IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED

May 2, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9506-CR-00174**
Appellee,	)	
	)	**BLOUNT COUNTY**
VS.	)	
	)	**HON. D. KELLY THOMAS, JR. , JUDGE**
PAUL E. CEBULA,	)	
	)	
Appellant.	)	(DUI; sentencing)

FOR THE APPELLANT:

MACK GARNER
Public Defender

NATALEE STAATS HURLEY
Asst. Public Defender
318 Court St.
Maryville, TN 37801

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELIZABETH T. RYAN
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

MIKE FLYNN
District Attorney General

CHARLES CARPENTER
Asst. District Attorney General
363 Court St.
Maryville, TN 37804

OPINION FILED:____________________

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was charged with driving under the influence of an intoxicant (DUI) on May 25, 1994. The defendant waived indictment and jury trial and pled not guilty. The General Sessions Court found the defendant guilty, and he appealed to the Circuit Court of Blount County, demanding a jury trial. The defendant was subsequently convicted by a jury of DUI. The trial court sentenced the defendant to eleven months, twenty-nine days, all suspended but ten days, plus a one thousand dollar ($1,000) fine imposed by the jury.

The defendant appeals, claiming the evidence was insufficient to support his conviction and that his sentence is excessive. We find no merit to either of the defendant's grounds for appeal and affirm the judgment below.

At about 11:00 p.m. on May, 24, 1994, Officer Steve Blankenship of the Blount County Sheriff's Department responded to an accident on Cold Springs Road in Blount County.[1] Upon arriving on the scene, the officer found a severely damaged vehicle "sitting in a back driveway to a house there." Two people, one of whom was lying on the ground, were outside the vehicle. There was also a third person, whom Officer Blankenship assumed to be a neighbor, talking to the other two people. One of the two people whom Officer Blankenship determined to have been in the car was the defendant.

Officer Blankenship testified that "I asked [the defendant] what had happened. He said: I was driving up the road, and a tree jumped out in front of me." On further questioning by the officer, the defendant began complaining of chest pains. The

[1]The transcript of the trial recites the location of the accident as "Coal Springs Road." However, the warrant sworn out by Officer Blankenship recites the location as "Cold Springs Road."

officer called for an ambulance and the defendant, who was "combative with the ambulance personnel" according to Officer Blankenship, was placed in the ambulance. As the officer followed the ambulance on the way to the hospital, the ambulance stopped. According to Officer Blankenship, "[o]ne of the ambulance attendants got out and said: I'm not going to take him threatening and cursing me." Officer Blankenship then spoke with the defendant, explaining to him that he was in an ambulance on the way to the hospital. Officer Blankenship testified that, upon hearing this, the defendant had said, "Oh, you mean I'm in an ambulance? And I said: Yes, sir. He said: Well, the reason I was upset, I thought I was in the back of a police car."

The defendant was then transported to the hospital. He refused to submit to a blood alcohol test. Officer Blankenship arrested the defendant for driving under the influence of an intoxicant. The defendant remained at the hospital, which called Officer Blankenship when it was time for the defendant to be released.

Officer Blankenship also testified that he had noticed a "strong odor of alcoholic beverage" while he was speaking with the defendant, that the defendant had been very unsteady on his feet, and that his eyes had appeared bloodshot. He also testified that, prior to the ambulance arriving, the defendant had become "belligerent on several occasions." Officer Scott Johnson, who assisted at the scene of the accident, also testified that in his opinion the defendant had been "definitely intoxicated."

In support of his contention that the evidence is insufficient to support his conviction, the defendant claims that the State offered no proof that he had been driving the car. Apparently, the defendant chooses to ignore Officer Blankenship's testimony about the defendant's own statement at the scene of the accident. This contention is

wholly without merit.

The defendant also seems to complain, although unclearly, that there was insufficient proof of his intoxication, apparently claiming that his inability to tell the difference between a police car and an ambulance stemmed from the disorientation caused by his injuries in the accident. However, Officer Blankenship also testified about the strong odor of alcohol he noticed about the defendant's person, his belligerence, his unsteadiness on his feet, and his bloodshot eyes. The defendant offered no expert proof at trial that any of these symptoms were caused by the defendant's medical condition at the time. This evidence was more than sufficient to support a finding of intoxication.

In the defendant's second issue, he complains that his sentence is excessive, specifically that his period of incarceration should have been forty-eight hours. Forty-eight hours is the minimum period of incarceration for a DUI, first offense. T.C.A. § 55-10-403. The defendant was sentenced to ten days incarceration.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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 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. 1994).

However, in determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

In sentencing the defendant, the trial court found, "In this case, there was extensive property damage to the vehicle that Mr. Cebula was driving. There was a bad wreck that sent two people away from the scene in an ambulance. This is certainly a far cry from the least serious, or minimum, driving under the influence case based on the proof that I've heard here today." Thus, the trial court found the existence of two statutory enhancing factors: (1) that the amount of damage to property sustained by a victim was great, and (2) that the potential for bodily injury was great. T.C.A. § 40-35-114(6), (16).

As noted by the State in its brief, there was no evidence presented at the trial about who owned the vehicle that was involved in the accident. Hence, there is no way to determine whether there was any "victim" with respect to this property damage. The trial court erred in relying on this enhancement factor.[2] However, the trial court was correct in finding the other enhancement factor: that the potential for bodily injury was great. This automobile accident sent two people to the hospital in an ambulance. This enhancement factor alone justifies the ten day incarceration.

The defendant's complaint about his sentence is without merit. The judgment below is affirmed.

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[2]We note, though, that the defendant swore that he had no property, including cars, in his "Uniform Affidavit of Indigency" signed just six days after the accident. This Affidavit lends credence to the trial judge's reliance on this enhancement factor. Moreover, there may be additional evidence regarding this issue in the presentence investigation report which was apparently prepared in this case, but not included in the record on appeal despite the defendant's request therefor.

JOHN H. PEAY, Judge

CONCUR:

DAVID G. HAYES, Judge

WILLIAM M. BARKER, Judge