IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 25, 2015 Session

STATE OF TENNESSEE v. GARY HAMILTON

Appeal from the Criminal Court for Knox County
No. 102689 Bobby R. McGee, Judge

No. E2014-01585-CCA-R9-CD – Filed July 6, 2015

Gary Hamilton ("the Defendant") seeks interlocutory review of the district attorney general's denial of his application for pretrial diversion and the trial court's affirmance of that denial. The Defendant, a former teacher's assistant, was charged with assault after engaging in an altercation with a student at the school where he was employed. The district attorney general denied the Defendant's application for pretrial diversion. The Defendant filed a petition for writ of certiorari to the trial court, challenging the denial, and the trial court upheld the district attorney general's decision. On appeal, the Defendant argues that the district attorney general abused his discretion in denying pretrial diversion and that the trial court erred when it found no abuse of discretion. Upon review of the record and applicable law, we hold that the trial court did not properly review the district attorney general's decision to deny pretrial diversion. Additionally, although the district attorney general considered all the relevant pretrial diversion factors and did not consider any irrelevant factors, the record does not contain substantial evidence supporting the denial of pretrial diversion. Accordingly, we reverse the decision of the trial court and remand with instructions that the Defendant be granted pretrial diversion.

Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Criminal Court Reversed and Remanded

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and NORMA JEAN OGLE, JJ., joined.

Stephen Ross Johnson, Knoxville, Tennessee, for the appellant, Gary Hamilton.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Counsel; Randall E. Nichols, District Attorney General; and Ashley McDermott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

The Defendant was employed at Fulton High School as the in-school suspension ("ISS") teacher's assistant. M.C.[1] was placed on ISS because he had violated the school dress code and was escorted to the Defendant's classroom. The Defendant asked for M.C.'s name when M.C. entered the classroom, but M.C. did not respond and simply walked to a desk at the back of the room. The Defendant again asked M.C. for his name, and M.C. mumbled something in response. The Defendant asked M.C. for his name a third time, and M.C. "responded loudly and with a rude tone."

M.C.'s teacher had not provided the Defendant or M.C. with work for M.C. to complete while in ISS. The Defendant allowed M.C. to leave the ISS classroom with a hall pass in order to retrieve his work from his teacher. The Defendant expected M.C. to return within ten minutes.

M.C. did not return for twenty minutes. During that time, the Defendant received a phone call from Assistant Principal Ara Rickman ("Principal Rickman"), advising the Defendant that she had seen M.C. in the hallway and that the Defendant should not have allowed M.C. to leave the ISS classroom. When M.C. returned, he did not have the hall pass. The Defendant asked where M.C. had been, and M.C. responded in a rude tone, "Upstairs." The Defendant asked where M.C. had left the hall pass, and M.C. responded, "I don't know, I left it somewhere." Because M.C. was speaking to the Defendant in a rude manner, the Defendant told him to report to Principal Rickman's office. M.C. protested and "was slow to follow [the Defendant's] instructions[.]" A shouting match ensued, and the Defendant followed M.C. into the hallway.

Once in the hallway, M.C. and the Defendant engaged in an altercation. The Defendant pushed M.C. against a wall to restrain him. While M.C. was pinned against the wall, both he and the Defendant hit each other. The school band director, a school administrator, and the school resource officer heard the commotion, and by the time they arrived, the Defendant had restrained M.C. on the floor. While the school resource officer was attempting to separate the Defendant and M.C., the Defendant punched M.C. in the face.

[1] In the interest of protecting the privacy of a minor, we will refer to the victim by his initials.

The Defendant was escorted outside where he spoke with members of the school administration. Later that day, he provided a written statement of what had occurred, as well as a letter of resignation. Ultimately, the Defendant was terminated from his position and charged with assault.

The Defendant applied for pretrial diversion and submitted fourteen letters of support written on his behalf by members of his family, members of his church, and former co-workers. In his application, the Defendant pointed to his resignation letter to show that he "felt that his response to [M.C.]'s conduct that day was not befitting that of a teacher or teaching assistant" and noted that "he has consistently exhibited a humble and remorseful attitude about what happened." Further, the Defendant stated that he did not have a criminal history. The Defendant noted that he had exhibited good behavior since the incident and had found another job. He also claimed that denial of pretrial diversion was not necessary to deter others from committing similar crimes and that he was amenable to correction. Additionally, the pretrial diversion application illustrates that people who knew the Defendant viewed this as an isolated incident; that the Defendant had a close, stable, and supportive family; that he was an engaged and successful student in high school, had entered the work force after two years of college, and had returned to school at the age of forty to complete a bachelor's degree while continuing to work full-time; that he had worked continuously since leaving college in 1985; that he was generous with his time and energy and wanted to help people; that he was active in his church; that he was devoted to his family; and that he did not drink alcoholic beverages or take illegal drugs.

The district attorney general denied pretrial diversion. In his written denial, the district attorney general considered (1) the circumstances of the offense; (2) the Defendant's criminal record, social history, and present condition including mental and physical conditions; (3) the deterrent effect on other criminal activity; (4) the Defendant's amenability to correction; and (5) whether pretrial diversion would serve the ends of justice and the best interests of both the public and the Defendant.

As to the circumstances of the offense, the district attorney general described the Defendant as the "aggressor" and noted that the Defendant had "acknowledged that his actions 'put him in a bad light.'" Further, the district attorney general expressed concern about "inconsistencies" between the Defendant's written statement immediately following the incident and his account of the facts in his application for pretrial diversion.

As to the Defendant's social history, the district attorney general concluded that the Defendant had a good reputation in the community; was loving, respectful, and a positive role model; and was hard-working, reliable, and helpful. The district attorney general gave the Defendant "credit" for a positive social history and lack of criminal record but found "that the other factors which support prosecution significantly outweigh the positive effect of these facts." The district attorney general also noted that the

Defendant's application did not contain any noteworthy physical characteristics or disability and concluded that this factor did not weigh in favor of or against prosecution.

The district attorney general concluded that the Defendant's amenability to correction "[did] not favor suspending prosecution" because "the Defendant's version of events changed significantly from [his written statement and letter of resignation] to the recitation given in the application for [p]retrial [d]iversion." The district attorney general claimed that the recitation of the facts in the application for pretrial diversion minimized the Defendant's responsibility and contradicted his written statement and his letter of resignation. The district attorney general stated, "The Defendant's current failure to take responsibility suggests that he is not amenable to correction and is a factor which favors prosecution."

As to deterrence, the district attorney general concluded that granting the Defendant pretrial diversion could "send a message to the Defendant or others [with supervisory authority over students] that the Justice System does not take such crimes seriously and may encourage similar behavior." Therefore, deterrence favored prosecution.

Finally, the district attorney general concluded that pretrial diversion would not serve the ends of justice because it would depreciate the seriousness of the offense. Specifically, the district attorney general relied on the fact that statements from the Defendant, the school resource officer, band director, and school administrator who responded to the scene "indicate[d] that the Defendant was the aggressor." The district attorney general also noted that the Defendant "stated that he caused the altercation," asked that his position be terminated, and admitted that he pushed M.C. and punched M.C. while M.C. was restrained on the ground. In light of those facts, the district attorney general concluded that "public interest and the ends of justice in such a case strongly favor prosecution."

The Defendant petitioned for a writ of certiorari, contending that the prosecutor abused his discretion in denying pretrial diversion. After hearing arguments, the trial court noted that it had not previously reviewed an application for pretrial diversion and stated,

> [T]his Court will make this finding, it's a narrow finding, the Court—there's no way to deal with this issue without, to some extent, considering the circumstances of the alleged offense. But the Court is only going to consider them—the circumstances in terms of their relationship to the issue of amenability of the defendant to correction and rehabilitation.
>
> It appears to the Court that there is evidence from the victim and from at least one other witness that supports the idea that [the Defendant] reacted in a verbal altercation in a way as to escalate the verbal altercation

> into a physical altercation, and that he—there's evidence to support the notion that he lost his temper. He got mad and he punched the victim.
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> . . .
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> . . .
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> I'm not making any finding as to who's telling the truth. I'm only considering the evidence that's there and how that relates to the reasonableness of the Attorney General's decision that this is a prosecutable case, and that there is a basis for believing that [the Defendant] is capable of losing his temper and acting out in violence, in this case against a minor that he was supposed to be in a caretakers' position over. He was, not exactly a teacher, but he was supposed to be keeping the peace in this case.
>
> So based on that this Court will make the finding that I cannot find that the Attorney General abused his discretion in denying pretrial diversion. And I think I've—for the purpose of the record, I think I made it as clear as I can, I'm only considering the circumstances of the offense as they relate to his amenability.

The Defendant requested and was granted permission to file this interlocutory appeal.

Analysis

Under the pretrial diversion statute, the district attorney general is permitted to suspend prosecution of a qualified defendant for a period of up to two years. See Tenn. Code Ann. § 40-15-105(a)(1)(A) (West, Westlaw through June 30, 2014). A qualified defendant is defined as one who has not previously been granted pretrial or judicial diversion, does not have a prior disqualifying conviction, and is seeking pretrial diversion for an offense that is not a felony, driving under the influence, a misdemeanor sexual offense, conspiracy to commit a Class E felony sexual offense, criminal attempt to commit a Class E felony sexual offense, solicitation to commit a Class D or Class E felony sexual offense, or any misdemeanor committed by an elected or appointed official while in the person's official capacity or involving the duties of the person's office. Tenn. Code Ann. § 40-15-105(a)(1)(B)(i)-(iii) (West, Westlaw through June 30, 2014).

Even though a defendant may be eligible, he is not presumptively entitled to pretrial diversion. State v. McKim, 215 S.W.3d 781, 786 (Tenn. 2007). Rather, the decision whether to grant pretrial diversion to an eligible defendant lies solely within the discretion of the district attorney general. State v. Curry, 988 S.W.2d 153, 157 (Tenn. 1999). "In deciding whether to grant pretrial diversion, 'the district attorney general has a duty to exercise his or her discretion by focusing on the defendant's amenability for

correction and by considering all of the relevant factors, including evidence that is favorable to a defendant.'" State v. Richardson, 357 S.W.3d 620, 626 (Tenn. 2012) (quoting State v. Bell, 69 S.W.3d 171, 178 (Tenn. 2002)). The district attorney general should consider any factor tending to reflect accurately on whether the defendant will or will not become a repeat offender. McKim, 215 S.W.3d at 786.

> 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.

State v. Hammersley, 650 S.W.2d 352, 355 (Tenn. 1983). Additionally, the district attorney general may consider the deterrent effect of punishment upon other criminal activity, the defendant's attitude and behavior since arrest, 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). However, the circumstances of the offense and need for deterrence "cannot be given *controlling* weight unless they are 'of such overwhelming significance that they [necessarily] outweigh all other factors.'" Id. (quoting State v. Markman, 755 S.W.2d 850, 853 (Tenn. Crim. App. 1988)) (emphasis in original).

If the district attorney general denies pretrial diversion, that denial "must be written and must include both an enumeration of the evidence that was considered and a discussion of the factors considered and weight accorded each." McKim, 215 S.W.3d at 787 (quoting State v. Pinkham, 955 S.W.2d 956, 960 (Tenn. 1997)) (internal quotation marks omitted). The defendant may petition the trial court for a writ of certiorari. Tenn. Code Ann. § 40-15-105(b)(3) (West, Westlaw through June 30, 2014). The district attorney general's decision is presumed to be correct, Curry, 988 S.W.2d at 158, and the trial court must determine whether the prosecutor abused his or her discretion by examining only the evidence considered by the prosecutor. Bell, 69 S.W.3d at 177.

The trial court may not reweigh the evidence, but can only look to the district attorney general's methodology. State v. Yancey, 69 S.W.3d 553, 558-59 (Tenn. 2002). To conduct this review, "the trial court should examine each relevant factor in the pretrial diversion process to determine whether the district attorney general had considered that factor and whether the district attorney general's findings with respect to that factor is supported by substantial evidence." Id. at 559. The appellate court's review is confined to a determination of whether the trial court's decision was supported by a preponderance of the evidence. Richardson, 357 S.W.3d at 627 (citing Curry, 988 S.W.2d at 158 and Pinkham, 955 S.W.2d at 960).

"A reviewing court may find that the district attorney general abused his or her discretion in one of two ways: either by failing to consider or articulate all the relevant

factors or considering and relying upon an irrelevant factor, or (2) by making a decision that is not supported by substantial evidence." Richardson, 357 S.W.3d at 627 (citing McKim, 215 S.W.3d at 788-89; Bell, 69 S.W.3d at 179; Curry, 988 S.W.2d at 158).

Should the district attorney general fail to consider all the relevant factors or give undue consideration to an irrelevant factor, the reviewing court must vacate the district attorney general's decision and remand the case to allow the district attorney general to reconsider and weigh all the relevant factors. Id. However, if the reviewing court determines that the district attorney general properly weighed all the relevant factors and did not give undue consideration to any irrelevant factors, but the denial of pretrial diversion is not supported by substantial evidence in the record, "the reviewing court may order the defendant to be placed on pretrial diversion rather than remand the case to the district attorney general." Id. (citing McKim, 215 S.W.3d at 788 n.3); see also Tenn. Code Ann. § 40-15-105(b)(3).

In this case, the trial court addressed only the circumstances of the offense in its review of the district attorney general's decision to deny pretrial diversion. The trial court did not state whether the district attorney general considered all of the relevant factors or whether the district attorney general's findings were supported by substantial evidence. Such review was not sufficient. The trial court should have reviewed each factor considered by the district attorney general to determine whether the factor was relevant and whether it was supported by substantial evidence. Nevertheless, the trial court concluded that the district attorney general did not abuse his discretion in denying pretrial diversion. We disagree.

It is evident that the district attorney general considered and weighed all the relevant factors. The district attorney general identified each of the factors he considered as well as the evidence supporting each factor and weight accorded to each. However, we do not believe the decision to deny pretrial diversion is supported by substantial evidence in the record. We will first address the district attorney general's conclusions that the circumstances of the offense, the Defendant's amenability to correction, and the ends of justice and public interest support denial of pretrial diversion. Second, we will address the district attorney general's conclusion that the need for deterrence supported denial of pretrial diversion.

a. Circumstances of the Offense, Amenability to Correction, and Ends of Justice

It appears that the primary facts supporting the district attorney general's conclusion that the circumstances of the offense, the Defendant's amenability to correction, and the ends of justice favored prosecution were (1) that the Defendant was the aggressor and (2) that the Defendant's written statement and resignation letter were inconsistent with his application for pretrial diversion.

First, it is unclear whether the district attorney general used the term "aggressor" to mean "initial aggressor" or that the Defendant was acting aggressively toward M.C. If the term means "initial aggressor," we do not believe the record supports the conclusion that the Defendant was the initial aggressor. The district attorney general correctly stated that the Defendant admitted in his resignation letter that he caused the altercation with M.C. and that his actions were "wrong." Additionally, in his written statement, the Defendant admitted that he engaged in a verbal altercation with M.C. and followed him into the hallway, where M.C. "took a defensive posture toward [the Defendant] and [the Defendant] pushed him away." While these statements indicate that the Defendant reacted poorly to the situation, we do not believe they support the conclusion that the Defendant was the initial aggressor. Additionally, although the district attorney general referenced statements from the band director, school administrator, and school resource officer to show that the Defendant was the initial aggressor, those statements make it clear that those three individuals did not see who started the altercation; they arrived on the scene after the Defendant had restrained M.C. on the ground.

If the district attorney general used the term "aggressor" to indicate that the Defendant was acting aggressively toward M.C., we also conclude that the record does not support denying pretrial diversion based on that conclusion. Even if the Defendant was acting aggressively toward M.C., such behavior constitutes a circumstance of the offense. We do not believe that fact is "of such overwhelming significance that [it necessarily] outweigh[s] all other factors" and should not be given controlling weight. Washington, 866 S.W.2d 951.

Second, the evidence does not support the conclusion that the Defendant's written statement and resignation letter were inconsistent with his application for pretrial diversion. Specifically, the district attorney general points to the Defendant's written statement and resignation letter in which he said he caused the altercation with M.C. and that his actions were wrong. The district attorney general compares those statements with statements in the Defendant's application for pretrial diversion which explain that M.C. was acting "rudely" and was "slow to follow instructions" and that the Defendant had been reprimanded by Principal Rickman for allowing M.C. to leave the ISS classroom. The district attorney general also noted that, in the Defendant's written statement, he described M.C. as taking a "defensive posture toward [the Defendant]," but in his application for pretrial diversion, the Defendant described M.C. as "suddenly turn[ing] 180 degrees" and approaching the Defendant with "balled up" fists. Also in his application for pretrial diversion, the Defendant explained that he pushed M.C. as a self-defense measure because he feared M.C. was "about to get violent." The district attorney general concluded that the differences in these statements indicate a "complete change" in the Defendant's story and illustrate the he is not amenable to correction.

We do not believe the statements identified by the district attorney general are inherently inconsistent. Certainly, they do not illustrate a "complete change" in the

Defendant's version of events. Therefore, we do not believe the record contains substantial evidence to support the conclusion that the circumstances of the offense, the Defendant's amenability to correction, or the ends of justice and public interest favor denying pretrial diversion.

b. Deterrent Effect on Other Criminal Activity

Next, we turn to the district attorney general's conclusion that denying pretrial diversion would have a deterrent effect on other criminal activity. Because we have determined that the record does not contain substantial evidence to support denying pretrial diversion on the basis of the factors listed above, any denial of pretrial diversion would be based solely upon the deterrent effect on other criminal activity. In order to deny pretrial diversion based solely upon the ground of deterrence, the district attorney general must consider the following factors:

> (1) Whether other incidents of the charged offense are increasingly present in the community, jurisdiction, or in the state as a whole[;] . . .
>
> (2) Whether the defendant's crime was the result of intentional, knowing, or reckless conduct or was otherwise motivated by a desire to profit of gain from the criminal behavior[;] . . .
>
> (3) Whether the defendant's crime and conviction have received substantial publicity beyond that normally expected in the typical case[;] . . .
>
> (4) Whether the defendant was a member of a criminal enterprise, or substantially encouraged or assisted others in achieving the criminal objective[; and] . . .
>
> (5) Whether the defendant has previously engaged in criminal conduct of the same type as the offense in question, irrespective of whether such conduct resulted in previous arrests or convictions.

State v. Hooper, 29 S.W.3d 1, 10-12 (Tenn. 2000).[2] Additional factors may be considered by the district attorney general so long as the district attorney general states any additional factors with specificity and those additional factors are supported "by at least some proof." Id. at 12.

In concluding that deterrence favored denying pretrial diversion, the district attorney general noted that the Defendant was an employee of the Knox County School

[2] Our supreme court has previously noted that "deterrence in pre-trial diversion cases is guided by the same considerations as deterrence in probation cases." State v. Hooper, 29 S.W.3d 1, 8 n.9 (Tenn. 2000) (citing Hammersley, 650 S.W.2d 354).

District and held a position of authority over the students. The district attorney general reasoned,

> Giving the Defendant [p]retrial diversion would allow the Defendant to emerge from this situation unscathed and without even the acknowledgment of guilt that a judicially deferred plea would entail. This could send a message to the Defendant or others similarly situated that the Justice System does not take such crimes seriously and may encourage similar behavior. The State finds that this factor favors prosecution.

There is no evidence in the record to support any of the five factors listed in Hooper, and it does not appear that the district attorney general relied on any of those factors to deny pretrial diversion on the ground of deterrence. Instead, the district attorney general relied on the fact that granting pretrial diversion *could* send educators a message that the Defendant's behavior was acceptable. However, there is no proof in the record to substantiate that claim.

Therefore, we find that the record does not contain substantial evidence to support the denial of pretrial diversion on the basis of its deterrent effect on other criminal activity and the district attorney general abused his discretion in doing so.

Conclusion

The trial court's order affirming the denial of pretrial diversion is reversed. The matter is remanded to the trial court with instructions to order the district attorney general to grant pretrial diversion under such terms and conditions as are deemed appropriate.

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ROBERT L. HOLLOWAY, JR., JUDGE