IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

December 3, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9605-CC-00189**
Appellee,	)	
	)	**HAWKINS COUNTY**
VS.	)	
	)	**HON. JAMES E. BECKNER,**
JAMES E. BRICE,	)	**JUDGE**
	)	
Appellant.	)	(Sentencing)

FOR THE APPELLANT:

KINDALL T. LAWSON
205 Hwy. 66 South
Suite 101
Rogersville, TN 37857

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

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

C. BERKELEY BELL
District Attorney General

DOUG GODBEE
Asst. District Attorney General
Hawkins County Courthouse
Main Street
Rogersville, TN 37857

OPINION FILED:_____

REMANDED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted on September 11, 1995, for vehicular homicide, leaving the scene of an accident resulting in a death, and possession of drug paraphernalia. The third count was severed from the first two and was later dismissed by the State. The first two counts were tried by jury. The jury acquitted the defendant of vehicular homicide and leaving the scene of an accident. However, the jury convicted the defendant of driving under the influence (DUI), a lesser included offense of vehicular homicide. Immediately following the verdict, the court sentenced the defendant to eleven months, twenty-nine days at one hundred percent. In this appeal as of right, the defendant contends that the court erred by giving him the maximum sentence. We agree with the defendant and remand for resentencing.

The defendant was arrested on the evening of May 29, 1995, after being involved in a motor vehicle accident with the victim, Michael Bennett. The defendant, who was driving a one ton truck, was traveling east on Carter's Valley Road in Hawkins County. When he attempted to make a left turn into the driveway of Tommy and Alicia Jean Horton, the defendant struck and killed the victim, who was riding a Harley Davidson motorcycle in the westbound lane.

James Lee, a trooper with the Tennessee Highway Patrol, was the first officer to arrive at the accident. Lee testified that upon his arrival, he briefly examined the victim and then observed the defendant's truck parked in the driveway. Lee could not locate the defendant. When emergency crew members arrived, Lee began to look for the defendant. After a short time, the defendant appeared from an area behind the Hortons' house. The defendant immediately identified himself as the driver of the truck. Lee testified that upon detecting an odor of alcohol, he administered three sobriety field tests. When the defendant performed poorly, Lee placed him under arrest. The

defendant later consented to a blood test which revealed that he had a .11 percent by weight alcohol in his blood.

Evidence at the trial revealed that cocaine and possibly marijuana were in the victim's blood at the time of the accident. Testimony was also offered that the victim may have been riding his motorcycle without the headlight on. Upon hearing all the evidence, the jury found the defendant guilty of DUI only.

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).

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the trial court is required to allow the parties a reasonable opportunity to be heard on the question of the length of the sentence and the manner in which it is to be served. T.C.A. § 40-35-302(a). The sentence must be specific and consistent with the purpose and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(b).

Tennessee Code Annotated § 40-35-103 sets out sentencing considerations which are guidelines for determining whether or not a defendant should be incarcerated. These include the need "to protect society by restraining a defendant who has a long history of criminal conduct," the need "to avoid depreciating the seriousness

of the offense," the determination that "confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses," or the determination that "measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant." T.C.A. § 40-35-103(1).

In determining the specific sentence and the possible combination of sentencing alternatives, the court shall consider the following: (1) any evidence from the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and the arguments concerning sentencing alternatives, (4) the nature and characteristics of the offense, (5) information offered by the State or the defendant concerning enhancing and mitigating factors as found in T.C.A. §§ 40-35-113 and -114, and (6) the defendant's statements in his or her own behalf concerning sentencing. T.C.A. § 40-35-210(b).

The defendant complains that the trial court erred when it sentenced him to serve at one hundred percent. Specifically, the defendant contends that the trial court improperly considered two enhancement factors. We first note that the sentence for a first time DUI offender is confinement in the county jail or workhouse for not less than forty-eight hours nor more than eleven months and twenty-nine days. T.C.A. § 55-10-403(a)(1). All persons convicted under T.C.A. § 55-10-403(a) will be placed on probation for the difference between the time actually served and the maximum sentence. T.C.A. § 55-10-403(c). Thus, in effect, the statute mandates a maximum sentence for DUI "with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended." State v. Kerry A. Combs, No. 03C01-9409-CR-00314, Greene County, (Tenn. Crim. App. filed September 9, 1996, at Knoxville). Generally, sentencing for misdemeanors ranges between zero and seventy-five percent. T.C.A. § 40-35-302(d). However, for DUI offenders, the confinement may extend to the maximum of one hundred percent. State

v. Palmer, 902 S.W.2d 391, 394 (Tenn. 1995). In order to determine what percentage a DUI offender should receive, the court must consider enhancement and mitigating factors as well as legislative purposes and principles related to sentencing. State v. Dockery, 917 S.W.2d 258, 261(Tenn. Crim. App. 1995).

We also note that in misdemeanor sentencing, unlike felony, the defendant is not entitled to the presumptive minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Thus, if supported by the evidence, the trial court may properly sentence a first time DUI offender to the maximum sentence of eleven months, twenty-nine days at one hundred percent. See State v. Michael L. Warren, No. 01-C-01-9307-CC-00192, Coffee County (Tenn. Crim. App. filed October 13, 1994, at Nashville). In the present case, however, the trial court erred in sentencing the defendant by improperly applying two enhancement factors.

As the first enhancement factor, the court relied on the defendant's history of criminal behavior. T.C.A. § 40-35-114(1). While the defendant had no criminal record whatsoever, the trial court found a criminal history by relying on the defendant's admission to the probation officer that he started drinking beer at age fourteen. The defendant further admitted that he may have been charged with reckless driving more than ten years ago when he was sixteen years old. While the Tennessee Supreme Court has held that a juvenile record can be a sufficient basis to enhance a defendant's sentence, State v. Adams, 864 S.W.2d 31, 34 (Tenn. 1993), we hold that the defendant's admitted underage drinking in this case is entitled to little or no weight as an enhancing factor because it occurred approximately ten years before this offense and did not result in any arrests or convictions. In Adams, the defendant had a lengthy juvenile record which was properly considered in determining a suitable sentence for the defendant's adult felony conviction. See also State v. Carter, 908 S.W.2d 410 (Tenn. Crim. App. 1995)(following Adams and

allowing juvenile record that dated back to 1988 and included several misdemeanors and a charge of theft of over five hundred dollars ($500) to be used as an enhancement factor in felony sentencing of the defendant).

In the present case, however, the defendant has absolutely no record, juvenile or otherwise, upon which the court can rely. The trial court merely relied on the defendant's statement in the presentence report that he began drinking at an early age. In State v. Clifford Atkins, No. 03C01-9302-CR-00058, Hawkins County (Tenn. Crim. App. filed March 3, 1994, at Knoxville), we determined that such a "bare bones statement" is not a sufficient basis for sentence enhancement. In Atkins, the trial court used the co-defendant's admission of drug and alcohol abuse as evidence of prior criminal behavior. On appeal, this Court concluded that reliance on that admission was misplaced and stated:

> The sentencing report contains a bare bones statement that appellant admitted to having a drug and alcohol problem. No evidence presented at the sentencing hearing indicates the type or extent of appellant's drug use. We cannot conclude that appellant's drug problem involved the use of illegal drugs or other criminal conduct. His police record contains no evidence of arrests for possession of an illegal substance or for D.U.I. Without more we cannot conclude that a defendant's admission of alcohol and drug abuse is indicative of prior criminal behavior.

Atkins, at 27. In Atkins, it is not clear whether the defendant was engaged in illegal drug use or whether his alcohol abuse occurred when he was a minor. In the present case, the defendant did admit to the illegal act of underage drinking. However, we conclude that such behavior, which occurred nearly ten years ago when the defendant was a juvenile, should be given little or no weight in enhancing the defendant's sentence.

We also find that the trial court erred in its application of the enhancement factor that the crime was committed under circumstances in which the potential for bodily

injury to a victim was great. T.C.A. § 40-35-114(16). In using this enhancement factor, the trial court said:

> The only other enhancement factor that I believe is applicable is number sixteen . . . . Although, the jury, I think has found by their verdict that your drinking and driving did not cause the death of the victim. There was a wreck and someone died while you were drinking and driving and I think that is a significant factor and I think that activates number sixteen.

In general, factor sixteen may be used as an enhancement factor in DUI cases. See Robert Kuykendall v. State, No. 03C01-9310-CR-00377, Grainger County (Tenn. Crim. App. filed February 23, 1995, at Knoxville) and State v. Philip Dale Jenkins, No. 03C01-9306-CR-00178, Knox County (Tenn. Crim. App. filed April 21, 1994, at Knoxville). However, factor sixteen was misapplied here because of the trial court's emphasis on the fact that a death occurred. In State v. David W. Andrews, No. 02C01-9201-CC-00024, Henry County (Tenn. Crim. App. filed January 20, 1993, at Jackson), the defendant was indicted for vehicular homicide but was found guilty of DUI only. His acquittal meant that the jury determined that alcohol was not the proximate cause of the accident, thus, the victim's death could not be considered as an enhancement factor. Andrews, at 4. A similar result was reached in State v. Dockery, 917 S.W.2d 258 (Tenn. Crim. App. 1995). In Dockery, the defendant was acquitted on a charge of vehicular homicide as a result of driving under the influence but was convicted of DUI. There too this Court concluded that the death of the victim could not be used as an enhancement factor. Thus, in the present case, the trial court erred when it relied on the death of the victim as an "activation" of factor sixteen.

The trial court's misapplication of these enhancement factors leads us to necessarily conclude, on the record before us, that the trial court erred by not suspending some portion of the defendant's sentence. In State v. Kerry A. Combs, No. 03C01-9409-CR-00314, Greene County, (Tenn. Crim. App. filed September 9, 1996, at Knoxville), we

reached a similar conclusion and remanded the case so that the trial judge could reconsider the record and correctly determine the appropriate sentence. We feel a remand is appropriate in this case as well.

Therefore, this matter is remanded to the trial court to determine the amount of the defendant's sentence which should be served on probation.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID J. HAYES, Judge

_____
WILLIAM M. BARKER, Judge