

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

FILED

September 5, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 01C01-9506-CC-00213

APPELLEE,

*

WILLIAMSON COUNTY

VS.

*

Hon. Henry Denmark Bell, Judge

TIMOTHY LANE,

*

(Pretrial Diversion)

APPELLANT.

*

For the Appellant:

For the Appellee:

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and
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OPINION FILED: _____

AFFIRMED
Gary R. Wade, Judge

OPINION

The defendant, Timothy Lane, appeals the trial court's denial of his petition for pretrial diversion. Indicted for aggravated assault, the defendant claims that the district attorney general abused his discretion by denying the application and that the trial court should have granted the request.

We affirm the judgment.

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 his 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 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. State v. 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).

In State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989), our supreme court expounded upon the duties of the district attorney general in making the initial assessment:

This requirement entails more than an abstract statement in the record that the district attorney general has considered these factors. He must articulate why he believes that a defendant in a particular case does not meet the test. If the attorney general bases his decision on less than the full complement of factors enumerated in this opinion he must, for the record, state why he considers that those he relies on outweigh the others submitted for his consideration.

"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)).

On September 29, 1994, the defendant resided in a trailer located upon property owned by his sister, Teresa McCord, who is listed in the indictment as the victim of the alleged offense. The defendant, now 32 years of age, is the custodian of his two minor children; at the time of the charges, he shared his residence with his mother. The defendant had been employed for the last several years in security at the Baptist Hospital in Nashville. Although not a high school graduate, he has an employment history that includes work as a dispatcher in the Fairview Police Department and work in traffic control in Nashville. The defendant is licensed to carry a firearm. He has no prior criminal record.

An altercation occurred after the victim, who lived next door, swore out an unlawful detainer warrant against the defendant. After being notified of the action by local authorities, the defendant had one or more telephone conversations with the victim about how long he could maintain his trailer on her property.

Later, the defendant and the victim argued. While the facts are contested, the victim claimed that the defendant attacked her in her own front yard, struck her in the face, and punched his finger into her eyes until she was helpless. The victim, who suffered serious injuries to her eyes, was hospitalized. Photographs in the record substantiate the severity of her injuries. The defendant claimed that the victim initiated the altercation. He asserted that his sister grabbed him by the throat, cutting off his air supply, and that he panicked, swinging wildly, until she released her hold.

The district attorney general denied diversion due to the violent nature of the assault. It was his opinion that the defendant had been untruthful and had not offered restitution or otherwise accepted responsibility for his act. While acknowledging that the defendant had a positive social history and no prior record, the district attorney general denied the application after weighing all considerations, including the serious injuries to the victim and the need to deter the commission of violent offenses.

As indicated, the nature and circumstances of the offense may be an appropriate basis for the denial of pretrial diversion. The severity of the injuries to a victim is a factor. That the defendant, a security officer, had a background in law enforcement and had been licensed to carry a weapon is also a source of legitimate concern. Moreover, any failure on his part to accept responsibility for his actions, either through an offer to pay medical expenses or otherwise, reflects upon his amenability for rehabilitation. Under all of these circumstances, this court cannot say that the district attorney abused his discretion. While judicial diversion may be a consideration, the district attorney general clearly acted within his discretionary authority by denying this application. See Tenn. Code Ann. § 40-35-313.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

William M. Barker, Judge