IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1995 SESSION

STATE OF TENNESSEE,	)	NO. 02C01-9410-CC-00248
	)	
Appellee	)	McNAIRY COUNTY
	)	
V.	)	HON. JOSEPH H. WALKER, III
	)	JUDGE
BRIAN K. CASS,	)	
	)	(D.U.I.)
Appellant	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

On September 28, 1994, the appellant, Brian K. Cass, was convicted by a McNairy County jury of the offense of driving under the influence of an intoxicant. The jury assessed a $500.00 fine against the appellant, and the trial court sentenced him to eleven months and twenty-nine days, with all but six days in jail suspended. The appellant, proceeding *pro se*, has filed this appeal alleging a multitude of trial court errors, some of which he contends are of constitutional proportions. Specifically, he contends that he was subjected to an invalid search and seizure at the time of his arrest; that he was unconstitutionally denied the right of counsel; that he was denied his right to compulsory process; and that he was denied his constitutional right to a fair and impartial jury. Additionally, the appellant contends that the trial judge and the district attorney general and her assistants had no authority to try and prosecute him for the offense charged; that the grand jury indictment against him was defective; and that the petit jury hearing the case was unlawfully constituted.

Following our review of the record in this case, we find no reversible error and affirm the judgment of the trial court.

Although the record on appeal contains voluminous motions, affidavits, briefs, written arguments, and other material, much of which is unintelligible, the record fails to include a transcript of the trial court testimony. Instead, a statement of the evidence was approved by the trial court and made part of the record pursuant to Rule 24 of the Rules of Appellate Procedure.

According to the statement of the evidence, the appellant was observed by Officer Johnny Williams of the Adamsville Police Department on January 30, 1994, after midnight, operating a motor vehicle at an excessive rate of speed within the corporate limits of the City of Adamsville. Williams testified that he drove his patrol car behind the speeding vehicle, engaged the blue lights on his patrol car, but the speeding vehicle failed to stop. Thereafter, Williams engaged his siren but again the speeding vehicle did not stop. After the speeding vehicle had proceeded outside the

city limits of Adamsville and had passed a vehicle traveling in the same direction, it finally stopped. Officer Williams determined that the appellant was the driver of the vehicle he had pursued. No other persons were in the vehicle. The officer asked the appellant to step out of the vehicle and to produce his driver's license. At that time the officer smelled a strong odor of alcoholic beverage on the appellant, observed beer in the appellant's automobile, including an open container of beer. The officer touched the open container of beer and found that it was still cool. Thereafter, the appellant was given a field sobriety test, including the one-leg-stand test and the horizontal gaze nystagmus, both of which the appellant failed. At that time the officer placed the appellant under arrest for driving under the influence and transported him to the Adamsville City Hall, where the appellant consented to take a breathalyser test. The officer testified that prior to administering the breathalyser test to the appellant, he observed the appellant in excess of twenty minutes and that during that time the appellant did not have any other drinks, smoke, chew gum, regurgitate, or do anything that would affect the test results. The officer testified that he had received training with the T.B.I. and was certified to administer a breathalyser test using the Intoximeter 3000 machine. The test was performed in accordance with the standards and operating procedures promulgated by the Forensic Service Division of the T.B.I. The testing instrument used was certified by the Forensic Services Division, was tested regularly for accuracy, and was working properly when the breath test was performed. The machine had been certified in November 1993, and again in March 1994, and was found to be in good working order both times. No maintenance had been performed on the machine between those tests, and the machine was working properly. The results of the breathalyser test indicated that the appellant had a blood alcohol level of .25 percent. No other witnesses testified at the trial, and the jury convicted the appellant for the offense of driving under the influence based upon the foregoing evidence.

The appellant failed to file a motion for a new trial following his conviction. Rule 3(e) of the Tennessee Rules of Appellate Procedure provides:

> . . . that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.

Although the appellant is representing himself and is not a licensed and practicing attorney, he is nevertheless required to abide by the rules of appellate procedure in connection with his appeal. Therefore, those issues raised by the appellant on appeal which do not involve constitutional claims are waived. However, we elect to address the constitutional issues raised by the appellant since the protection of an accused's constitutional rights goes to the very heart of our judicial system.

The appellant contends that his Fourth Amendment right to be free from unreasonable searches and seizures was violated when the officer stopped him, searched his car, and seized an open container of beer from his car. In support of this contention, the appellant argues that the officer had not taken an oath of office as required by law, failed to activate his siren prior to the stop, and that his search of the appellant's automobile was unreasonable because it was conducted without a warrant. Rule 12(b)(3) of the Tennessee Rules of Criminal Procedure requires that a motion to suppress illegally obtained evidence be filed and heard prior to trial. The record in this case does not show that the appellant filed such a motion or that a suppression hearing was requested or conducted prior to trial. Therefore, the appellant has waived this issue. See State v. Burton, 751 S.W.2d 440 (Tenn. Crim. App. 1988), and State v. McCray, 614 S.W.2d 90 (Tenn. Crim. App. 1981). Nevertheless, we address the appellant's issue on the merits and conclude that the record does not support the appellant's position.

First, the record does not affirmatively show that the arresting officer had failed to take his oath of office. Assuming, arguendo, that the officer had not taken an oath of office, we know of no rule of law which would have prevented him from effectuating the stop. Moreover, the only evidence introduced at trial was the testimony of the arresting officer, who testified that he did activate his siren. Further, from the testimony of the officer, it is apparent that the open container of beer was in plain view. Under these circumstances a search warrant was not required and no Fourth Amendment violation occurred.

Next, the appellant complains that he was denied "his constitutional right to the counsel of his choice." In that regard, the record in this case indicates that early on in the proceedings against him, the appellant filed an affidavit of indigency. In his sworn affidavit, the appellant took the position that, because of a faulty and unlawful monetary system in effect in the United States, no real money is presently in circulation. Therefore, he maintained the view that he, along with every other American citizen, is a pauper. The trial court made no finding of indigency. Even if the appellant were indigent, however, the Constitution does not afford him the right to be represented by the counsel "of his choice" at state expense. Nevertheless, the appellant requested of the trial court that he be allowed to be represented by a resident of DeSoto County, Mississippi, who did not possess a law license to practice in Tennessee, but who held himself out to be a "trader in the common law." The appellant had executed a durable power of attorney authorizing that person to represent him in this matter. The trial court wisely refused to allow an unlicensed person to practice law in the State of Tennessee. See Tenn. Code Ann. § 39-16-302 (1991 Repl.). This issue is without merit.

Next, the appellant argues that the indictment returned against him was defective because the grand jury was unlawfully constituted and because the district attorney general and her assistants appeared before the grand jury without proper

oaths of office. This claim is without merit. There is absolutely no proof in the record showing any unlawfully constituted grand jury. Also, there is nothing in the record as to who appeared before the grand jury, with the exception of Officer Johnny Williams, whose name appears as a witness on the indictment. Further, the appellant's argument that the district attorney general acted without authority of law in prosecuting him since she had no oath of office is ludicrous. Not only does the record fail to establish such a claim, it affirmatively appears in the record that the district attorney general who prosecuted this case was properly administered her oath of office by a member of this Court.

The appellant next contends that he was denied his constitutionally guaranteed right to a fair and impartial jury. There is not one shred of evidence in the record regarding the composition of the petit jury. The record contains only bald assertions of bias in the appellant's brief and affidavits. The statement of evidence filed in this case in lieu of a trial transcript contains no record of the *voir dire*, the challenges, if any, concerning any prospective jurors, or any showing that the jury pool was in any way constitutionally infirm. This issue is without merit.

The appellant also contends that the trial court improperly denied him relevant discoverable material, which he contends was set forth on numerous subpoenas duces tecum which were quashed by the trial court. In this appeal, however, the appellant does not specify what discoverable material he was denied, and without a specific allegation, this Court cannot determine what material he claims he was denied. Accordingly, the appellant has waived this issue.

Although we are uncertain, we assume that the appellant is also challenging the sufficiency of the convicting evidence based upon his issue presented on appeal which reads:

> 3. Did the Trial court err in allowing Evidence from the 'Arrest Report' and 'Arrest Warrant' in this case, which set forth the first time that the arresting officer observed this Appellant at 1:20 a.m. and then the court allowed an

> Intoximeter 3000 printout tape to be admitted into Evidence, with the time on the said tape of testing at 1:04 a.m. and 1:05 a.m., which was 15 to 16 minutes **before** the arresting officer first observed this Appellant on Hwy 117 South which was testified to by the officer and marked as Evidence, which is part of this Record?

Again, since no motion for a new trial was filed, which would have afforded the trial court the opportunity to correct any alleged errors made in the prosecution of this case, this issue has been waived on appeal. Although waived, we have nevertheless reviewed the record and conclude that the convicting evidence was overwhelming. See Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); T.R.A.P. 13(e). This issue is without merit.

In addition to contending that the prosecuting attorney acted without legal authority by failing to have taken an oath of office, the appellant likewise challenges the legal authority of the trial judge for the same reason. In essence, the appellant argues that Tennessee law requires that a member of the state judiciary take a prescribed oath of office, and that a copy of that oath be maintained in the office of the Secretary of State in Nashville, Tennessee. He contends, by way of affidavit, that he and members of his family have checked with the office of Secretary of State and have been advised that no oath of office for Judge Walker is of record at that location. Moreover, he also contends that the entire trial jury and the entire grand jury were likewise without proper oaths of office. The appellant has waived this issue by failing to make a single citation to the record as required by Rule 10(b) of the Rules of the Court of Criminal Appeals. As previously noted, the appellant has also waived this issue for failing to file a motion for new trial. See T.R.A.P. 3(e).

Finally, the appellant contends that he was denied his constitutionally guaranteed right of compulsory process by the action of the trial court in quashing certain subpoenas filed by the appellant. We conclude that this issue is without merit. As the State correctly points out in its brief, the Sixth Amendment constitutional right to

the compulsory attendance of witnesses is not an unlimited right. State v. Smith, 639 S.W.2d 677 (Tenn. Crim. App. 1982). If the court concludes that the testimony of a witness sought to be subpoenaed would be inadmissible at trial, the court is not required to issue the subpoena. Smith at 680. In this case the trial court, on its own motion, found that many of the subpoenas duces tecum sought to be issued by the appellant were for persons and things which were irrelevant to the guilt or innocence or punishment of the appellant. For example, the appellant sought to subpoena Betty Henry, foreman of the McNairy County Grand Jury, to appear at trial and bring with her the minutes of the grand jury's action with regard to the indictment in this case. Whether or not the indictment was valid would have been a question of law for the trial court, not for the jury, and accordingly, should have been addressed by the court in a pretrial motion. Tenn. R. Crim. P. 12(b)(2). Similarly, the appellant sought to issue subpoenas upon the district attorney general, all of her assistants, and the trial judge himself to appear at trial and bring with them a copy of their membership with the Tennessee Bar Association, the Tennessee Bar Association Corporate Charter, and/or other certified copies of their oaths of office. Clearly, such evidence was immaterial to any issue at trial.

The appellant also sought to subpoena two city commissioners for the City of Adamsville to bring with them records so as to be prepared to respond to questions concerning the amount of taxpayers' money allocated for funding of the Adamsville Police Department for a year, the amount of revenue taken in by the Adamsville Police Department, and to produce certified copies of their oaths of office. We agree with the trial court that such evidence was immaterial and irrelevant.

The appellant also sought to subpoena Arzo Carson, former director of the Tennessee Bureau of Investigation. The subpoena directed him to bring records reflecting his education and qualifications and to be prepared to discuss how instructors are taught to use every intoximeter and simulator in the State of Tennessee

for the prior five-year period. Again, the subpoena called for immaterial evidence. Finally, in an apparent effort to secure expert testimony at no cost, the appellant issued a subpoena to John C. Buckingham, Jr., president of Intoximeters, Inc., and a resident of St. Louis Missouri, together with Jack Singleton, area representative for that company, and a resident of Knoxville, Tennessee, to each bring with them records and materials so as to be prepared to testify regarding the use of any scientific instrument for the testing of the presence of alcohol in individuals.

It is clear that the trial court acted properly in quashing the foregoing subpoenas, and that the appellant's constitutional right to compulsory process was not violated.

Having reviewed the entire record in this cause and considered each of the issues raised by the appellant, we find that no reversible error has occurred in this cause, and the judgment of the trial court is affirmed.

WILLIAM M. BARKER

CONCUR:

JOE B JONES, PRESIDING JUDGE

(Not participating)

PAUL G. SUMMERS, JUDGE