

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1998 SESSION

FILED
September 22, 1998
Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee

v.

DAMON BYRD,

Defendant/Appellant

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C.C.A. NO. 01C01-9707-CR-00248

DAVIDSON COUNTY

HON. JANE W. WHEATCRAFT,
JUDGE

DIVERSION

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED
JOHN K. BYERS
SENIOR JUDGE

OPINION

The defendant appeals from the denial of his request for diversion by the District Attorney General and the action of the trial court in affirming that decision.

This is the second appeal in this case regarding the denial of the defendant's application for pretrial diversion.

The indictment in this case was filed on December 14, 1993 and charged the defendant with two counts of assault and two counts of sexual battery.

The defendant requested pretrial diversion, which was denied by the District Attorney General on June 28, 1994. On October 6, 1994, the trial court affirmed the action of the District Attorney General. The defendant appealed from the ruling by way of Rule 9 of the Tennessee Rules of Appellate Procedure. On August 1, 1996, this Court affirmed the judgment of the trial court in *State v. Damon Byrd*, No. 01C01-9503-CR-00083, Davidson County (Tenn. Crim. App. Aug. 1, 1996). The Supreme Court granted the defendant's application for review. On January 27, 1997, the Supreme Court entered a per curiam order in which the case was remanded to the District Attorney General for further consideration [of the application for diversion] in accordance with the standards which the Supreme Court adopted in *State v. Washington*, 866 S.W.2d 950 (Tenn. 1993).

We adopt the factual recitation of the events which occasioned the indictment from the opinion of this Court:

This case arises from an incident that occurred in August of 1992 at the Two Rivers Wave Pool in Nashville. According to the State's theory of the case, Appellant, a thirty-nine-year-old male, approached the victim, a thirteen-year-old female, engaged her in conversation, and then touched her breast by reaching inside her bathing suit. Some time later, Appellant again approached the victim and again touched her breast. Appellant denies that the incident occurred.

The District Attorney General must consider the following factors when determining whether to grant or deny diversion:

[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; defendant's amenability to correction; the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and 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 (Tenn. 1993)(citations omitted).

The record in this case shows the District Attorney General considered the relevant factors in reaching a decision. All of the factors are favorable to the defendant, except the factors of the nature of the offense and the value of the deterrent effect upon similar criminal activity.¹

The order of remand from the Supreme Court in the case for reconsideration directs the District Attorney General, as we view the opinion in *Washington*, to determine whether the circumstances of the offense and the need for deterrence in this type case are of such overwhelming significance that they outweigh all other factors.

The record shows the defendant in this case is in all other matters a highly qualified applicant for diversion, leaving the determination of this matter to the consideration of the two factors above set out, i.e., the nature of the case and the deterrent value of prosecution.

The District Attorney General responded to the defendant in light of the order of the Supreme Court to reevaluate this case in a letter, the pertinent parts of which are as follows:

The Supreme Court noted that offenses [sic] charged against the defendant, *Washington*, was simple possession of contraband and in light of the factors favorable to the defendant circumstances of the case and deterrence were not overwhelmingly significant and therefore not controlling to support a denial of diversion.

The State would distinguish the present case from *Washington* in that simple possession [sic] of drugs and a weapon are victimless crimes and misdemeanors. The case at hand involves a crime personal in nature and a minor child. The charges are felonies. Further, the crimes charged in *Washington* are malum prohibitum as opposed to the present case which charges crimes that are malum in se. While the possession of drugs are [sic] debated in society and guns may be possessed by the average citizen by license, no reasonable man would argue that inappropriate touching of minor children should be condoned. Thus the circumstances of this case and

¹ The District Attorney General was of the view the defendant was not suitable for probation because he would not admit guilt on the charges. An admission of guilt is not required for obtaining diversion.

deterrence to this type of behavior comes [sic] within the language overwhelmingly significant so as to be controlling.

Further, the allegation was that the defendant did the act twice, beneath the clothing, with intervening time to reflect demonstrating the acts were not impulsive rather intentional.

This elevates the weight to be given the circumstances of the crime to level required to be controlling as discussed in Washington.

For all the reasons stated before and this additional consideration of Washington, the State must respectfully deny the defendant's request for diversion.

The District Attorney General obviously followed the order of the Supreme Court which remanded the case to him for reconsideration in light of *Washington*. Upon doing so, he determined that the circumstances of this case and the need for deterring such behavior outweigh the favorable factors which point to diversion.

The trial court found the District Attorney General did not abuse his discretion in denying diversion. We find the record supports this finding and we affirm the judgment of the trial court.

The cost of this appeal is taxed to the defendant.

John K. Byers, Senior Judge

CONCUR:

David H. Welles, Judge

Jerry L. Smith, Judge