

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

<p>FILED</p> <p>July 15, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>STATE OF TENNESSEE, Appellee, V. PAUL EMILE OLIVER, Appellant.</p>	<p>)) C.C.A. No. 03C01-9510-CC-00322)) Hamblen County)) Hon. James Edward Beckner, Judge)) (Possession of Cocaine with Intent) to Sell))</p>
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FOR THE APPELLANT:

Gloria S. Moore
2415 Magnolia Avenue
Knoxville, TN 37917

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Elizabeth T. Ryan
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Berkeley Bell
District Attorney General

John Dugger
Victor Vaughn
Asst. Dist. Attorneys General
510 Allison Street
Morristown, TN 37814

OPINION FILED: _____

**AFFIRMED AS TO DENIAL OF JUDICIAL DIVERSION;
REMAINING APPELLATE ISSUES DISMISSED AS MOOT**

PAUL G. SUMMERS,
Judge

OPINION

The appellant, Paul Emile Oliver, pled guilty to possession of less than one-half gram of cocaine with the intent to sell.¹ Pursuant to a plea agreement, the appellant received a three-year sentence as a Range I offender. Following a hearing, the trial judge denied the appellant's request for probation.

In this appeal, the appellant attacks the trial judge's denial of alternative sentencing claiming that: (1) the trial court improperly denied him the presumption of entitlement to alternative sentencing; (2) the trial court improperly denied him probation because he had been granted a concession in the plea agreement; and (3) the evidence as to deterrence was insufficient to justify the denial of alternative sentencing. In addition, he claims that the trial judge improperly denied him judicial diversion.

The record reveals that the appellant was a passenger in a vehicle driven by Tristan Garrett. A confidential informant had notified Agent Mike Long of the Drug Task Force that Garrett was seen with cocaine in his possession. Agent Long and another officer followed Garrett's vehicle until it was stopped at a railroad crossing. The officers asked both Garrett and the appellant to exit the vehicle. Following a patdown search, the officers recovered a black film canister containing 3.3 grams of cocaine from the appellant's pants' pocket.

At the probation determination hearing, the appellant requested probation and more specifically judicial diversion. The appellant testified in his own behalf stating that his possession of cocaine was an isolated incident. Although he was from New York, the appellant was attending the Morristown campus of Knoxville College. He indicated that he felt remorse and had enrolled in college in New York since returning home. The appellant introduced several letters from community leaders attesting to his character. He also indicated that he had

¹The appellant was charged in the indictment with possession of 3.3 grams of cocaine, a Class B felony.

been performing community service work since his arrest.

On cross-examination, however, the appellant admitted that he had sold cocaine on “several” occasions prior to his arrest. These sales had occurred over a period of approximately four to six weeks. He said he did not use cocaine because he understood the harm it could cause his body.

The appellant’s father testified that his own drug addiction was likely the catalyst which triggered his son’s behavior. The appellant’s mother said that, due to a family crisis, she had been unable to maintain her extended telephonic relationship with her son.

This Court has been informed by the Hamblen County Circuit Clerk’s office that the appellant is no longer incarcerated. A January 6, 1996 order of the trial court placed the appellant on probation for a three-year period. Therefore, the appellant’s issues challenging his denial of probation are moot.

The remaining viable issue is whether the trial court should have granted judicial diversion with eventual expungement of appellant’s records as provided in Tenn. Code Ann. § 40-35-313(a)(1) (1990). The granting of judicial diversion is within the sound discretion of the trial court. State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). We will find no abuse of discretion if any substantial evidence exists to support the refusal of diversion. Id.

The trial court determined that the appellant was less than candid in his responses. The appellant told the court that this possession was an isolated incident. However, on cross-examination, he admitted to several previous sales over a six week period. Further, when asked by the court who supplied the cocaine and for what price it sold, the appellant said he could not remember.

In Anderson this court upheld the denial of judicial diversion where the appellant did not sincerely accept responsibility and where the offense was not impulsively committed. Id. at 574. “Since the trial court was in the best position to determine his [defendant’s] attitude and demeanor, we are not in a position to view the defendant differently upon the record before us.” Id. Similarly in State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994) this Court deferred to the trial court’s observation of the appellant’s statements, attitude and demeanor and gave the trial court the benefit of discretion. We follow that reasoning.

The trial judge’s denial of judicial diversion is affirmed. The remaining issues are dismissed as moot.

PAUL G. SUMMERS, Judge

CONCUR:

JOE B. JONES, Presiding Judge

GARY R. WADE, Judge