

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 8, 2005

STATE OF TENNESSEE v. PATRICIA MARIE JENSON

**Appeal from the Criminal Court for Davidson County
No. 2001-A-308 Steve R. Dozier, Judge**

No. M2003-02848-CCA-R3-CD

JOSEPH M. TIPTON, J., dissenting.

I respectfully disagree with the majority opinion's upholding the conviction. I do not believe the evidence is sufficient to convict the defendant of child neglect as that offense is described in State v. Mateyko, 53 S.W.2d 666 (Tenn. 2001). In Mateyko, our supreme court held that "a mere risk of harm" was insufficient and that the state was required to show "that the defendant's neglect produced an actual, deleterious effect or harm upon the child's health and welfare." Id. 53 S.W.3d at 671-72.

Although the police officers testified about the heavy smoke which caused one officer's eyes to water and bothered other officers, no such evidence was presented regarding the child. Also, the evidence wholly fails to connect the child's "hyperactivity" or recent placement on medication for Attention Deficit Hyperactivity Disorder to the crack cocaine smoke. Moreover, Dr. Greeley's statement that a "great likelihood" existed that exposure to "passive" crack cocaine smoke would have an effect on a child may tell us the risk of harm through exposure, but it does not tell us that the child was in fact harmed by the approximately one-hour exposure and previous presence in the house which was proven in the trial. As in Mateyko, I believe the evidence would sustain a conviction for attempted child abuse through neglect. I would reduce the defendant's conviction to attempt to commit child abuse by neglect, a Class E felony, and sentence her to two years in the community corrections program under conditions to be imposed by the trial court.

JOSEPH M. TIPTON, JUDGE