

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

December 10, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 V.)
)
 ROSS ROGERS,)
)
 Appellant.)
)
)

No. 03C01-9506-CR-00170

MEIGS COUNTY
HON. E. EUGENE EBLEN,
JUDGE
(Pretrial Diversion)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Ross Rogers, appeals from the judgment of the Meigs County Criminal Court affirming the district attorney's refusal to grant him pretrial diversion. In its affirmance, the trial court granted permission for appellant to pursue an interlocutory appeal to this Court. Pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure, we granted his request to appeal.

Appellant, a seventy-one (71) year old man, operates a mobile home business and routinely submits bids to insurance companies on damaged mobile homes. These bids generally are to obtain items of value that were not damaged or destroyed. On September 8, 1994, appellant received a letter informing him that his bid had been accepted on a burned mobile home in Meigs County. The letter awarded him the refrigerator, stove and air conditioning unit and authorized him to remove the salvaged trailer from the property. While removing these items, eyewitnesses saw appellant take several other items from the property. These items included a boat, boat motor, utility trailer, weed eater, life preservers, tools, clothing, etc. The award letter gave appellant no authority to remove these items and he was not entitled to possession of them. As a result, appellant was indicted in November of 1994 on one count of burglary and one count of theft over \$1,000.

On January 25, 1995, appellant filed an application with the district attorney seeking pretrial diversion. This application reflects that appellant has no prior criminal record, is a World War II veteran, attends church regularly and has been married to the same woman for forty (40) years. He is a retired machinist from TVA and has been in the mobile home business for over twenty (20) years. On March 17, 1995, a Meigs County assistant district attorney denied appellant's application for pretrial diversion. The letter¹ reflects that diversion was denied because appellant refused to

¹We recognize that appellant failed to properly include in the record the letter from the assistant district attorney denying pretrial diversion. The State argues that this omission precludes this Court from considering the issue.

pay restitution, because the district attorney had serious questions about appellant's credibility, and because the appellant refused to accept responsibility for the crime.

Appellant then filed a petition for writ of certiorari in the Criminal Court of Meigs County pursuant to Tennessee Code Annotated section 40-15-105(b)(3) seeking to overturn the decision of the assistant district attorney. After a hearing, the trial court upheld the denial of pretrial diversion finding no abuse of discretion by the assistant district attorney. The matter is now before us to review the order of the trial judge.

The legislature has deemed it prudent to divert certain criminal offenders from the usual prosecutorial process and this task is accomplished through our system of pretrial diversion. See Tenn. Code Ann. §40-15-105(a) (Supp. 1996). If an offender meets the minimum eligibility requirements set forth in the statute, he may seek this form of extraordinary relief from the district attorney general. See Tenn. Code Ann. §40-15-105 (Supp. 1996). The district attorney general shoulders the responsibility of evaluating the individual applications for pretrial diversion and may, in his discretion, grant or deny such relief. See Tenn. Code Ann. §40-15-105(b) (Supp. 1996). Because the decision is a discretionary one, the statute provides little guidance in making this decision. However, our supreme court has outlined particular factors that are proper considerations for a district attorney in evaluating a request for pretrial diversion:

“[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 interest of both the public and 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.”

Notwithstanding the validity of this contention, the letter does appear in the record and facilitates our review. Therefore, we have chosen to address this issue on the merits.

State v. Washington, 866 S.W. 2d 950, 951 (Tenn. 1993). See also State v. Herron, 767 S.W.2d 151, 155 (Tenn. 1989) and State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983).

If an application is denied, the offender may petition the trial court for a writ of certiorari under Tennessee Code Annotated section 40-15-105(b)(3). The trial court's duty in this review is to determine whether the district attorney has committed an abuse of discretion. Tenn. Code Ann. §40-15-105(b)(3) (Supp. 1996). Only when an appellant is able to demonstrate that there has been a patent or gross abuse of prosecutorial discretion will the district attorney's denial of pretrial diversion be reversed. Hammersley, 650 S.W.2d at 356. In order to demonstrate an abuse of discretion, the trial court must find the record lacking in any substantial evidence to support the district attorney general's decision. State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995). See also State v. Kirk, 868 S.W.2d 739, 743 (Tenn. Crim. App. 1993).

If the trial court finds the district attorney's denial is supported by substantial evidence and upholds the denial, the applicant may then seek an interlocutory appeal to this Court challenging the trial court's affirmance. See Tenn. R. App. P. 9. When an offender complains of the trial judge's finding of no abuse of discretion, the duty of this Court is to determine whether or not the evidence preponderates against the findings of the trial judge. See State v. Winsett, 882 S.W.2d 806, 809 (Tenn. Crim. App. 1993) (the question before us is whether the finding of the trial court that the district attorney general did not abuse his discretion in denying the application is supported by a preponderance of the evidence); State v. Kirk, 868 S.W.2d 739, 742 (Tenn. Crim. App. 1993); and State v. Watkins, 607 S.W.2d 486, 489 (Tenn. Crim. App. 1980). Cf. State v. Carr, 861 S.W.2d 850, 856 (Tenn. Crim. App. 1993) (the presumptive correctness which attaches to trial court's findings in certiorari hearings

applies only to the trial court's findings *of fact*, not conclusions of law where the facts are undisputed) (emphasis added). Such is our standard of review.

In its order, the trial court made the following findings in support of the district attorney's denial: (1) appellant refused to accept any responsibility for his crime; (2) his credibility/believability was poor; (3) the two previous factors militate against an inference that appellant is unlikely to engage in criminal behavior in the future; (4) appellant's attitude was very poor and absent of any remorse or regrets; and (5) although appellant bears a good reputation in the community where he lives, the district attorney properly found this to be outweighed by the other factors. The record supports each of the trial court's findings.

The record clearly indicates that appellant refused to accept any responsibility for his crime. Foremost, this refusal to accept responsibility was reflected in appellant's refusal to pay any restitution to the victims. Apparently, there was some discussion on this issue with the district attorney, but no agreement was reached. This refusal was one indication that appellant was not willing to accept the financial responsibility for these offenses. This a proper consideration when weighing factors for pretrial diversion. See Tenn. Code Ann. §40-15-105(a)(2)(D) (Supp. 1996). This finding was supported by other evidence also. At the certiorari hearing, appellant denied taking any of the unauthorized items. However, an eyewitness stated that he saw appellant with a group of people who loaded the stolen items onto a small pickup truck and drove away. In the face of such testimony, appellant had no explanation for how the items disappeared, contended that he never saw anyone else at the property, and denied taking the items. This Court has previously held that failure to accept responsibility for an offense is relevant in assessing the potential for rehabilitation. See State v. Anderson, 857 S.W.2d 571, 574 (Tenn. Crim. App. 1992). Accordingly, the district attorney and the trial court properly considered this factor as bearing on the appellant's amenability to correction.

Appellant contends, however, that it is improper to require an admission of guilt as a prerequisite to pretrial diversion. We agree that it is impermissible to require a defendant to enter a formal guilty plea as a condition to a grant of pretrial diversion. See State v. Anderson, 645 S.W.2d 251, 253 (Tenn. Crim. App. 1982) (requirement of guilty plea prior to approval of pretrial diversion is a nullity). However, the assistant district attorney never made such a demand upon appellant. Apparently, he did request that appellant accept some responsibility by paying restitution and appellant refused to do so. Therefore, this argument is without merit.

Secondly, the trial judge determined that appellant's credibility was poor. Such a determination is within the purview of the trial judge, who is in a unique position to observe the demeanor and behavior of the witnesses. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The trial court's finding is well supported by the proof. Appellant's poor credibility was first exemplified by his denial that he committed the crimes. He remained steadfast in this testimony even in the face of eyewitness testimony to the contrary. The trial court found the eyewitness' credibility to be superior to appellant's and we will not interfere with such a determination.

The record also demonstrates appellant's untruthfulness on another matter. The property surrounding the mobile home contained a small storage building. This was not included in appellant's award letter from the insurance company. However, appellant attempted to sell the storage building to a neighbor who was interested in buying it. Appellant accepted a check as payment for the building and issued a handwritten receipt to the neighbor. Several days later, the owner of the property informed the neighbor that appellant had no rights to the building and the neighbor demanded a refund from appellant. Appellant then returned the neighbor's check. At the hearing, appellant denied that he sold this storage building to the neighbor. Curiously enough, he did not dispute accepting the money or issuing the receipt, or returning the check to the neighbor. He incredulously insisted that he did not attempt to sell the storage building in the face of undisputed facts and documentary evidence

to the contrary. He also stated that he understood that the award letter did not include the storage building. The trial judge found that the appellant's testimony in that regard demonstrated his lack of credibility. An offender's refusal to accept responsibility for his crimes and poor credibility are proper considerations when weighing the factors for pretrial diversion. State v. Nease, 713 S.W.2d 90, 92 (Tenn. Crim. App. 1986) (failure to be completely truthful and to accept full responsibility for his crimes makes an offender a poor candidate for pretrial diversion). These factors strongly weighed against appellant in his application for pretrial diversion.

These factors also make it difficult to conclude that appellant would not be likely to engage in further criminal conduct. He maintained his innocence throughout the entire chain of events and never provided any rebuttal to the eyewitness testimony. Likewise, appellant's attitude of nonchalance regarding the theft weighed against his application. At no time did appellant demonstrate that he was sorry that these events happened or that he regretted the inconvenience to the victims. Even if we assume appellant is completely innocent, as he contends, remorse or regret for this misunderstanding would have been a proper consideration for the district attorney.

Finally, the trial judge held that the district attorney weighed all the factors in favor of diversion against the above considerations and correctly exercised his discretion in denying this remedy. Such a weighing process is integral to the district attorney's decision. See State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989) (factors upon which the denial is based must be clearly articulable on the record and accompanied by the reasons why they outweigh other factors submitted for consideration). At the hearing, the district attorney stated that he accepted appellant's employment history, his age, and his reputation within his community; he did not contest the validity of these favorable considerations. However, he did express serious reservations about the propriety of pretrial diversion in light of appellant's poor credibility and complete refusal to accept any form of responsibility. It is apparent that the district attorney considered the circumstances of the appellant's offenses, his lack

of amenability to correction, and appellant's attitude when evaluating his application for pretrial diversion. The record does not preponderate against the findings of the trial court at the certiorari hearing. Therefore, we find no error in the trial court's affirmance of the district attorney's denial of appellant's application for pretrial diversion.

William M. Barker, Judge

John H. Peay, Judge

David G. Hayes, Judge