

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

<p>FILED</p> <p>August 1, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>

STATE OF TENNESSEE,)
)
 Appellee,)
)
 v.)
)
 CHARLES ROBERT HARMUTH,)
)
 Appellant.)

No. 01C01-9503-CC-00074
 Franklin County
 Hon. Buddy D. Perry, Judge
 (Denial of Pretrial Diversion)

For the Appellant:

Timothy S. Priest
 100 First Avenue, S.W.
 Winchester, TN 37398

For the Appellee:

Charles W. Burson
 Attorney General of Tennessee
 and
 Hunt S. Brown
 Assistant Attorney General of Tennessee
 450 James Robertson Parkway
 Nashville, TN 37243-0493

James Michael Taylor
 District Attorney General
 First American Bank Bldg.
 Dayton, TN 37321
 and
 Steven M. Blount
 Assistant District Attorney General
 1 South Jefferson Street
 Winchester, TN 37398

OPINION FILED: _____

AFFIRMED

Joseph M. Tipton
 Judge

OPINION

The defendant, Charles Robert Harmuth, is before us in an interlocutory appeal by permission, T.R.A.P. 9, from the order of the Franklin 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 by affirming the denial.

The defendant is a medical doctor who is certified in gynecology, obstetrics, and drug dependency. He was indicted on ten counts of obtaining a schedule II controlled substance by fraud, twenty counts of obtaining a schedule III controlled substance by fraud and seven counts of obtaining a schedule IV controlled substance by fraud, all class D felonies. He filed an application for pretrial diversion that explained that he had developed a drug addiction after suffering a painful leg injury that required eight reconstructive surgeries. On the application, the defendant stressed that he did not believe that the drugs ever impaired or compromised the treatment he offered his patients. He also noted that he had completed a thirty-day drug rehabilitation program since his arrest and that he planned to complete an outpatient program that would take between three to six months and a long term treatment plan which would contractually obligate him to be free from drugs for a five-year period.

In a letter dated April 5, 1994, the prosecuting attorney denied the application for the following reasons:

(1) Mr. Harmuth occupied a position of trust and authority in the community. . . . From the evidence presented, he clearly violated this trust and authority by using his position of trust and authority to gain sufficient information to commit criminal violations. Specifically, Mr. Harmuth used his medical practice to gain names of patients and then used his position as a medical doctor to fraudulently write prescriptions and fraudulently obtain [s]chedule II, III, and IV [c]ontrolled [s]ubstances using the patients' names. Medical doctors are licensed by the State and take an oath. They are called upon to act in accordance with an even higher standard than that applied to the average citizen. The facts and circumstances of

. . . this case indicate that [the defendant] violated his position of trust and authority.

(2) The actions of Mr. Harmuth were obviously intentional, as the criminal activity continued over several months. Specifically, Mr. Harmuth's criminal activity continued from at least July 1993 to early February 1994. Mr. Harmuth has been charged . . . with fraudulently obtaining the following [c]ontrolled [s]ubstances: at least 30 [schedule III] in July 1993; at least 30 [schedule III] and [50 schedule IV] in August 1993; at least 165 [schedule III] in [September 1993]; at least 20 [schedule II] and 30 [schedule III] and 130 [schedule IV] in [October 1993]; at least 20 [schedule II] and [740 schedule III] and 30 [schedule IV] in November 1993; at least 70 [schedule II] and 30 [schedule III] and 10 [schedule IV] in January 1994; and at least 60 [schedule II] and 50 [schedule IV] in February 1994. The facts and circumstances of this case . . . indicate that the [d]efendant's criminal activity is not indicative of an isolated mistake, but rather show a continuing scheme or plan to engage in criminal endeavors which ended only upon the [defendant's] arrest.

(3) In addition, to let such conduct go unpunished would erode public confidence in the medical profession and the criminal justice system. As a medical doctor, the [d]efendant holds a highly respected position in the community. Giving the [d]efendant [pretrial diversion] just because he is a [d]octor, would certainly appear inappropriate to the general public and would appear to the general public that the [d]efendant is receiving preferential treatment because of his "status".

(4) There is a serious issue of deterrence that must be considered when weighing factors concerning [pretrial diversion]. The [d]efendant's criminal behavior must be deterred and granting him [pretrial diversion] would not serve as a deterrent to this type of behavior, either to Mr. Harmuth, or to others who might be inclined to commit such acts. There exists a strong public policy regarding the illegal taking of [c]ontrolled [s]ubstances and regarding obtaining [c]ontrolled [s]ubstances in an illegal manner. Certainly medical doctors are in a position to easily violate drug related offenses. There must, therefore, be a strong element of deterrence to this type of crime. To [agree to pretrial diversion] in this case would not serve to protect the public from such activities.

(5) Mr. Harmuth, as a medical doctor, was entrusted with the care of numerous patients. As stated above, he violated the trust of those patients by fraudulently placing their names on prescriptions for controlled substances. In addition, Mr. Harmuth was conducting medical procedures, surgeries and birthing procedures while under the influence of [s]chedule II, III, and IV [c]ontrolled [s]ubstances. The safety and well-being of these patients was certainly compromised by Mr. Harmuth's criminal behavior.

The defendant petitioned the trial court for a writ of certiorari to review the denial of pretrial diversion on the record. At the certiorari hearing, the prosecutor testified that he denied pretrial diversion based on the factors listed in the letter. He also said that he reviewed the defendant's application in some detail and was not unmindful of the defendant's lack of a criminal record and standing in the community. He acknowledged that the defendant's drug addiction may have begun in 1987 after he injured his leg and said that, at the defendant's request, he had talked to one of the doctors involved in treating the defendant for his addiction.

The defendant also testified at the hearing. He admitted his guilt to the charged offenses and stressed the rehabilitation efforts he had made since his arrest. He explained that his drug addiction began when he broke his leg in 1987. He said that while he was at the Mayo Clinic in 1990 undergoing tests and physical therapy on his leg, he sought and received treatment for a codeine addiction. He testified that he was only taking over-the-counter drugs in the summer of 1993 until he reinjured his leg and began consuming sample narcotics from his office. He said that as the pain in his leg continued, he enlisted the help of his mother and began writing prescriptions in her name and eventually used the names of his sister, girlfriend, and an employee to obtain drugs. The defendant admitted taking large amounts of drugs during months when he was treating patients but denied that drugs ever impaired his ability to treat patients.

The trial court held that there was no abuse of discretion in the prosecutor declining to grant the defendant pretrial diversion. Although the trial court rejected the prosecutor's conclusion that doctors or other professionals are ineligible for pretrial diversion because of public perception, it ruled that he had considered all the appropriate factors and that given the circumstances of the case, including the breach

of trust, the ongoing planned criminal conduct, and the need for deterrence, substantial evidence supported his decision to deny pretrial diversion.

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, 253 (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. Lowvorn, 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.

The defendant argues that the prosecutor abused his discretion by denying his request for pretrial diversion because he failed to consider the favorable facts listed in his application and because the record is void of any substantial evidence supporting the general’s decision. We disagree. The prosecutor’s testimony established that he considered all the facts listed in the defendant’s application for pretrial diversion.

Although we recognize that the evidence indicates that the defendant is making a sincere effort to overcome the drug addiction that motivated him to commit these crimes, we agree with the trial court’s conclusion that sufficient evidence supports the prosecutor’s decision to deny pretrial diversion. By fraudulently filling out thirty-seven prescriptions over less than an eight-month period of time, the defendant demonstrated a sustained intent to violate the law. Moreover, his addiction relapse is a negative factor relative to rehabilitation potential. Based on the defendant’s sustained intent to violate the law, the need for deterrence, and the other circumstances of this case, we conclude that the prosecutor did not abuse his discretion by denying the defendant’s request for pretrial diversion. Obviously, this opinion does not foreclose consideration of judicial diversion if the circumstances then existing merit it. However, the trial court’s order denying the defendant’s petition for a writ of certiorari is affirmed.

Joseph M. Tipton, Judge

CONCUR:

Gary R. Wade, Judge

Paul G. Summers, Judge