

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

<p>FILED</p> <p>March 27, 1997</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE,)	NO. 01C01-9509-CR-00309
)	
Appellee)	SUMNER COUNTY
)	
V.)	HON. JANE WHEATCRAFT, JUDGE
)	
BRIAN M. MINOUX)	(Pretrial Diversion)
)	
Appellant)	
)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellant, Brian M. Minoux, appeals as of right the judgment of the Sumner County Criminal Court affirming the Sumner County assistant district attorney's revocation of pretrial diversion. He presents two arguments on appeal. First, he contends that the trial court erred when it affirmed the revocation of the memorandum of understanding. Second, that the November, 1991, memorandum of understanding expired in November of 1993 and that the charges against him should have been dismissed. After a careful review of the record on appeal we affirm the trial court's findings.

During the 1980's, the Appellant owned and operated the company Tri-Circle Equipment, Incorporated. In 1988 or 1989, after the Tennessee Department of Revenue conducted a tax audit on Tri-Circle it became apparent that the company had failed to pay \$96,738.00 in sales taxes during the period of June, 1985, to April, 1987.

In October of 1989, the Sumner County Grand Jury handed down a twenty-count indictment charging the Appellant with filing falsified sales tax returns in violation of Tennessee Code Annotated, section 67-1-1440(d). The Appellant requested to be placed on pretrial diversion. On November 26, 1991, the Appellant and the assistant district attorney entered into a two-year memorandum of understanding under which the Appellant was liable to cause Tri-Circle to pay the \$96,738.00 tax liability.

At some point thereafter Tri-Circle ceased to operate as a business. According to the Appellant, the bad publicity surrounding the indictments charging the company with tax fraud caused Tri-Circle to lose its clients and forced it out of business.

On November 23, 1993, only a few days before the memorandum expired, the assistant district attorney filed a notice that he was terminating the memorandum of understanding because no restitution had been paid under the agreement. On June 21, 1994, the Appellant and the assistant district attorney entered into an agreed order

extending the memorandum for two more years. This order specifically stated that the Appellant was to sell Tri-Circle's remaining assets and inventory no later than October 1, 1994, and then personally pay the balance of the debt to the Department of Revenue before the memorandum expired.

On March 7, 1995, the assistant district attorney filed a notice of intent to terminate the extended memorandum of understanding because the Appellant had failed to sell any of the inventory and had not paid any restitution to the Department of Revenue. At an August 4, 1995, revocation hearing the trial court affirmed the revocation of the memorandum. The Appellant now appeals.

I.

The Appellant first argues that the trial court erred when it affirmed the assistant district attorney's revocation of the memorandum of understanding. This issue is without merit.

A defendant with no prior criminal record who satisfies certain conditions can be granted pretrial diversion and be allowed to enter into a memorandum of understanding to suspend prosecution with the district attorney. Tenn Code Ann. § 40-15-105(a); see State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995). The memorandum of understanding shall be conditioned on the occurrence or non-occurrence of certain statutorily outlined events or circumstances. See Tenn. Code Ann. § 40-15-105(a)(2)(A)--(H). The memorandum of understanding can be terminated by either the district attorney or the defendant by filing a notice that the memorandum is terminated. Tenn. Code Ann. § 40-15-105(d). If the district attorney files the notice, the defendant may "petition the court to review the action of the prosecution to determine whether the prosecution acted arbitrarily, capriciously or abused its discretion to terminate." Id.

If the trial court affirms the district attorney's termination of the memorandum of understanding, an appeal can be taken to the court of criminal appeals. See Tenn. R.

App. P. 9, 10. This Court has not had the opportunity to review a termination of a memorandum of understanding before this instance. We have, however, reviewed several cases where trial courts have reviewed district attorneys' decisions to deny pretrial diversion and our standard of review has been "whether the finding of the trial court that the district attorney general did not abuse his discretion . . . is supported by a preponderance of the evidence." State v. Winsett, 882 S.W.2d 806, 809 (Tenn. Crim. App. 1993). We have also stated that this Court may not substitute its own judgment for the district attorney's judgment. Houston, 900 S.W.2d at 714. We are of the opinion that the standard of appellate review under the pretrial diversion statute should be uniform and we will, therefore, apply this standard to the case before us. See State v. Carr, 861 S.W.2d 850, 856 (Tenn. Crim. App. 1993); State v. Markham, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988).

This case is somewhat problematic because the Tennessee Code Annotated's pretrial diversion statute provides that a memorandum of understanding can suspend prosecution for a maximum period of two years and that a defendant can only be granted pretrial diversion once. Tenn. Code Ann. § 40-15-105(a)(Supp. 1995). Therefore, we conclude that the Appellant's memorandum of understanding should have been terminated following the assistant district attorney's November, 1993, notice of termination. However, since the memorandum's extension ran entirely in the Appellant's favor, we do not believe that the Appellant has suffered any harm that needs to be corrected on appeal. Moreover, if the Appellant at any time had been discontent with either of the pretrial diversion arrangements he could have terminated the memorandum of understanding under Tennessee Code Annotated, section 40-15-105(d). Since the Appellant has suffered no prejudice and the two memorandums are almost identical we will review the trial court's actions.

Here, the assistant district attorney filed both notices of intent to terminate the memorandums of understanding because the Appellant had not caused one dollar to be paid towards the agreed upon restitution. After the final notice of termination the

Appellant petitioned the trial court for a revocation hearing and at that hearing the trial judge found that the Appellant had been given several chances to settle the delinquent taxes with the Department of Revenue, but that he had only been willing to do so on his own terms. The trial judge found that the district attorney had not acted arbitrary, capriciously, or abused his discretion.

Reviewing the trial court's actions and considering the fact that the Appellant did not attempt to sell any of Tri-Circle's inventory or did not cause Tri-Circle to make any payments to the Department of Revenue between November of 1991 and March of 1995, we find that the trial court's findings are supported by a preponderance of the evidence. We, therefore, affirm the memorandum's termination and the Appellant will have to face his criminal charges in court.

The Appellant also contends that to hold this matter in abeyance from the expiration of the first memorandum until the August, 1995, hearing violates the spirit and intent of the pretrial diversion statute. The Appellant has failed to support this argument with citations or other authority and the issue is, therefore, waived. Rules of the Court of Criminal Appeals of Tennessee 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

II.

The Appellant next argues that the November, 1991, memorandum of understanding expired in November of 1993 and that pursuant to its expiration his charges should have been dismissed by the trial judge. This issue is without merit.

In making this argument the Appellant cites Tennessee Code Annotated, section 40-15-105(e), which provides, in pertinent part: "The trial court shall dismiss with prejudice any warrant or charge against the defendant upon the expiration of ninety (90) days after the expiration of the period of suspension specified in the memorandum of understanding . . . provided that no termination of the memorandum of understanding has been filed" Id. The Appellant reads this to mean that the

memorandum of understanding expired ninety days after November 26, 1996 and that the trial court should have dismissed all charges against him at the expiration of those ninety days. The Appellant's argument is not well taken. The statute clearly provides that the trial court shall dismiss the charges if no termination of understanding has been filed. In this case the assistant district attorney filed a timely notice of termination of the memorandum of understanding and we, therefore, find that the trial judge was not in error.

For the above stated reasons, we affirm the trial court's revocation of the Appellant's memorandum of understanding.

WILLIAM M. BARKER, JUDGE

CONCUR:

JOE B. JONES, PRESIDING JUDGE

J. STEVEN STAFFORD, SPECIAL JUDGE