

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1996

<p><b>FILED</b></p> <p>August 1, 1996</p> <p>Cecil W. Crowson Appellate Court Clerk</p>
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STATE OF TENNESSEE,

Appellee,

VS.

DAMON W. BYRD,

Appellant.

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C.C.A. NO. 01C01-9503-CR-00083

DAVIDSON COUNTY

HON. JANE WHEATCRAFT  
PRESIDING JUDGE

(Interlocutory Appeal T.R.A.P. 9)

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

AFFIRMED

JERRY L. SMITH, JUDGE

## **OPINION**

The Davidson County Grand Jury indicted Appellant Damon Byrd on two counts of assault and two counts of sexual battery. Appellant entered a plea of not guilty and requested pretrial diversion of the offenses. In this interlocutory appeal pursuant to Tennessee Rule of Appellate Procedure 9, Appellant seeks review of the judgment of the Davidson County Criminal Court affirming the district attorney's denial of diversion. Appellant alleges that the district attorney abused his discretion in denying the request for diversion.

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

Following his indictment, Appellant requested pretrial diversion. On June 28, 1994, the district attorney denied his request. While acknowledging Appellant's excellent work record and social history, the district attorney denied diversion on the following grounds: (1) the facts and circumstances of the offense; (2) Appellant's lack of amenability to rehabilitation; (3) the interests of society; and (4) the deterrent effect of punishment.

Appellant filed a petition for a writ of certiorari in the Davidson County Criminal Court, seeking to overturn the district attorney's denial of diversion. On October 6, 1994, the trial court held a hearing to determine whether the district attorney's denial of diversion constituted an abuse of discretion. After considering the evidence, the trial court refused to find an abuse of prosecutorial discretion and affirmed the district attorney's decision. The denial of pretrial diversion forms the basis of the appeal.

The decision to grant pretrial diversion rests within the discretion of the district attorney. Tenn. Code Ann. § 40-15-105(b)(3) (Supp. 1995). That decision is presumptively correct and shall be reversed only when the appellant establishes that there has been a patent or gross abuse of prosecutorial discretion. State v. Hammersley, 650 S.W.2d 352, 356 (Tenn. 1983). In order to establish such an abuse of discretion, the record must show an absence of any substantial evidence to support the district attorney's refusal to grant pretrial diversion. Id.

When deciding whether to grant pretrial diversion, the district attorney should consider the following factors: (1) the circumstances of the offense; (2) the defendant's criminal record, social history, and present condition, including mental and physical conditions if appropriate; (3) the deterrent effect of punishment on other criminal activity; (4) the defendant's amenability to correction; and (5) the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and the defendant. State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993). When reviewing a denial of pretrial diversion, this Court may not substitute its judgment for that of the district attorney's even if we would have preferred a different result. State v. Watkins, 607 S.W.2d 486, 488 (Tenn. Crim. App. 1980). The role of this Court is limited to determining whether any substantial

evidence exists to support the district attorney's decision within the framework of these factors. State v. Houston, 900 S.W.2d 712, 714 (Tenn. Crim App. 1995).

Here, the district attorney properly considered all applicable factors. In his letter denying diversion, the district attorney conceded that Appellant had an excellent work and social history, with no prior criminal record, but concluded that the factors opposing diversion outweighed Appellant's favorable personal history. We will review the findings of the district attorney in order to determine whether there is substantial evidence to support a denial of pretrial diversion in this case.

The district attorney relied upon the circumstances of the offense in denying diversion. As noted by the trial court, the alleged crimes were perpetrated against a thirteen-year-old child and involved two distinct incidents of improper, intentional touching, rather than a single impetuous act. We conclude that the circumstances of the alleged offenses support the decision to deny diversion.

The district attorney also relied upon the need to protect the interests of society in denying diversion. The very fact of a sexual assault upon a child is disturbing. The fact that these alleged assaults took place in the seemingly innocuous setting of a public amusement attraction frequented by children is even more troubling. Parents and children should be free of the fear that adult sexual predators will strike in places reserved for innocent fun. Again, we conclude that the need to protect the interests of society weigh in favor of the denial of diversion.

The district attorney, in his letter notifying Appellant of the decision to deny diversion, referred to the need for deterrence in cases such as this one. Specifically, the prosecutor stated that the goal of deterrence would be best achieved "if other members of society [saw] that those in a position of prominence

[were] not diverted when they make sexual attacks on minors and others who are unable to defend themselves.” This Court has previously noted that “[d]eterrence, both specific and general, are admirable goals of a prosecutor’s office in determining how to exercise its vast discretion.” State v. Kirk, 868 S.W.2d 739, 743 (Tenn. Crim. App. 1993). In order to substantiate the need for deterrence, the State presented child abuse statistics for Tennessee and Davidson County to the trial court as well as examples of law enforcement efforts to address the problems of child abuse. Even absent underlying proof, certain criminal offenses, by their very nature, need no extrinsic proof to establish the deterrent value of punishment. State v. Pinkham, No. 02C01-9502-CR-00040, 1996 WL 275048 at \*4 (Tenn. Crim. App. May 24, 1996); State v. Millsaps, 920 S.W.2d 267, 271 (Tenn. Crim. App. 1995).<sup>1</sup>

We conclude that the sexual molestation of children is an offense where the need for deterrence is obvious. See State v. Vines, No. 95, 1991 WL 21603, at \*1 (Tenn. Crim. App. Feb. 22, 1991); see also State v. Kratts, No. 193, 1988 WL 63512, at \*4 (Tenn. Crim. App. June 22, 1988) (commenting that “there is a public awareness of the need to deter an individual who would sexually abuse children” and that “the need to deter . . . is obvious”). Thus, the district attorney’s consideration of and reliance upon the deterrent effect of punishment was proper.

The district attorney however was incorrect in finding that Appellant was not amenable to rehabilitation because he denied the allegations in the indictment. As Appellant correctly points out, an admission of guilt is not a valid prerequisite to the granting of pretrial diversion. See State v. Anderson, 645 S.W.2d 251, 253 (Tenn. Crim. App. 1982). There is no evidence in the record to support the conclusion that Appellant is unamenable to rehabilitation. Indeed, Appellant’s lack of any criminal

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<sup>1</sup>Ordinarily, considerations of deterrence in dealing with criminal defendants must be supported by specific evidence of the need for deterrence. State v. Asby, 823 S.W.2d 166, 170 (Tenn. 1991).

record and his social history would weigh in favor of his amenability to rehabilitation without the necessity of a public trial. This consideration weighs in favor of diversion.

This Court is not at liberty to second guess the decision of the district attorney in this matter absent a clear showing of abuse of discretion. Despite Appellant's outstanding personal history and apparent amenability to rehabilitation, the circumstances of the offense, the need to protect the public, and the deterrent effect of punishment provide ample support for the discretionary decision to deny pretrial diversion.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM S. RUSSELL, SPECIAL JUDGE