IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL SESSION, l995

FILED

September 20, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	NO. 02C0l-94l2-CC-00267
	)	
	)	WEAKLEY COUNTY
V.	)	
	)	HON. WILLIAM B. ACREE, JR.
	)	JUDGE
DAVID PRICE	)	
	)	(Possession of Marijuana with the
APPELLANT	)	Intent to Sell)

FOR THE APPELLANT:

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The defendant, David Price, was charged by the grand jury of Weakley County with possession of marijuana with the intent to sell in violation of Tenn. Code Ann. § 39-l7-4l7(a)(4). The defendant sought pre-trial diversion under Tenn. Code Ann. §§ 40-l5-l02, et. seq; however, the District Attorney General denied diversion. After the defendant filed a motion for review in the Weakley County Circuit Court, a hearing ensued. The trial judge found that the District Attorney General did not abuse his discretion and that there was ample evidence supporting his refusal to grant pre-trial diversion. We granted the defendant's application for an extraordinary appeal pursuant to Rule l0, Tenn.R.App.P.[1]

The defendant was thirty-one years old at the time of the crime, living with his parents where he farms and cares for his invalid father. He is a high school graduate and has attended over two years of college. Though he has no previous criminal record, he was found to be in possession of one-half joint of marijuana on July l, l987. In the defendant's application for pre-trial diversion, he explained that he had voluntarily disclosed the location of that marijuana following a police officer's futile search of his automobile.[2] In l982, he had been arrested for malicious mischief. He paid a fine or costs in the amount of $50.25. He also reported having received speeding tickets.

Also included with the defendant's application for pre-trial diversion were four letters written on his behalf. Two of the letters were from attorneys and two were from employees of the Tennessee Department of Human Services. All of the writers were personally acquainted with the defendant, and, not surprisingly,

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[1]The appellant sought review under Rule 9, Tenn.R.App.P., but the trial judge found there was "no basis for an appeal." The appellant then sought to appeal under Rule l0, Tenn.R.App.P., and his application was granted. Rules 9 and l0 are the only vehicles by which pre-trial diversion decisions can be reviewed.

[2]He also alleged that the officer asked him to break into the home of an acquaintance and report back to him if he could find cocaine there. He "declined" to do so.

all expressed a willingness to testify as to his good character.

The circumstances surrounding the defendant's arrest were detailed at the trial court hearing. Acting upon an informant's claim that the defendant had supplied him with drugs, the police stopped the defendant in his truck on April 28, l994, ostensibly for speeding. The defendant refused to consent to the search of his vehicle; however, after a drug dog indicated that drugs were present, police uncovered three quarters of a pound of marijuana in the vehicle bagged in three separate bags. After being placed under arrest, the defendant gave his consent to a search of his parents' home and farm where he was living. There, the law enforcement officers discovered fourteen plastic bags of marijuana, as well as nine growing marijuana plants, which, taken together, weighed over four pounds.[3]

The defendant told the officers that he had purchased five pounds of marijuana from a man in Texas three weeks earlier. In fact, the defendant said that he had been purchasing from the same man and his roommate from February l988 until January, l993. At first, it appeared that the defendant desired to cooperate with the police by incriminating the source in Texas; however, he changed his mind and refused to attempt to set up the Texan. Apparently, the defendant became dissatisfied with the deal that he was getting in exchange for the information that he was giving.

The District Attorney General denied the defendant's request for pre-trial diversion, setting forth the following reasons: (l) The defendant was found to be in possession of marijuana in l987. (2) According to a reliable informant, at the time of his arrest, the defendant was en route to sell a quarter pound of marijuana and had three quarters of a pound in his truck; following the

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[3]Because the defendant's parents' home and farm are in Gibson County, this prosecution does not encompass the illegal substance found there.

defendant's arrest, police officers found over four pounds of marijuana at the defendant's home, both in bags and as growing plants. The defendant admitted that he had recently purchased five pounds of marijuana from a man in Texas. (3) The actions of the defendant indicated that he was in the business of selling drugs and that this was "not a crime of impulse." (4) Illegal drug activity is "a tremendous problem in Weakley County," for which the deterrent effect of prosecution is needed. As stated above, the trial court upheld the denial of pre-trial diversion, finding that there was sufficient evidence to support the District Attorney General's decision.

"Pre-trial diversion, or a suspended prosecution, is truly extraordinary relief for a defendant." State v. Baxter, 868 S.W.2d 679, 68l (Tenn.Crim.App. l993). It permits certain defendants to avoid the consequences of public prosecution and conviction. This Court has stated that such relief is appropriate for "a person whose criminal conduct is uncharacteristic of his prior social history, who has demonstrated in some manner an ability to undertake and carry through on the ordinary obligations of the society, and who has a present ability and incentive to act within the law without the deterrent effect of a public trial." State v. Nease, 7l3 S.W.2d 90, 92 (Tenn.Crim.App. l986). For determining whether diversion is appropriate, our Supreme Court has articulated the following factors and circumstances which should be considered:

> (C)ircumstances of the offense; the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; the deterrent effect of punishment upon other criminal activity; defendant's amenability to correction; the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant; and the applicant'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, 95l (Tenn. l993) (citing State v. Markham, 755 S.W.2d 850, 852-53 (Tenn.Crim.App. l988), which cited Pace v. State, 566 S.W.2d 86l (Tenn. l978) and State v. Hammersley, 650 S.W.2d 352 (Tenn. l983)).

The decision to grant or to deny pre-trial diversion rests within the discretion of the District Attorney General and is subject to review by the trial court for an abuse of prosecutorial discretion. Tenn. Code Ann. § 40-l5-l05(b)(3). "The record must show an absence of any substantial evidence to support the refusal of the District Attorney General to enter into a [pre-trial diversion] memorandum of understanding before a reviewing court can find an abuse of discretion." State v. Hammersley, 650 S.W.2d at 356 (citing State v. Watkins, 607 S.W.2d 486, 488 (Tenn.Crim.App. l980)). In reviewing the trial court's decision, we must determine whether the evidence preponderates against the finding of the trial court. State v. Baxter, 868 S.W.2d at 68l. In this case, we find that the District Attorney General's decision denying pre-trial diversion was clearly supported by the evidence.

This is not a case about "a person whose criminal conduct is uncharacteristic of his prior social history." Nease, 7l3 S.W.2d at 92. The evidence showed that the defendant was caught with marijuana in his possession years before. More significantly, he admitted to the arresting officer that he had been purchasing marijuana from a source in Texas for the past six years and that he had bought five pounds as recently as three weeks before his arrest. In addition, the police found marijuana growing at the defendant's farm. This evidence, which "is indicative of more than a casual flirtation with marijuana," strongly supports the District Attorney General's refusal to enter into a memorandum of understanding. State v. Watkins, 607 S.W.2d at 489 (finding that the fact that the defendant was in possession of three pounds of marijuana was a sufficient basis for the District Attorney General's denial of pre-trial

diversion).

It might also be said that the District Attorney General acted within his discretion in considering the deterrent effect of this prosecution in a county where drug traffic is a problem. However, the trial judge specifically refused to take judicial notice of the drug problem in the county, and, since there was no proof about the drug problem, he made no finding that such a need for deterrence justified a denial of diversion.

Like the trial judge, we find no abuse of discretion by the District Attorney General in the denial of pre-trial diversion to this defendant, who was quite clearly a drug dealer. We affirm the judgment of the trial court.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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JOHN H. PEAY, JUDGE