IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1999

FILED

January 21, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9904-CR-00140**
	)	
Appellee,	)	
	)	**WASHINGTON COUNTY**
VS.	)	
	)	
GARRY LEE MATHES,	)	**HON. ARDEN L. HILL,**
	)	**JUDGE**
Appellant.	)	
	)	**(Reckless Endangerment and**
	)	**Evading Arrest)**

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OPINION FILED ______________________

AFFIRMED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

The Defendant, Garry Lee Mathes, was indicted for felony reckless endangerment and felony evading arrest and was subsequently found guilty by a Washington County jury of misdemeanor reckless endangerment and felony evading arrest. He was sentenced to eleven months and twenty-nine days for the misdemeanor reckless endangerment conviction and four years for the felony evading arrest conviction. He was also ordered to serve eight years of probation for the felony evading arrest conviction after serving ninety days in jail. The first year of probation was to be served on intensive probation. In addition, as conditions of his probation, the Defendant was ordered to continue to receive mental health treatment, to continue taking his mental health medication as prescribed, to refrain from driving a vehicle unless one of his parents is in the car with him, and to refrain from drinking any alcohol. In this appeal as of right, the Defendant argues that the evidence is insufficient to support the convictions and that the sentence is excessive.

FACTS

Officer Jeff White of the Washington County Sheriff's Department testified that he was on routine patrol on Interstate 81 South around 4:45 a.m. on December 13, 1996. He was driving in the left-hand lane of traffic when a vehicle approached quickly from behind with bright lights. Officer White signaled to move into the right-hand lane and then changed lanes. The vehicle with the bright lights also moved into the right-hand lane behind Officer White, staying "right on [his] bumper." It then swerved around Officer White to pass. As the vehicle was passing Officer White, it swerved towards the police car, forcing it off the

roadway. Officer White testified that his two right tires veered off the pavement and onto the grass shoulder of the road. The vehicle did not hit Officer White's patrol car, but it began to accelerate with its emergency flashers turned on after passing Officer White.

Officer White radioed his sergeant, Wayne France, who told him to follow the vehicle and try to ascertain what the problem was. Officer White activated his blue lights and siren and began to follow the vehicle. He testified that he drove approximately two miles before catching up with the vehicle. Although Officer White's blue lights and siren were on, the vehicle failed to pull over and stop. A high-speed chase began, lasting from seven to ten miles, with Officer White traveling at speeds up to one hundred three miles per hour. Both vehicles passed a tractor and trailer and several cars which yielded to Officer White's lights and siren. None of the vehicles were damaged in the chase.

At some point Sergeant France, Officer White's supervisor, joined the chase. Officers from the Johnson City Police Department were present at all of the exits within the city limits, but they did not join in the chase. Sergeant France passed Officer White and approached the speeding vehicle. When Sergeant France was within eight or ten feet of the back of the vehicle, it slowed and pulled off to the side. Both Sergeant France and Officer White drew their weapons as they approached the vehicle. According to Sergeant France, he and Officer White both pulled the driver, later identified as the Defendant, out of the vehicle, "[i]mmediately took him to the ground and handcuffed him behind his back." Officer White testified that when the Defendant failed to get out of the vehicle, he and Sergeant France used "necessary force" to remove the Defendant from the

car, put him on the ground, and handcuff him. Both officers noticed an odor of alcohol about the Defendant's person but did not notice any vomit or regurgitation on him. Both officers searched the vehicle for items of value in doing an inventory search before towing the vehicle, and neither officer noticed any vomit in the car. The Defendant told the officers that "he was enroute [sic] to the hospital that he had an emergency, that his grandmother was dying, and that's all he said." Later, at the Detention Center, the Defendant told Officer White that "he was coming from Kingsport and that a big guy had grabbed him and tried to pour beer down his throat, and he was running from that guy. He thought that [Officer White] was that guy behind him and that's why he kept running."

Due to suspicion that the Defendant was driving under the influence of alcohol, Officer White asked the Defendant to submit to a blood alcohol test. The Defendant requested a blood test, rather than a breathalyzer, so he was taken to the hospital to have his blood drawn. While at the hospital, the Defendant did not complain of any other injuries. The test for alcohol was negative.

The Defendant testified that he is a forty-year old divorced man who is on disability for his nerves. He has one son who is sixteen years old. He has been treated for his mental health condition by Watauga Mental Heath since 1982, when he had a breakdown. He was taking two medications at the time of his arrest, and he was taking three medications at the time of trial. He explained in his testimony that on the night of December 13, 1996, he was returning home from Kingsport in the early morning hours when he noticed lights behind him while he was stopped at a traffic light. He then gave the following version of events:

> Well, I can't remember exactly what red light that it happened at. But I noticed lights up behind me and I looked over and he jerked the door open and throwed my head back and poured down [sic] on my face and which some of it had went in my mouth, because when he throwed my head back against the head rest my mouth flew open, and with the medicine that I had taken, I'm not supposed to be drinking no alcohol, so it didn't agree with me too well. And I was tired anyway, because it was early in the morning and I was going back home. So I just stepped on the gas and took off and the door shut itself. And then he come behind me, and I seen him up in my mirror and I was coming towards Johnson City and he was riding real close behind me. So I was trying to get away from him.

The Defendant insisted that some person opened his car door and poured alcohol down his throat. He believed that the person was following him. He said that he did not see Officer White's police car and that he did not remember passing it. He denied trying to run Officer White off the road. He testified that he believed the truck with the bright lights was following him, and he was trying to get away from the truck when he was driving fast down Interstate 81. He saw lights, but thought they were the lights from the truck. He did not hear the police siren. Eventually, he realized that a police car was behind him, and he pulled over and stopped.

The Defendant's version of events after the stop was different from that of the officers. The Defendant testified that Officer White pulled his gun and said to step out of the car. The Defendant then opened the door. He said,

> they throwed me on the ground and then they handcuffed me. They was punching me and kicking me – kicking me in the ribs and punched me. And the one squezed [sic] between the legs and when he squezed [sic] me between the legs that's when I hollered out. I don't even remember what I did holler out, but I didn't holler out that my grandmother was dying because that would hurt me real bad to say that. My grandmother has been dead for about six years. So when he grabbed me between the legs and squezed [sic] I hollered out something, that was to stop them from doing what they did.

The Defendant said that the officers gave him scars on his leg from throwing him on the pavement and that they broke his glasses.

Doctor Pramod Shah testified that he is a psychiatric consultant employed by Frontier Health, which is commonly known as Watauga Mental Health System. He said that he has been treating the Defendant since May 1996 and that he sees the Defendant about once every three months. When he first started treating the Defendant, the Defendant had been diagnosed with bipolar disorder. Dr. Shah explained that bipolar disorder can be associated with psychotic features which include hallucinations. At the time of this incident, the Defendant was taking two medications: Tegretol, which is a mood stabilizer, and Adavan, which is an anti-anxiety drug. He was not taking any anti-psychotic drugs which would have prevented auditory or visual hallucinations because during that period, the Defendant had not been experiencing any psychotic symptoms. At the time of Dr. Shah's testimony, the Defendant was also taking Resperodal, which is an anti-psychotic drug, and Cogentin, which is a medication prescribed to counteract the side effects caused by the anti-psychotic drugs. Dr. Shah testified that the medication would help prevent hallucinations or any other psychotic symptoms.

Bettye Mathes, the Defendant's mother, testified that when she and her husband went to pick up the Defendant's car from the impound lot, it had "phlegm and stuff all over the passenger's side of the seat." She said that she had to clean the car before she could sit in the seat. She further testified that they "like to have not got [the car] home" and that "it would not have went no hundred mile an hour."

SUFFICIENCY OF THE EVIDENCE

The Defendant first challenges the sufficiency of the convicting evidence. Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." Evidence is sufficient if, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). In addition, because conviction by a trier of fact destroys the presumption of innocence and imposes a presumption of guilt, a convicted criminal defendant bears the burden of showing that the evidence was insufficient. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1976), and State v. Brown, 551 S.W.2d 329, 331 (Tenn. 1977)); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982); Holt v. State, 357 S.W.2d 57, 61 (Tenn. 1962).

In its review of the evidence, an appellate court must afford the State "the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom." Tuggle, 639 S.W.2d at 914 (citing State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978)). The court may not "re-weigh or re-evaluate the evidence" in the record below. Evans, 838 S.W.2d at 191 (citing Cabbage, 571 S.W.2d at 836). Likewise, should the reviewing court find particular conflicts in the trial testimony, the court must resolve them in favor of the jury verdict or trial court judgment. Tuggle, 639 S.W.2d at 914.

Before the Defendant could be convicted of reckless endangerment, the State had to prove beyond a reasonable doubt that the Defendant recklessly engaged in conduct which placed or might have placed another person in imminent danger of death or serious bodily injury. See Tenn. Code Ann. § 39-13-103. The proof at trial showed that the Defendant approached quickly behind Officer White's patrol car as Officer White was traveling south on Interstate 81 and came within a few feet of Officer White's bumper. When Officer White moved into the right-hand lane of traffic, the Defendant moved into that lane behind the officer. The Defendant moved into the other lane to pass Officer White, but then swerved towards the patrol car, forcing it off the roadway. The Defendant subsequently accelerated and failed to stop when Officer White and Sergeant France pursued him with their blue lights and sirens activated. During the chase, the Defendant and the officers zipped past other vehicles at speeds up to one hundred and three miles an hour. Based on this evidence, a rational jury could have found beyond a reasonable doubt that the Defendant recklessly placed Officer White in imminent danger of death or serious bodily injury by forcing him off the roadway while he was traveling on the interstate and that the Defendant recklessly placed the other motorists in similar danger by approaching and passing them at a high speed and failing to yield to the police vehicles. Accordingly, the evidence is sufficient to support this conviction.

Also, the Defendant was convicted of felony evading arrest. The crime of felony evading arrest is set forth as follows:

> It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop.

Id. § 39-16-603(b)(1). If the evading arrest creates a risk of death or injury to innocent bystanders or other third parties, as found by the jury in this case, then the crime is a Class D felony. Id. § 39-16-603(b)(3).

The Defendant does not dispute that he failed to stop after receiving a signal from police officers to do so, but he argues that he did not intentionally flee or attempt to elude any law enforcement officer. A person "acts intentionally with respect to the nature of the conduct or to a result of the conduct when it is the person's conscious objective or desire to engage in the conduct or cause the result." Id. § 39-11-302(a). The Defendant's argument is that he did not act intentionally because he thought he was fleeing from a person in a truck with bright lights who had poured alcohol down his throat at a traffic light; he did not know that he was fleeing from police officers.

Though this was the only testimony as to the Defendant's subjective state of mind, a person's intent may be inferred from the surrounding facts and circumstances. See State v. Lowery, 667 S.W.2d 52, 57 (Tenn. 1984); Hall v. State, 490 S.W.2d 495, 496 (Tenn. 1973). The State presented evidence showing that two police officers chased the Defendant at high speeds for seven to ten miles with their blue lights and sirens on. Other police officers were present at the exits on the interstate highway. The other vehicles on the roadway yielded to the police vehicles, but the Defendant did not yield to an obvious police signal to stop. Once the Defendant finally did pull over and stop, he told the officers that he was going to the hospital to see his dying grandmother. It was not until later that the Defendant stated that he thought he was fleeing from someone else. After hearing this evidence, the jury, which had the duty to judge

the credibility of the witnesses, could rationally find beyond a reasonable doubt that the Defendant intentionally attempted to flee and to elude the police officers after receiving a signal to stop.

The Defendant also argues that his conduct did not place any third parties within risk of death or injury, such that the evidence was insufficient to support the determination that the crime was a Class D felony. We disagree. The testimony of the officers indicated that the Defendant passed a tractor and trailer and several cars on the interstate at very high speeds. We believe that a rational jury could find that such conduct created a risk of death or injury to those other motorists. Had the Defendant lost control of his vehicle because he was driving too fast, he could have killed or seriously injured persons in a vehicle near him. Moreover, the other motorists could have lost control of their vehicles and been killed or seriously injured due to surprise caused by the Defendant's fast speeds and the police chase. This issue has no merit.

SENTENCING

The Defendant also challenges the sentence imposed by the trial court. When an accused challenges the length, range, or manner of service of a sentence, this Court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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).

When conducting a de novo review of a sentence, this Court must consider: (a) the evidence, if any, received at the trial and sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement made by the defendant regarding sentencing; and (g) the potential or lack of potential for rehabilitation or treatment. State v. Thomas, 755 S.W.2d 838, 844 (Tenn. Crim. App. 1988); Tenn. Code Ann. §§ 40-35-102, -103, -210.

If our review reflects that the trial court followed the statutory sentencing procedure, that the court imposed a lawful sentence after having given due consideration and proper weight to the factors and principles set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

At the sentencing hearing, the trial court went through the sentencing principles and enhancement and mitigating factors on the record and set forth its reasons for imposing the sentence that it did. Because the trial court considered the appropriate factors and principles, our review of the Defendant's sentence is de novo with a presumption of correctness. We conclude that the trial court entered a lawful sentence after giving due consideration and proper weight to the factors and principles of the sentencing law and thus affirm the Defendant's sentence.

For the misdemeanor reckless endangerment charge, the Defendant was sentenced to eleven months twenty-nine days, to be served on probation. He does not challenge this sentence. For the felony evading arrest conviction, the Defendant was sentenced to the minimum sentence of four years incarceration,[1] suspended after the service of ninety days in jail. He was also placed on probation for eight years, with the first year to be served on intensive probation. As conditions of probation, the Defendant was ordered to continue to receive mental health treatment, to continue taking his medication as prescribed, to refrain from driving his vehicle unless one of his parents is in the vehicle with him, and to refrain from drinking any alcohol. Of this sentence, the Defendant challenges only the ninety day jail time and the condition of probation that he not drive without a parent in the vehicle with him.

The Defendant seeks total probation. The burden rests on the Defendant to establish his suitability for total probation. Tenn. Code Ann. § 40-35-303(b); see State v. Bingham, 910 S.W.2d 448, 455 (Tenn. Crim. App. 1995). In determining whether to grant probation, the judge must consider the nature and circumstances of the offense, the defendant's criminal record, his background and social history, his present condition, including his physical and mental condition, the deterrent effect on other criminal activity, and the likelihood that probation is in the best interests of both the public and the defendant. Stiller v. State, 516 S.W.2d 617, 620 (Tenn. 1974). The burden is on the Defendant to show that the sentence he received is improper and that he is entitled to probation. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

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[1] Due to two prior felony convictions, the Defendant is a Range II offender. The sentence range for a Class D felony for a Range II offender is four to eight years. Tenn. Code Ann. § 40-35-112(b)(4).

We must first note that while the trial court at the sentencing hearing clearly sentenced the Defendant to serve ninety days in jail, that jail time is not reflected on the actual judgment entered by the trial court. Consequently, we must remand the case to the trial court for correction of the judgment. Having so noted, we find that the Defendant was properly sentenced to serve ninety days in jail. Throughout the trial and the sentencing hearing, the Defendant continued to insist that he had done nothing wrong. When asked at the sentencing hearing if he had anything to say, the Defendant stated,

> That's about it. I'm not guilty. I couldn't – couldn't help that it happened. I only hope that sometime down the line you catch the person that done what they did to me. And I hope if it ever happens again that I feel like stomping them.

This statement indicates that instead of accepting that he committed a crime and taking responsibility for it, the Defendant reflects on engaging in other activity – perhaps the "stomping" of an unknown and possibly imaginary person – that could potentially be criminal as well.

In considering the facts of this case, the trial judge accepted that the Defendant truly believed he was being pursued by a man in a truck who had poured alcohol down his throat. He commented, "I don't know how to bring home to Mr. Mathes that even though he thinks he had whiskey poured on him and thinks that a truck was after him, and whether or not it was. [sic] Even if there was alcohol poured on him, even if there was a truck after him, he has violated the law." Perhaps a period of confinement will help drive home to the Defendant that he violated the law. In any event, the ninety day jail sentence was not an improper imposition on the part of the trial court in light of the facts and

circumstances of this case, the Defendant’s refusal to admit that he did anything wrong, and the Defendant's prior record of criminal activity.

Likewise, we do not find the condition of probation that the Defendant only drive a vehicle with a parent in the car to be unreasonable. According to Tennessee Code Annotated § 39-16-603(b)(4), the statute setting forth the offense of evading arrest, it was too lenient. That statues provides that “[i]n addition to the penalty prescribed in this subsection, the court shall order the suspension of the driver license of such person for a period of not less than six (6) months nor more than two (2) years.” Tenn. Code Ann. § 39-16-603(b)(4) (emphasis added). The language used in the statute renders the suspension of the offender’s license mandatory, not discretionary. Consequently, the trial court erred by failing to suspend the Defendant’s driver’s license, and we are compelled to also remand the case to the trial court for suspension of the Defendant’s license for a period not less than six months nor more than two years, as may be determined by the trial court.

Once the Defendant’s license is reinstated, the restriction that he not drive without a parent in the vehicle would nevertheless appear to be proper. While undoubtedly an imposition on a forty-year old man, Tennessee Code Annotated § 40-35-303(d)(9) allows a court to require a defendant to comply with any conditions of probation “reasonably related to the purpose of the offender’s sentence and not unduly restrictive of the offender’s liberty, or incompatible with the offender’s freedom of conscience, or otherwise prohibited by this chapter.”

The Defendant was convicted of evading arrest with risk of injury, which is a Class D felony driving offense. The condition was imposed to assure that similar driving offenses do not occur in the future. As such, it was reasonably related to the purpose of the Defendant's sentence. Though the Defendant insists that he will not have any similar episodes, he also insists that some unknown person was chasing him on the night of his arrest. If he is not willing to admit that his mental condition could have caused him to believe that someone was chasing him, then it is possible he will not be diligent in following the instructions of his doctor in treating his mental health problems. If he fails to take his medication, such an occurrence could happen again. There is no guarantee that it will not happen again even if he does take his medication. Requiring the Defendant to drive only with a parent in the car is a reasonable way to attempt to ensure that the Defendant will not be a danger to anyone on the highways.

Moreover, though onerous, the condition does not unduly interfere with the Defendant's liberty. The Defendant committed a serious driving offense, and the trial court was warranted in taking steps to prevent a future offense. The Defendant is still permitted to go places and even to drive to those places. He must follow restrictions designed to protect the Defendant and the other persons on the roadways.

Finally, because the condition that the Defendant drive with a parent in the car only imposes on the Defendant's driving privileges, it is not incompatible with the Defendant's freedom of conscience. Accordingly, the condition was lawful under the statute and was not an abuse of discretion on the part of the trial court.

Though eight years is a long time to have driving privileges restricted, it is warranted under the facts of this case.

CONCLUSION

We conclude that the evidence presented at trial was sufficient to support the convictions and that the Defendant was properly sentenced for both convictions. Accordingly, the judgment of the trial court is affirmed. The case is, however, remanded to the trial court for correction of the judgment to reflect that the Defendant was ordered to serve ninety days of his sentence in jail and for the trial court to order suspension of the Defendant's driver's license for a period not less than six months nor more than two years, as required by statute.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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JERRY L. SMITH, JUDGE