IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9411-CC-00388
APPELLEE,	*	FRANKLIN COUNTY
VS.	*	Hon. Thomas A. Greer, Jr., Judge
JOHN W. BUCHANAN,	*	(DUI, Third Offense, and Driving
APPELLANT.	*	on a Revoked License, Third
	*`	Offense)

For the Appellant:

Clifford E. Whitaker, Jr.
Asst. Public Defender
12th Judicial District
P.O. Box 220
Jasper, TN 37347

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Charlotte H. Rappuhn
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Steven M. Blount
Asst. District Attorney General
One South Jefferson Street
Winchester, TN 37398

OPINION FILED:_____

AFFIRMED

Gary R. Wade, Judge

OPINION

The defendant, John W. Buchanan, was convicted of driving under the influence, third offense, and driving on a revoked license, third offense. The trial court imposed a sentence of 11 months, 29 days, for the DUI with 180 days to be served in jail, the last 60 days of which to be served at the rate of two days per week; a fine of $5,000 was imposed and the defendant was prohibited from driving for a period of four years. The trial court imposed a consecutive sentence of 11 months and 29 days for driving on a revoked license; although 60 days of that term was to be served in jail, the jail time was ordered to be served concurrently with the jail time for the DUI. There was an additional fine for this latter offense of $500.

In this appeal of right, the defendant claims that the trial court improperly admitted prior convictions during the guilt phase of the trial and then abused its discretion by refusing to lower the fines assessed by the jury. We affirm the judgment.

There is no material dispute in the facts. On October 6, 1992, Officer Danny Mantooth was dispatched to a residence where someone had reportedly been "beating on the door." As the officer approached the residence, he observed the defendant back out of the driveway and then drive back into the driveway. A young female, later identified as the defendant's daughter, Angela Buchanan, was in the passenger's seat. Officer Mantooth smelled alcohol and asked the

defendant how much he had had to drink. The defendant answered, "A few," at which point he was asked to get out of the car. When the defendant could not produce a driver's license, Officer Mantooth checked on its status and learned that it had been revoked. The defendant was unable to successfully perform a one-leg-stand sobriety test or a finger-to-nose test. The defendant refused a blood alcohol test. The officer described the defendant as "intoxicated" and "too impaired to be driving." Two other officers testified for the state. One had observed the defendant and had the opinion that the defendant was intoxicated. The other confirmed that the defendant's license had been revoked.

At trial, the defendant admitted that he was drunk at the time of his arrest. He claimed that he only intended to back the car out of the driveway for his daughter. Angela Buchanan testified that she and her father were parked in the driveway of a friend's residence at the time of the arrest. When no one answered her knock at the door, she returned to the car with the intention of leaving. She claimed that she had been driving but, because she could not back "out of driveways too good," her father had undertaken the task of doing that for her. She stated that the officers arrived before the defendant drove "all the way out of the driveway."

After the jury returned a verdict of guilt on each count, they were informed that the second phase of the proceeding would be to determine whether the defendant was

guilty of a third offense.[1] Two certified copies of DUI and driving on a revoked license convictions from Coffee County were entered into evidence over the defendant's objection.

I

The defendant now argues that the trial court committed error by admitting the prior convictions. He claims that the judgments were void because the record was silent as to whether he had been advised of his constitutional rights before entering guilty pleas. The defendant asserts that the convictions were facially invalid. The basis for his argument is that the Coffee County warrants, while making reference to the defendant's right to a jury trial, were "utterly silent as to the privilege against ... self-incrimination as well as his right to confront his accusers."

In State v. McClintock, 732 S.W.2d 268, 270 (Tenn. 1987), our supreme court held as follows:

> An unreversed judgment of a General Sessions Court is as final as a judgment rendered in a court of record. "If the losing party chooses to accept [the] determination without appeal, it is as final and binding as if affirmed by the highest appellate court." To hold otherwise would obviously undermine the legislative intent of the statutes creating the General Sessions Courts and vesting them with concurrent jurisdiction in certain classes of cases, including DUI offenses.

[1] A bifurcated trial is the appropriate procedure. See Harrison v. State, 217 Tenn. 31, 39-40, 394 S.W.2d 713, 717 (1965); Crawford v. State, 4 Tenn. Crim. App. 142, 145-46, 469 S.W.2d 524, 525 (1971). The second phase of the proceeding relates only to punishment and does not add a new charge. The fact that the defendant had prior convictions of DUI simply enhanced the possible range of punishment. In that respect, the sentence enhancement procedure is analogous to the old habitual criminal statutes. State v. Ward, 810 S.W.2d 158, 159 (Tenn. Crim. App. 1991).

(Citation omitted). There is a presumption of regularity in any final judgment:

> Every intendment is in favor of the sufficiency and validity of proceedings before the General Sessions Court, when brought in question, either directly or collaterally, in any of the courts, where it appears on the face of the proceedings that the General Sessions Court had jurisdiction of the subject matter and of the parties.

Tenn. Code Ann. § 16-15-728 (previously codified in Title 19, "Civil Procedure in General Sessions Court").

In State v. Cottrell, 868 S.W.2d 673, 678 (Tenn. Crim. App. 1992), this court held as follows:

> The McClintock rule precluded any collateral attack on the [prior] judgment[s] on grounds other than facial invalidity; that resolves many of the defendant's objections. Further, the general sessions judge signed the judgment portion of the warrant.... [T]hat indicates acceptance of the defendant's plea of guilty and his waiver of his rights to a preliminary hearing, counsel, jury, and trial only by indictment or presentment.[2]

---

[2]The state argues that the defendant cannot attack a facially valid judgment in the same proceeding the judgment is used to enhance. State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). McClintock did not, however, preclude an attack in the same proceeding when the judgment was facially invalid. 1991 Tenn. Pub. Acts, ch. 355, § 2, passed 5/2/91 and effective 7/1/91, added subsection (1) to Tenn. Code Ann. § 55-10-403, to read as follows:

> Notwithstanding any other provision of law or rule of court to the contrary, a person shall be permitted to challenge the validity of any prior guilty plea conviction for a violation of [Tennessee Code Annotated] § 55-10-401, at any proceeding in which the state seeks to use such prior conviction to enhance punishment for a subsequent violation of such section. Failure to comply with the requirements of Rule 11 of the Tennessee Rules of Criminal Procedure or the Tennessee Supreme Court decision of State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), shall be considered grounds for challenging the validity of any such prior guilty plea conviction.

Then 1991 Tenn. Pub. Acts, ch. 502, § 3, passed 6/20/91 and effective

In our view, each of the prior judgments entered as evidence was facially valid. Even if the pleas had been involuntarily made, the convictions would have been voidable, not void. In those circumstances, it would have been incumbent upon the defendant to have first attacked the validity of the judgments in a separate, collateral action under the Post-Conviction Procedure Act. See Tenn. Code Ann. § 40-30-101, et seq. This was not the proper forum. Archer v. State, 851 S.W.2d 157 (Tenn. 1993). Here, the defendant did not do so. The McClintock rule precluded his effort to challenge the validity of the prior convictions in this proceeding.

II

Next, the defendant contends that the trial court abused its discretion by failing to modify the amount of the fine assessed against the defendant. The defendant claimed that he made only $200.00 to $250.00 per week from which he had to support his child. He asserts that the total fine, if approved, would amount to more than one-half of his annual net income.

6/28/91, rewrote subsection (1) to read as follows:

> Notwithstanding any other provision of law or rule of court to the contrary, a person shall be permitted to challenge the constitutional validity, under the Tennessee supreme court decision of State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), and any other related state or federal decisions, of any prior guilty plea conviction for a violation of [Tennessee Code Annotated] § 55-10-401, at any proceeding in which the state seeks to use such prior conviction to enhance the punishment for a subsequent violation of such section.

1992 Tenn. Pub. Act, ch. 773, § 1, effective 4/28/92, deleted (1) in its entirety. The ruling in McClintock was in effect at the time of the trial. This case was tried in March of 1991.

Our constitution prohibits fines over $50.00 unless approved by the jury. Art. VI, § 14, Tenn. Const. While the trial court may impose the fine, it shall not exceed that fixed by the jury. See State v. Bryant, 805 S.W.2d 762 (Tenn. 1991). There are exceptions to these guidelines unless the defendant waives his constitutional protection or his right to a trial by jury. State v. Durso, 645 S.W.2d 753 (Tenn. 1983); State v. Harless, 607 S.W.2d 492 (Tenn. Crim. App. 1980). Here, the trial court approved the maximum fines of $5,500 as imposed by the jury. See Tenn. Code Ann. §§ 55-10-403 and 40-35-111(e). Some two months after the sentencing hearing, the defendant filed a motion asking the trial court to modify the amount of the fines. See Tenn. R. Crim. P. 35(b). He claimed that it was "far higher than necessary to provide a deterrent effect" and that his "meager means [w]as evidenced by the fact that he is being represented by the public defender's office." The motion was apparently overruled at the same time the defendant's motion for new trial was overruled. The record does not contain the transcript of the hearing.

A defendant's ability to pay is a factor in the establishment of fines. Tenn. Code Ann. § 40-35-207(7). It is not controlling, however. See State v. Michael Westley Portzer, No. 01C01-9208-CC-00252 (Tenn. Crim. App., at Nashville, August 12, 1993), perm. to app. denied, (Tenn. 1993). Here, the record does establish that the circumstances were aggravated. The defendant had two prior DUI convictions and two prior driving on a revoked license convictions. Between 1981 and the time he moved to the State of Tennessee,

the defendant had been convicted of driving under the influence in South Carolina on three separate occasions. The defendant was in the company of his fourteen-year-old daughter at the time of this arrest. He had either allowed her to drive the car without a license and with little or no experience or he had lied about who had been driving the car. These are circumstances which would tend to justify a larger fine. Moreover, it was the duty of the defendant, as the appellant, to provide an adequate record on appeal. Otherwise, there is a presumption that the trial court ruled correctly. Tenn. R. App. P. 24(b); State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991). Because the transcript of the hearing on the motion to modify the fines is not a part of this record, it would be inappropriate for us to substitute our opinion for that of the trial court.

Accordingly, the judgment is affirmed.

_____
Gary R. Wade, Judge

CONCUR:

_____
John H. Peay, Judge

_____
Rex H. Ogle, Special Judge