IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

STATE OF TENNESSEE	)	
	)	C.C.A. NO. 02C01-9409-CR-00223
Appellee,	)	
	)	Shelby County Circuit Nos. 92-07664
	)	92-07665
V.	)	
	)	Hon. W. Fred Axley, Judge
JEREMY WINSETT	)	
	)	(Vehicular Homicide)
Appellant.	)	

FOR THE APPELLANT:

Charles D. Wright
Attorney at Law
150 Court Avenue, 2nd Floor
Memphis, Tennessee 38103

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Ellen H. Pollack
Assistant District Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0485

James H. Challen, III
Assistant District Attorney General
Criminal Justice Center, Third Floor
201 Poplar Avenue
Memphis, Tennessee 3810

John W. Pierotti
District Attorney General
201 Poplar Avenue, Suite 301
Memphis, Tennessee 38103-1947

OPINION FILED:_____

REVERSED AND REMANDED

MARY BETH LEIBOWITZ,
Special Judge

O P I N I O N

This is an appeal by permission of the Court of Criminal Appeals from Division VI of the Criminal Court for the Thirtieth Judicial District of Tennessee at Memphis. The appellant, Jeremy A. Winsett, presents an appeal of the judgment of that trial court affirming the District Attorney General's decision to deny pre-trial diversion in this case. The appellant is charged with two counts of vehicular homicide, having been arrested in this cause on or about May 26, 1992.

The history of this case is as follows: On June 11, 1992, the appellant executed a Waiver Bind Over and submitted his case to the Shelby County Grand Jury for review. On August 4, 1992, two indictments were returned for vehicular homicide. To these counts the appellant has pled not guilty. On February 24, 1993, the appellant, by and through his attorney, made a written application for pre-trial diversion. This application for pre-trial diversion was denied by Assistant Attorney General James J. Challen, III, on February 26, 1993. A Writ of Certiorari was filed in the trial court and on the 19th day of April, 1993, the appellant's application was denied. In addition, the court denied judicial diversion and the appellant's motion for a Rule 9 interlocutory appeal. However, a Rule 10 appeal was taken to this court.

On December 22, 1993, the Court of Criminal Appeals in Docket No. 02-C-01-9305-CR-00088, reversed and remanded for a reapplication in accordance with its opinion, State v. Winsett, 882 S.W. 2nd 806 (1993). The State filed a Rule 11 application but said application was denied on June 13, 1994.

Following the reversal to the trial court the appellant resubmitted his application on June 22, 1994, to District Attorney General John Pierotti. The District Attorney General again denied the application on July 22, 1994, and on July 28, 1994, the appellant again filed a Petition for Writ of Certiorari to have the matter reviewed by the trial court. This petition was denied by the trial court on August 30, 1994, and on that date the trial court granted permission for a Rule 9 interlocutory appeal, for which permission was granted by the Court of Criminal Appeals on October 13, 1994.

The facts of this case are as follows: On May 26, 1992, the appellant was an eighteen year old high school junior, who had no prior criminal record whatsoever. Due to a fire drill at school he and friends got out of school and decided to take a ride. The weather was poor and rainy, and he lost control of the automobile. The accident caused the death on one of his passengers and the driver

of another car. Since this accident, the appellant has had no blemishes on his record of any kind. Proof was offered on the record that the appellant was a first offender, held employment as a high school student, and had an outstanding reputation in school and in the community. The reasons the State offered in testimony of the District Attorney General for the denial of consideration of pre-trial diversion were, "After I looked at it, I also felt that this was not the type of offense that I would recommend for diversion." Also, he said, "I'm not mindful that he is youthful and does not have any prior record, however, I just think the balancing of the situation, the community's interest in this matter far outweighs the interest of putting this young man on diversion." The District Attorney General further testified that he had never placed anyone with a charge of vehicular homicide on diversion, although, he does not deny that the vehicular homicide offense is an eligible offense for diversion.

We once again reverse and remand with direction to the trial court to grant pre-trial diversion. The State has not followed the mandate of this Court, in the previous application to consider the evidence which tends to show that the applicant is amenable to correction and not likely to commit additional crimes, pursuant to State v. Markham 755 S.W.2nd 850, 853 (Tenn. Crim. App. 1988). The State has not responded and informed the applicant of his decision in the formal written manner required, including:

1. An enumeration of all the evidence considered;

2. The reason for denial: that is, an enumeration of the factors considered and how some factor (s) controlled the decision and some explanation of why certain factors outweighed others; and

3. An identification of any disputed issue of fact.

There has been no such written report even though the State in open Court through Assistant Attorney General Challen stated:

> "This was the matter the Court of Appeals sent back and indicated that General Pierotti needed to review he testimony of these four witnesses that were not presented to him. He has done that, and after reviewing their testimony, he is of the opinion that he still does not feel like that diversion is proper in this particular case. He does point out, and I think Mr. Wright will agree, that basically these four witnesses that Your Honor heard were in the nature of character witnesses for the defendant. He indicated--General Pierotti indicated that he felt like on the front end, that there would be people that would come forward that would say favorable things about this defendant. But, after reading testimony of these witnesses, he is still of the opinion that this is not a proper case for diversion based on his original ruing (sic) before Your Honor, and the reasons that he rejected diversion as he presented to Your Honor back on April the

19th, 1993."

The failure of the Attorney General to obey the previous order of this Court indicates an abuse of his discretion in not following Markham. Regardless of the fact that vehicular homicide is not a popular offense to consider for pre-trial diversion, it nevertheless is a qualifying offense under the statute.

The judgment of the trial court is therefore reversed and this case is remanded to the trial court to grant pre trial diversion.

REVERSED AND REMANDED

MARY BETH LEIBOWITZ, SPECIAL JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

WILLIAM M. BARKER, JUDGE