

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
MAY SESSION, 1998

**FILED**

July 22, 1998

Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
)  
Appellee )  
)  
vs. )  
)  
LONNIE RUSSELL "RUSTY" )  
GRAY, )  
)  
Appellant )

No. 01C01-9703-CR-00078

SUMNER COUNTY

Hon. Jane Wheatcraft, Judge

(Denial of Pre-trial Diversion)

For the Appellant:

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For the Appellee:

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District Attorney General

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Gallatin, TN 37066

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

AFFIRMED

**David G. Hayes**  
Judge

## **OPINION**

The appellant, Lonnie Russell “Rusty” Gray, appeals, pursuant to Rule 10, Tenn. R. App. P., from the decision of the trial court affirming the assistant district attorney general’s denial of his application for pre-trial diversion. The appellant seeks to divert four class D felony counts of theft of property. On appeal, the appellant argues that the trial court erred in finding that the prosecutor did not abuse his discretion in denying diversion.

After review of the record, we affirm the judgment of the trial court.

## **FACTUAL BACKGROUND**

On July 3, 1996, a four count indictment was returned against the appellant charging him with theft of property as follows: count one, theft of \$5,000 on the date of May 29, 1995; count two, theft of \$1,000 on May 31, 1995; count three, theft of \$2,000 on June 7, 1995; and count four, theft of \$6,000 on June 8, 1995. On the dates of these alleged offenses, the appellant was a martial arts instructor and the victims of the theft were parents of one of his students. The proof established that the appellant convinced the victims to invest their money by purchasing “points” in a corporation called the “American Dream.” The victims were “downline distributors” underneath the appellant in the marketing scheme. Rather than investing the victims’ \$14,000 as promised, the appellant deposited the entire sum into his personal account, spending the money to support his needs. He contends that he had intended to repay the amount from the thousands of dollars he had been promised from the marketing scheme. These funds never materialized.

The appellant admits that he used poor judgment “in spending money that was not mine,” but, “if it were not for heavy drinking and depression I was experiencing due to the dissolution of my marriage,” this would not have occurred. The proof indicates that for over a period of one year, the appellant “strung the victims along with excuses and allegations that others were delaying the process” in recovering their funds. As of the date of the application for diversion, October 1, 1996, no attempt to make restitution in any form had been made by the appellant.<sup>1</sup>

The assistant district attorney denied the application, citing, in part, the following reasons:

Defendant was allowed to enter a plea on a worthless check charge in 1991 under Tenn.Code Ann. § 40-35-313. A defendant who previously used the diversion statutes to avoid criminal liability is not eligible for diversion again.

Your client is charged with four counts of felony theft. The number of charges against a defendant is one fact relevant to determining the appellant’s stability for pre-trial diversion.

Defendant utilized a position of trust to facilitate the thefts.

The money was used to pay defendant’s personal obligations.

The crime and cover-up and failure to satisfy the victims went on for more than a year. Defendant’s actions did not appear impulsive and spontaneous.

Only after criminal charges were filed has there been evidence of a willingness to pay reparations to the victims.

No showing of remorse or any attempt to rectify the situation.

The record reflects that the assistant district attorney general considered the “positive factors” submitted by the appellant in seeking diversion concluding, however, that these factors were outweighed by the interest of the public.

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<sup>1</sup>In his application, the appellant did acknowledge that he was prepared to make scheduled monthly restitution payments of “\$200/ month for 1 st year then \$300/month.”

On January 14, 1997, the trial court dismissed the petition for writ of certiorari, finding no abuse of discretion by the assistant district attorney general.

## ANALYSIS

The appellant contends that the trial court erred in failing to find that the assistant district attorney general abused his discretion in denying the appellant's application for pre-trial diversion. The decision to grant pre-trial diversion rests within the discretion of the district attorney general. Tenn. Code Ann. § 40-15-105(b)(3) (1994 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) (citations omitted). See also Houston, 900 S.W.2d at 714.

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. 1993), perm. to appeal denied, (Tenn. 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.), perm. to appeal denied, (Tenn. 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 assistant 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.

The appellant argues that the assistant district attorney placed "undue weight on the circumstances of the offense" and failed to consider the positive factors of his "current sober and diligent lifestyle." Additionally, he argues that the assistant district attorney was in error in concluding that he was ineligible for pre-trial diversion due to the fact that he had previously been granted judicial diversion, Tenn. Code Ann. § 40-35-313, from a 1991 criminal prosecution.<sup>2</sup>

The provisions of Tenn. Code Ann. § 40-35-313(c), commonly referred to as judicial diversion, provide that, "[d]ischarge and dismissal under this subsection may occur only once with respect to any person." (emphasis added). The pre-trial

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<sup>2</sup>The appellant's eligibility for diversion was not the dispositive ground upon which the trial court found no abuse of discretion. The trial court's order incorporates the following language, "[a]fter reviewing all the testimony, the court file and arguments of counsel in this case," no abuse of discretion is found.

diversion statute, Tenn. Code Ann. § 40-15-105(a), similarly provides that “a defendant may be granted pre-trial diversion one (1) time under the provisions of this chapter.” (emphasis added). Thus, from a plain reading of the statutes, it is clear that a defendant who has previously been granted judicial diversion is not statutorily ineligible for pre-trial diversion. Moreover, the granting of pre-trial diversion will not, *per se*, disqualify the defendant from eligibility for judicial diversion. Nonetheless, the fact that a defendant seeking pre-trial diversion was previously granted judicial diversion is appropriate in determining whether the defendant is amenable to correction. Accordingly, in the present case, although the appellant remained statutorily eligible for pre-trial diversion, the fact that he had been previously granted judicial diversion was an appropriate factor considered by the prosecutor in denying pre-trial diversion.

The circumstances of this case, as evidenced by the multiple thefts and the appellant’s attempts to thwart responsibility for his conduct, indicate that this was not a crime of impulse. Clearly the appellant abused a position of trust. No attempt or proffer of restitution was made to the victims until criminal charges were brought. In appropriate cases, the 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.

Before a reviewing court can find an abuse of discretion, the record must show an absence of any substantial evidence to support the district attorney general's denial of pre-trial diversion. Hammersley, 650 S.W.2d at 356 (emphasis added). Upon review of this case, the record provides substantial evidence to affirm the trial court's judgment that the assistant district attorney general did not abuse his discretion in denying pre-trial diversion.

The judgment of the trial court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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GARY R. WADE, Presiding Judge

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JERRY L. SMITH, Judge