IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1996 SESSION

STATE OF TENNESSEE	)C.C.A. No. 03C01-9509-CC-00285
	)
Appellee,	) Sevier County
V.	)
	) Hon. Rex Henry Ogle, Judge
CHRIS RAMEY	)
	)(Pretrial Diversion Denial)
Appellant,	

FOR THE APPELLANT:

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FOR THE APPELLEE:

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Hunt S. Brown
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G. Scott Green
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Sevierville, Tn. 37862

OPINION FILED: _____

AFFIRMED

CHARLES LEE,
Special Judge

O P I N I O N

The appellant was originally charged with rape and sexual battery. The state amended the rape charge to attempted rape. The appellant sought pretrial diversion, which the District Attorney General denied. The appellant then sought review of the denial and the trial judge affirmed the action of the District Attorney General. The appellant sought and received an interlocutory appeal by permission of the trial court pursuant to Rule 9, Tenn.R.App.P., and this Court granted review. On appeal he contends that the trial court abused its discretion when pretrial diversion was denied to him. Since the record on appeal is incomplete, we are unable to address the merits of appellant's complaint and must affirm the judgment of the trial court.

At the hearing on the appellant's writ of certiorari before the trial court, no witnesses were called to testify, no stipulations were entered, and only one exhibit, the denial letter of the assistant District Attorney general, was entered into evidence. If the parties were relying on the local rules to circumvent the need to correctly introduce evidence, no citation to those rules was made.

The transcript of the hearing consists of the arguments of counsel to the trial judge. From these arguments we can glean that the appellant filed with the District Attorney an application for pretrial diversion. At one point in the hearing the trial judge indicated that it had read the application. The application for pretrial diversion is not evidence unless properly introduced as such. Hillhaven Corp. v. State ex rel. Manor Care, 565 S.W.2d 210, 212 (Tenn. 1978); Price v. Mercury Supply Co., Inc., 682 S.W.2d 924, 929 n. 5 (Tenn. App. 1984). It was obviously contemplated by the parties that this

application along with the denial letter would be the record in this case. However, the application was never introduced in the hearing.

Before an exhibit may be considered by this Court, it must have been (a) received into evidence, (b) marked by the trial judge, clerk or court reporter as having been received into evidence as an exhibit, (c) authenticated by the trial judge, and (d) included in the transcript of the evidence transmitted to this Court. Tenn. R. App. P. 24(f); Krause v. Taylor, 583 S.W.2d 603,605-606 (Tenn. 1979); State v. Melson , 638 S.W.2d 342,351 (Tenn. 1982), cert. den. 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983); State v. Williams, 638 S.W.2d 417,421 (Tenn. Crim. App. 1982); State v. Brock, 678 S.W.2d 486,489 (Tenn. Crim. App. 1984).

Furthermore, we cannot consider the arguments of counsel as evidence. The arguments of counsel and the recitation of facts contained in the briefs of counsel, or similar pleadings, are not evidence. Price v. Mercury Supply Co., Inc., supra; Goodway Marketing, Inc. v. Faulkner Advertising Assoc., Inc., 545 F. Supp. 263 (E.D. Pa. 1982). The same is true of statements made by counsel during the course of a hearing or trial. Trotter v. State, 508 S.W.2d 808, 809 (Tenn. Crim. App. 1974); Davis v. State, 673 S.W.2d 171, 173 (Tenn. Crim. App. 1984). Consequently, the record correctly before us lists no qualifications of the appellant to be considered for diversion.

When an accused seeks appellate review of an issue in this Court, it is the duty of the accused to prepare a record which conveys a fair, accurate

and complete account of what transpired with respect to the issue. Tenn. R. App. P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). The appellant has failed to carry his burden of showing that the District Attorney General abused his discretion in denying pretrial diversion. No abuse of discretion will be found where the record shows that the defendant seeking diversion failed to submit evidence to the prosecutor to show his entitlement to diversion. State v. Lewis, 641 S.W.2d 517, 520 (Tenn. Crim. App. 1982). While the record in this case tends to show that information was provided to the prosecutor, that information was not properly presented to the trial judge. Since there was no information properly before the trial judge to refute the denial of diversion, we affirm the judgment.

Our decision may seem hyper-technical and particularly harsh to the defendant who may be relying on a local practice that does not demand strict compliance to proper procedure. Such may be the case here. It is obvious from the transcript of the proceedings that all concerned believed the trial court's ruling to be predicated upon a comparison of the application for pretrial diversion and its accompanying attachments with the denial letter of the District Attorney General supplemented by the arguments of counsel. Assuming the application for pretrial diversion reviewed by the District Attorney General is the same as the application contained in the pleadings transmitted to this court, and assuming this document is the same document review by the trial judge, the outcome would be no different than that which we have reached.

It appears the appellant was the youth minister in his church and had been active for some time in counseling young people. The alleged victim was a fifteen year old young man who was having adjustment difficulties. While under the influence of an intoxicant, the alleged victim was entrusted to the care of the appellant to counsel. The appellant was accused by the young man of performing fellatio upon him when he was thought to be asleep. While not consenting to this act, the minor reported he did not resist.

The appellant has no prior criminal record of any kind. He worked his way through school, had a stable work history as an adult, and has married since these charges were brought. He is thought of well by several members of his community and fellow church members all of whom expressed disbelief of the charges. The appellant admitted to lying on the same bed with the minor but denied any sexual contact.

In his letter the District Attorney General denied pretrial diversion relying primarily upon the nature of the offense and deterrence. The District Attorney placed great emphasis on the age of the victim and the position of trust held by the appellant.

Whether to grant or deny an application for pretrial diversion is in the discretion of the District Attorney General. State v. Hammersley, 650 S.W.2d 352 (Tenn. 1983). 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; and (5) the likelihood that the defendant will benefit from the pretrial diversion program. Hammersley, 650 S.W.2d at 355. 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. Cyton, 668 S.W.2d 678 (Tenn. Crim. App. 1984).

Although there are factors weighing favorably for the defendant, the criteria for pretrial diversion, while similar to those of probation, should be more stringently applied. State v. Poplar, 612 S.W.2d 498, 501 (Tenn. Crim. App. 1980). The defendant holds a position of high trust. He is charged with the spiritual guidance of several youths. This is similar to a parental duty. Any violation of that responsibility is in breach of a most sacred trust. And, even though pretrial diversion may be granted in appropriate circumstances to one charged with sexual abuse, the nature of this charge is particularly offensive.

On the other hand, if not guilty, the defendant should be fully exonerated at trial. Under these circumstances, a disposition one way or the other is preferable. Society will be best served when the adversarial system works to its logical conclusion.

In summary, had the record been as the parties believed it to be, it would have supported the denial of pretrial diversion based upon the nature and gravity of the charge.

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Charles Lee, Special Judge

CONCUR:

_____
Paul G. Summers, Judge

_____
Joseph M. Tipton, Judge