

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST SESSION, 1996

FILED
December 13, 1996
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

MARTHA JEAN FRAZIER,

Appellant.

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C.C.A. NO. 01001-96-0012

PUTNAM COUNTY

HON. LEON BURNS, JR.
JUDGE

(Pretrial Diversion)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF PUTNAM COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Defendant appeals from the trial court's determination that the District Attorney General did not abuse his discretion by denying pretrial diversion. We affirm the judgment of the trial court.

The Defendant, Martha Jean Frasier, was indicted in January of 1995 on one count of accessory after the fact, a Class E felony. The indictment charged her with knowingly aiding her Co-defendant, Richard Lynn Hutson, in avoiding arrest and punishment for aggravated child abuse. The incident of child abuse occurred on February 18, 1994. At that time, the Defendant was living with her boyfriend, Richard Lynn Hutson and two children from her marriage to Jeff Frasier. Also living in the home was the Defendant's two-year-old daughter. The identity of the father of that child is not certain, but the Defendant has stated that the father is the brother of the President of the United States. This two-year-old child is the victim in this case. The Defendant was separated from her husband and was going through a bitter divorce and custody fight.

On the day of the incident, the Defendant went to work and left the Co-defendant at home with her two-year-old daughter. The Defendant spoke with her boyfriend on the telephone around noon and heard the child crying in the background. Her boyfriend explained that the child was riding a toy tractor and had ridden down the steps of their trailer and hit her head. When the Defendant came home from work, she saw the child's injuries and asked her co-worker, a

nurse, to look at them. The nurse advised her to take the child to the emergency room for treatment. The Defendant was concerned about the impact the injuries would have on her chances of keeping custody of her children.

The child had two black eyes, bruising of and bleeding from her ears, and bruising on the back of her head. The Defendant told the emergency room personnel that she was present when the child fell down the steps. The examining physician determined that the injuries the child received were inconsistent with a fall, and the incident was reported as child abuse to the Department of Human Services. During an investigative interview by the police and a Department of Human Services worker, the Defendant maintained her story until the investigator confronted her with information that she was known to have been at work at the time the injuries occurred. Throughout the interview, the Defendant resisted admitting to the investigators or to herself that her boyfriend abused her child.

The Defendant applied for pretrial diversion pursuant to Tennessee Code Annotated section 40-15-105. The District Attorney denied the Defendant's application, enumerating the reasons for denial in a letter dated May 31, 1995. The Defendant submitted a petition for writ of certiorari to the Circuit Court in Putnam County, asserting that the District Attorney abused his discretion by denying the Defendant pretrial diversion. After a hearing, the trial court upheld the denial of pretrial diversion.

The Defendant appeals to this court with two issues: (1) That the trial court erred in upholding the District Attorney's denial of pretrial diversion and (2) that

the trial court erred by refusing to examine all the documents that the District Attorney relied upon in making the decision to deny pretrial diversion.

The Pretrial Diversion Act provides a means of avoiding the consequences of a public prosecution for those who have the potential to be rehabilitated and avoid future criminal charges. See Tenn. Code Ann. § 40-15-105. Pretrial diversion is extraordinary relief for which the Defendant bears the burden of proof. State v. Baxter, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993); State v. Poplar, 612 S.W.2d 498, 501 (Tenn. Crim. App. 1980).

The district attorney is vested with the discretion to approve or deny pretrial diversion. Tenn. Code Ann. § 40-15-105(b)(3). A Defendant who applies for and is denied pretrial diversion may “petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion.” Tenn. Code Ann. 40-15-105(b)(3). The trial court may review the district attorney’s decision from the record, or in addition, conduct a hearing. The trial court judge cannot substitute his judgment for that of the district attorney when reviewing a denial of pretrial diversion. State v. Watkins, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980). The district attorney's decision is viewed as "presumptively correct" and will not be set aside unless there is a finding of gross and patent abuse of discretion. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983).

The trial court’s scope of review is limited to the information provided in the record upon which the district attorney based the decision. State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993); State v. Poplar, 612 S.W.2d at 500 (Tenn. Crim. App. 1980). We note that the propriety of even conducting an

evidentiary hearing has been questioned. See Carr, 861 S.W.2d at 856. “In view of this evidentiary restriction, an evidentiary hearing would seem unneeded in the usual case. However, a hearing may be useful to clarify matters already in the record about which there may be some dispute.” State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App.1993), perm to appeal denied, id. (Tenn. 1994).

In cases in which the facts are undisputed, as they generally are in this case, the issue primarily becomes a question of law, and this court therefore is not bound by the lower court's decision. Carr, 861 S.W.2d at 856. In such a case, the underlying issue is whether, as a matter of law, the district attorney general abused his or her discretion. Id. Our review focuses on whether there is substantial evidence in the record to support the District Attorney's refusal to divert. In a close case, if the record supports the decision to grant or deny pretrial diversion, “it cannot be an abuse of discretion to decide the case either way.” Carr, 861 S.W.2d at 856 (quoting State v. Grear, 568 S.W.2d 285, 286 (Tenn. 1978)). In an appeal from the denial of pretrial diversion, if the facts are disputed and the trial court conducts an evidentiary hearing to resolve the factual issues, the findings of fact made by the trial court are binding upon this court. State v. Helms, 720 S.W.2d 474, 476 (Tenn. Crim. App. 1986). In such a case, there can be no reversal by this court based upon the facts unless the preponderance of the evidence is contrary to the trial judge's factual findings. Id. If the district attorney's denial of pretrial diversion was based on erroneous facts, the district attorney's exercise of discretion must then be reviewed in light of the correct factual determinations. We emphasize that the underlying issue remains whether the district attorney abused his or her discretion in denying pretrial diversion.

We now turn to the case sub judice, in which the Defendant challenged the District Attorney's decision, claiming that there was not substantial evidence to support the denial of pretrial diversion. A certiorari hearing was held during which the Defendant called the probation officer who prepared the investigation report supplied to the District Attorney. The Defendant did not contest the facts in the report. The Defendant also called the Assistant District Attorney as a witness, questioning the basis for items enumerated in the letter of denial. Finally, the State and the Defendant presented arguments. The trial court found that the District Attorney did not abuse his discretion in denying pretrial diversion. There was no resolution of disputed facts reflected in the trial court's decision. Thus, we review the District Attorney's decision to determine whether there was an abuse of discretion.

When a pretrial diversion request is denied, the district attorney must state the specific reasons for denial in the record to preserve those reasons for meaningful appellate review. State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989). The following factors should be considered to determine whether pretrial diversion should be granted:

[the] circumstances of the offense; the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; the deterrent effect of punishment upon other criminal activity; defendant's amenability to correction; the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and the defendant; and the applicant's attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.

State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993)(quoting State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988)).

Deterrence, of both the defendant and others, is a factor the importance of which varies according to the individual circumstances of each case. Hammersley, 650, S.W.2d at 354. The circumstances of the crime and the need for deterrence may, in the appropriate case, outweigh the other relevant factors and justify a denial of pretrial diversion. Carr, 861 S.W.2d at 855.

Due to the limited scope of certiorari review, a formal written response is required to demonstrate that the district attorney considered all the relevant factors and explain why certain factors outweigh others. The narrow scope of review has made the district attorney's letter of primary importance. Indeed, in a review in which no hearing is held, the letter is the only concrete record from which to evaluate whether an abuse of discretion has occurred. In this environment, it is almost imperative that district attorneys general draft letters of denial that clearly explain how the appropriate factors have been considered and evaluated and why the decision was made to deny diversion.

In Winsett, this court set forth the necessary elements for an appropriate and proper pretrial diversion denial letter. Winsett, 882 S.W.2d at 810.

"It should include:

1. An enumeration of all the evidence considered;
2. The reason for denial: that is, an enumeration of the factors considered and how some factor(s) controlled the decision and some explanation of why certain factors outweighed others; and

3. An identification of any disputed issue of fact.”

Id. We agree that these are necessary elements for the district attorney to include in a response. We also note that one district attorney’s letter, reprinted in an appendix in Carr, is an excellent illustration of an effective letter containing these elements. In the Carr letter, there was an enumeration of reasons for denial, each supported by some facts, and an explanation of positive factors and why those factors were insufficient to support pretrial diversion. Carr, 861 S.W.2d at 859-60. Such explanations need not be lengthy, but should demonstrate that appropriate consideration was given to all applicable factors. For purposes of certiorari review and appeal, this insures that the district attorney’s position is clearly understood in determining whether he or she has exercised discretion properly.

While not discounting the importance of the contents of a denial letter, we also note that the letter does not work as an estoppel, such that only the quality of the letter determines whether or not there has been an abuse of discretion. If the trial court reviews for abuse of discretion from the record when a hearing is not conducted, the letter may be the only tangible evidence to reflect the attorney general’s decision making process. Naturally, a denial letter in this context has great significance. However, if a certiorari hearing has been conducted and evidence admitted, the record available for review is expanded to include these proceedings.

Through an evidentiary hearing to resolve factual questions or in hearing arguments of counsel, this process may reveal more about the prosecutor’s decision than what is memorialized in the four corners of the denial letter.

Indeed, information made available at the hearing may cure apparent deficiencies in the letter. Such a cure may be accomplished even with the caution that the scope of the hearing must remain extremely narrow and that it may not be used as a substitute for clearly insufficient or conclusory letters with rationales created after the fact. Conscientiously drafted denial letters reflecting consideration of the factors established in Hammersley and its progeny must remain of paramount importance in reviewing an attorney general's denial of pretrial diversion.

In the case sub judice, the District Attorney listed seven reasons to deny pretrial diversion. These included the circumstances of the offense and deterrence. The Defendant challenges several of the reasons, arguing that there is no evidence to support them. The factors stated to be considered by the District Attorney were:

- (1) The circumstances of the crime;
 - (2) the Defendant jeopardized the life of her child to protect the co-defendant;
 - (3) crimes of this nature (child abuse) are a serious problem;
 - (4) granting diversion would depreciate the deterrent effect on the defendant and the community;
 - (5) the Defendant continues to deny guilt and blames her co-worker;
 - (6) the crime violates a position of trust and is reckless and wanton conduct;
 - (7) the Defendant is an educated, employed, twenty-nine-year-old mother of three who has sufficient age and education to appreciate the wrongfulness of her acts.
- The letter concluded that “[i]t is my opinion that the considerations listed herein outweigh any positive factors of the defendant’s application.”

We note that letters containing bald assertions have resulted in discounting those factors when considering a district attorney's decision. See State v. Kirk, 868 S.W.2d 739, 743 (Tenn. Crim. App. 1993). However, the focus must remain on determining whether the Defendant is amenable to correction and not likely to commit further criminal acts. See Markham, 755 S.W.2d at 853.

The Defendant takes issue with every one of the factors enumerated by the District Attorney. In particular, she contests: factor (2), that she jeopardized the life of her child, because there was no evidence that her failure to disclose had this effect; factor (3), that child abuse is a problem, because the crime she has been charged with is accessory after the fact and not child abuse; factor (5) that she denies guilt and blames her co-worker, citing that she did admit the cover-up to the police investigator; and factor (6), that she violated a position of trust and behaved recklessly or wantonly.

The District Attorney's factors (2) and (3), that the Defendant endangered her child and that child abuse is a problem may be somewhat speculative, but reflect the overriding concern that her course of action, if undetected, could have subjected her child to future child abuse. We agree that the record does not strongly support every factor listed in the letter. Even if some inappropriate factors were considered, if there is substantial evidence to support the District Attorney's decision, no patent or gross abuse of discretion has occurred. See Carr, 861 S.W.2d at 857.

As for factor (5), the Defendant submitted a statement with her pretrial diversion application that the nurse she first consulted told her to lie. "Kim stated

that due to how my divorce was going that I should state that I was there if anyone asked so I did.” Factor (6), that the behavior was a violation of trust and that it was reckless, is supported by the Defendant’s assertion that she was motivated primarily by her divorce. Concealing child abuse for this motive, or to protect the Co-defendant, indicates a subordination of her child’s need for protection to guard her own interests.¹

The Defendant had the opportunity to challenge the factors at the certiorari hearing. At that hearing, the Defendant presented her challenge to the contents of the letter. The Defendant’s counsel highlighted her positive factors: several letters recommending her for pretrial diversion, the fact that she earned a G.E.D. and attended a trade school, her lack of prior offenses, and her history of steady employment. The Defendant called the Assistant District Attorney to testify to explain how she substantiated each factor and whether she considered any positive factors. The testimony revealed that the prosecutor had generally considered all of the applicable positive and negative factors.

We recognize that the Defendant does have a number of favorable factors that suggest she is a credible candidate for pretrial diversion. There is no substantial previous history of criminal behavior, although she admits to some prior drug use. She has earned a trade school degree and has maintained steady employment. She also has support from friends and employers, as evidenced by the character letters she submitted.

¹ “‘Reckless’ refers to a person who acts recklessly with respect to circumstances surrounding conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.” Tenn. Code Ann. § 39-11-106(a)(31).

Regarding the negative factors, the record reflects that the Defendant was untruthful to the hospital personnel about the cause of her child's injuries. What is more troubling, and apparently the primary factor upon which the District Attorney relied, is that the Defendant has maintained an unwillingness or inability to admit that the abuse occurred. Although it is difficult for any parent to admit that her significant other has abused her child, such a denial is precisely what undermines one's amenability to correction. She argues that she was motivated by her divorce and custody battle. This motive does not dilute the impact of covering up for the Co-defendant nor justify exposing her child to future harm.

Regardless of the motive, it does not appear from the record that the Defendant demonstrated an understanding of the consequences of her actions nor clearly expressed remorse. There is evidence that she has maintained some contact with her Co-defendant. The record also reflects that the general truthfulness of the Defendant is questionable. The District Attorney could have reasonably found that the circumstances of the crime and deterrence were important and controlling factors if the Defendant was likely to re-offend and put her children at risk of future child abuse. After reviewing the record, and in deferring to the presumption of correctness of the District Attorney's decision, we conclude that there was substantial evidence in the record to support the decision to deny pretrial diversion. Although there were significant positive factors, we simply cannot say that the District Attorney abused his discretion in deciding against diversion.

The Defendant also argues that the trial court erred by not examining the entire record upon which the District Attorney based his decision to deny pretrial diversion. She asserts that in order for the trial court to conduct a meaningful review, all documents must be examined.

The State argues that the trial court must “confine its review to the reasons given by the prosecutor for denial” and cites State v. Brown, 700 S.W.2d 568 (Tenn. Crim. App. 1985). We believe that the State misreads the holding in Brown. In that case, the prosecutor attempted to add additional reasons for the denial of pretrial diversion that came to his attention after he submitted his denial. He presented them at the certiorari hearing in order to bolster his position. Id. at 569. Brown holds that the trial judge may consider all of the factors as long as they are based on evidence available to the district attorney at the time of the denial, but that the reasons for denial under review must be limited to those formalized when the letter was issued, not those which come to light after that time. Id. This is not designed to substitute for the district attorney’s judgment, but to adequately assess whether his or her decision was a patent or gross abuse of discretion in light of the applicable factors to be considered.

In assessing pretrial diversion decisions “[t]he trial judge must also adhere to the same balancing procedure, which must be followed on a case-by-case basis, assigning the significance to all relevant factors, and set out in findings of fact and/or his order affirming or reversing the prosecutors decision.” Herron, 767 S.W.2d at 156. Nothing specifies that a trial judge must examine every document relied upon by the district attorney, nor does it foreclose that possibility. The trial judge should consider evidence such that he may fairly determine

whether the prosecutor abused her discretion. In a case in which no certiorari hearing is conducted, it is incumbent upon the trial judge to review the record. Yet, if there has been a hearing, if the evidence and/or arguments presented fully reflect the factors that were considered by the district attorney, the trial court is warranted in ruling based on that hearing.

The trial court must review the prosecutor's decision to determine only whether there has been a patent or gross abuse of discretion. The Defendant argued at the hearing that there was not substantial evidence to support the District Attorney's decision. The court heard testimony concerning every factor listed in the denial letter. Defendant's counsel presented evidence of the positive factors pertaining to her application. The court also determined that the District Attorney had considered all the positive factors about the Defendant. The trial court was presented with sufficient evidence to support its decision, therefore, the trial court did not err by failing to review all of the submitted documents.

We find that the District Attorney did not abuse his discretion by denying the Defendant's application for pretrial diversion. Also, the trial court did not err by reviewing the District Attorney's decision based on the evidence and arguments presented at the certiorari hearing. Accordingly, the judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

JOSEPH M. TIPTON, JUDGE