

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1997 SESSION

FILED
December 23, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 VS.)
)
 DUANE A. HEDRICK,)
)
 Appellant.)

NO. 02C01-9704-CC-00161

CARROLL COUNTY

HON. JULIAN P. GUINN,
JUDGE

(Denial of Pre-Trial Diversion)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

**JOE G. RILEY,
JUDGE**

OPINION

Appellant, Duane A. Hedrick, was indicted for the offense of vehicular homicide and appeals, pursuant to Tenn. R. App. P. 9, from the denial of pre-trial diversion and subsequent denial of certiorari by the trial court.¹ Appellant complains that the prosecutor abused her discretion in denying pre-trial diversion, and further complains he was denied an adequate hearing on his petition for writ of certiorari in violation of the due process provisions of the Tennessee and United States Constitutions. We affirm the judgment of the trial court.

FACTS

On or about June 11, 1996, appellant, a commercial truck driver, left Goodlettsville, Tennessee, at about 2:00 a.m. and drove to Indianapolis, Indiana, where he had about three hours of rest. Leaving Indianapolis at approximately 1:00 p.m., he arrived in Clarksville, Tennessee, around 8:00 p.m. and attended his son's little league game. He left Clarksville around 10:30 p.m. and began his journey to Southaven, Mississippi, his ultimate destination. About midnight on U. S. Highway 79 in Carroll County, appellant's truck veered into the oncoming lane and struck the car of the victim, resulting in her death. Appellant did not know whether he went to sleep beforehand. It is undisputed that appellant drove in violation of governmental regulations of the trucking industry in that he did not have the required rest.

PRE-TRIAL DIVERSION

The Pre-trial Diversion Act provides a means of avoiding the consequences of a public prosecution for those who have the potential to be rehabilitated and avoid future criminal charges. See Tenn. Code Ann. § 40-15-105. Pre-trial diversion is extraordinary relief for which the defendant bears the burden of proof. State v.

¹A defendant now has the option of raising this issue by interlocutory appeal, extraordinary appeal or an appeal as a matter of right after a final judgment of conviction. Tenn. R. Crim. P. 38 (effective July 1, 1997).

Baxter, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993); State v. Poplar, 612 S.W.2d 498, 501 (Tenn. Crim. App. 1980).

The decision to grant or deny an application for pre-trial diversion is within the discretion of the district attorney general. Tenn. Code Ann. § 40-15-105(b)(3); see *also* State v. Pinkham, ___ S.W.2d ___ (Tenn. 1997); State v. Hammersley, 650 S.W.2d 352, 353 (Tenn. 1983); State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995); State v. Carr, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). In making the determination, the district attorney general must consider:

the defendant's amenability to correction. Any factors which tend to accurately reflect whether a particular defendant will or will not become a repeat offender should be considered Among the factors to be considered in addition to the circumstances of the offense are the defendant's criminal record, social history, the physical and mental condition of a defendant where appropriate, and the likelihood that pretrial diversion will serve the ends of justice and the best interest of both the public and the defendant.

Hammersley, 650 S.W.2d at 355; see *also* State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993); State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

Deterrence of both the defendant and others is a factor, the importance of which varies according to the individual circumstances of each case. Hammersley, 650 S.W.2d at 354. The circumstances of the crime and the need for deterrence may, in the appropriate case, outweigh the other relevant factors and justify a denial of pre-trial diversion. Carr, 861 S.W.2d at 855.

A prosecutor's decision to deny diversion is presumptively correct, and the trial court should only reverse that decision when the appellant establishes an abuse of discretion. State v. Lutry, 938 S.W.2d 431, 434 (Tenn. Crim. App. 1996); Houston, 900 S.W.2d at 714. The record must be lacking in any substantial evidence to support the district attorney general's decision before an abuse of discretion can be found. Pinkham, ___ S.W.2d at ___; Carr, 861 S.W.2d at 856. The trial court may not substitute its judgment for that of the district attorney general when the decision of the district attorney general is supported by the evidence. State v. Watkins, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980).

APPLICATION AND LETTER OF DENIAL

The appellant's application for pre-trial diversion indicated he had no prior criminal record, had only two (2) speeding tickets, was married with four (4) minor children, was active in his church, was loyal to his friends, was honest, and did not smoke, drink alcohol, or use illicit drugs. In her letter of denial, the assistant district attorney considered all of these positive factors as reflected in numerous letters of support attached to the application.

In spite of these favorable factors, the assistant district attorney noted that appellant's crime resulted in a death. The death was the direct result of the appellant's violation of governmental regulations designed to protect the safety of the public. She also noted the appellant did not know if he fell asleep just prior to hitting the other vehicle.

Most importantly, the assistant district attorney noted the need for deterrence. The appellant was a commercial truck driver subject to regulations designed to protect the safety of the public. The prosecutor concluded that pre-trial diversion would send a message to other commercial truck drivers that there would be no criminal responsibility for violating the regulations and endangering the public.

ANALYSIS

The case before us is difficult in that we have on the one hand a man who has been a good citizen and a dedicated father and husband who has been active in his church and community. On the other hand, we have the loss of life of a young woman, a terrible and irrevocable consequence of appellant's misguided decision. However, the only question subject to our review is whether the prosecutor abused her discretion in denying pre-trial diversion.

Appellant specifically complains that the prosecutor failed to consider appellant's amenability to correction. Our review of the letter of denial reveals that the assistant district attorney indeed considered all information submitted. Impliedly,

this included appellant's amenability to correction. The prosecutor simply concluded that the nature and circumstances of the offense and the need for deterrence in the trucking industry outweighed the favorable factors. These two (2) factors may justify denial of pre-trial diversion if properly weighed against other relevant factors. Carr, 861 S.W.2d at 855.

It is not for this Court to judge whether the denial of pre-trial diversion was wise or unwise. It is only for this Court to determine whether the district attorney's denial of diversion was an abuse of discretion. Since (1) the assistant district attorney considered the relevant factors and concluded that the nature of the offense and the need for deterrence dictated the denial of diversion, and (2) there is substantial evidence to support this decision, there was no abuse of discretion in the denial of pre-trial diversion. Accordingly, this issue is without merit.

HEARING ON PETITION FOR WRIT OF CERTIORARI

Appellant also contends that he was denied an adequate hearing on his petition for writ of certiorari in violation of the due process provisions of the Tennessee and United States Constitutions. The only authorities cited by appellant are Tenn. Code Ann. § 40-15-105(b)(3), for the general proposition that denial of pre-trial diversion is reviewable by writ of certiorari, and State v. Poplar, 612 S.W.2d 498 (Tenn. Crim. App. 1980), for the proposition that defendant has the burden to show that he is entitled to this extraordinary relief. Neither of these authorities support his argument. This issue is waived as the appellant has failed to cite authority to support his argument. Tennessee Court of Criminal Appeals Rule 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

In spite of this, we choose to consider appellant's argument. Appellant contends that he was deprived of a fair hearing because he was not allowed to introduce testimony of the State Trooper in charge of the investigation. The appellant argues that the trooper would testify as to the cooperation, meekness, and remorse of appellant, as well as his attitude toward law enforcement. The officer was not

allowed to testify. In Poplar, this Court found that:

The trial court then must determine whether the prosecuting attorney abused his discretion in refusing to divert a defendant's prosecution. By necessity, a de novo hearing is not appropriate; the trial judge should bring before him only the evidence made available to and considered by the District Attorney General in determining whether to grant a diversion of prosecution. The statute vests discretion only with the District Attorney General and not with the trial judge; for this reason, a determination of whether the District Attorney General abused his discretion could only be determined by considering what evidence was before the District Attorney General when he considered the application for diversion.

612 S.W.2d at 500.

We note that, as appellant has already pointed out, the burden is not on the prosecutor, but on the defendant to submit all desired evidence to the prosecutor. The trial court properly excluded this testimony.

Appellant next contends that the trial court should have required the District Attorney to testify regarding every factor the District Attorney General "failed to consider," meaning his amenability to correction and favorable attitude toward law enforcement.

As was stated in State v. Winsett, an evidentiary hearing is unneeded in the usual case; however, a hearing may be useful to clarify matters about which there may be some dispute. 882 S.W.2d 806, 810 (Tenn. Crim. App. 1993). In the case before us, the appellant desired the testimony of the assistant district attorney relating to the failure to consider appellant's amenability to correction and her reliance upon deterrence. We find that the appellant was not prejudiced by the failure to require testimony. It is apparent from the letter of denial that all positive factors submitted by appellant were considered. It is implicit that this included appellant's amenability to correction. It is also apparent from the letter of denial that the deterrence factor related to other commercial truckers. We find this to be a proper consideration for denial of pre-trial diversion. In short, the appellant was not prejudiced by the refusal to require the prosecutor to testify. Nor, does there appear to be any factual disputes that needed clarification by testimony. See Pinkham, ___ S.W.2d at ___.

This issue is without merit.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the trial court.

JOE G. RILEY, JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID G. HAYES, JUDGE