

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1996

**FILED**  
April 3, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

WARNER D. BRANNON, )

Appellant. )

C.C.A. NO. 03001-9508-CR-00233

KNOX COUNTY

HON. RAY L. JENKINS  
JUDGE

(DUI)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF KNOX COUNTY

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant, Warner Brannon, appeals as of right from a jury verdict convicting him of driving under the influence. The jury fined the Defendant five hundred dollars, and the trial court sentenced him to eleven months and twenty-nine days in confinement with all but fifteen days suspended. The Defendant now appeals his conviction and his sentence. We affirm the judgment of the trial court.

The Defendant brings the following issues for our review: (1) That the evidence is not sufficient to support a conviction for DUI beyond a reasonable doubt; (2) that the trial court erred in allowing the District Attorney in his closing argument to argue that the Defendant did not call exculpatory witnesses to testify during the trial, thereby giving the jury the impression that the Defendant had the burden of proof; and (3) that the Defendant's sentence of fifteen days was excessive.

About two a.m. on the morning of May 7, 1993, the Defendant was returning to his home in Knoxville after leaving a local bar. Two officers from the Knox County Sheriff's Department, Darrell Wheat and Charles Vance, saw the Defendant's white van weave across the solid yellow line numerous times. The van was traveling fifty-five miles per hour in a forty-mile-per-hour speed zone. Officer Wheat followed the Defendant for approximately a quarter mile, then turned on the blue lights and signaled the Defendant to pull over.

The Defendant pulled over on the shoulder, got out of his vehicle and walked towards the officers. Both officers testified that the Defendant apparently had no trouble removing his license from his wallet, but that he appeared to have trouble maintaining his balance as he walked toward them. The officers also testified that the Defendant smelled of alcohol and his speech was slurred. The Defendant told the officers that he had consumed three beers.

Officer Wheat then asked the Defendant to take three sobriety tests. In the first test, the heel-to-toe walk, Officer Wheat explained that the Defendant should take nine steps forward touching his heel to his toes while looking down and counting out loud. The Defendant was then to pivot and take nine steps back to his original position, again while touching heel to toe. Officer Wheat testified that the Defendant failed this test by raising his arms several times to maintain balance, taking ten steps instead of nine, and starting the test before being told to do so.

The Defendant also did not pass the second test, the "lift-the-leg test," in which he was to stand with his hands down and feet together then lift one foot six inches off the ground, look at his toe, and count to three. During the test, the Defendant dropped his foot to maintain his balance and raised his arms to keep from swaying.

The officer last administered the "horizontal gaze nystagmus" test. In this test, the suspect is to stand with his feet together and his arms by his side. The officer holds a pen above the suspect's head and has him touch the tip of the pen. Then, while holding his head still, the suspect is to follow the movement of

the pen with his eyes only. Officer Wheat testified that if a suspect is under the influence of alcohol or a narcotic, his eyes will "jiggle" or reflex sideways. The officer testified that the Defendant failed to keep his head still and move only his eyes and that his eyes jiggled, indicating that he was under the influence of alcohol.

After the Defendant failed the field sobriety tests, the officers concluded that he was driving while under the influence of alcohol and arrested him. Officer Wheat then tried to administer a breathalyzer test to the Defendant. The Defendant refused the test. Officer Wheat then read the Implied Consent law to the Defendant, explaining that failure to take the test could result in a one-year suspension of driving privileges in Tennessee. The Defendant again refused to take the breathalyzer test, but said that he would take a blood test to determine his blood alcohol level. A blood test was not taken.

The Defendant first argues that the evidence is not sufficient to sustain a conviction for DUI beyond a reasonable doubt.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (Tenn. 1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

The Defendant contends that the most damaging evidence sustaining his conviction was his failure to satisfactorily pass the three field sobriety tests. He argues that these tests were not reliable evidence because they were not properly administered. Specifically, he argues that the part of the road on which the police stopped him was under construction and was not level. The Defendant contends that the first two tests, which basically gauged balance and coordination, were performed on a part of the road that had a fifteen to twenty degree slope and was cluttered with gravel. Thus, these impediments hindered his balance and coordination. He also contends that the flashing lights and floodlights from the police car interfered with the horizontal gaze nystagmus test.

The Defendant testified that he had consumed three beers in the course of the evening, one with dinner, and two later at a local bar where he was playing darts. Although the Defendant contends that he was not driving erratically, the two police officers testified that they saw him veer across the center line numerous times while exceeding the speed limit. The officers testified that the Defendant smelled of alcohol, had slurred speech, and apparently had trouble maintaining his balance when walking toward the police car.

Both officers testified that although the area in which the tests were given was under construction, the gravel was sparse and the slope of the shoulder was not enough to affect the outcome of these tests. Officer Vance also testified that Officer Wheat informed the Defendant before taking the test that he could move to which ever side of the shoulder he wanted to take the tests. The Defendant did not at any time object to the conditions of the three field sobriety tests. Officer Wheat also testified that the horizontal gaze nystagmus test is commonly

performed in the presence of the police car lights with no adverse effects on the result.

The jury as the trier of fact determines the credibility of witnesses and the determination of factual issues. The jury obviously accredited the testimony of the two arresting officers and resolved the conflicting testimony in favor of the State. The evidence in the record supports their conclusion, and the Defendant has not met his burden of illustrating that the evidence shows otherwise. Therefore, we conclude that the evidence is sufficient to support the conviction of DUI beyond a reasonable doubt.

The Defendant next argues that the trial court erred by allowing the State, during the closing argument, to comment on the Defendant's failure to call certain missing witnesses to testify on his behalf.

The Defendant testified that a friend had been playing darts with him on the night that he was arrested. After his arrest, an ex-girlfriend arrived on the scene where the Defendant was being stopped. The Defendant did not call either of these witnesses to testify at trial. The State commented on the Defendant's failure to call these witnesses to substantiate his testimony that he was not intoxicated and had only had three beers during the course of the evening. Defense counsel objected to the prosecutor's comment, but the trial court overruled that objection stating that "the State has the right to argue the facts and the logical inferences therefrom."

The Defendant claims that the trial court erred by allowing this comment over his objection and that such a comment shifted the burden of proof to the defense. A prosecutor may sometimes be allowed to comment on the failure of a defendant to call an available and material witness whose testimony would ordinarily be expected to favor that defendant. State v. Francis, 669 S.W.2d 85, 88 (Tenn. 1984). If a party has the ability to produce a witness whose testimony would be material to an issue, the fact that he does not do so creates a permissive inference for the jury that the testimony may have been unfavorable. Id. at 88; see State v. Jones, 598 S.W.2d 209, 224 (Tenn. 1980); State v. Philpott, 882 S.W.2d 394, 407 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

Three factors, first espoused in Delk v. State, 590 S.W.2d 435, 440 (Tenn. 1979), must be established in the record before a party can comment on a missing witness: (1) The witness must have knowledge of material facts; (2) a relationship exists between the witness and the party that would naturally incline the witness to favor the party; and (3) the missing witness was available to the process of the court for the trial. Id. Additionally, the prosecutor must get an advance ruling from the trial judge before arguing the adverse witness inference. Francis, 669 S.W.2d at 90.

In the case sub judice, the record does not indicate that all three Delk requirements were met. Nor does the record show that the prosecution sought an advance ruling from the court that he could argue the missing witness instruction. Although the record tenuously establishes that factors one and two were satisfied for each witness, neither witness was proven to be within the



court's jurisdiction for service of process. Because the requirements outlined in Delk and Francis were not met, we conclude that the trial court erred in allowing the prosecutor to comment on the Defendant's refusal to call the two witnesses. To so argue was prosecutorial misconduct.

Upon concluding that the trial court erred in allowing the prosecutor to argue the missing witness inference to the jury, we must now determine whether the error resulted in prejudice to the Defendant. In Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976), this court set forth five factors to determine whether prosecutorial misconduct during the closing argument prejudiced the defendant or was harmless beyond a reasonable doubt. These factors are:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Id.

The record reflects that the only improper comments made by the prosecutor during closing arguments related to the missing witness inference. Because the comments were improper, the trial judge should have instructed the jury to disregard that part of the State's argument. However, the State's reference to the missing witnesses was not repeated or extensive, nor did the

prosecutor make any other improper comments. The prosecutor did not appear to be intentionally trying to unfairly prejudice the Defendant.

Although the judge overruled the Defendant's objections, we do not know if he took any curative measures in instructing the jury because the judge's charge to the jury was not transcribed in the record on appeal. The party who brings an appeal has a duty to prepare an adequate and complete record to allow meaningful review of the issue. T.R.A.P. 24(b); State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). The judge did explain to the jury before closing arguments that the State had the burden of proof beyond a reasonable doubt. In the absence of the jury instructions in the record, we must presume that the trial court fully and accurately instructed the jury on the burden of proof of each party and the difference between evidence and argument. We, thus, cannot conclude that the comment in any way shifted the burden of proof from the State to the Defendant.

The record does not reflect other errors or misconduct that would unfairly prejudice the Defendant. Based on the strength of the State's case against the Defendant, we cannot conclude that the prosecutor's comment on the missing witnesses unfairly affected the verdict. Therefore, we hold that although the comment was improper, this error was harmless beyond a reasonable doubt. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

Finally, the Defendant contends that the sentence imposed by the trial court was excessive. The trial court imposed a \$500 fine and sentenced the Defendant to serve eleven months and twenty-nine days in confinement, with all

but fifteen days of the sentence suspended. The court further explained that the Defendant had the option to serve the fifteen days on weekends.

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).

The minimum sentence for a first offense DUI is forty-eight hours in confinement and a three hundred and fifty dollar fine. The maximum sentence is confinement for eleven months and twenty-nine days and a fine of fifteen hundred dollars. The Defendant argues that his jail sentence should have been suspended, except for the mandatory minimum sentence of forty-eight hours, and probation granted.

As a basis for his argument, the Defendant contends that the court found no enhancement factors, but made his ruling based on the Defendant's failure to pass the sobriety tests and his refusal to take the breathalyzer test. The Defendant submits that the record shows that he was only affected by alcohol by a slight degree and his driving posed no threat to other motorists. The Defendant also contends that he had no prior criminal record and had a steady employment record, thus only the minimum sentence should have been imposed.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides in part that the trial court shall impose a sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. In determining the correct sentence, the trial court should examine the case in the light of the nature and character of the offense. State v. Gilboy, 857 S.W.2d 884, 889 (Tenn. Crim. App. 1993).

Apparently no presentence report was included in the record on appeal. The record does show that the Defendant had no prior record and was employed at the time of the offense and at the time of the sentencing hearing. However, the misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1994).

Contrary to the Defendant's assertions, he was more than minimally impaired. He was speeding, driving across the center line, smelled of alcohol, and failed to pass three sobriety tests. Fortuitously for the Defendant, the circumstances were not particularly aggravated here; however, they are serious enough to be a contributing factor in the trial court's decision to order the fifteen-day period of confinement. In light of the need to protect society from impaired drivers and to deter others from driving while intoxicated, we cannot conclude that the trial court erred in ordering a sentence greater than the minimum forty-eight hours mandated by the statute.

Based on this record, we cannot conclude that the trial judge erred or abused his discretion in requiring the Defendant to serve fifteen days of incarceration. The judgment of the trial court is, therefore, affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOE B. JONES, PRESIDING JUDGE

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JOHN H. PEAY, JUDGE