were alone at the defendant's home and were "scared or frightened." Darrell Dean testified that Dewayne Dean asked him to check on the girls, and Darrell Dean went to the defendant's home and spoke to Kendall Dean and her sister. While he was at the home, the defendant and Mrs. McDonnell called, and when Kendall Dean gave Darrell Dean the telephone at the defendant's request, the defendant told Mr. Dean to "get the 'F' our of my house" and that he would kill Mr. Dean if he was still there when the defendant got home. Darrell Dean testified that the defendant was very angry, "screaming, yelling."

Tyler Smith's father, Greg Smith, testified that the car that was damaged by the defendant's gunshot belonged to him and that the repair bill for the damage was \$933.97.

Sam Long testified for the defendant that he had known the defendant for a long time and that he had never known the defendant to engage in any other conduct similar to that which resulted in his conviction. He opined that the defendant was not deserving of a felony conviction on his record. He denied that the defendant has a bad temper when he is intoxicated and opined that the defendant posed a threat to no one.

Bill Rudolph testified that he knew the defendant through the construction business. He testified that he had never seen the defendant raise his voice, even in stressful situations.

Mike Sullivan testified that he had been doing siding work for the defendant for four or five years. He described the defendant as being "really a laid back guy to work for" who "never gets bent out of shape . . . on the job."

Lisa McAuthur testified that she thought of the defendant as a stepfather who "treats those kids like his own children." She opined that the defendant's firing the gun was an accident.

The defendant testified that the conduct resulting in the conviction was a reaction to a "situation" – that he "was attacked in [his] own home . . . [and] was threatened to be killed." He testified that both his sister and wife were attacked, and his wife was threatened, and he "just wanted the boy off the property." The defendant agreed that, if the same thing happened again, he would protect his family and home by pulling a gun, if necessary. He stated that the only persons who were injured during the episode were himself and his sister.

The defendant testified that he would be willing to surrender his firearms if he were required to do so.

The defendant testified, “I’m very sorry that it happened. It was just one of those situations, accident.” He opined that the case had gone as far as it had because Dewayne Dean was “always trying to stir up trouble,” cannot “go on with his life,” and “manipulates people.”

Following the testimony and arguments of counsel, the trial court made findings that led to imposing a suspended sentence. Concerning judicial diversion, the court found that the defendant’s version of the shooting was “completely incredible” and that the defendant had been “less than honest with the court.”

On appeal, the defendant’s his brief claims that the trial court abused its discretion in denying judicial diversion because it failed to consider all relevant criteria and because the record contains no substantial evidence to support the decision denying judicial diversion. We disagree.

“Judicial diversion” is a reference to Code section 40-35-313(a)’s provision for a trial court’s deferring proceedings in a criminal case. *See* Tenn. Code Ann. § 40-35-313(a)(1)(A) (2003). The result of such a deferral is that the trial court places the defendant on probation “without entering a judgment of guilty.” *Id.* To be eligible or “qualified” for judicial diversion, the defendant must plead guilty to, or be found guilty of, an offense that is not “a sexual offense or a Class A or Class B felony,” and the defendant must not have previously been convicted of a felony or a Class A misdemeanor. *Id.* § 40-35-313(a)(1)(B)(I). Diversion requires the consent of the qualified defendant. *Id.* § 40-35-313(a)(1)(A).

Eligibility, however, does not automatically translate into entitlement to judicial diversion. *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). The statute states that a trial court “may” grant judicial diversion in appropriate cases. Tenn. Code Ann. § 40-35- 313(a)(1)(A) (2003) (court “may defer further proceedings”). Thus, whether an accused should be granted judicial diversion is a question entrusted to the sound discretion of the trial court. *Bonestel*, 871 S.W.2d at 168.

“Tennessee courts have recognized the similarities between judicial diversion and pretrial diversion and, thus, have drawn heavily from the case law governing pretrial diversion to [\*5] analyze cases involving judicial diversion.” *State v. Cutshaw*, 967 S.W.2d 332, 343 (Tenn. Crim. App. 1997). Accordingly, the relevant factors related to pretrial diversion also apply in the judicial diversion context. They are:

The defendant’s criminal record, social history, mental and physical condition, attitude, behavior since arrest, emotional stability, current drug usage, past employment, home environment, marital stability, family responsibility, general reputation and amenability to correction, as well as the circumstances of the offense, the deterrent

effect of punishment upon other criminal activity, and the likelihood that [judicial] diversion will serve the ends of justice and best interests of both the public and the defendant.

*Id.* at 343-44; *see State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993). Moreover, the record must reflect that the court has weighed all of the factors in reaching its determination. *Bonestel*, 871 S.W.2d at 168. The court must explain on the record why the defendant does not qualify under its analysis, and if the court has based its determination on only some of the factors, it must explain why these factors outweigh the others. *Id.*

On appeal, this court must determine whether the trial court abused its discretion in failing to sentence pursuant to the statute. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168. Accordingly, when a defendant challenges the denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *Bonestel*, 871 S.W.2d at 168.

The trial court in the instant case based its decision to deny judicial diversion on the circumstances of the offense and the defendant's lack of candor, which is a negative indicator of amenability to correction. The trial court did not specifically recite the other factors that should be considered; even so, the totality of the trial court's sentencing remarks reflect that the trial court announced its decisions on the length of the defendant's sentence, probation as the manner of service of the sentence, and judicial diversion together as a considered approach to the total disposition of the defendant's case. *See State v. Robert S. Lutrick*, No. M2001-02720-CCA-R3-CD (Tenn. Crim. App., Nashville, Dec. 31, 2002) (affirmed trial court's denial of judicial diversion based upon the circumstance that defendant had brandished a gun during an "emotion-steeped" situation; clear from the record that court took global approach to sentencing). The trial court, in this case, specifically noted that it had considered all of the factors set forth in Code sections 40-35-102 and 40-35-103, and the court obviously considered the defendant's background as reflecting favorably on a probationary sentence. Just as obviously, the court believed that the circumstances of the offense and the defendant's "incredible" testimony outweighed all other factors in deciding to withhold the largesse of judicial diversion. Accordingly, we are of the opinion that the trial court's determination is supported by substantial evidence in the record.

Based upon the foregoing, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE