

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

FILED
May 7, 1997
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
)
 VS.)
)
 TOMMY LEE MANOR,)
)
 Appellant.)

C.C.A. NO. 01C01-9512-CC-00435

HUMPHREYS COUNTY

HON. ROBERT E. BURCH
JUDGE

(Rule 9 - Pretrial Diversion)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

This is an appeal pursuant to Rule 9, Tennessee Rules of Appellate Procedure, from the judgment of the Circuit Court of Humphreys County affirming the District Attorney's refusal to grant pretrial diversion. On appeal, Appellant Tommy Lee Manor claims that the District Attorney abused his discretion in denying his application for pretrial diversion. For the reasons set forth, the judgment of the trial court is affirmed.

Factual Background

On August 13, 1994, Appellant was stopped at a sobriety checkpoint and found to be in possession of marijuana and cocaine. On November 14, 1994, Manor submitted an application to the District Attorney for pretrial diversion. The District Attorney denied his application citing the nature and circumstances of the crimes, the need for deterrence, and background information indicating Appellant's history of involvement with narcotics as reasons for his denial. On April 4, 1995, Appellant was indicted for one count of possession of marijuana with intent to sell (a Class E felony) and one count of possession of cocaine with intent to sell (a Class C felony). On June 6, 1995, Appellant was re-indicted for possession of cocaine in excess of 4 grams with intent to sell (a Class B felony). On August 17, 1995, Appellant filed a writ of certiorari challenging the District Attorney's denial of pretrial diversion. A hearing was held on August 24, 1995 and the trial court ruled that although Appellant was eligible for pretrial diversion, the District Attorney General did not abuse his discretion in denying Appellant's application.

Appellant's Eligibility for Pretrial Diversion

Appellant argues that he is eligible for pretrial diversion and that it was an abuse of discretion for the District Attorney to deny his application. The State maintains, although the trial court found to the contrary, that Appellant's indictment for a Class B felony makes him ineligible for pretrial diversion. In its reply brief, Appellant argues that the State's argument should be disregarded as beyond the scope of this Rule 9 interlocutory appeal. Appellant maintains that he did not appeal what he considers an appropriate ruling by the trial court on Appellant's eligibility. Instead, Appellant claims that the only issue before this Court is whether the District Attorney abused his discretion.

We find that the issue of Appellant's eligibility is properly before this Court. In his Motion for a Written Order Permitting An Interlocutory Appeal, Appellant cites the fact that eligibility of a defendant for pretrial diversion after indictment for an indivertible offense is a matter of first impression for Tennessee appellate courts as a reason why his permission for interlocutory appeal should be granted. Appellant's eligibility for pretrial diversion is obviously integral to the issue of whether the District Attorney or this Court can properly order that Appellant be placed in pretrial diversion status.

In ruling that Appellant was eligible for pretrial diversion the trial court relied on State v. Landers, 723 S.W.2d 950 (Tenn. 1987). The Landers opinion involved two defendants each indicted for vehicular homicide while under the influence of intoxicants and vehicular homicide under circumstances manifesting indifference to human life. Id. at 951. The Tennessee Supreme

Court noted that one of the prerequisites to pretrial diversion under the pretrial diversion statute in effect at the time was that the maximum punishment for the offense charged had to be ten years or less. Because a conviction for vehicular homicide while under the influence of an intoxicant carried a maximum punishment of twenty-one years, it was considered an indivertible offense. On the other hand, because a conviction for the lesser grade of vehicular homicide carried a maximum punishment of only five years it was considered divertible. In Landers the district attorney sought to dismiss the indivertible offenses so that he could approve diversion for the divertible offenses. The Court held that an attorney general may not dismiss an indivertible offense in order to grant diversion for a divertible offense for several reasons. Id. at 952. While the prosecution retains absolute discretion over pretrial diversion before indictment, at the moment of indictment the court obtains jurisdiction. Once the prosecution decides to have a defendant indicted for an indivertible offense, he cannot then extend the benefits of pretrial diversion to those offenders not included by the pretrial diversion statute. To do so would be unlawful.

Appellant focuses on the following language in Landers to support its argument that Appellant's initial indictment for a Class C felony made him eligible for pretrial diversion: "the determination of whether a defendant is within or without the eligible class is irrevocably determined by the indictment." The problem with Appellant's argument is twofold. While the language quoted above in isolation may support Appellant's position, understood in the context of the Landers opinion as a whole it does not. Landers holds that a district attorney general has no absolute right to dismiss a charge for which pretrial

diversion is improper in order that pretrial diversion may be granted on the remaining charges. In fact, the reliance in Landers on forbidding a district attorney from diverting cases not permitted under the pretrial diversion statute to be diverted supports the conclusion that the District Attorney in this case should not be permitted to divert Appellant's case. In addition, Landers does not govern a re-indictment situation. It does not hold or state that in the case of several indictments, the initial indictment determines the eligibility of a defendant for pretrial diversion such that an eligible defendant cannot ever lose his pretrial diversion eligibility.

There is no doubt that had Appellant been initially indicted for a Class B felony he would not be eligible for pretrial diversion. Tennessee Code Annotated Section 40-15-105(a) reads as follows:

. . . [I]n cases where the defendant is charged with a misdemeanor or felony . . . the parties may, by a memorandum of understanding, agree that the prosecution will be suspended for a specified period, not to exceed two (2) years from the filing of the memorandum of understanding, for a misdemeanor other than driving under the influence of an intoxicant . . ., or for a Class C felony . . ., or a Class D felony . . ., or a Class E felony,

There is no allegation in this appeal of any "bad faith" on the part of the district attorney in obtaining an indictment for an indivertible offense. Thus, we need not address the question of whether a re-presentation of a case to the grand jury solely for the purpose of making a divertible charge an indivertible one would alter the results of our opinion.

Because Appellant was indicted for a Class B felony, he is ineligible for pretrial diversion. Therefore, we reverse the ruling of the trial court that Appellant was eligible for pretrial diversion and affirm the ruling of the trial

court that the District Attorney did not abuse his discretion in denying Appellant's application.

JERRY L. SMITH, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE