IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1996 SESSION

FILED

February 20, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	NO. 01C01-9510-CC-00323
	)	
Appellee	)	COFFEE COUNTY
	)	
V.	)	HON. GERALD L. EWELL, SR, JUDGE
	)	
CHRISTIE QUICK	)	
	)	(Pretrial Diversion)
Appellant	)	
	)	

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OPINION FILED:_____

REVERSED AND REMANDED

William M. Barker, Judge

Opinion

The Appellant, Christie Quick, appeals the Coffee County Circuit Court's judgment affirming the Coffee County assistant district attorney's denial of her pretrial diversion. She argues on appeal that the assistant district attorney abused his discretion when he denied the pretrial diversion. We have carefully reviewed the record on appeal and we agree. We, therefore, reverse the trial court's decision to uphold the district attorney's denial of pretrial diversion.

The record concerning the events leading up the request for pretrial diversion is very sparse. It appears that in April of 1995, the Appellant's husband was contacted by Timmy Brown, a construction worker, who was trying to sell some kitchen appliances. Although the appliances were brand new and still in their factory cardboard packaging, Brown told the Appellant's husband that he was their rightful owner. The Appellant's husband agreed to purchase the appliances and paid $600.00 for a dishwasher, a microwave oven, and a range top. At some point after the sale, the appliances, which in fact belonged to a Tim Hall, were found in the possession of the Appellant and her husband.

In June, 1995, the Appellant and her husband were both indicted for theft of property valued over $1000.00. Before trial the Appellant applied for pretrial diversion. In his letter denying diversion, the assistant district attorney stated that he could not grant the Appellant's diversion request because she failed to "acknowledge any responsibility for her criminal conduct. . ." The Appellant, in her application for diversion, had stated that the appliances had been bought by her husband from a person who had represented that he was the rightful owner of those appliances. The Appellant had then stated: "I do not feel that I am guilty of the crime charged." Because of these two statements, the assistant district attorney stated that "[a] defendant who denies guilt is not amenable to correction or rehabilitation. . ." and that defendants who claim that they are innocent should not use diversion as "a convenient vehicle to avoid prosecution" and should instead proceed to trial. The letter further

stated that the district attorney's office, during the last eight to ten months, had noticed a general increase in crime and that the Appellant's "offense of theft needs to be deterred in our community."

After the assistant district attorney's denial, the Appellant filed a writ of certiorari in the Coffee County Circuit Court appealing the assistant district attorney's decision. The trial court affirmed the assistant district attorney's denial of diversion by stating that there was not an absence of substantial evidence to support the denial of the pretrial diversion. The Appellant now appeals that decision.

If an individual charged with a crime satisfies certain statutory criteria, he or she can apply to the district attorney for pretrial diversion. See Tenn. Code Ann. § 40-15-105 (Supp. 1995). The decision of whether to grant a request for pretrial diversion lies within the district attorney's sole discretion. State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Markham, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988). This discretion, however, is not totally unbridled. The district attorney's decision may not be arbitrary or capricious. Tenn. Code Ann. § 40-15-105(b)(2); Markham, 755 S.W.2d at 852-53. The district attorney's decision to deny diversion must also serve the interests of justice. Hammersley, 650 S.W.2d at 353 (citing Pace v. State, 566 S.W.2d 861, 864 (Tenn. 1978)). In considering whether to grant diversion the district attorney should consider the following factors:

> (1) the circumstances of the offense; (2) the defendant's criminal record, social history and present condition, including his mental and physical conditions if appropriate; (3) the deterrent effect of punishment on other criminal activity; (4) the defendant's amenability to correction; and (5) the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant.

State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995); State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993); see Markham, 755 S.W.2d at 852-53; Hammersley, 650 S.W.2d at 35.

When the district attorney denies pretrial diversion, an appellant can appeal that decision by filing a writ of certiorari to the trial court. Tenn. Code Ann. § 40-15-105 (b)(3). On appeal the appellant has the burden to prove that the district attorney grossly abused his discretion in denying the diversion. Id; State v. Watkins, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980). "[T]he record must [also] show an absence of any substantial evidence to support the refusal of the District Attorney General to [grant pretrial diversion]." Watkins, 607 S.W.2d at 488; see Houston, 900 S.W.2d at 714. When reviewing the district attorney's denial, "the trial judge [has] to [not only] confine his consideration to the evidence considered by the District Attorney General *at the time* he considered the application, but that he must also confine his review to the reason or reasons given by the District Attorney General *at that time*. Fairness demands that the defendant know what allegations he must meet when he comes before the trial judge on his application." State v. Brown, 700 S.W.2d 568, 570 (Tenn. Crim. App. 1985) (emphasis added); State v. Sherman Steele, No. 01C01-9205-CC-00185 (Tenn. Crim. App., Nashville, Sept. 9, 1993) (Permission to Appeal Denied Feb. 7, 1995).

If the trial court upholds the district attorney's denial of diversion, an appeal can be taken to the court of criminal appeals. See Tenn. R. App. P. 9. In reviewing the appeal, this Court may not substitute its own judgment for the district attorney's judgment. Houston, 900 S.W.2d at 714. The standard of review for this Court is to determine "whether the finding of the trial court that the district attorney general did not abuse his discretion in denying [the] application of pretrial diversion is supported by a preponderance of the evidence." State v. Winsett, 882 S.W.2d 806, 809 (Tenn. Crim. App. 1993).

I.

The Appellant first argues that the State cannot deny pretrial diversion on the ground that the Appellant maintains and asserts her innocence.

The assistant district attorney, in his letter denying pretrial diversion, stated that he did not find the Appellant amenable to diversion because she failed to admit any wrongdoing in this case. In the State's brief, an argument is made that diversion was not denied because the Appellant maintained that she was innocent of the crime with which she was charged. Instead, the State argues that "[t]he proof [introduced at the writ of certiorari hearing] and the [assistant district attorney's] letter show that the defendant's refusal to acknowledge any wrongdoing on her part, based on the facts and circumstances of the offense, indicate that the defendant is not amenable to rehabilitation."

It may very well be that the Appellant was not amenable to rehabilitation based on the circumstance of the offense. If that is the case it is unfortunate that the assistant district attorney failed to provide for that in his letter denying diversion. This Court cannot uphold a denial of pretrial diversion based on factors that were not stated in the assistant district attorney's letter.

The only rationale stated in the letter to why the Appellant was not considered to be amenable to rehabilitation seems to be that she failed to admit to any wrongdoing. It is well-established in Tennessee that the State cannot condition a request for pretrial diversion on a defendant's guilty plea. State v. King, 640 S.W.2d 30, 33 (Tenn. Crim. App. 1982). Such a condition would "supplant [the pretrial diversion] program with probation, and would totally defeat the legislative purpose of these statutes." Id. In our opinion, to condition pretrial diversion on an Appellant's admission of criminal conduct is, for all practical purposes, the same thing as a requesting an Appellant to enter a guilty plea.

Moreover, the denial letter also states that: "Defendants who maintain their innocence should proceed to trial and not apply for diversion." It appears, therefore, that the assistant district attorney maintained a policy to only grant pretrial diversion

when applicants would admit some criminal conduct. Tennessee law, however, has made it clear that a district attorney cannot establish a policy on whether to grant or deny pretrial diversion that is different from the pretrial diversion policy of the State of Tennessee. Hammersley, 650 S.W.2d at 356-57. Any diversion denial that is based on such a policy is in error. We, therefore, find that the evidence in the record preponderates against the trial court's finding that the assistant district attorney did not abuse his discretion in denying the Appellant's pretrial diversion because she was unamenable to rehabilitation.

II.

The Appellant next contends that the State had no right to deny the Appellant pretrial diversion based on a general ground of deterrence alone, citing only a general rise in crime.

The need for deterrence is one of the factors the district attorney should consider when deciding whether to grant or deny pretrial diversion. Houston, 900 S.W.2d at 714; Washington, 866 S.W.2d at 951. The need for deterrence, however, cannot be "given controlling weight unless [it is] 'of such overwhelming significance that [it necessarily] outweigh[s] all other circumstances.'" Markham, 755 S.W.2d at 853 cited in Washington, 866 S.W.2d 951.

In his letter denying pretrial diversion, the assistant district attorney stated that there had been a general rise in crime in the community over the last eight to ten months. During the writ of certiorari hearing, two Coffee County assistant district attorneys testified that they felt that there had been a general increase in crime based on their increased case load. More specifically they testified that the number of thefts and burglaries had increased in Coffee County, but they also testified that violent crimes and drug related crimes had increased in a similar manner. Although we have held that no person is in a better position to know the level of criminal activity in an area than the district attorney, State v. Holland, 661 S.W.2d 91 (Tenn. Crim. App.

1983), the denial letter failed to show that the need for either specific or general deterrence is of such overwhelming significance that it outweighs all the other circumstances of this case. The circumstances of the offense indicate that it was the Appellant's husband who purchased the kitchen appliances. The Appellant has no criminal record and has a solid work history. The Appellant is also providing for her two children and is making current payments on two loans to a lending institution.

For the reasons stated herein, we reverse the trial court's upholding of the assistant district attorney's denial of pretrial diversion. We remand the case to the trial court with an order to place the Appellant on pretrial diversion with appropriate conditions to such diversion.

_____
WILLIAM M. BARKER, JUDGE

CONCUR:

_____
JOE B. JONES, PRESIDING JUDGE

_____
J. STEVEN STAFFORD, SPECIAL JUDGE