

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED
April 9, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

THEODORE J. WADE,

Appellee.

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C.C.A. NO. 03C01-9504-CR-00115

HAMBLEN COUNTY

HON. JAMES E. BECKNER,
JUDGE

(Denial of Pretrial Diversion)

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The defendant, Theodore J. Wade, was charged in the indictment with reckless homicide of Ashley D. Anderson. On September 30, 1994, the defendant filed an application for pretrial diversion with the attorney general's office. The attorney general denied this application by a response filed on November 14, 1994. The defendant then filed a petition for a writ of certiorari, which the trial court denied after a hearing on March 13, 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 his petition. The sole issue presented in this appeal is whether the trial court erred in affirming the decision of the district attorney general to deny pretrial diversion. After our review of the record, we affirm the judgment of the trial court.

The record reviewed by the trial court consisted of the defendant's application for pretrial diversion which included affidavits from the defendant and from the defendant's employer; the presentence report prepared and submitted by the Department of Correction; the written response and denial by the district attorney general; a "toxicology report" and "laboratory report" in connection with drug and alcohol screens of the defendant; and a "toxicology report" concerning a drug screen run on the deceased victim. After reviewing these matters and hearing the argument of counsel, the trial judge found that the district attorney general had not abused his discretion and therefore dismissed the petition.

The facts of the case, as gleaned from the record, indicate that the defendant and several other individuals, including the victim, had been engaged in a gathering of some type from approximately 11:30 p.m. the previous evening until 6:00

a.m. on the morning of the incident. Just prior to the incident the defendant was preparing to leave the residence where they had gathered when, according to the defendant, the victim requested that the defendant play a game called "trust" with him. Although the details are somewhat sketchy, it appears that the defendant then placed a pistol to the victim's head and pulled the trigger, causing it to fire. The defendant, and others present, all indicated that this shooting was a tragic accident in that the defendant had thought the pistol was unloaded. Immediately after the shooting, the defendant left the premises and rode around in his automobile for a period of time before turning himself in to the local authorities.

The record reveals that the defendant, at the time of the incident, was a nineteen-year-old male who had quit school in the eleventh grade but later obtained his G.E.D. He was employed as a delivery person for Papa John's Pizza and was said by his employer to be an excellent employee. The employer's affidavit also stated that the defendant appeared to be a stable person with no signs of current drug or alcohol usage and that the defendant was planning to marry his girlfriend who was expecting a baby.

The defendant's affidavit indicated that he had never been in trouble; that he had been accepted to Walters State Community College and planned to attend when finances were available; that the victim had been his best friend; that he had undergone counseling as a result of this incident; and that he was willing to abide by any and all restrictions and limitations placed on him in the event he was granted pretrial diversion.

The presentence report revealed that the defendant had been convicted of two speeding charges and a misdemeanor trespassing charge. The report also indicated an additional trespassing charge that had been dismissed and that the fine remained

unpaid on the trespassing conviction. The presentence report also recited that the defendant had a history of alcohol and drug abuse.

The response filed by the district attorney general provided that the affidavits of witnesses who were present at the time of the accident were in direct conflict with prior statements given by the witnesses to police. The response filed by the district attorney general also contained the defendant's account of the events preceding and at the time of the killing. In this account the defendant admitted that he had consumed a small amount of alcohol on the evening prior to the shooting, and that his 9mm pistol, and a friend's .22 caliber pistol, had been passed around for everyone present to examine. The defendant had further stated that he had believed no cartridge was in the chamber and, thinking the gun was empty, he had pulled the trigger. He continued that he had gone outside the residence momentarily and then returned to retrieve both guns, and had then left in his automobile and drove around for a while before going to the police station.

In denying the application for pretrial diversion, the district attorney general relied on the fact that the defendant had been convicted on two occasions of speeding and on one occasion for trespassing, that he had a history of alcohol and drug abuse, with the alcohol usage beginning at age fifteen, that he had been under psychiatric treatment, that the need to deter the type of activity related to the homicide was critical, and that the defendant had failed in the past to demonstrate his amenability to correction. The district attorney general further found three favorable factors for the defendant consisting of an attitude that appeared to be favorable, a favorable behavioral pattern since the incident, and his present employment. The district attorney general concluded that the need to deter others who would be similarly inclined to recklessly handle firearms was of paramount concern to the State and accorded significant weight to this fact. Also

a basis for denial, to a lesser extent but still significant, was the questionability of the defendant's amenability to correction. This latter concern was supported, in the opinion of the district attorney general, by the defendant's prior record, particularly the repeated trespass charges, and the defendant's failure to pay his fine for the trespass conviction. The district attorney general concluded that diversion of the defendant in this case would not serve the ends of justice or the best interests of the public or the defendant and to grant diversion would depreciate the seriousness of this offense.

The defendant contends that the circumstances of the offense are facts that actually weigh in his favor. He contends that, although it does not diminish the seriousness of the offense, this death was the result of an accident rather than an intentional act. The defendant further contends that the record does not support a finding that he is not amenable to rehabilitation; that his prior record is insignificant; that there is a lack of proof to support a deterrence factor; and that the lab reports were contradictory concerning the presence of marijuana in the defendant's urine sample after the offense.

Where 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. State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993); State v. Brown, 700 S.W.2d 568, 570 (Tenn. Crim. App. 1985).

The factors required 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. State v. Carr, 861 S.W.2d 850, 856 (Tenn. Crim. App. 1993). 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).

Although other district attorney generals might have granted pretrial diversion in this case, our review of the record in this cause leads us to the conclusion that there is substantial evidence to support the district attorney general's decision. For this reason we cannot find that there was an abuse of discretion by the district attorney general, or that the trial judge erred in failing to so find.

For the reasons set out above, the action of the trial judge in dismissing the petition for writ of certiorari is affirmed.

JOHN H. PEAY, Judge

CONCUR:

DAVID G. HAYES, Judge

WILLIAM M. BARKER, Judge