

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
SEPTEMBER SESSION, 1996

**FILED**

March 27, 1997

No. 03C01-9512-CC-00401

**Cecil Crowson, Jr.**  
Appellate Court Clerk

HAMBLEN COUNTY

STATE OF TENNESSEE, )  
)  
Appellee )  
)  
vs. )  
)  
ROBERT EUGENE PFOFF, SR. )  
)  
Appellant )

Hon. **James E. Beckner**, Judge

Interlocutory Appeal  
(Denial of Pre-Trial Diversion)

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**David G. Hayes**  
Judge

## OPINION

The appellant, Robert Eugene Pfoff, Sr., brings this interlocutory appeal pursuant to Tenn. R. App. P. 9, contending that the district attorney general abused his discretion in denying the appellant's application for pre-trial diversion and that he was denied an adequate hearing of his petition for writ of certiorari in violation of the due process provisions of the Tennessee and United States constitutions. Following a review of the record, we affirm the judgment of the trial court.

### I. Factual Background

On July 3, 1995, the Grand Jury of Hamblen County returned an indictment charging the appellant with two counts of sexual battery of his sixteen year old granddaughter, MP.<sup>1</sup> In October, 1995, the appellant applied for pre-trial diversion pursuant to Tenn. Code Ann. § 40-15-105 (1996 Supp.). On November 9, 1995, the district attorney general denied the appellant's request, and, accordingly, the appellant filed a petition for a writ of certiorari. On November 17, 1995, the trial court conducted a hearing, concluding that the prosecutor had properly exercised his discretion.

Along with his application for pre-trial diversion, the appellant submitted to the district attorney general a letter from the victim, MP, in which she stated that she would not object to the appellant's placement in a pre-trial diversion program. Moreover, in denying the appellant's request for pre-trial diversion, the district attorney general noted the following factors supporting the appellant's application: the appellant's lack of a criminal record; the appellant's good behavior since his arrest in the instant case; the appellant's lack of any history of

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<sup>1</sup>As a matter of policy, this court does not name minors who are victims of sexual abuse. See State v. Schimpf, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

drug or alcohol abuse; the appellant's education and history of "sustained and regular" employment; the appellant's good reputation in the community;<sup>2</sup> the appellant's marital stability;<sup>3</sup> and the appellant's fulfillment of family responsibilities. The district attorney general also noted the following factors militating against pre-trial diversion: the circumstances of the offense, including the appellant's repeated exploitation of his custodial relationship with his granddaughter, MP,<sup>4</sup> and an ongoing investigation by the Department of Human Services of allegations that the appellant has sexually molested another granddaughter, SP, who was five years old; the appellant's poor physical and mental condition;<sup>5</sup> the appellant's attitude;<sup>6</sup> the attitude of law enforcement;<sup>7</sup> the need for deterrence; and the appellant's lack of amenability to correction. The prosecutor accorded most significance to the circumstances of the offense, the appellant's lack of amenability to correction, and the need for deterrence and concluded that the adverse factors outweighed those factors supporting pre-trial diversion.

On November 15, 1995, the appellant submitted a motion to the trial court, in essence objecting to the district attorney general's reliance upon the

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<sup>2</sup>The appellant also attached to his application for pre-trial diversion seven letters from relatives, friends, and co-workers, who attested to the appellant's good character.

<sup>3</sup>At the time of the writ of certiorari hearing, the appellant had been married for forty-five years.

<sup>4</sup>The appellant assumed legal custody of MP when she requested permission to permanently reside with her grandparents. She had previously lived with her aunt and uncle, with whom she was experiencing problems. Since the initiation of these criminal proceedings, MP has returned to the home of her aunt and uncle. The appellant testified at the writ of certiorari hearing that, although he continues to provide financial support to MP, he is voluntarily transferring legal custody of MP to her aunt and uncle.

<sup>5</sup>The appellant submitted various letters from treating physicians, who indicated that the appellant's afflictions include depression, atypical migraines, cerebral vascular disease, atherosclerotic cardiovascular disease with an underlying ischemic heart disease, high blood pressure, diabetes mellitus, chronic dyspepsia, degenerative lumbar spine, and sleep apnea.

<sup>6</sup>The district attorney general asserted, "[The appellant] appears to be self-centered and unconcerned with the victim and the consequences his acts may have on her life."

<sup>7</sup>With respect to this factor, the district attorney general noted, "The attitude of law enforcement is that sexual abuse of children is a serious problem in our society and its perpetrators need to be punished and deterred."

appellant's alleged sexual abuse of his five year old granddaughter, SP. At the writ of certiorari hearing, defense counsel brought the appellant's motion to the attention of the trial court and asked that the court omit from its review of the prosecutor's decision any consideration of the appellant's alleged sexual abuse of SP. While according the allegation little weight, the trial court nevertheless concluded that the allegation was one factor supporting the prosecutor's exercise of discretion in the instant case. The trial court additionally found that the prosecutor's denial of diversion was supported by the appellant's lack of amenability to correction, the need for specific deterrence, the circumstances of the offense, the appellant's mental condition, and, generally, the best interests of the public.<sup>8</sup> The trial court questioned the State's reliance upon the appellant's physical condition, noting that "[i]t could go either way," the State's reliance upon the poor attitude of the appellant, citing the lack of evidence supporting this factor, and the State's reliance upon the attitude of law enforcement and general deterrence, again citing the lack of evidence in the record.<sup>9</sup> Again, in the final analysis, the court concluded that the prosecutor had not abused his discretion and denied the appellant's petition.

## **II. Analysis**

On appeal, the appellant contends that the district attorney general abused his discretion in denying the appellant pre-trial diversion. In a related

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<sup>8</sup>With respect to the appellant's amenability to correction and the circumstances of the offense, the trial court noted the appellant's statement to the police in which he confessed to fondling and kissing MP's breasts on at least one occasion.

<sup>9</sup>We note that this court has previously suggested, in *dicta*, that sexual molestation of children is an offense requiring no extrinsic proof of the need for deterrence. See State v. Byrd, No. 01C01-9503-CR-00083 (Tenn. Crim. App. at Nashville, August 1, 1996), perm. to appeal granted, (Tenn. 1997). Moreover, our legislature has declared:

The incidence of child sexual abuse has a tremendous impact on the victimized child, siblings, family structure, and inevitably on all citizens of this state, and has caused the general assembly to determine that the prevention of child sexual abuse shall be a priority of this state.

Tenn. Code Ann. § 37-1-601(a) (1996)

issue, the appellant argues that the district attorney general's reliance at the writ of certiorari hearing upon an uncharged offense precluded a fair hearing.

Initially, the decision to grant pre-trial diversion rests within the discretion of the district attorney general. Tenn. Code Ann. § 40-15-105(b)(3) (1996 Supp.); see also State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1995); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). When deciding whether to grant an application for pre-trial diversion, the district attorney general should consider 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; the defendant's amenability to correction; the likelihood that pre-trial 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) (citing State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988) (citing Pace v. State, 566 S.W.2d 861 (Tenn. 1978), and Hammersley, 650 S.W.2d at 352)). See also Houston, 900 S.W.2d at 714. In appropriate cases, the nature and circumstances of the offense and the need for deterrence may outweigh all other relevant factors and justify a denial of pre-trial diversion. Carr, 861 S.W.2d at 855. Indeed, the nature and circumstances of the offense may alone support the denial of pre-trial diversion. State v. Sutton, 668 S.W.2d 678, 680 (Tenn. Crim. App. 1984).

The district attorney general's decision regarding pre-trial diversion is

presumptively correct, and the trial court will only reverse the decision when the appellant establishes that there has been a patent or gross abuse of prosecutorial discretion. Houston, 900 S.W.2d at 714 (citing Hammersley, 650 S.W.2d at 356). In order to establish abuse of discretion, "the record must show an absence of any substantial evidence to support the district attorney general's refusal to grant pre[-]trial diversion." Id. The trial court may only consider evidence considered by the district attorney general in the decision denying pre-trial diversion, State v. Winsett, 882 S.W.2d 806, 810 (Tenn. Crim. App. 1994), and the trial court may not substitute its judgment for that of the district attorney general when his decision is supported by the evidence. State v. Watkins, 607 S.W.2d 486, 489 (Tenn. Crim. App. 1980).

For purposes of our review, the findings of the trial court are binding on this court unless the evidence preponderates against such findings. Houston, 900 S.W.2d at 715. We review the case, not to determine if the trial judge has abused his discretion, but to determine if the evidence preponderates against the finding of the trial judge who holds that the district attorney general has or has not abused his discretion. Watkins, 607 S.W.2d at 489. Thus, the underlying issue for our determination remains whether or not, as a matter of law, the prosecutor abused his discretion in denying pre-trial diversion. Carr, 861 S.W.2d at 856.

With respect to the prosecutor's consideration of allegations that the appellant sexually abused his five year old granddaughter, SP, in State v. Morgan, 934 S.W.2d 77, 82 (Tenn. Crim. App. 1996), this court held that "[t]o deny diversion based upon an alleged event that may or may not have occurred would constitute an abuse of discretion." We observed that fundamental fairness dictates that, if the State intends to rely solely upon an uncharged offense, there must be probable cause to believe that the offense did, in fact,

occur. Compare State v. Lutry, No. 03C01-9502-CR-00058 (Tenn. Crim. App. at Knoxville, April 25, 1996)(for publication)(this court, noting that pre-trial diversion is an extraordinary largesse of the law and the consequent importance of ensuring that the prosecutor is in possession of the fullest information possible concerning the defendant's life and characteristics, held that the district attorney general may consider evidence of arrests in denying a defendant pre-trial diversion). Although the prosecutor's consideration of an uncharged offense must be supported by probable cause, in State v. Pinkham, No. 02C01-9502-CR-00040 (Tenn. Crim. App. at Jackson), perm. to appeal granted, (Tenn. 1996), we held that reliable hearsay evidence may sufficiently support such consideration. If a defendant nevertheless contends that information considered by the district attorney general is materially false, the burden is upon the defendant to challenge such information. Id.

At the writ of certiorari hearing, the State indicated, "We were provided with a report from the ... counselor who has been counseling the child involved in this case as well as [the five year old] grandchild, and it was related ... to the ... counselor by the mother of the children, that the [five year old] child had related to her that [the appellant] had had her take a shower with him in the nude and that he had had her play with his penis and that he had videotaped her ... in the nude. ... That matter is still under investigation." The appellant, at the hearing, denied molesting SP. In any event, as noted earlier, the trial court accorded very little weight to the uncharged offense, finding other substantial evidence to support the district attorney general's denial of diversion. See Pinkham, No. 02C01-9502-CR-00040 (even if the trial court finds that the district attorney general considered false or misleading facts in arriving at his decision, thereby abusing his discretion, the trial court must affirm the denial of diversion if there exists other substantial evidence to support the district attorney general's decision). We agree that, even omitting any consideration of the uncharged

offense, the record adequately supports the prosecutor's exercise of discretion. Additionally, the record reflects that the appellant received a hearing consistent with principles of due process.<sup>10</sup>

Accordingly, we affirm the trial court's denial of the appellant's petition for writ of certiorari.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge

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<sup>10</sup>We note that the appellant, in his brief, failed to cite any authority in support of his due process claim. Tenn. R. App. P. 27(a)(7); Ct. of Crim. App. Rule 10(b).