IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs at Knoxville May 21, 2013

STATE OF TENNESSEE v. PARESH J. PATEL

Appeal from the Circuit Court for Warren County
No. F-13471 Larry B. Stanley, Jr., Judge

No. M2012-02130-CCA-R3-CD - Filed July 10, 2013

JOSEPH M. TIPTON, P.J., concurring and dissenting.

I concur with the majority opinion's conclusion that the trial court did not err by denying judicial diversion because it properly considered and weighed all the appropriate factors. *See State v. Electroplating, Inc.*, 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998); *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). I respectfully disagree, though, with the conclusion that the standard of review announced in *State v. Bise*, 380 S.W.3d 682 (Tenn. 2012), and *State v. Caudle*, 388 S.W.3d 273 (Tenn. 2012), is applicable to judicial diversion.

The majority opinion quotes and cites recent unpublished cases for the propositions that (1) the *Bise* standard of review affording trial court sentencing decisions a presumption of reasonableness applies to a court's granting or denying judicial diversion and (2) the previous principles guiding this court to reverse a denial of judicial diversion for a trial court's failure to consider expressly "one or more of the seven legally-relevant factors (or merely because it failed to specify why some factors outweighed others)" is no longer good law. *See State v. Kiara Tashawn King*, No. M2012-00236-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App. Mar. 4, 2013), *petition for perm. app. filed* (Tenn. May 2, 2013); *State v. Lewis Green*, No. W2011-02593-CCA-R3-CD, slip op. at 13 n.1 (Tenn. Crim. App. Mar. 28, 2013), *petition for perm. app. filed* (Tenn. May 29, 2013). I respectfully disagree, and I believe we are bound by *Electroplating, Inc.* and *Parker*.

In *Kiara Tashawn King*, this court rejected *Electroplating, Inc.* and *Parker* insofar that they require a trial court to consider and weigh the following factors during its judicial diversion determinations and that failure to do so was cause for reversal: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal

record; (4) the defendant's social history; (5) the defendant's physical and mental health; (6) the deterrence value to the defendant and others; and (7) whether judicial diversion will serve the ends of justice. *Kiara Tashawn King*, slip op. at 8; *see Electroplating, Inc.*, 990 S.W.2d at 229 (stating that a trial court *must* consider and weigh each factor in determining whether to grant or deny diversion (emphasis added)). I note that although a trial court's failure to consider and weigh each factor may be cause for a reversal, this court is permitted to review the record to determine whether the court properly denied judicial diversion. *See Electroplating, Inc.*, 990 S.W.2d at 229. In *Lewis Green*, this court noted that the mandate requiring express consideration of each *Electroplating* factor "may no longer be appropriate in light of" our supreme court's decisions in *Bise* and *Caudle*. *Lewis Green*, slip op. at 13 n.1. The court stated that the mandate conflicted with this court's duty imposed by *Bise* and *Caudle* to "treat all in-range sentences imposed by trial courts as presumptively reasonable." *Id.* Although this court did not abrogate a trial court's obligation to consider each factor, it concluded that a trial court's failure to consider one or more of the factors or to state its reasoning why some factors outweighed others was no longer cause for reversal. *Id.*

In essence, the majority opinion relies on *Kiara Tashawn King* and *Lewis Green* to conclude that *Bise* no longer permits a reversal in judicial diversion cases when a trial court fails to consider each factor as mandated by *Electroplating, Inc.* and *Parker* as long as the court did not wholly depart from the principles and purposes of the Sentencing Act. *See Kiara Tashawn King*, slip op. at 8 (citing *Bise*, 380 S.W.3d at 706); *Lewis Green*, slip op. at 13 n.1. I respectfully disagree that *Bise* overruled *Electroplating, Inc.* and its progeny and conclude that the proper standard of review regarding a trial court's decision to grant or deny judicial diversion is abuse of discretion. *See Electroplating, Inc.*, 990 S.W.2d at 229.

In *Bise*, our supreme court concluded that the length of a sentence "within the appropriate statutory range [is] to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'" *Id.* at 708. Our supreme court has, likewise, applied the abuse of discretion standard with a presumption of reasonableness to "questions related to probation or any other alternative sentences." *Caudle*, 388 S.W.3d at 279. Recently, this court applied the supreme court's rationale in *Bise* and *Caudle* to misdemeanor sentencing. *See State v. Sue Ann Christopher*, No. E2012-01090-CCA-R3-CD, slip op. at 9 (Tenn. Crim. App. Mar. 14, 2013).

Although the *Bise* standard applies to the length of a sentence, alternative sentencing, and misdemeanor sentencing, judicial diversion is a unique legislative concept. Judicial diversion permits a trial court to defer judicial proceedings in a criminal case and to place a defendant on probation "without entering a judgment of guilty." T.C.A. § 40-35-313(a)(1)(A) (2010). This court has previously distinguished between the appellate review of the range, length, and the manner of service of a sentence and judicial diversion. *See State*

v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). Before *Bise*, review of the range, length, and the manner of service of a sentence was reviewed *de novo* with a presumption of correctness. *See* T.C.A. § 40-35-401(d) (2010); *see also Anderson*, 857 S.W.2d at 572. Judicial diversion, though, is "more than these characteristics - it affects the underlying conviction as well." *Anderson*, 857 S.W.2d at 572. Likewise, Tennessee Code Annotated section 40-35-104 (2010), addressing sentencing alternatives such as probation and community corrections, does not include judicial diversion. I conclude that our legislature did not intend judicial diversion to be considered a form of "alternative sentencing" and that *Bise* is inapplicable to matters concerning judicial diversion.

Moreover, although a defendant must admit his or her guilt before receiving judicial diversion, judgment is withheld during the deferral period. The probation a defendant is required to complete during the deferral period is simply the mechanism used by the State to supervise a defendant, not a sentence of probation. I conclude that judicial diversion is a distinct legislative concept and that nothing in *Bise* and *Caudle* suggests our supreme court intended to alter a trial court's obligations or the appellate review of a decision to grant or deny judicial diversion. As a result, this court is bound by existing, published case law addressing judicial diversion. As previously noted, though, the trial court did not err in denying diversion.

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JOSEPH M. TIPTON, PRESIDING JUDGE