IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE	)	NO. 02C01-9501-CC-00001
	)	
Appellee	)	OBION COUNTY
	)	
V.	)	HON. WILLIAM B. ACREE, JR.
	)	JUDGE
MONTREL THOMPSON, JR.	)	
	)	(Rule 10 Appeal - Pretrial Diversion)
	)	
Appellant	)	
	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Montrel Thompson, appeals pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure from an interlocutory order of the Circuit Court for Obion County affirming the District Attorney General's denial of his application for pretrial diversion.

We affirm the judgment of the trial court.

In its October 1994 term, the Obion County Grand Jury handed down three (3) separate indictments against the appellant. The first indictment (case number 9534) contains one (1) count of theft of property valued at under five hundred ($500.00) dollars, and one (1) count of fraudulent use of a credit or debit card. The second indictment (case number 9535) contains one (1) count of aggravated burglary, and one (1) count of theft of property valued at less than five hundred ($500.00) dollars. The third and final indictment (case number 9536) includes one (1) count of aggravated assault, one (1) count of reckless endangerment, one (1) count of unlawful possession of a weapon, one (1) count of vandalism of property valued at over one thousand ($1,000.00) dollars, one (1) count of vandalism of property valued at under five hundred ($500.00) dollars, and one (1) count of evading arrest.

In early November of 1994, the appellant, through counsel, applied to the district attorney general's office for pretrial diversion. The request was denied.

After receiving notification of the prosecutor's denial of the request for pretrial diversion, the appellant filed a petition in the trial court seeking a writ of certiorari. After a full hearing on the appellant's petition, the trial court dismissed the appellant's petition finding that the district attorney general did not abuse his discretion in refusing to grant pretrial diversion in this case. The sole question for this court on appeal is whether the trial court erred in affirming the prosecutor's denial of pretrial diversion.

When reviewing an interlocutory order of a trial court affirming the decision of the district attorney not to grant pretrial diversion, this court is bound by the findings of fact made by the trial court unless the evidence contained in the record preponderates

against the trial court's findings. State v. Helms, 720 S.W.2d 474, 476 (Tenn. Crim. App. 1986); State v. Watkins, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980).

In its order denying the appellant's petition for writ of certiorari, the trial court stated that after reviewing the evidence which the prosecutor considered in denying the application, it found that prosecutor did not abuse his discretion in denying the application.

Whether to grant or deny an application for pretrial diversion is within the discretion of the district attorney general. State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983). In Hammersley the Supreme Court provided a list of factors which must be considered by district attorneys when making the decision to grant or deny pretrial diversion. These are; 1) the circumstances of the offense; 2) the defendant's criminal record; 3) the defendant's social history; 4) the physical and mental condition of the defendant; 5) the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and the defendant. Id. at 355.

Both the petition of the appellant requesting pretrial diversion and the attorney general's letter denying the request were made exhibits to the hearing. The evidence favorable to the appellant’s candidacy for pretrial diversion included the fact that by all accounts, the appellant is a good father and provider. The appellant is a single father with custody of his six-year old daughter. Additionally, the appellant demonstrated himself to be a stable member of his community. He is a homeowner, although his status as a homeowner has been seriously threatened as a result of the criminal charges filed against him.

The appellant has no prior criminal record.[1] Prior to the events leading to his arrest in this case, he was employed by Goodyear as a power house operator for over ten years. Prior to that he served in the United States Navy from 1977 to 1983 when he was honorably discharged.

The appellant's criminal activity flowed from what was apparently a serious and first-time addiction to cocaine. The appellant sought in-patient treatment for his addiction after his arrest at Baptist Memorial Hospital in Union City. He completed that program and testified that he has been sober since entering the program. The appellant was extremely remorseful for his conduct and took full responsibility for such conduct. His acknowledgement that his cocaine addiction led him down the wrong path was not an attempt on his part to blame the drug for his actions. Testimony at the hearing revealed that the two individuals from whom the appellant stole property continue to this day in their friendships with the appellant. Given the uncharacteristic, sudden, and brief antisocial behavior demonstrated by the defendant which culminated in a very violent episode and his subsequent treatment for substance abuse and admission of his problem, the appellant appears to be an excellent candidate of rehabilitation. We agree these factors weigh favorably toward pretrial diversion. However, amenability to rehabilitation is not the sole inquiry when determining whether pretrial diversion is appropriate in a given case. See State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993).

In a letter to the appellant's counsel, the prosecutor cited the following four (4) reasons in support of his decision to deny pretrial diversion in this case:

> (1) The defendant is indicted in three separate indictments involving three distinct criminal episodes. Pretrial diversion is extraordinary relief intended for a person who commit

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[1]The appellant revealed in his application for pretrial diversion that in 1980 he was detained in Philadelphia, Pennsylvania in connection with possession of marijuana. No formal charges were ever brought because a casual acquaintance of the appellant admitted that, unknown to the appellant, he had placed marijuana in the appellant's camera bag.

> (sic) crimes of impulse uncharacteristic with his social history.
>
> (2) The defendant has admittedly been abusing drugs.
>
> (3) The actions of the defendant as set out in indictment number 9536 indicate that he has a disregard for human life. His actions endangered many innocent citizens.
>
> (4) Theft is a tremendous problem in Obion County. The deterrent effect of prosecution would be negated by granting this application.

The first reason given for denying diversion is essentially that the nature and circumstances of the charged offenses militate against pretrial diversion in this case. The appellant was indicted in three (3) separate indictments for three (3) distinct criminal episodes which included no less than five (5) felony charges and five (5) misdemeanors. The nature and circumstances of the offenses are appropriate factors to be considered upon an application for pretrial diversion and may provide a sufficient basis for its denial. State v. Carr, 861 S.W. 2d at 855; State v. Sutton, 668 S.W.2d 678, 680 (Tenn. Crim. App. 1984).

The second reason cited by the prosecutor in denying pretrial diversion in this case, that the appellant had admitted to using drugs, is not a valid reason upon which to deny pretrial diversion. To legitimate such a reason would automatically exclude an entire class of persons from the pretrial diversion statute whom the Legislature has not seen fit to exclude. The pretrial diversion statute itself contemplates that rehabilitated substance abusers are eligible for consideration of pretrial diversion. See Tenn. Code Ann. § 40-15-105 (a) (2)(C) (1994 Supp.).

Finally, we agree that the actions of the defendant in engaging in an open exchange of gunfire in a crowded parking lot which led to his indictment in case number 9536 was carried out in such a dangerous manner that this conduct outweighs all other relevant factors tending to support his eligibility for pretrial diversion. Of the four reasons given by the prosecutor for denying diversion to the appellant, this is the most compelling and standing alone supports the judgment of the trial court in

affirming the prosecutor's denial of diversion in this case.[2] Carr, supra; Sutton, supra . The appellant offered no evidence to refute or mitigate the circumstances of the aggravated assault. It was apparently committed during a shift change at the Gurien Finishing Plant. The parking lot was, according to the record, filled with approximately 100 people, all of whom were put at substantial risk to life and limb as a result of the appellant's conduct which resulted in the infliction of a serious gunshot wound to the victim of the aggravated assault.

Because of the number of the criminal charges pending against the appellant and the nature and circumstances surrounding the charges in indictment number 9536, we conclude that there is substantial evidence to support the district attorney general's denial of pretrial diversion to the appellant in this case.

Accordingly, the trial court's denial of the appellant's petition for a writ of certiorari is affirmed.

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WILLIAM M. BARKER, JUDGE

CONCUR BY:

_____
PAUL G. SUMMERS, JUDGE

[2]The prosecutor failed to establish in the hearing that prior to denying the application for pretrial diversion he concluded that theft is one of Obion County's "top problems", as required by State v. Brown, 700 S.W.2d 568, 570 (Tenn. Crim. App. 1985). However given our holding that the violent nature of the aggravated assault and the number of charges pending against the appellant are reason enough to support the denial of diversion, we do not reach the issue of whether substantial evidence exists to cite this factor as a valid reason for denying pretrial diversion in this case.

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MARY BETH LEIBOWITZ, SPECIAL JUDGE