IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1995 SESSION

FILED

October 4, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 03C01-9411-CR-00419
Appellee,	)
	) Jefferson County
V.	)
	) Hon. William R. Holt, Jr., Judge
	)
JACKIE HAROLD MESSAMORE,	) (Driving Under the Influence)
	)
Appellant.	)

FOR THE APPELLANT:

John E. Herbison
Attorney at Law
2016 Eighth Avenue South
Nashville, TN 37204

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Hunt S. Brown
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Alfred C. Schmutzer, Jr.
District Attorney General

James L. Gass
Asst. Dist. Attorney General
149 East Main Street
Dandridge, TN 37725

OPINION FILED: _____

REVERSED AND DISMISSED

PAUL G. SUMMERS,
Judge

O P I N I O N

A jury found Jackie Harold Messamore (defendant) guilty of driving under the influence of an intoxicant. The Circuit Court of Jefferson County entered judgment on the verdict and defendant appealed. The issues are 1) whether the statute of limitations bars prosecution of the defendant, 2) whether the state failed to prove venue, and 3) whether the state's reference to a missing witness during closing argument is reversible error.

We respectfully reverse the judgment of the trial court and dismiss the indictment.

STATUTE OF LIMITATIONS

The defendant contends that the state failed to commence prosecution within the limitations period. The state must commence prosecution for a misdemeanor within twelve months after the offense has been committed. T.C.A. § 40-2-102 (1990). The misdemeanor offense in this case occurred on December 17, 1992. The indictment was filed on January 3, 1994. The state contends that prosecution was "commenced" within the limitations period. A prosecution is commenced by finding an indictment or presentment, the issuing of a warrant, binding over the offender, or making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter. T.C.A. § 40-2-104 (1990); See State v. Kirk, 613 S.W.2d 485, 486 (Tenn. Crim. App. 1980). The defendant was bound over to the grand jury of Jefferson County on October 13, 1993. The arrest warrant in the record indicates that a continuance was granted three times before October 13, 1993. A bail bond was filed with the sessions court on the same date. Contrary to the defendant's contention, the state timely commenced prosecution of the defendant.

The defendant, however, further contends that we must reverse his conviction because the state failed to allege facts to "toll" the statute of limitations. We agree. The indictment indicates on its face that the statute of limitations has expired. "[W]here an indictment or presentment shows upon its face, or by stipulation, that the applicable statute of limitations has expired, the instrument must allege facts which demonstrate that the statute was tolled for a sufficient period of time to avoid the bar of the statute of limitations." State v. Davidson, 816 S.W.2d 316, 321 (Tenn. 1991). "[A]n indictment or presentment which fails to allege sufficient facts to toll the statute of limitations must be dismissed...." State v. Tidwell, 775 S.W.2d 379, 389 (Tenn. Crim. App. 1989). "When an indictment is brought after the period of limitations has expired, the specific facts which toll the statute of limitations must be pleaded and proved." State v. Hix, 696 S.W.2d 22, 25 (Tenn. Crim. App. 1984). In the case at bar, the defendant's appearance in court stopped the running of the statute because prosecution was commenced. If an indictment on its face indicates that the statute has expired, the state must allege the specific facts relied upon in order to avoid the statutory bar whether the statute is "tolled" or whether prosecution was commenced within the statutory period. See Hix, 696 S.W.2d 22 at 25; State v. Kennedy, No. 02C01-9207-CC-00168 (Tenn. Crim. App. Apr. 7, 1993); State v. Blystad, C.C.A. No. 89-64-III (Tenn. Crim. App. Sept. 22, 1989). Accordingly, we must reverse the judgment of the trial court and dismiss the indictment.

VENUE

The defendant also argues that the state failed to prove venue. We disagree. Venue is not an element of the offense which must be proved beyond a reasonable doubt; it is a jurisdictional fact which must be proved by a preponderance of the evidence. State v. Hutcherson, 790 S.W.2d 532, 533, 535 (Tenn. 1990). Venue may be shown by either direct or circumstantial evidence. See Id. at 533. A jury is entitled to draw a reasonable inference from proven

facts, including the issue of venue. Smith v. State, 607 S.W.2d 906, 907 (Tenn. Crim. App. 1980). There is sufficient evidence to support a finding by the jury that the offense occurred in Jefferson County. Randy Osborne testified that he is a paramedic with the Jefferson County Ambulance Service and that he provided services to the defendant at the scene of the accident. Osborne testified that he saw Trooper David Harbin at the scene. Trooper Harbin testified that he was on patrol in Jefferson County at the time of the accident.

MISSING WITNESS INFERENCE

The defendant also argues that the trial judge abused his discretion in allowing the state to argue the missing witness inference in closing argument. See State v. Francis, 669 S.W.2d 85 (Tenn. 1984). We find no error with the state's comments. In any event, any error in admitting the comments would be nonprejudicial because of the overwhelming evidence of guilt in this case. See T.R.A.P. 36(b). Both the paramedic at the scene and the state trooper who investigated the defendant's accident noted a strong odor of alcohol on the defendant. A witness testified that the defendant was intoxicated prior to the accident. Other evidence proved intoxication. Accordingly, this issue is without merit.

REVERSED AND DISMISSED

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PAUL G. SUMMERS, JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
WILLIAM M. BARKER, JUDGE