

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1995 SESSION

FILED

January 26, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

TRACEY VAUPEL,

Appellant.

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C.C.A. NO. 01C01-9505-CC-00142

HICKMAN COUNTY

HON. CORNELIA A. CLARK,
JUDGE

(Denial of Pretrial Diversion)

FOR THE APPELLANT:

FOR THE APPELLEE:

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- and -

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(At Trial and On Appeal)

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,

Judge

OPINION

The defendant, Tracey Vaupel,¹ was charged in the indictment with taking marijuana into a state institution where prisoners are quartered in violation of T.C.A. § 39-16-201(a)(1). On January 24, 1995, the defendant filed an application for pretrial diversion with the district attorney's office. The district attorney denied her application on February 15, 1995. She then filed a petition for a writ of certiorari, which the trial court denied on May 2, 1995. Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, the defendant sought and was granted permission to appeal the trial court's dismissal of her petition. The sole issue presented in this appeal is whether the trial court erred in affirming the decision of the district attorney to deny pretrial diversion. We find that the defendant's issue lacks merit, and the judgment of the trial court is affirmed.

The defendant was arrested on November 21, 1993, while attempting to transport concealed drugs into the Turney Center Prison. A drug-sniffing dog alerted law enforcement officials to the presence of marijuana in a can of candy which the defendant was allegedly taking to her boyfriend, an inmate at the Turney Center. Upon questioning, the defendant told prison officials that she had received a call from another inmate's girlfriend requesting assistance in smuggling drugs into the prison. Specifically, the girlfriend had asked the defendant to take some marijuana and pills to a rendezvous point near the Turney Center. The girlfriend had explained to the defendant that the former's boyfriend needed the drugs to "come down" from a heroin addiction. The defendant waited at the rendezvous point, but the other inmate's girlfriend never arrived. The

¹It appears from several documents in the record, including the application for pretrial diversion, that the defendant's correct name is Tracy Vaupel. The indictment, however, lists the defendant's name as Tracey Vaupel. It is the policy of this Court to style cases according to the name as it is spelled in the formal charging instrument.

defendant then proceeded to the prison for her scheduled visit with her boyfriend. Once prison officials had discovered the marijuana hidden in the can of candy, the defendant told them of the plot to smuggle drugs into the prison. She also assisted prison officials in recovering two balloons containing drugs which, according to her application for pretrial diversion, were concealed on her person. From a complete review of the record, however, it appears that the two balloons were actually concealed inside the defendant's vagina.

The record also reveals that the defendant cooperated with law enforcement officials in targeting the source of the marijuana which she had allegedly attempted to transport into the Turney Center. She did not, however, reveal the name of the other inmate's girlfriend who had supposedly telephoned her for assistance in smuggling the drugs into the prison.

The district attorney denied the defendant's request for pretrial diversion through a detailed letter dated February 15, 1995. In that letter, the district attorney set forth several reasons to support the denial of the defendant's request. First and foremost, the circumstances of the offense indicated that it was not an impulsive, atypical action taken by an otherwise law-abiding citizen. Instead, the fact that the drugs were concealed and the manner in which they were concealed reflect a calculated, deliberate attempt to violate the law. Moreover, the district attorney believed that the defendant was not forthcoming and truthful in her application for pretrial diversion. Specifically, the defendant claimed that the scheme to smuggle drugs into the prison originated with another inmate's girlfriend, but she never identified the girlfriend. In addition, the defendant stated that drugs were concealed "on her person" when, in fact, the drugs

were hidden "in her person." Furthermore, the district attorney noted that she admitted being a user of marijuana in the past. As a result, her social history was not indicative of an otherwise law-abiding citizen. Finally, the district attorney cited the strong need for deterrence in cases of this type. He pointed out that smuggling drugs into prisons is a significant problem in Tennessee, particularly with regard to the Turney Center.

In response to the district attorney's denial of her request for pretrial diversion, the defendant filed a petition for a writ of certiorari. After a hearing on the matter, the trial court found that the district attorney had articulated valid reasons in support of the denial of diversion, specifically that circumstances of the offense indicated a carefully prepared plan, that the defendant's past use of marijuana and prior assault charges indicated an adverse social history, and that deterrence was particularly needed in light of the current problems of introducing drugs into prisons. As a result, the trial court concluded that the district attorney had not abused his discretion and therefore dismissed the defendant's petition. The defendant has now appealed that ruling to this Court, contending that the trial court erred in dismissing her petition for a writ of certiorari.

When diversion is denied, the duty of the trial judge is to review the action of the district attorney general and to dismiss the petition unless he finds that the district attorney general has abused his discretion. T.C.A. § 40-15-105. The trial judge must confine his review to the evidence which was considered by the district attorney general at the time he considered the application and to the reason or reasons given by the district attorney general at the time he refused the application for pretrial diversion. State v. Brown, 700 S.W.2d 568, 570 (Tenn. Crim. App. 1985).

The factors to be considered by the district attorney general in deciding whether or not to grant pretrial diversion and the standard of the trial court's review were set forth in State v. Hammersley, 650 S.W.2d 352 (Tenn. 1983), and again in State v. Herron, 767 S.W.2d 151 (Tenn. 1989). These factors to be considered, in addition to the circumstances of the offense, are the defendant's criminal record and social history, the physical and mental condition of the defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and the defendant. The standard of review is that the record must be lacking in any substantial evidence to support the district attorney general's decision before an abuse of discretion can be found. On appeal from the trial court, when the defendant complains of the action of the trial judge in considering whether or not the attorney general abused his discretion, the duty of this Court is to determine whether or not the evidence preponderates against the findings of the trial judge. State v. Watkins, 607 S.W.2d 486, 489 (Tenn. Crim. App. 1980).

The defendant complains that the district attorney, in denying her request for diversion, did not fully consider factors such as her minimal criminal record, her social history, and her cooperation with law enforcement authorities. She argues that it is unclear from the record which factors the district attorney relied upon in making his decision to deny diversion and what weight was given to each individual factor. As a result, she contends that the trial court erred in upholding the decision of the district attorney to deny diversion. From a review of the entire record, however, we can only conclude that the evidence does not preponderate against the findings of the trial court. As set forth in the discussion above, the district attorney articulated valid reasons for denying pretrial diversion in this case. Based on those reasons, the trial court concluded

that the district attorney had not abused his discretion, and we find that the trial court did not err in dismissing the petition for a writ of certiorari. Thus, the defendant's issue lacks merit, and the judgment of the trial court is hereby affirmed.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Presiding Judge

JOSEPH H. WALKER III, Special Judge