IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1998 SESSION

FILED

December 7, 1998

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 01C01-9712-CR-00585
Appellee,	)
	) Davidson County
V.	)
	) Honorable Cheryl Blackburn, Judge
	)
KIMBERLY HAYES,	) (Judicial Diversion)
	)
Appellant.	)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Kimberly Hayes, pled guilty to possession of thirty-five and one-half pounds of marijuana with intent to sell or deliver, a Class D felony. See T.C.A. § 39-17-417(g)(2). The trial court denied the appellant's request for judicial diversion, see T.C.A. § 40-35-313, and imposed a four-year suspended sentenced with four years' standard probation. The sole issue on appeal is whether the trial court abused its discretion in denying judicial diversion. Finding no error, we affirm the judgment of the trial court.

The appellant was arrested in the Nashville airport upon the discovery of the marijuana in her luggage. Although she pled guilty to knowing possession, at her sentencing hearing she insisted that she had not been aware that she was transporting a controlled substance. According to the appellant, she flew to Los Angeles at the request and expense of an acquaintance, Wayne Plummer, to meet with and listen to some musicians on his behalf. Ultimately, however, she did not conduct any music-related business during her one- to two-day stay in Los Angeles. On the morning of her return flight, a person purporting to be Plummer's business associate came to her hotel room with two pieces of luggage for her to deliver to Plummer. While the appellant finished getting ready for her flight, this person packed the appellant's clothes in the luggage that she was to deliver. The appellant admitted that the luggage had seemed heavier than she expected and that she had felt generally uneasy about the circumstances of her trip. Nevertheless, she stated that because she was rushing to catch her flight, she did not inspect the luggage or know of its contents. The appellant testified that she had believed that the luggage contained contracts, files, and other personal items belonging to Plummer.

After pleading guilty, the appellant moved the trial court for judicial diversion pursuant to T.C.A. § 40-35-313. At her sentencing hearing, the trial judge found that the appellant's version of events was not credible. She then concluded that the public interest and the need for deterrence precluded granting

diversion. The appellant challenges that decision, arguing that the trial judge abused her discretion.

The appellant intimates that the trial judge did not duly consider the statutory presumption in favor of alternative sentencing. See T.C.A. § 40-35-102(6). We recognize that the appellant is eligible for alternative sentencing and that the presumption of T.C.A. § 40-35-102(6) generally applies. However, this Court has repeatedly held that the presumption in favor of alternative sentencing does not apply to judicial diversion. See e.g., State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996); State v. Anderson, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). Moreover, the appellant received an alternative sentence; she was placed on probation. The statutory presumption is, therefore, not germane.

The appellant is eligible for judicial diversion. See T.C.A. § 40-35-313(a)(1). Nevertheless, "that an accused meets [the] prerequisites [for judicial diversion] does not entitle the accused to judicial diversion as a matter of right." Parker, 932 S.W.2d at 958. "[W]hether an accused should be granted judicial diversion is a question which addresses itself to the sound discretion of the trial court." Id. The appellant bears the burden of showing the impropriety of her sentence, see State v. Kear, 809 S.W.2d 197, 198 (Tenn. Crim. App. 1991); and we will not upset the trial court's refusal to grant diversion except upon a showing of abuse of discretion. See Parker, 932 S.W.2d at 958; State v. Kyte, 874 S.W.2d 631, 634 (Tenn. Crim. App. 1993).

The trial court's discretion is guided by the following factors, which must be considered:

> (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the accused's criminal record, (d) the accused's social history, (e) the accused's physical and mental health, . . . (f) the deterrence value to the accused as well as others . . . [and (g)] whether judicial diversion will serve the ends of justice–the interests of the public as well as the accused."

Parker, 932 S.W.2d at 958. The record reflects that the trial judge duly contemplated each of these factors. Noting the appellant's lack of any criminal record, negative drug testing, and commendable social and educational background, the trial judge found, in sum, that "all of [the appellant's] background is exceptional." Nevertheless, based on the severity of the offense, the magnitude of the local drug problem, and the incredibility of the appellant's version of events, she also found that deterrence was needed and that the interests of the public precluded granting diversion:

> The problem this Court has is a situation that there are 35 pounds of marijuana coming into the airport at a time for which drug usage in this community is at an all time high. . . . [W]hat does it say to the public if I were to place Ms. Hayes in a position to have her record expunged after just four years for such an offense?
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> The main problem is . . . that this is 35 pounds of marijuana. This is not ten pounds, it is not eleven pounds, because when you consider that and the statement Ms. Hayes makes about the circumstances, it really doesn't--it bothers me because 35 pounds of marijuana, in brick form, is an incredibly heavy load to be carrying, such that your suspicions are or should be pretty high. This is not paperwork. This is 35 pounds of marijuana, and for that reason . . . I'm going to have to deny your request, because I think that is something that the ends of justice and the best interest of the public and Davidson county, and the defendant, I just can't do that at this time, or at any time, because it just isn't credible, what she tells about what happened.

Public interest and the need for deterrence are among the established criteria upon which a trial court may refuse to grant diversion. See id. That these criteria are implicated in the present case is amply supported by the record. The trial court also apparently considered the appellant's lack of credibility, and, because "lack of truthfulness is probative on the issue of amenability to rehabilitation," State v. Byrd, 861 S.W.2d 377, 380 (Tenn. Ct. App. 1993), it is not improper to do so. We find no abuse of discretion.

For the reasons stated above, we find that the trial judge's denial of judicial diversion was within the proper exercise of her discretion. The judgment of the trial court is AFFIRMED.

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PAUL G. SUMMERS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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JOE G. RILEY, Judge