IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

SEPTEMBER SESSION, 1996

STATE OF TENNESSE , APPELLEE	§	
	§	
VS.		C.C.A. NO. 01C01-9508-CC-00244
	§	PUTNAM COUNTY
		HONORABLE LEON BURNS
MARY HOPSON APPELLANT	§	(Denial of Pre-trial Diversion)

FOR THE APPELLANT

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FOR THE APPELLEE

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William Locke
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P. O. Box 410
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OPINION FILED: _____

AFFIRMED

L. T. LAFFERTY, SPECIAL JUDGE

OPINION

This is an interlocutory appeal under Rule 9 of the Tennessee Rules of Appellate Procedure to decide whether the district attorney general abused his discretion in denying pre-trial diversion. The trial court affirmed the denial.

Based on the reasons set forth in this opinion the trial court's decision is affirmed.

FACTS

In April, 1994, and January, 1995, the appellant was indicted by a Putnam County Grand Jury in eleven (11) counts of selling unregistered securities and one count of theft over $10,000.00. The counts allege fraudulent acts, sales and financial representation. One count alleges theft over $500 for passing a bad check.

The appellant is alleged to have approached various citizens of Putnman County, between July, 1992, and May, 1993, about investing in a book she was publishing about the history of Putnam County, The appellant had previously written a similar book and it was financed in the same manner. The victims were told that this money would buy a share in the book, that there were only a few shares remaining to be sold, and if they wanted to buy them, their money would be returned along with a 100% profit within six (6) months. The victims were never paid any money. The District Attorney General alleges the fraudulent solicitations amounted to approximately $56,000.00 dollars. The appellant was employed by the Cookeville Police Department as a communications officer (dispatcher). The appellant is accused of presenting a bad check to the Red Lion Supermarket, while in her uniform, for the amount of $500.00

The appellant applied for pre-trial diversion by submitting an application dated June 17, 1994, Exhibit 1 (TE). The District Attorney General for Putnam County recused himself and Mr. William M. Locke, from an adjoining judicial district, was appointed District Attorney General, pro-tem. On December 20, 1994, the District Attorney General entered a memorandum of denial of pre-trial diversion, Exhibit 6 (TE), setting out the reasons for the denial. On January 5, 1995, the appellant filed a petition for a writ of certiorari with the Criminal Court for Putnam County, Tennessee, to review the actions of

the District Attorney General in refusing diversion. In a bifurcated hearing on March 2, 1995, and March 29, 1995, the trial court heard the merits of the petition.

At pages 5, 6, 7, and 8 of the trial transcript, District Attorney General Locke testified as to his reasons in denying pre-trial diversion. General Locke considered the appellant's application, probation report, certain letters and the circumstances of the offenses and found the appellant to be, "on the front end", a favorable candidate for diversion. However, he believed this initial finding was outweighed in that the offenses were not crimes of impulse, but involved planning, deception, and deceit on the appellant's part. The District Attorney General testified that when the six (6) months expired, the appellant would tell the various victims that she was experiencing financial difficulties, or that the check was in the mail, or she would give them a check requesting them to hold the same. She continually put the victims off and made no attempt to pay them their money. Due to the continued deception and lack of forthrightness, the District Attorney General believed this to be a major factor in his denial.

The District Attorney General, in his signed memorandum of denial, was of the belief the appellant was a Cookeville Police Officer. Later the District Attorney General learned that the appellant was a communications officer (dispatcher) with the police department. Therefore, he believed, as part of his denial, that persons employed in law enforcement should or might be held to a little higher standard of accountability. The District Attorney General believed that great weight should be given to the factor of deterrence due to the nature of the offenses and their magnitude. The District Attorney General acknowledged he was aware of the appellant's filing bankruptcy, but there was no plan of restitution and no remorse or responsibility was shown by the appellant for her actions, which affected his decision. The District Attorney General confirmed he had read and considered letters submitted by three (3) additional witnesses in support of the appellant.

Ms. Brenda Reed, Probation Officer, testified she received several letters of support for the appellant, but did not include them in her report or send them to the

District Attorney General. She believed them to be more character in nature and not to be included in her official report. The trial court granted a continuance, at the request of appellant's counsel, so the District Attorney General might consider these additional letters.

March 29, 1995

In this continued hearing the District Attorney General enlarged on his opinion for considering deterrence as a result of questioning by appellant's counsel. The appellant's employment was a concern in determining deterrence. Apparently there was a case in Putnam County involving a Putnam County Public Official who had received pre-trial diversion for some theft offenses. The District Attorney General was made aware of this incident on March 29th, but did not consider this collateral case in making his decision. The District Attorney General was not questioned about the additional letters arising in the previous hearing. Apparently, the District Attorney General filed an addendum to the original memorandum of denial, however, the addendum was not entered in the record. The appellant also entered two exhibits at this hearing--a memorandum of the McBroom case, and a copy of the indictment in McBroom. These exhibits were not forwarded to this Court for review. It is the duty of the attorneys to furnish a proper record for appellate review and the failure to do so results in a waiver of that issue. On March 30, 1995, the trial court entered an order denying the writ ruling that the District Attorney General did not abuse his discretion in denying pre-trial diversion to the appellant, leading to this appeal.

CONCLUSIONS OF LAW

Our review is solely limited to whether or not there is any substantial evidence in the record to support the District Attorney General's refusal to enter into a memorandum of understanding for pre-trial diversion. The General Assembly in Tenn. Code Ann. § 40-14-101, seq., vested in District Attorneys General the sound discretion to properly consider worthy candidates for the purpose of pre-trial diversion. When appropriate, prosecutors should utilize pre-trial diversion. To ensure the fair and objective application

of the diversion states, the Supreme Court in *State v. Hammersley*, 650 S.W.2d 352 (Tenn. 1983) stated:

> "We believe that in order for prosecutors to properly exercise the discretion vested in them by the pre-trial diversion statute some objective standards should be established to guide them in the decision-making process."

Such standards, for consideration, by the prosecutors include attitude, post-arrest behavior, prior record, home environment, current problems with substance abuse, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement. *State v. Hammersley, supra*. The prosecutor must give equal weight to all factors brought to his attention or specify why he or she does not. *State v. Kirk*, 868 S.W.2d 739 (Tenn. Crim. App. 1993). Also, the prosecutor must consider all evidence which tends to show that the applicant is amenable to correction and is not likely to commit additional crimes. *State v. Winsett*, 882 S.W.2d 806 (Tenn. Crim. App. 1993). Now that we know the duties of the prosecutor in determining pre-trial diversion, were these factors appropriately applied in this case?

The District Attorney General's decision is presumptively correct and shall be reversed only when the appellant establishes that there has been a patent or gross abuse of prosecutorial discretion. *State v. Houston*, 900 S.W.2d 712 (Tenn. Crim. App. 1995). This Court may not substitute its judgment for the district attorney's when reviewing a denial of pre-trial diversion. *State v. Watkins*, 607 S.W.2d 486 (Tenn.Crim.App. 1980) We are of the opinion that the District Attorney General in this case properly considered the factors set forth in *State v. Hammersley, supra*, and *State v. Washington*, 866 S.W.2d 486 (Tenn. 1993). In his analysis the District Attorney General found three (3) factors in favor of the appellant: (1) her background (2) her lack of a prior criminal record and (3) she appeared to be amenable to correction and rehabilitation. The District Attorney General found five (5) factors that outweighed the application for pre-trial diversion:

> (1) The crime was not one of impulse, but involved planning, deception, deceit, and a continuing scheme over ten (10) months;
>
> (2) The continued deception by the appellant about her financial condition when victims made inquiries about their return--lack of forthrightness (honesty) on the part of the appellant;

(3) An abuse of public trust in that the appellant was an employee of the Cookeville Police Department and wore her uniform during some of these transactions;

(4) The magnitude of the offenses--13 victims involving approximately $56,000; and

(5) Deterrence.

From a review of the record, we find that the five factors of denial fit into the criteria set forth in *State v. Hammersley, State v. Washington, supra*. We concur with the District Attorney General's analysis that the magnitude of the offenses, the continuing deception and deceit, and the violation of a public trust strongly support denial of pre-trial diversion.

The District Attorney General was most influenced by the circumstances of the offense and the violation of public trust. The Supreme Court of this State considered the factor of public trust in a probation request. In *Woodson v. State*, 608 S.W. 2d 591 (Tenn. 1980), the Court stated:

> "We also believe that public officials, and especially members of the criminal justice system, are called upon to act in accordance with an even higher standard that that applied to the average citizen. In the normal course of events, an applicant for a suspended sentence has not, prior to committing a crime, taken an oath that he will commit no crime. On the other hand a public official whose sworn duty is to uphold the law has taken such an oath. Thus (the defendant) stands before the court as one who by committing a crime has violated his oath of office, and has thereby breached the public trust."

Such a statement applies equally to an application for pre-trial diversion. Even if the appellant had not taken an oath, she represents to the public a symbol of law enforcement.

This Court has held on several occasions, that in appropriate cases the circumstances of the offense and the application of deterrence may outweigh other relevant facts and justify a denial of pre-trial diversion. *State v. Carr, supra*. See *State v. Helms*, 720 S.W.2d 474 (Tenn. Crim. App. 1986).

We agree with the trial court, that the District Attorney General's denial of diversion did not constitute an abuse of discretion. The judgment of the trial court is affirmed.

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L. T. Lafferty, Special Judge

CONCUR:

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Gary R. Wade, Judge

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Paul G. Summers, Judge