IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1996 SESSION

FILED

April 18, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9503-CR-00114**
Appellee,	)	
	)	**WASHINGTON COUNTY**
VS.	)	
	)	**HON. ARDEN L. HILL ,**
BILLY PAUL MOTTERN,	)	**JUDGE**
	)	
Appellant.	)	(Driving Under the Influence)

FOR THE APPELLANT:

STEVE FANDUZZ
(At Trial)

STEVE JOHNSON
1113 Sunset Dr.
Johnson City, TN 37601
(At Sentencing and
New Trial Motion)

JACK D. HODGES
205 West Walnut St.
Johnson City, TN 37604
(On Appeal)

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

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

DAVID CROCKETT
District Attorney General

KENT GARLAND
Asst. District Attorney General
P. O. Box 38
Jonesborough, TN 37659

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was convicted at a jury trial of driving under the influence of an intoxicant (DUI), third offense. He received a sentence of eleven months and twenty-nine days and a fine of five thousand dollars ($5,000) for this conviction. In this appeal he contests only his conviction, presenting three issues. In his first issue he contends that there was not "reasonable suspicion" for the officer to make a traffic stop. In his second issue he contends that the evidence to support his conviction was insufficient, and in his final issue he contends that the trial judge erred in sending the court reporter on errands during the showing of video evidence to the jury. After a review of the record in this cause, the judgment below is affirmed.

Officer Michael Templeton of the Johnson City Police Department testified on behalf of the State. This officer had received training at the Tennessee Police Academy which included "DUI detection" and had made "many" stops and arrests for DUI. He testified that at 11:53 p.m. the left turn signal on a vehicle that had just turned left remained on for a long period of time. When he followed, the driver accelerated. He further testified that, although the speed limit was thirty miles per hour, the defendant's vehicle had reached speeds of forty-seven miles per hour on a very curvy road. He stated that the driver's side wheels had crossed the double yellow lines, and that both passenger side wheels had gone into the gravel on a curve and the vehicle had almost struck a guardrail. Officer Templeton also testified that, after he had arrived at a safe area and stopped the defendant, the defendant had immediately exited his vehicle and started toward the officer's vehicle. Officer Templeton further stated that the defendant had been noticeably unstable on his feet, that he had swayed slightly and had a strong odor of alcohol about his person. He quoted the defendant as having insisted that he

(the defendant) be given a break and that he had only consumed a couple of drinks at a local hotel.

Officer Templeton testified that the defendant had not complained of any foot or leg problems, that he had failed three field sobriety tests, and that the horizontal gaze nystagmus test had indicated an impairment. Upon inventorying the vehicle the officer found an open beer can in the seat with a small amount of alcohol, and a brown sack with one empty beer can under the driver's seat. Additionally, four unopened cans of beer were found in another bag in the vehicle. After being transported to the local jail, the defendant refused the intoximeter test. Five more sobriety tests were administered and recorded on a video camera at the jail. The officer opined that the defendant had been in an impaired condition. The video was shown to the jury after the officer's testimony and before cross-examination.

The defendant testified in his own behalf and denied that his ability to drive had been impaired since he had only consumed two twelve ounce beers and a "sip" of a third. He further testified that his eyes were habitually bloodshot and that he had undergone surgery for torn ligaments in a knee which still presented a problem. These matters were offered by the defendant in defense of the officer's testimony concerning his failure of the sobriety tests, but the defendant denied having refused a chemical test offered by the officer. Further, the defendant denied that he had almost struck a guardrail or crossed over the center line prior to the time the officer had stopped him.

The defendant's wife, from whom the defendant was separated, also testified on behalf of the defendant and stated that he had consumed only two beers while present with her just prior to his arrest. She further denied that he had shown any

evidence of having been drinking prior to the time he arrived at the motel where she was residing.

The defendant contends in his first issue that the investigatory stop made by the officer was not based on reasonable suspicion, supported by specific and articulable facts. He contends in his third issue that the trial court erred in sending the court reporter on an errand while a video introduced into evidence was being shown to the jury. We note that no written motion was filed for a new trial as required under our rules. Such a motion is required to be filed in writing, or if made orally in open court shall be reduced to writing, within thirty days of the date the order of sentence is entered. Tenn. R. Crim. P. 33(b).[1] For this reason, we find that the defendant's first and third issues, on the basis of which he seeks a new trial, have been waived. However, even if not waived, we think the evidence is sufficient to support the trial judge's finding that the officer had sufficient cause to stop the defendant. As to the defendant's issue concerning the absence of the court reporter, there has been no allegation of prejudice and therefore this alleged error would have been harmless at most.

In the defendant's second issue he contests the sufficiency of the evidence. Failure to file a motion for a new trial does not deprive this Court of jurisdiction. State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980). In his issue attacking the sufficiency of the evidence, the defendant does not seek a new trial but, rather, a reversal and dismissal of the charge. For this reason, this issue is not waived by the failure to file a new trial motion. We also note that the defendant's notice of appeal was not timely filed. However, because of the death of defendant's counsel after trial and prior to

[1]The transcript of the sentencing hearing indicates that an oral motion for a new trial may have been previously made by counsel but we do not find such in the record. Also, there is no indication that it was ever reduced to writing and filed as required by the rules.

perfecting appeal, in the interests of justice we will waive the timely filing of the notice of appeal. See T.C.A. § 27-1-123 (Supp. 1990).

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

In reviewing the testimony offered at trial, we find more than sufficient proof to support the jury's verdict of guilt beyond a reasonable doubt. The jury obviously accepted the State's proof and rejected the defendant's proof.

For the reasons hereinabove set forth, we affirm the defendant's conviction for driving under the influence.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

_____
DAVID H. WELLES, Judge