IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1996

STATE OF TENNESSEE,	)	
	)	No. 02C01-9502-CR-00040
Appellee	)	
	)	SHELBY COUNTY
vs.	)	
	)	Hon. JULIAN GUINN, Judge (by
	)	designation of the Supreme Court)
CHARLES A. PINKHAM, JR.,	)	
	)	(Denial of Pretrial Diversion)
Appellant	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Charles A. Pinkham, Jr., pursuant to Rule 10, Tenn. R. App. P., appeals from the decision of the trial court affirming the district attorney general's denial of his application for pretrial diversion. The appellant seeks to divert the offenses of falsely representing himself as a lawyer, Tenn. Code Ann. § 23-3-108 (1994), a class E felony; impersonating a licensed professional, Tenn. Code Ann. § 39-16-302 (1991), a class E felony; and aggravated perjury, Tenn. Code Ann. § 39-16-703 (1991), a class D felony. In this interlocutory appeal, the appellant presents two issues. First, the appellant challenges the trial court's finding that the district attorney general did not abuse his discretion in denying diversion. Next, the appellant contends that the trial court erred by refusing to exclude certain evidence from consideration for the purposes of pretrial diversion and writ of certiorari hearing.

After a review of the record, we affirm the judgment of the trial court.

I. Factual Background

On January 20, 1994, three indictments were returned against the appellant charging him with (1) aggravated perjury by making false statements under oath during a hearing in the Probate Court of Shelby County;[1] (2) two counts of practicing law without a license during the period between December

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[1]The indictment recites the following alleged false statements by the appellant:

> Q. And you're an attorney? A. Yes. Q. How long have you been licensed in Tennessee? A. Six, seven years. . . . Q. Did you take the bar exam to get a license in Tennessee or did you do it on reciprocity? A. Reciprocity. Q. You are currently licensed in Tennessee? A. Yes. Q. Since when? A. I believe '87. Q. But you pay your license fee as an attorney? A. Yes.

1, 1992, and September 15, 1993; and (3) falsely representing himself as an attorney during the period between December 1, 1992 and September 15, 1993.

The undisputed facts reveal that, on December 3, 1992, the appellant, although not licensed to practice law in this state, drafted and improperly executed a will on behalf of Mrs. Hilda Bratton. Mrs. Bratton died shortly thereafter. The will left the majority of Mrs. Bratton's estate to two of her natural children. A third child challenged the will. The appellant testified at the will contest hearing, which was conducted in the Probate Court of Shelby County.

The Probate Court declared the will to have been invalidly executed. Consequently, the heirs received shares of the estate through the laws of intestacy. The actual amount of the losses incurred by the two intended beneficiaries is disputed. The appellant contends that the losses were less than ninety thousand dollars.[2] The State asserts that, as a direct result of the appellant's criminal behavior, the two beneficiaries suffered losses amounting to two hundred thousand dollars.[3] These losses were distributed to the third natural child of the testatrix. Thus, although in a different proportion than originally intended, all funds remained with the children of the testatrix.

On March 17, 1994, the appellant filed an application for pretrial diversion. The appellant's application is accompanied by fifty letters of support, outlining his contributions to the community. The appellant is fifty years old, married, and has

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[2]The appellant submitted an affidavit from Frank Mason, C.P.A., attesting that the losses were less than ninety thousand dollars. We note that the affidavit was submitted five months after the appellant's application for pretrial diversion. Accordingly, the affidavit could not have been considered by the district attorney general.

[3]The State also refers to a civil lawsuit filed against the appellant by one of the intended beneficiaries of the will, seeking one hundred thousand dollars for actual pecuniary losses and five hundred thousand dollars for punitive damages.

two children. Educationally, the appellant possesses both a bachelor's degree and a law degree. The appellant is a native of California and entered the practice of law in that state. In his application, the appellant explained that, in 1983, he realized that he had an alcohol problem and admitted himself to a treatment center in Mississippi. In 1984, the appellant voluntarily surrendered his California law license. Soon thereafter, the appellant and his family permanently moved to Memphis. Immediately upon settling in Memphis, the appellant became very active within his church and Alcoholics Anonymous. He has continued with these activities and also is involved with other support groups and youth organizations. The appellant is a self-employed financial planner with an excellent work history. The application reflects a commitment to his family and his church. The appellant has no prior criminal history, has an exemplary social history, and is a leader in his community. Additionally, the appellant accepts responsibility for his actions and has established a plan for self-rehabilitation which involves ongoing therapy, attendance with a support group, and restriction of his employment. The appellant contends that a conviction would cause him to lose those professional licenses related to his ability to engage as a financial planner in this state.

The prosecuting attorney denied the application for the following reasons:

> (1) The circumstances of the case indicate that the defendant engaged in a systematic and continuing criminal activity. . . . Having engaged in the unauthorized practice of law, Mr. Pinkham compounded original criminal behavior by lying under oath when questioned by Judge Southern - some ten months later - as to whether or not Mr. Pinkham is a licensed attorney in the State of Tennessee. In addition to committing three (3) separate offenses for which he is indicted, Mr. Pinkham has a fourth uncharged offense in which he contracted to prepare another Will for a Mr. Charles E. Shartle on March 23, 1993.
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> (2) The magnitude of the losses suffered by the victim mandate against Mr. Pinkham's application for diversion.
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> (3) I believe further that Mr. Pinkham is not a suitable candidate for pretrial diversion because Mr. Pinkham, unfortunately, has a history of dishonesty and unethical behavior. Mr. Pinkham voluntarily resigned from the California Bar on December 31, 1986, while a

> disciplinary proceeding was pending to disbar Mr. Pinkham. The State of California alleged that Mr. Pinkham: engaged in professional misconduct; violated his oath and duties as an attorney; misappropriated or converted client funds; abandoned his clients; and/or committed acts involving moral turpitude, dishonesty and/or corruption. Having voluntarily surrendered his California law license, Mr. Pinkham engaged in the criminal and egregious conduct which led to his current indictments.
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> (4) There is an overwhelming need for deterrence in this case. Through Mr. Pinkham's actions, innocent victims have suffered enormous pecuniary and emotional losses. We must deter individuals from unlawfully engaging in the unauthorized practice of law. . . . We shall not send a message that the Attorney General condones a defendant's intentionally lying to a Judge.

No evidentiary hearing was conducted due to the parties' agreement that the determinative issue would be submitted to the court upon the record. On November 4, 1994, the trial court entered its order finding that the district attorney general did not abuse his discretion in denying pretrial diversion to the appellant. The appellant appeals from the trial court's order.

II. Denial of Diversion

The appellant contends that the trial court erred in failing to find that the district attorney general abused his discretion in denying the appellant's application for pretrial diversion. The decision to grant pretrial diversion rests within the discretion of the district attorney general. Tenn. Code Ann. § 40-15-105(b)(3) (1994 Supp.); see also State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). When deciding whether to grant an application for pretrial diversion, the district attorney general should consider the circumstances 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; the 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 the 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, 951 (Tenn. 1993) (citing State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988) (citing Pace v. State, 566 S.W.2d 861 (Tenn. 1978) and Hammersley, 650 S.W.2d at 352). See also Houston, 900 S.W.2d at 714.

The district attorney general's decision regarding pretrial diversion is presumptively correct, and the trial court will only reverse the decision when the appellant establishes that there has been a patent or gross abuse of prosecutorial discretion. Houston, 900 S.W.2d at 714 (citing Hammersley, 650 S.W.2d at 356). In order to establish abuse of discretion, "the record must show an absence of any substantial evidence to support the district attorney general's refusal to grant pretrial diversion." Id. The trial court may only consider evidence considered by the district attorney general in the decision denying pretrial diversion, State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), and the trial court may not substitute its judgment for that of the district attorney general when his decision is supported by the evidence. State v. Watkins, 607 S.W.2d 486, 489 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1980).

For purposes of our review, the findings of the trial court are binding on this court unless the evidence preponderates against such findings. Houston, 900 S.W.2d at 715. We review the case, not to determine if the trial judge has abused his discretion, but to determine if the evidence preponderates against the

finding of the trial judge who holds that the district attorney general has or has not abused his discretion. Watkins, 607 S.W.2d at 489. Thus, the underlying issue for our determination remains whether or not, as a matter of law, the prosecutor abused his discretion in denying pretrial diversion. Carr, 861 S.W.2d at 856.

In the present case, the district attorney general considered the relevant factors. In denying diversion, the district attorney general conceded that:

> Mr. Pinkham is a fifty year old man with no criminal record. I have considered his exemplary social history. I have considered that Mr. Pinkham appears to be a leader in his community. . . . I have considered all of the parameters of Mr. Pinkham's social, family, personal, educational and professional background.

However, the district attorney general concluded that these factors were outweighed by the "interests of the public."

Although the appellant's application indicates that he is an excellent candidate for pretrial diversion based upon his social history and amenability to rehabilitation, the focus of diversion does not rest solely upon the alleged offender. In appropriate cases, the circumstances of the offense and the need for deterrence may outweigh all other relevant factors and justify a denial of pretrial diversion. Carr, 861 S.W.2d at 855. The circumstances of this case indicate that this was not a crime of impulse, but one of planning. The appellant had numerous opportunities to reflect upon his conduct and rectify his wrongs. He failed to do so. The appellant maintained his misrepresented status as a licensed attorney throughout his contact with the testatrix and her beneficiaries and during his testimony at the will contest hearing.

The district attorney general also denied the appellant diversion based

upon the need to deter others from committing similar offenses. The appellant argues that the district attorney general offered no statistics or facts which would support a need for deterrence. The appellant's argument is misplaced. This court has repeatedly held that the deterrent effect of punishment upon other criminal activity is a factor which the district attorney should consider. See generally, Hammersley, 650 S.W.2d at 355; State v. Kirk, 868 S.W.2d 739, 743 (Tenn. Crim. App. 1993); Markham, 755 S.W.2d at 853. Moreover, our sentencing laws recognize that the punishment of certain offenses is particularly suited to provide an effective deterrent to others likely to commit similar offenses. See Tenn. Code Ann. § 40-35-103(1)(B) (1990). We have held that these offenses, by their very nature, need no extrinsic proof to establish the deterrent value of punishment. State v. Millsaps, No. 03C01-9211-CR-00374 (Tenn. Crim. App. at Knoxville, December 12, 1995). Clearly, the offenses of practicing law without a license and perjury would fall into this category. Our system of justice rests upon the premise that a witness will speak the truth. The condonation of behavior such as the appellant's would often result in frequent miscarriages of justice, thereby making a mockery of our judicial system. See, e.g., State v. Perry, 882 S.W.2d 357, 360 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994). Moreover, the licensing of professionals is necessary to protect the unsuspecting public from those who would prey on their vulnerabilities. See Union City & Obion County Bar Assn. v. Waddell, 30 Tenn. App. 263, 205 S.W.2d 573 (1947). We conclude that the district attorney general's consideration of deterrence was proper.

The district attorney general also referred to the magnitude of the victims' losses and the appellant's past conduct. Although the amount of the actual losses is disputed, ranging between ninety thousand and two hundred thousand dollars, we conclude that either amount is excessive and was appropriately considered by the district attorney general. See, e.g., Carr, 861 S.W.2d at 854

(losses amounted to $23,370); State v. Adkins, No. 01C01-9210-CC-00324 (Tenn. Crim. App. at Nashville, April 7, 1994). Additionally, the district attorney general noted that the appellant was involved in similar conduct in California which resulted in disciplinary charges by the California State Bar. The appellant argues that these allegations were improperly considered. We disagree. See *infra* Section III: Exclusion of Evidence from Consideration. Moreover, the appellant has demonstrated an unwillingness to tell the truth based upon misrepresentations proffered in the probate court and his statement to an investigator, after being informed of his constitutional right against self-incrimination, that "he could not remember" telling the probate judge that he was a licensed Tennessee lawyer. Diversion should be granted to defendants whose criminal conduct is uncharacteristic of their prior history. State v. Nease, 713 S.W.2d 90, 92 (Tenn. Crim. App. 1986) (emphasis added). We agree with the district attorney general's conclusion that the appellant's conduct, in certain respects, was not uncharacteristic of his prior behavior.

Before a reviewing court can find an abuse of discretion, the record must show an absence of any substantial evidence to support the district attorney general's denial of pretrial diversion. Hammersley, 650 S.W.2d at 356 (emphasis added). Upon review of this case, the record provides substantial evidence to affirm the trial court's judgment that the district attorney general did not abuse his discretion in denying pretrial diversion.

III. Exclusion of Evidence from Consideration

The appellant contends that the trial court erred in failing to exclude certain evidence from consideration for the purposes of pretrial diversion and writ

of certiorari hearing.[4] Specifically, the appellant contends that reference to the uncharged offense should be excluded on the grounds that "it is so ambiguous that the defense has had no opportunity to explain or deny the charges." Furthermore, the appellant contends that the California State Bar report should be excluded from consideration. In support of this contention, he argues that the report is unreliable, that no adjudication of guilt was ever made, and that the alleged events are remote in time.[5] The appellant does not deny the allegations in the bar report or the uncharged offense. Rather, he challenges their admissibility. Thus, the relevant question for our determination is what evidence may the district attorney general consider in either granting or denying an applicant diversion.

A. Exclusion Based upon Evidentiary Rules

Initially, we note that pretrial diversion does not involve a determination of guilt or innocence. Moreover, diversion may not be viewed as a sentencing alternative or as a specialized form of probation. [6] In the probation context, the

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[4]The trial court denied the motion finding that the appellant's position was not well taken and "even if the questioned material was excluded . . . there are more ample grounds supporting the denial in this case." We agree with the trial court's conclusion that, even if the contested evidence was excluded, the record shows the existence of other "substantial evidence to support the district attorney general's denial of pretrial diversion."

[5]We note that neither evidence of the uncharged offense nor evidence of the California Bar Report were included in the record for our review.

[6]Although we distinguish between probation and pretrial diversion, our supreme court indicated in Hammersley, 650 S.W.2d at 354, that the same factors relevant to the issue of probation are equally relevant in determining entitlement to diversion. Nonetheless, it is not necessarily inconsistent that the same criteria should be utilized for both. Although previous appellate decisions of this state have referred to pretrial diversion as “pretrial probation,” we recognize that they have drawn procedural similarities from other jurisdictions which have implemented pretrial diversion programs. Specifically noted are the diversion programs of California and New Jersey. See Pace, 566 S.W.2d at 868 (Henry, C.J., concurring); Hammersley, 650 S.W.2d at 353 (Brock, J.). We note, however, that in both of those jurisdictions, eligibility for admission into their respective programs is determined by a judge; the ultimate decision to divert is by a judge; and upon unsuccessful termination of the program, it is the judge

State has already obtained a judicial determination of the accused's guilt. Thus, society's interest in convicting the accused has been achieved. Recognizing that no adjudicative element is present within the pretrial context, we conclude that reliable hearsay evidence may be considered by the district attorney general in arriving at his decision to grant or deny diversion. Thus, evidence that is deemed trustworthy and relevant to the issue of diversion may be considered by the district attorney general, regardless of its admissibility under exclusionary rules of evidence. Cf. State v. Mackey, 553 S.W.2d 337, 344 (Tenn. 1977); State v. Flynn, 675 S.W.2d 494, 498 (Tenn. Crim. App. 1984). Accordingly, if the appellant contends that information considered by the district attorney general is materially false or is unconstitutionally obtained, the burden is upon the appellant to challenge such information.

In the present case, the appellant did not deny either the uncharged offense or the allegations contained in the California State Bar report. Nor did the appellant seek an opportunity to refute the accuracy of the evidence. Accordingly, we conclude that the uncharged offense and the California Bar Report were properly considered by the district attorney general. This issue is without merit.

B. Exclusion Based upon "Disputed Facts"

In a somewhat related argument, the appellant contends that the trial

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who orders prosecution. See State v. Leonardis, 363 A.2d 321, 331 (N.J. 1976); see also People v. Superior Court of San Mateo County, 520 P.2d 405 (Cal. 1974). In both states, the prosecutor exercises little or no discretion at any of the procedural stages contrary to the statutory authority granted to the district attorney general in this state. Both California and New Jersey have interpreted their pretrial diversion schemes as judicial functions in view of the role exercised by the judiciary in their programs. Moreover, we note that Tennessee has enacted a separate statutory scheme for judicial diversion. See Tenn. Code Ann. § 40-35-313 (1990).

court improperly considered the California State Bar Report and the uncharged offense in affirming the district attorney general's denial of diversion. The appellant argues that these facts were improperly considered due to their unreliability.[7]

The appellant's argument is grounded upon what he contends is a procedural violation of State v. Winsett, 882 S.W.2d at 806. In Winsett, a panel of this court identified three criteria which should be included in the district attorney general's written response denying diversion.[8] Id. at 810. The appellant contends that the district attorney general failed to comply with the third criterion of Winsett which suggests that the district attorney general identify "any disputed issue of fact" in his letter denying diversion. Id. The trial court may then hold an evidentiary hearing, if necessary, to clarify matters already in the record about which there may be some dispute.

We agree that the district attorney general's letter denying diversion did not identify disputed issues of fact. It would be instructive at this juncture to review the procedural aspects of an application for diversion. As a practical matter, the district attorney general rarely will be in a position to identify disputed facts when advising the applicant, via letter, of his denial of diversion. Factual disputes typically arise after communication of the denial has been made. Indeed, this scenario occurred in the instant case. The request to exclude

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[7]We note that an appellate court is not the proper forum for resolution of disputed facts. Factual determinations are within the jurisdiction of the trial court. Accordingly, we make no determination resolving disputed facts other than affording the finding of the district attorney general the presumption of correctness. In any case, the only disputed fact is the amount of the losses suffered by the victims, which is not at issue in this appeal. See *supra* note 2.

[8]A written response denying diversion should include:
1. An enumeration of all the evidence considered;
2. The reason for denial. . .; and
3. An identification of any disputed issue of fact.

Id.

evidence was made after the district attorney general had denied the appellant's request for diversion.[9] Generally, it is only upon the release of the letter that an applicant becomes aware of any disputed fact. Therefore, it is incumbent upon the appellant to affirmatively identify and contest disputed facts in his petition for writ of certiorari hearing.[10] This was not done in the present case.

As we have previously determined, the district attorney general's decision regarding diversion is presumed correct. Houston, 900 S.W.2d at 714. The burden of establishing entitlement to pretrial diversion rests with the appellant. Winsett, 882 S.W.2d at 810. Likewise, the burden of presenting "disputed facts" before the trial court also rests with the appellant.

The only evidence that the trial court may consider at the certiorari hearing is that evidence considered by the district attorney general in the decision denying pretrial diversion. Winsett, 882 S.W.2d at 810. If the trial court finds that the district attorney general considered false or misleading facts in arriving at his or her decision, the trial court may find that "abuse of discretion" has occurred and order diversion of the applicant, unless there exists other "substantial evidence" to support the district attorney general's denial of diversion. See Houston, 900 S.W.2d at 714.

In the present case, neither the uncharged offense nor the allegations of the California Bar report are in dispute. Moreover, the appellant neither denied the veracity of such facts before the trial court nor sought an evidentiary hearing

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[9]In the present case, the district attorney general denied the appellant's application for pretrial diversion on April 22, 1994; the appellant filed a petition for writ of certiorari on May 9, 1994; and on August 22, 1994, the appellant filed a motion to exclude evidence from consideration for purposes of pretrial diversion and writ of certiorari hearing.

[10]Identifying disputed facts in the petition enables the trial court to find that an evidentiary hearing is necessary to resolve the disputed facts and review the district attorney general's decision.

to challenge the alleged facts in dispute. The appellant only challenges their admissibility in accordance with evidentiary standards. Therefore, we conclude that the uncharged offense and the allegations of the California Bar Report were appropriate for consideration. This issue is likewise without merit.

V. CONCLUSION

After conducting the appropriate review of such matters, we conclude that the trial court was correct in finding that the district attorney general did not abuse his discretion in denying pretrial diversion. Additionally, we hold that reliable hearsay may be considered by the district attorney general in reviewing applications for pretrial diversion. Thus, the trial court properly overruled the appellant's motion to exclude evidence from consideration. Moreover, we conclude that the burden is upon the diversion applicant to identify and affirmatively contest any disputed fact prior to the trial court's review of the district attorney general's decision. Accordingly, the decision of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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LYNN W. BROWN, Special Judge