

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 6, 2026

STATE OF TENNESSEE v. GENA KILGORE**Appeal from the Criminal Court for Shelby County**
No. 23-04212 Raymond J. Lepone, Judge¹

No. W2025-01870-CCA-R3-CD

A Shelby County jury convicted the Defendant, Gena Kilgore, of theft of property valued at more than \$1,000 but less than \$2,500. Following a sentencing hearing, the trial court imposed a two-year term of judicial diversion and ordered the Defendant to pay \$2,500 in restitution. The Defendant appeals, challenging the sufficiency of the convicting evidence and the trial court's denial of her request to sit at counsel table during her trial. Because we conclude we lack jurisdiction to consider this appeal, we dismiss it.

**Tenn. R. App. P. 3 Appeal as of Right;
Appeal Dismissed**

STEVEN W. SWORD, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and MATTHEW J. WILSON, JJ., joined.

Jerri Green, District Public Defender; Tony N. Brayton, Assistant District Public Defender (on appeal); and Glover Wright, Assistant District Public Defender (at trial), for the appellant, Gena Kilgore.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and L. Dan Buchanan and Daniel Woodford, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

¹ Judge Paula L. Skahan presided over the Defendant's pretrial matters and trial until her retirement. Judge Raymond J. Lepone presided over the Defendant's motion for a new trial and sentencing hearings.

I. FACTUAL AND PROCEDURAL HISTORY

On November 14, 2023, a Shelby County grand jury returned a two-count indictment charging the Defendant with TennCare fraud and theft of property valued at \$60,000 or more but less than \$250,000 relating to offenses occurring between February 1, 2017, and April 7, 2022. Following her June 2025 jury trial, the Defendant was acquitted of TennCare fraud and convicted of theft of property valued at more than \$1,000 but less than \$2,500.

On August 11, 2025, the Defendant filed a request that the trial court impose a term of judicial diversion. On October 15, 2025, the State filed a response opposing the Defendant's request for judicial diversion. Following a sentencing hearing, the trial court granted the Defendant's request for judicial diversion.² The trial court found that the Defendant qualified as a Range I, standard offender, and that no enhancement factors applied. The trial court applied mitigating factor (1), finding that the Defendant's "criminal conduct neither caused nor threatened serious bodily injury." Tenn. Code Ann. § 40-35-113(1). The trial court also applied mitigating factor (13), finding that the Defendant was sixty-four years old at the time of sentencing and was caring for her dying husband at the time of the offense. *See id.* § 40-35-113(13). Accordingly, the trial court imposed judicial diversion for a term of two years and ordered the Defendant to pay \$2,500 in restitution. An order of deferral of the Defendant's sentence and placing her on judicial diversion was entered on October 27, 2025.

On November 17, 2025, the Defendant filed a motion for a new trial, challenging the sufficiency of the evidence and arguing that the trial court erred by denying her motion for judgment of acquittal; by denying her evidentiary objections and granting the State's evidentiary objections; by admitting the preliminary hearing testimony of an unavailable witness; and by denying her motion to sit at counsel table during her trial. Following a hearing, the trial court denied the Defendant's motion for a new trial on November 24, 2025. The Defendant filed a notice of appeal that same day.

II. ANALYSIS

On appeal, the Defendant challenges the sufficiency of the convicting evidence and argues the trial court erred by denying her motion to sit at counsel table during her trial. The State responds, and we agree, that the Defendant's appeal must be dismissed because she does not have a right to appeal from a grant of judicial diversion.

² The record does not include a copy of the transcript of the Defendant's sentencing hearing.

Tennessee Rule of Appellate Procedure 3 governs appeals as of right to our appellate courts. Unlike civil litigants, criminal defendants do not have an absolute appeal as of right to any judgment entered by a trial court. *See* Tenn. R. App. P. 3(a), (b); *State v. Lane*, 254 S.W.3d 349, 352 (Tenn. 2008). As Rule 3(b) provides:

In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation; an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; an order or judgment pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure; from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceedings; from a final order on a request for expunction; and from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure.

Tenn. R. App. P. 3(b).

Rule 3(b)'s list is exhaustive; in other words, “[a] defendant in a criminal case has no appeal as of right unless it is enumerated in Rule 3(b).” *State v. Bobo*, 672 S.W.3d 299, 302 (Tenn. Crim. App. 2023) (citing *State v. Rowland*, 520 S.W.3d 542, 545 (Tenn. 2017)). Whether an appeal as of right lies from a judgment or order is an issue of subject-matter jurisdiction, and the appropriate remedy when a defendant attempts to file an appeal unauthorized by Tennessee Rule of Appellate Procedure 3(b) is dismissal. *See Id.*

Our supreme court has described judicial diversion as “a form of ‘legislative largess’ available to qualified defendants who have entered a guilty or nolo contendere plea or have been found guilty of an offense without the entry of a judgment of guilt.” *State v. King*, 432 S.W.3d 316, 323 (Tenn. 2014) (footnote omitted) (citing *State v. Schindler*, 986 S.W.2d 209, 211 (Tenn. 1999)). When a trial court grants a defendant’s application for judicial diversion, the defendant’s “plea or verdict is held in abeyance and further

proceedings are deferred under reasonable conditions during a probationary period established by the trial court.” *Rodriguez v. State*, 437 S.W.3d 450, 455 (Tenn. 2014) (citing Tenn. Code Ann. § 40-35-313(a)(1)(A)). If a defendant successfully completes the probationary period without violating the conditions the trial court imposed, then “the court shall discharge the person and dismiss the proceedings. . . .” Tenn. Code Ann. § 40-35-313(a)(2). If, however, a defendant violates the conditions of judicial diversion, then the trial court “may enter an adjudication of guilt”—in this case, a judgment of conviction—“and proceed as otherwise provided.” *Id.* In other words, “[i]n judicial diversion cases, no judgment of conviction is entered, and a sentence is imposed only in the instance that the defendant fails to successfully complete the period of probation pursuant to the grant of judicial diversion.” *State v. Dycus*, 456 S.W.3d 918, 928 (Tenn. 2015).

Here, the Defendant was convicted at trial of one count of theft of property valued at more than \$1,000 but less than \$2,500. Following a sentencing hearing, the trial court granted the Defendant’s request for judicial diversion, imposed a two-year probationary period, and ordered the Defendant to pay \$2,500 in restitution. The record does not reflect that the Defendant has violated the terms of her judicial diversion; accordingly, no judgment of conviction has yet been entered from which the Defendant may appeal. As this court has previously recognized, Rule 3(b) does not authorize an appeal as of right from a grant of judicial diversion until and unless a defendant violates the terms of judicial diversion and the trial court revokes diversion and enters a judgment of conviction. *See State v. Norris*, 47 S.W.3d 457, 461-63 (Tenn. Crim. App. 2000). This court has consistently reaffirmed that principle. *See, e.g., State v. Williams*, No. E2023-00996-CCA-R3-CD, 2024 WL 4891600, at *3 (Tenn. Crim. App. Nov. 26, 2024), *perm. app. denied* (Tenn. Apr. 17, 2025); *State v. Roach*, No. M2022-01626-CCA-R3-CD, 2023 WL 6389679, at *3 (Tenn. Crim. App. Sept. 29, 2023), *no perm. app. filed*; *State v. Sullivan*, No. E2019-01471-CCA-R3-CD, 2021 WL 1086886, at *2 (Tenn. Crim. App. Mar. 22, 2021), *no perm. app. filed*; *State v. Long*, No. M2015-01057-CCA-R3-CD, 2016 WL 385164, at *3 (Tenn. Crim. App. Feb. 2, 2016), *no perm. app. filed*. Thus, no appeal as of right presently lies in this case, and dismissal is appropriate.

As the State notes, although Rule 3 does not authorize the Defendant’s appeal, we may consider it as an extraordinary appeal pursuant to Tennessee Rule of Appellate Procedure 10. *See Norris*, 47 S.W.3d at 463; *State v. Leath*, 977 S.W.2d 132, 135 (Tenn. Crim. App. 1998). Under Rule 10, an extraordinary appeal from a lower court’s interlocutory orders may be granted “(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in [the Tennessee Rules of Appellate Procedure].” Tenn. R. App. P. 10(a). Our supreme court has held that the circumstances supporting a grant of a Rule 10 extraordinary appeal are

the same as those warranting a grant of the common law writ of certiorari. *See State v. McKim*, 215 S.W.3d 781, 791 (Tenn. 2007). “Granting certiorari is appropriate to correct a lower court’s (1) fundamentally illegal rulings; (2) proceedings inconsistent with essential legal requirements; (3) proceedings that effectively deny a party his or her day in court; (4) decisions beyond the lower tribunal’s authority; and (5) plain and palpable abuses of discretion,” as well as when a party “has lost a right or interest that may never be recaptured.” *State v. Ferguson*, 739 S.W.3d 268, 285 (Tenn. Crim. App. 2026) (first citing *Lane*, 254 S.W.3d at 355; and then citing *State v. Johnson*, 569 S.W.2d 808, 815 (Tenn. 1978)).

No such circumstances are apparent in this case. First, the Defendant did not ask this court to convert her appeal into an application for review under Rule 10, nor did she respond to the State’s dismissal argument. Regardless, the record does not show that the trial court contravened essential legal requirements, exceeded its authority, plainly and palpably abused its discretion, or entered a fundamentally illegal order by granting the Defendant’s request for judicial diversion. Although the Defendant is presently unable to litigate the claims she raises in this appeal, if she successfully completes her two-year probationary period without violating the conditions of judicial diversion, the issues will be moot because no judgment of conviction will be entered. *See* Tenn. Code Ann. § 40-35-313(a)(2). If, however, she violates the conditions and the trial court revokes her judicial diversion and enters her judgment of conviction, then she will be entitled to an appeal as of right pursuant to Rule 3 and may appropriately raise her claims of error at that time. *See id.*; *see also Norris*, 47 S.W.3d at 463; *Sullivan*, 2021 WL 1086886, at *2. In that respect, the Defendant has not lost an interest or right that may never be recaptured in this case. Accordingly, we decline to convert the Defendant’s appeal into a Rule 10 extraordinary appeal. Because this court does not have jurisdiction to consider the Defendant’s appeal pursuant to Rule 3(b), the appeal is dismissed.

III. CONCLUSION

Following our review of the record and based upon the foregoing analysis, we dismiss the Defendant’s appeal.

s/ *Steven W. Sword*

STEVEN W. SWORD, JUDGE