

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1998 SESSION

FILED

June 4, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

*

No. 02C01-9710-CC-00375

Appellee,

*

Hardeman County

vs.

*

Hon. Jon Kerry Blackwood, Judge

NORMAN JEFFREY PIPKIN,

*

(Rule 9 Interlocutory Appeal)

Appellant.

*

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Norman Jeffrey Pipkin, was denied an application for pretrial diversion. In this interlocutory appeal pursuant to Rule 9, Tennessee Rules of Appellate Procedure, the defendant presents one issue for review: whether the trial court erred by ruling that the district attorney did not abuse her discretion in denying the defendant's application for pretrial diversion.

The judgment of the trial court is affirmed.

The defendant, who had obtained permission to hunt on the property of a friend, either intentionally or unintentionally went onto the nearby property of another landowner without permission. When Joel Porter and a friend, Rob Kalb, confronted the defendant, he attempted to escape. Porter caught him and asked for identification. The defendant refused, later maintaining that the men were armed and hostile toward him in spite of his attempts to explain. Porter left to call the game warden while Kalb stayed to watch the defendant. When the defendant attempted to leave, Kalb followed. What happened thereafter is subject to dispute. The defendant asserted that Kalb then aimed his gun at the defendant. He claimed that after thirty or forty-five minutes, he caught Kalb off-guard and disarmed him. The defendant pointed his shotgun at Kalb's head and ordered him to empty his weapon and relinquish the shells. As he did so, the defendant asked Kalb if he had a family. The defendant claimed that Kalb then threatened him, saying that if he ever saw the defendant again, he would kill him.

Later in the day, game warden officers went to the defendant's residence to ask him about the incident. Initially, the defendant denied that he had been hunting that morning. Later, he admitted he had been hunting and claimed to

the officers that two men had chased him down. The defendant was then charged with aggravated assault and hunting without permission.

The defendant, thirty-five years old, has been married thirteen years and is the father of two children. He has been employed by Proctor and Gamble for nearly a decade, has no criminal history, and has taken an active role in his community. He coaches youth baseball and softball teams and actively participates in the Optimist Club. The defendant is also an avid sportsman and hunter.

The district attorney general recognized that the defendant had presented a favorable argument for pretrial diversion. She reviewed the application, the letters filed on behalf of the defendant, and the investigative report prepared by the Department of Correction. The record establishes that she considered the circumstances of the offense, the use of a deadly weapon, denial of criminal responsibility by the defendant, the affidavits of complaint, and the deterrent effect of punishment on criminal activity in ultimately determining that pretrial diversion should be denied. The district attorney general provided five reasons for rejecting the application:

- (1) The offenses were not impulsive, but required premeditation, effort and planning.
- (2) There was a sustained intent to violate the law.
- (3) Defendant has failed to accept responsibility for the commission of the offenses charged.
- (4) The attitude of law enforcement in this case that diversion should be denied.
- (5) Considering the above factors, it appears that pretrial diversion will not serve the ends of justice and the best interest of the public and the Defendant.

The defendant filed a petition for the writ of certiorari following the denial of his application for diversion. The defendant alleged that the district attorney general had abused her discretion in refusing to grant his application. The trial court afforded the defendant an evidentiary hearing but denied relief on the ground the district attorney general did not patently abuse her discretion. The trial court made no findings of fact. Afterward, this court entered an order granting the defendant's application for permission to appeal.

Whether to grant or deny an application for pretrial diversion is in the discretion of the district attorney general. Tenn. Code Ann. § 40-15-105; State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). On a petition for certiorari, the hearing conducted by the trial judge is limited to two issues:

- (1) whether the accused is eligible for diversion; and
- (2) whether the attorney general abused her discretion in refusing to divert the accused.

State v. Watkins, 607 S.W.2d 486, 488-89 (Tenn. Crim. App. 1980).

In making the initial determination, the district attorney general must consider (1) the circumstances of the offense; (2) the defendant's criminal record; (3) the defendant's social history; (4) the defendant's physical and mental condition; (5) the deterrent effect of punishment upon other criminal activity; (6) the defendant's amenability to correction; (7) the likelihood that pretrial diversion will "serve the ends of justice" and the best interests of the defendant and the public; and (8) the defendant's "attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility, and attitude of law enforcement." State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (citing State v. Markham,

755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988)). The nature and circumstances of the alleged offenses are not only appropriate factors to be considered upon application for diversion but may alone provide a sufficient basis for denial. Carr, 861 S.W.2d at 855; State v. Sutton, 668 S.W.2d 678, 680 (Tenn. Crim. App. 1984).

The circumstances of the case and a generalized need for deterrence, however, "cannot be given controlling weight unless they are 'of such overwhelming significance that they [necessarily] outweigh all other factors.'" Washington, 866 S.W.2d at 951 (emphasis in original) (quoting Markham, 755 S.W.2d at 853). Where there are no "such exceptional circumstances, 'the district attorney general must consider evidence which tends to show that the applicant is amenable to correction [by diversion] and is not likely to commit further criminal acts.'" Id.; see also State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993).

"The decision of a district attorney general granting or denying pretrial diversion to an accused is said to be 'presumptively correct'; and the decision should not be set aside unless there has been a 'patent or gross abuse of prosecutorial discretion.'" State v. Perry, 882 S.W.2d 357, 360 (Tenn. Crim. App. 1994) (quoting Pace v. State, 566 S.W.2d 861, 870 (Tenn. 1978)). See State v. Pinkham, 955 S.W.2d 956, 957 (Tenn. 1997) (holding the district attorney must "include in the record the factual basis and rationale for denying diversion").

The defendant has the burden of providing the district attorney with information in his application that supports his eligibility and suitability for pretrial diversion. State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989). The trial court does not conduct a de novo review at the certiorari hearing but looks instead only to the information available to and considered by the prosecutor when deciding to deny

diversion. Winsett, 882 S.W.2d at 809; Sutton, 668 S.W.2d at 680. And, where the record would support the grant or denial of pretrial diversion, the court must defer to the prosecutor's discretion. Carr, 861 S.W.2d at 856 (citing State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978)).

In this case, there is substantial evidence in the record to support the district attorney general's decision to refuse to enter into a memorandum of understanding with the defendant. The defendant's untruthfulness or lack of candor are factors the district attorney general may consider in determining whether to grant pretrial diversion. State v. Nease, 713 S.W.2d 90, 92 (Tenn. Crim. App. 1986). Those factors reflect upon prospects for rehabilitation. See United States v. Grayson, 438 U.S. 41(1978); State v. Morton, 639 S.W.2d 666, 669 (Tenn. Crim. App. 1982); State v. Poe, 614 S.W.2d 403, 404 (Tenn. Crim. App. 1981). Here, the defendant first denied he had been hunting. Later, he recanted but withheld information about whether he had threatened Kalb with his rifle.

The seriousness of the circumstances were relevant considerations for the district attorney general in denying diversion. The defendant admits that he aimed his weapon at Kalb in a threatening manner. The situation could easily have elevated into a deadly confrontation.

It is our conclusion that the evidence contained in the record supports the trial court's decision to affirm the district attorney general's denial of pretrial diversion. The defendant has failed to demonstrate abuse of prosecutorial discretion. This precludes any consideration of judicial diversion. See Tenn. Code Ann. § 40-35-313.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

(See below)
Joe B. Jones, Presiding Judge

Jerry L. Smith, Judge

Honorable Joe B. Jones died May 1, 1998, and did not participate in this opinion. We acknowledge his faithful service to this Court, both as a member of the Court and as its Presiding Judge.