IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	(	
	:	C.C.A. No. 03C01-9501-CR-00015
Appellee,	(	
	:	McMinn County
v.	(	
	:	Hon. Mayo L. Mashburn, Judge
	(	
WAYNE KIRBY,	:	AFFIRMED, Sentence Modified
	(	
Appellant	:	

For The Appellant:

William C. Donaldson
Attorney for Defendant
110 1/2 Washington Ave. N.E.
Athens, TN 37303
615/744-9875

For the Appellee:

Charles W. Burson
Attorney General & Reporter

David N. Smith
Counsel for the State
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493
615/832-8265

Steve Ward
Asst. District Atty. General
P. O. Box 647
Athens, TN 37303

OPINION FILED: _____

AFFIRMED; SENTENCE MODIFIED:

John A. Turnbull, Special Judge

O P I N I O N

The defendant, Wayne Kirby, was found guilty by jury verdict of driving under the influence of an intoxicant (D.U.I.) third offense and of driving on a revoked license (D.R.L.), first offense. The trial judge sentenced the defendant to 11 months and 29 days for D.U.I. and 6 months for D.R.L. and ordered that the sentences run consecutively to each other and consecutively to any sentence defendant was presently serving. In this appeal as of right, defendant challenges both the sufficiency of the evidence on the D.U.I. conviction and the sentence imposed as to both convictions. We find the evidence sufficient to support defendant's conviction, but the sentence imposed must be modified.

The State's only witness, Officer Daniel Denton, stopped defendant for speeding at 12:17 a.m. on March 22, 1994 after clocking him on radar at 55 m.p.h. in a 45 m.p.h. zone. Upon approaching the vehicle defendant was driving, Officer Denton detected an odor of alcohol coming from the vehicle. Officer Denton, after securing identification from defendant, asked if he had been drinking, to which defendant responded, "he'd had a few." Officer Denton had defendant perform two field sobriety tests, walking a straight line heel to toe, and a one-leg stand while reciting the alphabet. Officer Denton judged that defendant failed both tests because of lack of balance, formed the opinion that defendant was under the influence, and arrested him.

Defendant agreed to submit to an intoximeter test. The intoximeter machine "aborted" and no reading could be achieved on defendant's breath alcohol because defendant on his first attempt to blow had tobacco in his mouth, and on his second and third attempts, defendant stuck his tongue in the tube and did not force sufficient air into the machine to produce a reading.

In his defense, defendant produced two witnesses who testified as to defendant's activities the evening before his arrest. Defendant's brother, Jackie

Kirby, testified that defendant came to his house about 6:00 p.m. to wash clothes and stayed there until between 9:30 and 10:00 p.m. During that period he did not see defendant consume any alcohol. Ms. Standridge, a lady who defendant had been dating for a couple of years, testified that defendant came to her home shortly after 10:00 p.m., left at 11:00 p.m. and did not drink while at her home. In Ms. Standridge's opinion defendant was not under the influence when he left her home; but she could not say that he had not been drinking.

Defendant, on the witness stand in his own defense, denied drinking at all that night and did not recall telling Officer Denton that "he'd had a few." Defendant explained his lack of balance in the field sobriety tests may have been the result of damage to his ear that kind of "messed my balance up some."

SUFFICIENCY OF THE EVIDENCE

The jury chose to believe the testimony of Officer Denton rather than the testimony of the defendant. There was ample time between 11:00 p.m. and defendant's arrest at 12:17 a.m. for defendant to consume sufficient alcohol to influence his ability to drive safely. It is not this court's function to re-weigh the evidence. Questions of credibility are for the jury to decide. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978); State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984). Once the trial court approves the jury verdict, as here, the testimony favoring the State is accredited and all conflicts are resolved in favor of the State's theory. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978).

The question for this court, when the sufficiency of the evidence is questioned on appeal, is "whether, after viewing 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, 99 S.Ct. 2781, 2789 (1979). The jury rejected defendant's testimony and

found that his defense raised no reasonable doubt as to his guilt. The testimony of the officer is sufficient to support this conviction.

S E N T E N C I N G

Defendant next challenges both the length of sentences imposed by the trial judge and the ruling that the sentences run consecutively to each other and consecutively to the felony sentence defendant was serving. We must conduct a de novo review of the sentence imposed by the trial judge. If the trial court followed the statutory sentencing procedure and imposed a lawful sentence, after giving due consideration to the factors and principles relevant to sentencing under the act, the sentence imposed is entitled to the presumption of correctness. T.C.A. 40-35-401. State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991). The state concedes and the record reflects that the trial judge in sentencing the defendant erroneously applied two enhancement factors, T.C.A. 40-35-114 (8) and (13). Factor (8) an "unwillingness to comply with condition of a sentence involving release into the community" was inappropriately applied by the trial judge since the only revocation of probation in the record is for the commission of the subject offense. Likewise, factor (13) is not applicable since that factor applies to commission of a felony while on probation not, as here, a misdemeanor.

The trial judge did have ample support in the record for applying enhancement due to defendant's extensive record of criminal conduct. Defendant had two felony assault convictions: In April, 1984 and January, 1993. He also had six prior misdemeanor convictions. There were no significant aggravating factors involved in this particular arrest for D.U.I. beyond the fact that it was a third offense. No accident was involved. We apply the one available enhancing factor, a record of extensive criminal conduct, and find defendant must be sentenced to eight months in the county jail to be served at 75% for an effective sentence of six months. T.C.A. 40-35-302[d]; see State v. Dedrick L. Phelps, No. 01C01-9309-CR-00332 (Tenn. Crim. App., Nashville, June 9, 1994). For the first offense D.R.L.

defendant's sentence is modified to ten days. The sentences will run consecutively to each other and consecutively to the sentence defendant is now serving. T.C.A. 40-35-115[b][2]. After defendant has completed service of his effective sentence of six months and ten days, he will be released on supervised misdemeanor probation under appropriate probationary rules which shall include a requirement that defendant receive inpatient alcohol and drug treatment and follow-up care.

The convictions for D.U.I. third offense and D.R.L. are affirmed. Defendant's sentence is modified as set out above and the case is remanded to the trial court for execution of the judgment of this court.

_____
JOHN A. TURNBULL, SPECIAL JUDGE

CONCUR:

_____
DAVID WELLES, JUDGE

_____
DAVID HAYES, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

STATE OF TENNESSEE,	(	
	:	C.C.A. No. 03C01-9501-CR-00015
Appellee,	(	
	:	McMinn County
v.	(	
	:	Hon. Mayo L. Mashburn, Judge
	(	
WAYNE KIRBY,	:	
	(	
Appellant	:	AFFIRMED, Sentence Modified
	(	

JUDGMENT

Came the Appellant, Wayne Kirby, by counsel, and also come the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Hamilton County; and upon consideration thereof, this Court is of the opinion that there is no reversible error on the record and that the judgment of the trial court should be affirmed. The sentence is modified.

In accordance with the Opinion filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, the sentence is modified, and the case is remanded to the Criminal Court of Hamilton County for the execution of the judgment of this Court and for the collection of the costs accrued below.

Costs of appeal will be paid into this Court by the Appellant, Wayne Kirby, for which let execution issue.

DAVID WELLES, JUDGE

DAVID HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE

Certification

Office of Clerk of Court of Criminal Appeals
for the Eastern Division of the State of Tennessee:

I, _____, Clerk of said Court, do hereby certify that the foregoing is a trust, perfect and complete coy of the Judgement of said Court, pronounced _____, 1995 in the case of State of Tennessee against Wayne Kirby as appears of records now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court at office in Knoxville, Tennessee on this the _____ day of _____, 1995.

_____
CLERK