

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1998

**FILED**  
December 28, 1998  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

GARY PRUDE, )

Appellant. )

C.C.A. NO. W1997-0277-CC-1998D

SHELBY COUNTY

HON. CHRIS CRAFT,  
JUDGE

(DUI-4th Offense, Reckless Driving)

OPINION ON REMAND FROM THE  
TENNESSEE SUPREME COURT

FOR THE APPELLANT:

ROBERT A. WAMPLER  
P.O. Box 3410  
Memphis, TN 38173-0410

FOR THE APPELLEE:

JOHN KNOX WALKUP  
Attorney General and Reporter

PETER M. COUGHLAN  
Assistant Attorney General  
425 Fifth Avenue North  
Nashville, TN 37243

JOHN W. PIEROTTI  
District Attorney General

DAN BYER  
Assistant District Attorney General  
Criminal Justice Complex,  
Suite 301  
Memphis, TN 38103

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

AFFIRMED

DAVID H. WELLES, JUDGE

## **OPINION ON REMAND**

The Tennessee Supreme Court has remanded this case to give us the opportunity to review and reconsider our previous opinion in light of the Supreme Court's opinion in State v. Lemacks, 996 S.W.2d 166 (Tenn. 1999).

This case involves an appeal from a DUI conviction in which there was some factual dispute as to whether the Defendant was driving the vehicle or one of his “passengers” was driving the Defendant's vehicle. In addition to jury instructions for DUI based upon the theory that the Defendant was the driver of the vehicle, the State asked for and received a jury instruction on criminal responsibility for the conduct of another, based on the theory that the “passenger” was the driver. In our prior opinion in this case,<sup>1</sup> we concluded that the trial judge erred by charging the jury concerning both theories of guilt without clearly communicating to the jury the need for a unanimous verdict on the facts. However, we concluded that the error was harmless.

In Lemacks, a DUI case with similar facts and a similar jury unanimity issue, the supreme court held that the general verdict satisfied the Defendant's right to a unanimous jury and stated that “the right of jury unanimity has never required more than a general verdict in cases where only one offense is at issue based upon a single criminal occurrence.” 996 S.W.2d at 171. “In such cases, as here, where the State seeks to prove one crime arising from one event, we may presume that the jury's general verdict was unanimous.” Id. The court concluded that the general verdict of guilt satisfied the jury unanimity requirement even though the jury was instructed that it could find guilt based on either one of the two factual theories. Id. at 173.

---

<sup>1</sup> State v. Gary Prude, No. 02C01-9711-CR-00425, 1998 WL 467096 (Tenn. Crim. App., Jackson, Aug. 12, 1998).

Having reconsidered our previous opinion in light of Lemacks, as instructed by our supreme court, we now conclude that the trial judge did not err by charging the jury concerning both theories of guilt without clearly communicating to the jury the need for a unanimous verdict on the facts. In our previous opinion in this case, however, we also concluded that the trial judge's error was harmless beyond a reasonable doubt, and we thus affirmed the judgment of the trial court. It now appears that we erred in finding that the trial court erred. Because we found the trial court's error harmless, however, we conclude that our error was also harmless, and we again affirm the judgment of the trial court.

\_\_\_\_\_  
DAVID H. WELLES, JUDGE

CONCUR:

\_\_\_\_\_  
JOE G. RILEY, JUDGE

(Not Participating)  
\_\_\_\_\_  
PAUL G. SUMMERS, JUDGE