IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER SESSION, l994

FILED

November 27, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE APPELLEE V. CATHY A. FIORITO APPELLANT	)	NO. 03C0l-940l-CR-00032 BLOUNT COUNTY HON. D. KELLY THOMAS, JR., JUDGE (DUI and Child Endangerment)

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AFFIRMED

OPINION FILED:_____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

The appellant was convicted of driving under the influence of an intoxicant, for which she received a sentence of eleven months and twenty-nine days in jail and a $500.00 fine. She was also convicted of child endangerment, for which she received a consecutive sentence of eleven months and twenty-nine days in jail and a $l,400.00 fine. She was ordered to serve five days for the DUI and forty days for endangering her child. After service of forty-five days, the balance of her sentence will be suspended. Much aggrieved by her convictions and resulting sentences, she has presented four issues on appeal.

In the first issue, she challenges the sufficiency of the convicting evidence.[1]

At about dusk on April l6, l993, Carlos Hess, Jr., a patrolman employed by the Maryville Police Department, observed an automobile being driven by the appellant. Mr. Hess was driving behind the appellant's car and noticed that she veered to the left across the double yellow lines in the center of the roadway. He further testified that "then directly after that, she went into the actual ditch line. Her right tires, passenger side, actually were in the ditch, in the grass area." Then "just almost instantly again" she crossed "over the double yellow line and then right into the ditch line." Upon seeing such obviously erratic driving, Mr. Hess turned on his blue lights and stopped the appellant. When he approached her car, he smelled the odor of alcohol coming from inside the vehicle and when she got out, he noticed the same odor about her. An opened twelve pack of beer was in the floorboard, with seven cans unopened. In addition to the appellant, there were two adult women and her young daughter in the vehicle. Just as she stopped, she handed the child across the seat from the front seat

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[1]The appellant's issue is framed as whether the verdict of the jury was supported by the "weight of the evidence." Appellate courts do not weigh evidence. We simply determine whether the evidence was sufficient to support the verdict.

where the child had been seated to the back seat where the child's restraint seat was located.

A blood test revealed that her blood alcohol level was .ll%. The horizontal gaze nystagmus test was administered to her twice, once by Mr. Hess and shortly thereafter by Philip Hood, a back-up officer. The test indicated that she was intoxicated.

The appellant testified in her own behalf, contending that she was not intoxicated, that she had been having coughing spells due to her bronchitis and that she had been taking Formula 44-D and Nyquil. At trial she testified that she had consumed one beer at about 2:00 P.M. The officer testified that she told him that she had consumed three beers. She also testified that her Nyquil consumption exceeded the suggested dosage and there was further proof that Nyquil contains alcohol.

A jury verdict of guilty, approved by the trial judge accredits the testimony of the state's witnesses and resolves all conflicts in favor of the theory of the state. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. l978). On appeal the state is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 57l S.W.2d 832, 835 (Tenn. l978).

There was ample, indeed overwhelming, evidence from which any rational trier of fact could conclude that the appellant was guilty of each of the charged offenses beyond a reasonable doubt. Rule l3(e), Tenn.R.App.P., Jackson v. Virginia. 443 U.S. 307, 3l4-324, 99 S.Ct. 278l, 2786-2792, 6l L.Ed.2d 560 (l979). This issue has no merit.

In the next issue the appellant contends that the trial judge erred by

allowing the introduction of testimony regarding her prior drug use. Mr. Hess, the arresting officer, testified that he took the appellant to the Blount Memorial Hospital to the blood laboratory for blood to be drawn. In response to the question, "Were you present when the blood was drawn," he testified:

> A. Yes, sir. They had difficulty drawing the blood because Ms. Fiorito advised me that she used to be, in the past, a drug user by needle. So, they had trouble finding a vein.

Defense counsel interposed with an objection, but the trial judge never ruled on the objection and the testimony proceeded on other subjects.

Later, during the cross-examination of the appellant, the following occurred:

> Q. Did you tell Officer Hess that you had been using drugs in your arms at the hospital?
>
> A. Do I have to answer this question?
>
> MR. MORTON: I just asked if she --
>
> MRS. HURLEY: Your Honor, I would object. It's extremely prejudicial and completely irrelevant.
>
> THE WITNESS: This is -- this is -- I mean, I --
>
> THE COURT: Wait a minute, wait just a second, Ms. Fiorito.
>
> THE WITNESS: Pardon me?
>
> THE COURT: Just a moment and let me rule on the objection first before you answer the question. Now go ahead.
>
> MS. HURLEY: I was just saying that what her past history may or may not have been is not only highly prejudicial, it's extremely irrelevant and doesn't have anything to do with it. That was my objection before and I object again to any questioning on it.
>
> MR. MORTON: It's been suggested that this was involuntary intoxication. I submit it's relevant on the voluntariness --
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> THE COURT: I sustain the objection. Whether or not -- the only thing that's relevant is what kind of intoxicant, if any, or drugs, if any, that she took this day. That's the only thing that makes any difference on this case.

It is clear that when the objection was interposed and pursued, the trial judge sustained the objection and he then told the jury that the only issue was what substances, if any, that she ingested that day.

Given the absolutely overwhelming evidence of the appellant's alcohol-induced impairment at the time of her arrest and the judge's statement, it is clear that testimony about her prior drug usage affected the jury in no way whatsoever. This issue has no merit.

In the next issue the appellant questions whether the trial judge erred by denying her requested jury instructions regarding involuntary intoxication.

The proposed instruction which appears only in the technical record deals with the defense of involuntary intoxication as a defense to crime. The instruction, drawn from T.P.I.--Crim. § 40.02 deals with the defense of involuntary intoxication as it relates to the formation of specific intent and other culpable mental states. Tenn. Code Ann. § 39-11-503(c).

The appellant was charged with driving while "under the influence" of an intoxicant. There is no culpable mental state required for guilt of DUI. The statute simply prohibits driving "while under the influence of any intoxicant," including medications. Tenn. Code Ann. § 55-l0-40l(a). The appellant's defense was that she was intoxicated by the medication which she voluntarily ingested, not by alcohol. She did not assert a defense of "involuntary intoxication" and the trial judge properly refused to give the requested charge to the jury. This issue has no merit.

Finally, the appellant questions whether the trial judge properly sentenced her to more than the minimum mandatory sentence on each charge. The record does not contain a transcript of the sentencing hearing, pre-sentence report or anything else for this Court to review concerning this issue. It is the responsibility of the appellant to have prepared a transcript of the relevant portions of the record concerning the issues that are the bases of appeal. Rule 24(b), Tenn.R.App.P. Since the appellant did not present us anything from which to review the sentence, there can be no review of the sentence and that issue is without merit.

Finding no merit to any of the issues, the judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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PENNY J. WHITE, JUDGE

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DAVID G. HAYES, JUDGE