IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

STATE OF TENNESSEE,	)	NO. 01C01-9512-CR-00399
	)	
Appellee	)	SUMNER COUNTY
	)	
V.	)	HON. JANE WHEATCRAFT
	)	JUDGE
LUTHER TUTTLE, JR.,	)	
	)	(Possession of Schedule II Drug
	)	with Intent to Sell)
Appellant	)	

FOR THE APPELLANT:

John Pellegrin
113 East Main Street
Gallatin, Tennessee 37066

FOR THE APPELLEE:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Rebecca Lyford
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37243-0493

Lawrence Ray Whitley
District Attorney General

Kathi Phillips
Assistant Attorney General
113 East Main Street
Gallatin, Tennessee 37066

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Luther Tuttle, Jr., appeals as of right from the judgment of the Criminal Court of Sumner County. The jury found him guilty of possession with intent to sell Schedule II drugs. He was sentenced to eight years in the Tennessee Department of Correction, with seven of those eight years to be served in a community-based program.

On appeal the appellant presents two issues:

(1) Whether the evidence was sufficient to support the conviction for possession of Schedule II drugs with intent to sell.

(2) Whether Article VI, section 11, of the Tennessee Constitution was violated when the judge who presided at trial also presided at the preliminary hearing of the appellant's case.

We affirm the judgment of the trial court.

On June 9, 1994, Officers Birdwell and Carpenter of the Sumner County Sheriff's Department were on routine patrol in Hendersonville, Tennessee. At approximately 10:20 p.m. the officers stopped at a local market in Hendersonville where they observed the appellant stumble across the parking lot and enter the market. The officers sat in their patrol car for a few minutes and watched the appellant leave the market and stumble back across the parking lot and get into the driver's side of a Dodge pickup truck. They followed the pickup truck after it pulled out of the parking lot and onto the road where they observed the truck swerving slightly in its lane. The officers called in the tag on the truck to the dispatcher and learned that it was registered to a gray Mustang, not a pickup truck. The officers then activated their patrol car's blue lights and stopped the vehicle. A spotlight was turned on from the cruiser to light up the pickup truck. The officers could see that there was movement inside the truck. It was at this time that the officers noticed that the appellant was not driving. Ultimately it was determined that Mr. James R. Durham was driving the vehicle. However, the truck was owned by the appellant.

Officer Carpenter obtained the appellant's signed consent to search the truck, which yielded a pill bottle found in a computer box on the passenger side of the truck

under the dashboard. The bottle contained 126-1/2 pills which were later determined to be four milligrams each Dilaudid, a Schedule II drug. The pill bottle did not have a label on it.

Una Jo Sloan testified on behalf of the appellant. She said that her son, Michael Batson, died of cancer on Thanksgiving Day in 1993. At the time of his death, he drove a pickup truck that she thought he had gotten from the appellant. She stated that her son had a prescription for Dilaudid for his pain, and that he hid the Dilaudid because he was afraid people would steal it. She did not know, however, whether her son had hidden any of the Dilaudid in the truck, which had been searched. After her son died, she believed that the appellant repossessed the truck because her son owed money on it.

SUFFICIENCY OF THE EVIDENCE

Where the sufficiency of the evidence is challenged, the relevant question for this court is whether, after reviewing the evidence in the light most favorable to the prosecution, 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); T.R.A.P. 13 (e).

A guilty verdict, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves any conflicts in favor of the State's theory. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and to all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). A verdict against the defendant removes the presumption of innocence and replaces it with a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474 (Tenn. 1973). The defendant has the burden of overcoming the presumption of guilt. State v. Brown, 551 S.W.2d 329 (Tenn. 1977). We do not reweigh or reevaluate 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 at 835 (Tenn. 1978).

The appellant argues that there was simply no proof on the issue of whether he intended to sell the Dilaudid. We disagree. Intent to sell may be inferred from the quantity of the controlled substance possessed, together with other relevant facts surrounding the arrest. State v. Holt, 691 S.W.2d 520, 522 (Tenn. 1984). In this case the appellant possessed 126-1/2 pills of Dilaudid, each in the strongest form available, four milligram tablets. The appellant had the pills stashed under the dashboard of his truck. Furthermore, the pills were found in an unlabeled pill bottle, leading to the clear inference that the pills were not obtained through a lawful prescription. All of these facts taken together could have reasonably led the jury to infer that the pills were possessed by the appellant for resale. Accordingly, this issue is without merit.

DISQUALIFICATION OF TRIAL JUDGE

Next the appellant contends that because the trial judge presided at his preliminary hearing, it was unconstitutional for her to also preside at his trial. Article VI, section 11, of the Tennessee Constitution provides:

> [n]o judge of the supreme or inferior courts shall preside on the trial of any cause in the event of which he may be interested, or either of the parties shall be connected with him by affinity of consanguinity, within such degrees as may be prescribed by law, or in which he may have been of counsel, or in which he may have presided in any inferior court, except by consent of all the parties . . . .

(emphasis added)

There is no dispute that the trial judge presided in the general sessions court at the appellant's preliminary hearing. This is clearly an inferior court to the criminal court to which the judge had been elevated at the time of appellant's trial. Accordingly, Article VI, section 11, is applicable to this case. This does not end our

inquiry, however. To determine whether the trial judge in this case properly presided at appellant's trial, two questions must be answered. The first is whether the Article VI, section 11 provision which allows an otherwise disqualified judge to preside with the consent of the parties applies in criminal proceedings. If the answer to the first question is yes, the second question to be answered is whether the appellant did in fact consent to have the judge preside at his trial.

The answer to the first question is clearly yes. Although it has not always been the law of this state, the consent provision of Article VI, section 11 is applicable in criminal cases. Contra Wilson v. State, 153 Tenn. 206, 281 S.W. 151 (1925); Hamilton v. State, 218 Tenn. 317, 403 S.W.2d 302 (1966).

In State Ex. Rel. Roberts v. Henderson, 442 S.W.2d 629, 632 (Tenn. 1969), the Supreme Court held that the Article VI, section 11 disqualification could be waived and the judge consented to in a criminal case. In Henderson, the trial judge had, while sitting as General Sessions Court judge, issued the arrest warrant for the defendant. The court held that the appellant had consented to the judge by voluntarily submitting a guilty plea to the trial court. The decision in Henderson overruled both Wilson v. State, supra and Hamilton v. State, supra, to the extent that they held that there could be no waiver of the Article VI, section 11 constitutional disqualification of judges in a criminal case. See Hawkins v. State, 586 S.W.2d 465, 466 (Tenn. 1979). Accordingly, the appellant's reliance on those cases is misplaced.

We now turn our attention to the question of whether the appellant in this case did consent to have Judge Wheatcraft preside at his trial. After a full review of the record we determine that the appellant did in fact consent to having Judge Wheatcraft preside at his trial.

The following comments of appellant's counsel at the hearing on the motion for a new trial support this determination.

> I assumed, quite frankly, that had such a motion been raised that Your Honor probably would have recused yourself out of

> an abundance of caution, if nothing else. I at least considered that possibility and, quite frankly, determined that it was no advantage to Mr. Tuttle.

Appellant's counsel later reiterated this point, stating "I didn't think it was any particular advantage to my client to make such [disqualification] objection." In Henderson the court recognized that criminal defendants might well opt not to seek removal of an otherwise disqualified judge. The court reasoned that the right to waive the disqualification,

> . . . is by no means one-sided, against the defendant. It is not inconceivable that a defendant, knowing the trial judge to be a fair-minded, impartial officer, would rather that he preside over his trial than someone else about whose character and qualifications he knows nothing. And, if we were to adhere to the rule in *Wilson* we would have to deny the defendant this right even though he clearly is entitled to it under our Constitution.

Henderson at 632.

Given the comments of appellant's counsel, the fact that no pre-trial motion was filed seeking disqualification, and that the appellant submitted to the trial without objection, we hold that the appellant consented to having Judge Wheatcraft preside at his trial.

Accordingly, the judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOSEPH M. TIPTON, JUDGE