IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 23, 2008 Session

STATE OF TENNESSEE v. TIMOTHY S. KAYLOR

Appeal from the Criminal Court for Carter County
Nos. S18412 Robert E. Cupp, Judge

No. E2007-01942-CCA-R3-CD - Filed June 18, 2009

Appellant, Timothy S. Kaylor, was indicted for theft of property over $10,000. The State denied pretrial diversion. Appellant pled guilty to the offense. At sentencing, Appellant sought judicial diversion. The trial court denied the request for judicial diversion and sentenced Appellant to a sentence of three years, ordering Appellant to serve 90 days of the sentence in incarceration before being released to probation. Appellant seeks a review of the trial court's denial of judicial diversion. We determine that the trial court did not abuse its discretion in denying judicial diversion and, therefore, affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J. and DAVID H. WELLES, J., joined.

Frank L. Slaughter, Jr., Bristol, Tennessee, for the appellant Timothy Kaylor.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Joe Crumley, District Attorney General and Kenneth Baldwin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On November 6, 2006, the Carter County Grand Jury indicted Appellant for theft of property valued at more than $10,000 but less than $60,000. Specifically, Appellant was indicted for illegally obtaining approximately $24,000 from his employer, Grindstaff Chevrolet.

Subsequently, Appellant filed a motion for pretrial diversion in which he claimed that he was amenable to correction and that diversion would "serve the ends of justice and [the] best interests

of both public and [Appellant]." Appellant pointed out that he had no criminal record and was "remorseful about the events." The State denied pretrial diversion.[1]

Appellant pled guilty to the offense on August 6, 2007. In preparation for sentencing, Appellant submitted a "Sentencing Memorandum" in which he detailed the circumstances of the offenses that led to the indictment. Apparently, while employed at Grindstaff Chevrolet, Appellant committed thefts on June 22, 2006, in the amount of $500, on June 27, 2006, in the amount of $1,500, on June 30, 2006 in the amount of $6,000, and on July 19, 2006, in the amount of $5,000.

In the memorandum, Appellant alleged that his father's diagnosis with terminal cancer in June, 2005 coupled with his own divorce and prescription drug abuse helped to lead to the crimes. Additionally, in March, 2006, Appellant's wife was severely injured in a car accident. According to Appellant, all of these things led him "down a path of self destruction." Appellant expressed remorse for his actions.

The trial court held a sentencing hearing. At the hearing, the trial court heard testimony from Phillip Torbett, who had known Appellant for more than thirty years. Mr. Tolbert explained that Appellant's father passed away in approximately April of 2006. Mr. Tolbert was surprised by Appellant's actions, explaining that Appellant came from a good family.

Gary Munt, the finance director at Bill Gatton Chevrolet in Bristol, Tennessee, also testified on Appellant's behalf. He stated that he had known Appellant for about eight and a half years while he worked in the finance office at Bill Gatton Chevrolet and also knew Appellant's father. Mr. Munt confirmed that Appellant held the position as finance director while employed at Grindstaff Chevrolet. Mr. Munt stated that the finance director was in charge of controlling the money for the car dealership and oversaw the sales process. Mr. Munt was shocked by Appellant's actions but still considered him a friend.

Appellant took the stand in his own behalf. He claimed that he was willing to do whatever it took to receive judicial diversion. Appellant explained that he has one child and pays child support for that child. He also informed the court that he left his employment at Bill Gatton Chevrolet to work for Grindstaff Chevrolet. According to Appellant, he left Bill Gatton because his father was sick and as "a good challenge and [to] get my mind off things." He later testified that he left Bill Gatton Chevrolet because his wife became involved with someone that he worked with at Bill Gatton. Appellant explained to the trial court that he has had two surgeries since 1999 and thereafter became addicted to prescription pain medication. He was taking the pain medication at the time of the offenses and stated that his addiction to the medication was a contributing factor to the thefts. Appellant testified that when he was confronted with the thefts he was able to pay back $13,500 of the money before he was indicted. Appellant borrowed that money from his mother but had not repaid her at the time of the hearing. Appellant also informed the trial court that Mr. Grindstaff himself loaned Appellant $4,000 in addition to the money that he stole from Grindstaff Chevrolet.

[1] From the record, it does not appear that Appellant sought review of this denial via a writ of certiorari.

Appellant explained that he stole the money from his employer by keeping cash down payments on four car deals. Appellant thought that he would be able to repay the money before anyone noticed that it was missing.

Appellant admitted that he stole a total of $13,500 from Grindstaff Chevrolet but denied stealing more although more money was missing. He said other employees must have taken it. He even told another employee, William Desorbs, that he had taken the money. Appellant asked Mr. Desorbs about borrowing $15,000; however Mr. Desorbs wrote him a check on an account with insufficient funds.

Adam Mullins, Appellant's supervisor in June and July of 2006, explained that he easily discovered that the dealership "was a bunch of money short." At first, Mr. Mullins thought it was because the checks were being held by the bank prior to deposit but later learned that the money was not there. Mr. Mullins confronted Appellant, who admitted to taking some of the missing money. There was then a small scuffle when Appellant accused Mr. Desorbs of taking a portion of the money.

At the time of the hearing, Appellant was employed by Strobe Appraisal Service in Blacksburg, Virginia. Apparently, his employer was made aware of the theft charge before he began working there.

On cross-examination, Appellant admitted that his last surgery occurred in November of 2004, nearly a year and a half before the offense. Further, Appellant admitted that he was divorced from his first wife two years prior to the offense and that he learned about his father's illness about one year prior to the offense. Appellant explained that a portion of the money that he stole was to support his drug habit and the remainder of the money was used to pay bills.

Appellant informed the court that, at the time of the hearing, he had yet to seek any drug treatment because he did not have the full benefits of his insurance until after September of 2007.

At the conclusion of the hearing, the trial court determined that it was "possible" that Appellant was amenable to correction subject to his addiction problem but that Appellant ultimately stole the money because he "wanted to steal it," not because he was guided by some form of depression from all of the things that were going on in his life at the time of the offense. Thus, the trial court determined that "this was a planned, preconceived idea . . . a plot . . . to take money from his employer who not only gave him a job, but was good enough to lend him four [thousand dollars]." The trial court also found that the "activities of this offense involved a significant breach of duty, and loyalty to his employer" and that "to slap him on the hand and send him out of here under those conditions to go to work for another employer with no knowledge of this is absolutely the worst thing that this court could do to the public in this case." Accordingly, the trial court denied judicial diversion. The trial court sentenced Appellant to three years but determined that Appellant was entitled to probation after service of ninety days in jail.

Appellant filed a timely notice of appeal.

Analysis

On appeal, Appellant challenges several aspects of his sentence. Specifically, Appellant challenges the State's decision to deny pretrial diversion and the trial court's denial of judicial diversion and/or full probation. Appellant argues that he should have received pretrial diversion and that the trial court later abused its discretion in denying judicial diversion.

Pretrial Diversion

The Pretrial 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. T.C.A. § 40-15-105. Those who are statutorily eligible are not presumptively entitled to diversion; rather, it is extraordinary relief for which the defendant bears the burden of proof. *State v. Curry*, 988 S.W.2d 153, 157 (Tenn. 1999); *State v. Baxter*, 868 S.W.2d 679, 681 (Tenn. Crim. App. 1993).

Tennessee Code Annotated section 40-15-105 provides that candidates who satisfy certain criteria may be eligible for pretrial diversion.[2] "The self-evident purpose of pre-trial diversion is to spare appropriately selected first offenders the stigma, embarrassment and expense of trial and the collateral consequences of a criminal conviction." *Pace v. State*, 566 S.W.2d 861, 868 (Tenn. 1978).

The decision to grant pretrial diversion rests within the discretion of the district attorney general. T.C.A. § 40-15-105(b)(3); *see Curry*, 988 S.W.2d at 157. The Tennessee Supreme Court has held that in determining whether to grant pretrial diversion, "the district attorney general has a duty to exercise his or her discretion by focusing on a defendant's amenability for correction and by considering all of the relevant factors, including evidence that is favorable to a defendant." *State v. Bell*, 69 S.W.3d 171, 178 (Tenn. 2002); *see also State v. Hammersley*, 650 S.W.2d 352, 355 (Tenn. 1983). Specifically, district attorneys should consider the following factors:

> [1] circumstances of the offense; [2] the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; [3] the deterrent effect of punishment upon other criminal activity; [4] defendant's amenability to correction; [5] the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant; and [6] the applicant's attitude, behavior since arrest, prior record, home environment,

[2] Under the statute, a "qualified defendant" is one who has not previously been granted pretrial diversion; does not have a prior misdemeanor conviction for which a sentence of confinement is served; does not have a prior felony conviction within a five-year period after completing the sentence or probationary program for the prior conviction; and the offense for which the prosecution is being suspended cannot be a Class A or Class B felony, nor can it be certain Class C felonies (certain sexual offenses, driving under the influence of an intoxicant, vehicular assault or, beginning January 1, 2008, vehicular homicide). T.C.A. §§ 40-15-105(a)(1)(B)(i)(*a*)-(*c*).

> current drug usage, current alcohol usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.

State v. Markham, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988); *see also State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993) (quoting *Markham* but excluding "current alcohol usage").

Although an important factor for consideration, "[t]he focus on amenability to correction is not an exclusive one . . . ." *State v. Carr*, 861 S.W.2d 850, 855 (Tenn. Crim. App. 1993). Deterrence of both the defendant and others is also a proper factor to consider. *Hammersley*, 650 S.W.2d at 354. "In fact, the circumstances of the crime and the need for deterrence may . . . outweigh the other relevant factors and justify a denial of pretrial diversion." *Carr*, 861 S.W.2d at 855. The district attorney's analysis must be conducted "on a case-by-case basis, assigning due significance to all relevant factors." *Markham*, 755 S.W.2d at 853. Accordingly, "the circumstances of the offense and the need for deterrence may alone justify a denial of diversion, *but only if all of the relevant factors have been considered as well*." *Curry*, 988 S.W.2d at 158 (emphasis in original).

When denying an application for pretrial diversion, the district attorney general must clearly articulate the specific reasons for denial in the record in order to provide for meaningful appellate review. *Hammersley*, 650 S.W.2d at 355. Specifically, the Supreme Court has provided that a district attorney general's consideration of all of the relevant factors:

> entails more than an abstract statement in the record that the district attorney general has considered these factors. He must articulate why he believes a defendant in a particular case does not meet the test. If the attorney general bases his decision on less than the full complement of factors enumerated in this opinion he must, for the record, state why he considers that those he relies on outweigh the others submitted for his consideration.

State v. Herron, 767 S.W.2d 151, 156 (Tenn. 1989), *overruled in part on other grounds by State v. Yancey*, 69 S.W.3d 553, 559 (Tenn. 2002).

In the case herein, after submission of an application by Appellant ,the State denied pretrial diversion because of the circumstances of the offense and the best interests of the public. The record does not specify whether a hearing was held to determine whether the State would grant or deny pretrial diversion. Ordinarily, if the application for pretrial diversion is denied, the defendant must appeal by petitioning the criminal court for a statutory writ of certiorari. T.C.A. § 40-15-105(b)(3). In the petition, the defendant "should identify any part of the district attorney general's factual basis he or she elects to contest. We would expect such contests to be limited to matters that are materially false or based on evidence obtained in violation of the petitioner's constitutional rights." *Pinkham*, 955 S.W.2d 956, 960 (Tenn. 1997).

"The only evidence that may be considered by the trial court is the evidence that was considered by the district attorney general." *Curry*, 988 S.W.2d at 157. A hearing is conducted only to resolve any factual disputes concerning the application, and the trial court should not hear additional evidence which was not considered by the prosecutor. *Id.* at 157-58.

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. *Id.* at 158; *State v. Houston*, 900 S.W.2d 712, 714 (Tenn. Crim. App. 1995). The record must be lacking any substantial evidence to support the District Attorney General's decision before an abuse of discretion can be found. *Pinkham*, 955 S.W.2d at 960. "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).

To seek relief from the District Attorney General's denial of pretrial diversion, one must file a petition for statutory writ of certiorari in the criminal court. The petition should identify any factual disputes with the District Attorney General. *Pinkham*, 955 S.W.2d at 960. It is the filing of the petition which vests authority in the criminal court to review the action of the District Attorney General. No such petition was filed in this case. The failure to file the petition waives appellate review of this issue.

Appellant urges this Court to review the issue via plain error review. We decline to do so. In order to seek review via a plain error analysis, the following five factors must be established:

> (a) the record must clearly establish what occurred in the trial court;
> (b) a clear and unequivocal rule of law must have been breached;
> (c) a substantial right of the accused must have been adversely affected;
> (d) the accused [must not have waived] the issue for tactical reasons; and
> (e) consideration of the error [must be] "necessary to do substantial justice."

State v. Terry, 118 S.W.3d 355, 360 (Tenn. 2003) (quoting *State v. Adkisson*, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted)). Appellant has failed to establish all five factors necessary for plain error review. A clear and unequivocal law was not breached. The grant or denial of pretrial diversion is a discretionary decision made by the prosecutor, review of which is available by writ of certiorari. Appellant failed to seek available review of this decision. Moreover, it is not clear whether the decision not to pursue available review in the trial court was a tactical decision. We will not review the denial of pretrial diversion as plain error.

Judicial Diversion

According to Tennessee Code Annotated section 40-35-313, commonly referred to as "judicial diversion," the trial court may, at its discretion, following a determination of guilt, defer further proceedings and place a qualified defendant on probation without entering a judgment of guilt. T.C.A. § 40-35-313(a)(1)(A). A qualified defendant is one who:

> (*a*) Is found guilty of or pleads guilty or nolo contendere to the offense for which deferral of further proceedings is sought;
> (*b*) Is not seeking deferral of further proceedings for a sexual offense or a Class A or Class B felony; and
> (*c*) Has not previously been convicted of a felony or a Class A misdemeanor.

T.C.A. § 40-35-313(a)(1)(B)(i)(*a*), (*b*), & (*c*). When a defendant contends that the trial court committed error in refusing to grant judicial diversion, we must determine whether the trial court abused its discretion by denying the defendant's request for judicial diversion. *State v. Cutshaw*, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997). Judicial diversion is similar to pretrial diversion. However, judicial diversion follows a determination of guilt, and the decision to grant judicial diversion is initiated by the trial court, not the prosecutor. *State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992). When a defendant challenges the trial court's denial of judicial diversion, we may not revisit the issue if the record contains any substantial evidence supporting the trial court's decision. *Cutshaw*, 967 S.W.2d at 344; *State v. Parker*, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996).

The criteria that the trial court must consider in determining whether a qualified defendant should be granted judicial diversion are similar to those considered by the prosecutor in determining suitability for pretrial diversion and includes the following: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social history; (5) the defendant's physical and mental health; and (6) the deterrence value to the defendant and others. *Parker*, 932 S.W.2d at 958; *Cutshaw*, 967 S.W.2d at 343-44. An additional consideration is whether judicial diversion will serve the ends of justice, i.e., the interests of the public as well as of the defendant. *See Parker*, 932 S.W.2d at 958; *Cutshaw*, 967 S.W.2d at 344; *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9-10 (Tenn. 2000).

After hearing the evidence, the trial court concluded that the circumstances of the offense weighed heavily against the grant of diversion but noted that Appellant's clean criminal history weighed in favor of the grant of diversion. The trial court noted that Appellant's amenability to correction was "possible." The trial court also pointed out that Appellant had not sought treatment for his drug addiction at the time of the hearing. However, the trial court concluded that the need for deterrence was high and that Appellant had not shown his suitability for judicial diversion. After reviewing the evidence presented to the trial court at the sentencing hearing, we determine that the trial court considered the necessary factors and that there was "substantial evidence" to support the trial court's denial of judicial diversion. *See Cutshaw*, 967 S.W.2d at 344; *Parker*, 932 S.W.2d at 958. This issue is without merit.

Denial of Probation

Appellant also argues that the trial court failed to follow sentencing procedures and guidelines and that probation was a viable alternative to incarceration. The State disagrees.

"When reviewing sentencing issues . . . the appellate court shall conduct a de novo review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. T.C.A. §§ 40-35-103(5), -210(b); *Ashby*, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of showing that the sentence is improper." *Ashby*, 823 S.W.2d at 169.

With regard to alternative sentencing, Tennessee Code Annotated section 40-35-102(5) provides as follows:

> In recognition that state prison capacities and the funds to build and maintain them are limited, convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation shall be given first priority regarding sentencing involving incarceration . . . .

A defendant who does not fall within this class of offenders "and who is an especially mitigated or standard offender convicted of a Class C, D, or E felony should be considered as a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. A court shall consider, but is not bound by, this advisory sentencing guideline." T.C.A. § 40-35-102(6); *see also State v. Carter*, 254 S.W.3d 335, 347 (Tenn. 2008). For offenses committed on or after June 7, 2005, a defendant is eligible for probation if the sentence actually imposed is ten years or less. *See* T.C.A. § 40-35-303(a) (2006).

All offenders who meet the criteria for alternative sentencing are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is a favorable candidate for alternative sentencing under Tennessee Code Annotated section 40-35-102(6), a trial court may deny an alternative sentence because:

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant . . . .

T.C.A. § 40-35-103(1)(A)-(C). In choosing among possible sentencing alternatives, the trial court should also consider Tennessee Code Annotated section 40-35-103(5), which states, in pertinent part, "[t]he potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant's untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

Appellant herein pled guilty to theft of property valued at more than $10,000 that occurred in the months of June and July of 2006. He was sentenced to less than ten years in incarceration for the crime. Therefore, he is eligible for alternative sentencing including probation. *See* T.C.A. §§ 40-35-102(6) & -303(a). However, we point out that the above considerations are advisory only. *See* T.C.A. § 40-35-102(6). We have reviewed the record on appeal and find that the trial court appeared to consider the sentencing principles and all pertinent facts in the case. Therefore, there is a presumption of correctness in the findings of the trial court.

With regard to Appellant's prior record, the presentence report shows no prior convictions. Further, Appellant expressed an unwillingness to accept responsibility for his actions, instead blaming the commission of the offense on his prescription drug usage. Moreover, the trial court specifically found that the circumstances surrounding the offense indicated that it was not impulsively committed but required planning on Appellant's part. We determine that there is ample evidence in the record to support the trial court's denial of full probation. Consequently, we affirm the judgment of the trial court ordering Appellant to serve ninety days of his sentence in incarceration.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE