

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

FILED
February 23, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 DARWIN L. WILD,)
)
 Appellant.)

No. 03C01-9507-CC-00198

Jefferson County

Hon. Ben W. Hooper, II, Judge

(Denial of Pretrial Diversion)

For the Appellant:

Edward C. Miller
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For the Appellee:

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and
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Alfred C. Schmutzer, Jr.
District Attorney General
and
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Assistant District Attorney General
Sevierville, TN 37862

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
Judge

OPINION

The defendant, Darwin L. Wild, is before us in an interlocutory appeal by permission, T.R.A.P. 9, from the order of the Jefferson County Circuit Court affirming the prosecuting attorney's denial of his application for pretrial diversion. The sole issue for our review is whether the trial court erred in affirming the denial.

On January 3, 1994, the defendant was indicted for one count of arson. He filed an application for pretrial diversion that stressed that he was only twenty years of age, had graduated from high school with a 2.6 grade point average, and was very involved in his high school's student government as well as the Key Club. It stated that he had only one prior "brush with the law" and that it was a malicious mischief charge when the defendant was a juvenile. Upon graduating from high school, the defendant attended and graduated from a security school. He enlisted in the delayed entry program of the United States Air Force but was discharged for medical reasons associated with a head injury he suffered while working for Cracker Barrel Restaurants. The defendant is currently employed with a landscaping company and has stayed out of trouble for the last two years since the present offense was committed.

The prosecuting attorney denied the application for the following reasons:

(1) The defendant involved two juveniles in this offense who were adjudicated in juvenile court and sustained a juvenile record and to grant diversion to the defendant would diminish the seriousness of his conduct and imply that less punishment is sustained by adult offenders.

(2) The defendant's juvenile malicious mischief conviction arose from his involvement in cutting down a tree on school property and this case involves the arson of a sign at the same school, evidencing the defendant's continued refusal to respect the value of another's property.

(3) The defendant has failed to express any remorse and has attempted to place blame on his juvenile friends.

(4) There is a need for deterrence of the destruction of public property.

The defendant petitioned the trial court for a writ of certiorari to review the prosecuting attorney's decision upon the record. The trial court dismissed the petition, holding that there was no abuse of discretion in declining to grant the defendant pretrial diversion. In denying the petition, the trial court stated:

The court is going to have to rule that the State has not abused its discretion in denying you diversion, Mr. Wild, and for -- and I guess for almost the sole reason that I rule that way is because of the other incident having taken place, the chopping of the tree. That would certainly have been something that should have made an impact on you, and -- but it didn't.

The trial court held that there was no abuse of discretion because this was not the defendant's first involvement with the destruction of property and that the defendant apparently had not learned anything from his juvenile adjudication.

The decision to grant or deny an application for pretrial diversion is in the discretion of the prosecuting attorney. T.C.A. § 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 court is limited to two issues:

- (1) whether the accused is eligible for diversion; and
- (2) whether there was an abuse of discretion by the prosecuting attorney in refusing to divert the accused.

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

In making the initial determination, the prosecuting attorney must consider (1) the circumstances of the offense, (2) the accused's criminal record, (3) the

accused's social history, (4) the accused's physical and mental condition, (5) the deterrent effect of punishment upon other criminal activity, (6) the accused's amenability to correction, (7) the likelihood that pretrial diversion will serve the ends of justice and the best interests of the accused and the public, (8) the accused's attitude, behavior since arrest, home environment, current drug usage, emotional stability, past employment, general reputation, family stability and attitude of law enforcement. State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993). Thus, the nature and circumstances of the alleged offenses are not the only appropriate factors to be considered upon application for diversion, but they may 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). Also, a sustained intent to violate the law, as opposed to impulsive criminal behavior, may be a factor in denying diversion. State v. Lovvorn, 691 S.W.2d 574, 577 (Tenn. Crim. App. 1985).

The decision of a prosecuting attorney to grant or deny pretrial diversion is presumptively correct and it will not be set aside absent a "patent or gross abuse of prosecutorial discretion." Hammersley, 650 S.W.2d at 356 (quoting State v. Pace, 566 S.W.2d 861, 870 (Tenn. 1978), concurring opinion, Henry, C.J.). Thus, on appeal, the record must be void of any substantial evidence in support of the decision before this court may find an abuse of discretion by the prosecuting attorney. Hammersley, 650 S.W.2d at 356; Carr, 861 S.W.2d at 856.

We acknowledge that the defendant has stayed out of any further trouble and maintained employment since the commission of the charged offense. Indeed, his continued good behavior may stand him in good stead if he is ultimately found guilty and seeks judicial diversion. See T.C.A. § 40-35-313(a)(1). However, the fact that he involved two juveniles in his conduct and the fact that he has a prior juvenile adjudication for a similar offense committed against the same school constitutes

sufficient evidence to support the prosecuting attorney's decision regarding pretrial diversion. The trial court's order denying the defendant's petition for a writ of certiorari for pretrial diversion is affirmed.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

John K. Byers, Senior Judge