IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9504-CC-00118**
	)	
Appellee,	)	
	)	
	)	**MARSHALL COUNTY**
VS.	)	
	)	**HON. CHARLES LEE**
FARRIS JOHN HUNTER, III,	)	**JUDGE**
	)	
Appellant.	)	(DUI, Fourth Offense)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CIRCUIT COURT OF MARSHALL COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Defendant appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from his conviction of fourth offense of driving under the influence. He argues six issues in his appeal. We affirm the judgment of the trial court.

The Defendant argues these six issues in this appeal: (1) Whether the trial court erred in overruling his motion to continue the case; (2) whether the trial court erred in allowing the State to introduce into evidence a judgment from the City Court of Columbia, Tennessee; (3) whether the trial court erred in not allowing the defense to ask the clerk of court for the City of Columbia, Tennessee whether the judge for said court was an elected official; (4) whether the trial court erred by allowing the intoximeter testimony of the testing officer when he could not positively testify that he observed the Defendant for the requisite twenty (20) minutes; (5) whether the trial court erred in allowing the State to amend the indictment on the day of trial; and (6) whether the trial court erred in sentencing the Defendant to nine (9) months of incarceration.

On June 12, 1994 the Lewisburg Police Department received a call concerning a pick-up truck driving erratically in a liquor store parking lot that was located in an area frequented by the public. An officer was dispatched to the location. When the officer arrived, he saw the truck moving very slowly. The truck immediately stopped when the officer asked the Defendant to stop. When the Defendant stepped out of the vehicle, the officer smelled the strong odor of an intoxicant. The Defendant could not stand and had to support himself on the truck. The officer requested the Defendant's license and the Defendant produced a license which was for identification only. The officer administered some field sobriety tests and the Defendant did not pass them. The

officer transported the Defendant to the Marshall County jail, where an intoximeter test was administered. The Defendant registered .33 percent.

I.

The Defendant's first issue is whether the court erred in overruling the Defendant's motion to continue the case. We combine this issue with Defendant's fifth issue, whether the trial court erred in allowing the State to amend the indictment on the day of trial.

On October 6, the State moved to amend the indictment so that it read that the Defendant had a previous conviction for DUI in the Circuit Court in Franklin, Williamson County instead of the Circuit Court in Columbia, Maury County. The trial court granted the motion. On October 7, the Defendant filed a motion for a continuance. The trial court denied this motion. The trial took place as scheduled on October 10. The Defendant argues that he was not given enough time to attack the conviction with the amended court name, because he did not get a continuance.

Rule 7(b) of the Tennessee Rules of Criminal Procedure states, "If no additional or different offense is thereby charged and no substantial rights of the defendant are thereby prejudiced, the court may permit an amendment without the defendant's consent before jeopardy attaches." In State v. Beech, 744 S.W.2d 585 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1987), this court faced a similar situation. In Beech, the indictment for a DUI read that a prior DUI conviction occurred in Williamson County General Sessions Court when it should have read that it occurred in the Franklin City Court, Williamson County. Id. at 587. The trial court allowed the State to amend the indictment to include this change the day before the trial began. Id.

This court held that the changing of the court's name did not constitute an additional or different offense. Id. This court stated that the amended count "was in a supplementary count to give the notice of a prior DUI conviction (for penalty enhancement purpose)" and the charge before the court remained the same after the amendment was made. Id. We also held that the defendant in Beech was not prejudiced because the identity of the court was corrected and there was sufficient notice about the prior conviction. Id. at 588.

Therefore, the trial court properly allowed the amendment to the indictment.

The Defendant moved for a continuance so that he could collaterally attack his prior DUI convictions at this trial. The granting or denial of a continuance is a matter left to the sole discretion of the trial judge, whose decision will not be disturbed absent "a clear showing of gross abuse of this discretion to the prejudice of the defendant." Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1973). This court has previously stated that "[t]he only test is whether the defendant has been deprived of his rights and an injustice done." State v. Goodman, 643 S.W.2d 375, 378 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1982). In order to reverse the judgment of the trial judge, we must be convinced that the defendant "did not have a fair trial and that a different result would or might reasonably have been reached had there been a different disposition of the application for a continuance." Baxter, 503 S.W.2d at 230; accord Goodman, 643 S.W.2d at 378.

Defendant's counsel cannot argue in this case that he was prejudiced by the amendment of the indictment immediately before the trial because he knew about the Williamson County conviction. In an affidavit filed October 7, Defendant's counsel stated that he had contacted the Circuit Court of Williamson County. Counsel had obviously located the judgment for that conviction when he moved for the continuance.

Furthermore, his attacks of his prior DUI convictions would not have been successful because a Defendant cannot at trial collaterally attack a prior conviction used to enhance punishment. State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). Such an attack must be pursued through a post-conviction relief petition. Id.

The result would not likely have been different if the Defendant's motion for a continuance had been granted. Therefore, the trial court's denial of the motion for a continuance was proper.

This issue is without merit.

II.

For the next issue we combine the Defendant's second and third issues. The second issue is whether the trial court erred in allowing the State to introduce a certified copy of a judgment of the Columbia City Court and in not permitting the Defendant to question the Clerk of the Columbia Municipal Court about whether Columbia's Municipal Court Judges are elected.

The Defendant argues that he should have been allowed to attack prior DUI convictions entered in the Columbia City Court on the basis that the judge for the Municipal Court of Columbia is not elected as required by the Tennessee State Constitution. He argues that these convictions should not be used to enhance the punishment of the Defendant, relying on Town of South Carthage v. Barrett, 840 S.W.2d 895 (Tenn. 1992). These issues were recently resolved by our supreme court.

In Bankston v. State, 908 S.W.2d 194 (Tenn. 1995), the court held that if a Defendant did not challenge the jurisdiction of the municipal court either in that court

or on direct appeal, Town of South Carthage "does not apply." In Bankston, the court reasoned that "'disastrous consequences would follow if we were to automatically invalidate all acts of municipal judges not elected in accordance with the Tennessee Constitution: hundreds of otherwise valid convictions could potentially be nullified, and those defendants would have to be retried. This would put at risk settled rights, entail a substantial expense to the taxpayers of this state and place an additional load on our already overburdened judicial system." The court concluded that under the circumstances presented, the municipal court was acting as a de facto court at the time the convictions were entered.

Therefore, these issues are without merit.

III.

The third issue is whether the trial court erred in allowing the intoximeter testimony of the officers in question who could not positively testify as to observing the Defendant the requisite twenty minutes before administering the test.

In State v. Sensing, 843 S.W.2d 412 (Tenn. 1992), our supreme court held that an officer testifying concerning the results of a breath alcohol testing instrument must be able to testify to six requirements for the results of the test to be admissible. Id. at 416. One of these requirements is that the testing officer must be able to testify "that the motorist was observed for the requisite 20 minutes prior to the test, and during this period, he did not have foreign matter in his mouth, did not consume any alcoholic beverage, smoke, or regurgitate." Id. In State v. McCaslin, 894 S.W.2d 310 (Tenn. Crim. App. 1994), this court held that where an officer transported the defendant to the police station and then observed the defendant for sixteen minutes,the requisite twenty

minutes was not met because the officer could not conclusively testify that the defendant did not regurgitate in the back seat of the police car. Id. at 311.

There is only a summary of the evidence in the case sub judice because there is no transcript of the trial. The arresting officer did not administer the breath alcohol test. Another officer was called as backup at the scene and administered the test at the station. The testing officer testified that he observed the Defendant for fifteen minutes at the station before he administered the test. He stated that he typically waits twenty minutes, but he was taught that ten minutes is a sufficient amount of time. The arresting officer testified that after arresting the Defendant at the scene and transporting him to the station, he observed the Defendant for twenty minutes in the booking room and ten additional minutes in the intoximeter room. The arresting officer then testified that "he observed the Defendant for thirty (30) minutes before the breath test to insure that the Defendant had not regurgitated, belched, etc."

The summary of the evidence demonstrates that the arresting officer observed the Defendant for thirty minutes prior to the breath alcohol test being administered. We conclude that this testimony provided a sufficient basis to allow the results of the breath alcohol test to be admitted. Even though the testing officer could not testify that the motorist was observed for the requisite twenty minutes, we believe that this requirement of Sensing was satisfied by the testimony of the arresting officer.

Therefore, this issue is without merit.

IV.

The last issue is whether the trial court erred in sentencing the Defendant to serve nine months. When an accused challenges the length, range, or the manner of

service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

In conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 785 (Tenn. Crim. App. 1991).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory but the court is required to provide the Defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). The sentence must be specific and consistent with the purposes and principles of the

Criminal Sentencing Reform Act of 1989. Tenn. Code Ann. § 40-35-302(b). The trial court retains the authority to place the Defendant on probation either immediately or after a period of continuous confinement. Tenn. Code Ann. § 40-35-302(e). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. One convicted of a misdemeanor, unlike one convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

The range of punishment for a third or subsequent DUI conviction is from 120 days to eleven months and twenty-nine days in the county jail or workhouse. Tenn. Code Ann. § 55-10-403(a)(1). The Defendant was sentenced to eleven months and twenty-nine days, nine months of which was to be served in confinement. The trial court found that there were two enhancement factors and no mitigating factors. The two enhancing factors were that the Defendant had a previous history of criminal behavior in addition to that necessary to establish the appropriate range and that the Defendant had no hesitation of committing a crime where the risk to human life was high.

We agree with the trial judge that the first enhancement factor applies. There was a history of criminal behavior in that the Defendant had three prior DUI convictions. This is one conviction in addition to the two needed to enhance the minimum punishment to 120 days. He was also charged with driving on a revoked license at the time of his Williamson County DUI conviction. However, we conclude that the record does not support the second enhancement factor. The Defendant was discovered

driving in a parking lot. There is no proof summarized in the statement of the evidence to establish a higher risk to human life than exists in every DUI.

Even though the second enhancement factor is not supported by the record, we cannot conclude that the trial judge erred or abused his discretion in sentencing the Defendant to serve nine months for a fourth offense DUI.

Therefore,this issue is without merit.

We affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
GARY R. WADE, JUDGE

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ROBERT E. CORLEW, III, SPECIAL JUDGE