

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

FILED
November 12, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
) C.C.A. No. 02C01-9510-CC-00307
Appellee,)
) Haywood County
V.)
) Honorable Dick Jerman, Jr., Judge
)
PERCY MARTIN, JR.,) (Driving Under the Influence)
)
Appellant.)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED AS MODIFIED

PAUL G. SUMMERS,
Judge

OPINION

The appellant, Percy Martin, appeals from a jury verdict convicting him of driving under the influence. The jury fined the appellant \$1,000. The trial court sentenced him to eleven months and twenty-nine days confinement with all but sixty days suspended and suspended his driver's license for two years. The appellant contends that the evidence was insufficient to support his conviction and that his fine and sentence were excessive. Upon review of the record, the judgment of the trial court is affirmed as modified.

FACTS

On September 16, 1995, Trooper James Tate and Trooper Ronnie Belew were conducting a roadblock on Highway 70 in Haywood County. At approximately 9:20 P.M. the appellant approached the roadblock in a Chevrolet Camaro. Officer Tate noticed that the appellant's speech was slurred and instructed him to pull off to the side of the roadway where a field sobriety test would be administered. The appellant informed the officer that he had just left a nearby bar and had consumed three to four beers. The appellant refused to take a Breathalyzer test but submitted to three sobriety tests.

First, the appellant was asked to count to four, forward and backwards, on his fingertips and to touch his thumb to that finger. Officer Tate testified that the appellant "went one, two, three, four and did not touch his thumb to any finger nor did he count backwards to four."

Officer Tate next administered the "one-leg stand" test. He asked the appellant to count to fifteen by thousands while elevating one leg off the ground. The appellant reached six before he put his foot down to regain his balance.

The last test administered on the appellant was the “horizontal gaze nystagmus” test. In this test the suspect is to stand with his feet together and his arms by his sides. The officer holds a pen above the suspect’s head and has him watch the tip of the pen. The suspect, while holding his head still, is to follow the movement of the pen with only his eyes. Officer Tate testified that the appellant’s eyes “were real darty and bounced real heavily” and were red and watery. Officer Belew testified that he witnessed the administration and failure of the sobriety tests. Both officers testified that the appellant appeared to be under the influence of alcohol.

SUFFICIENCY OF THE EVIDENCE

The appellant contends that the evidence presented at trial is insufficient to support his conviction. Great weight is given to the result reached by the jury in a criminal trial. A jury verdict approved by the trial judge accredits the state’s witnesses and resolves all conflicts in favor of the state. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of both. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). The appellant has the burden of overcoming this presumption of guilt. Grace, 493 S.W.2d at 476.

Where sufficiency of the evidence is challenged, the relevant question for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of

the crime or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn.R.App.P. 13(e). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987).

The appellant testified that he had consumed three to four beers earlier that evening but was not impaired. Officers Tate and Belew testified that the appellant failed three different sobriety test and visibly appeared to be intoxicated. The jury obviously accredited the testimony of the two arresting officers and resolved the conflicting testimony in favor of the State. The evidence in the record supports their conclusion, and the appellant has not met his burden. The evidence is legally sufficient.

PROPRIETY OF SENTENCE

The appellant next contends that his fine and sentence were excessive. He was sentenced to sixty days confinement, fined \$1,000, and had his license suspended for two years. He argues that deviation from the minimum statutory sentence is unjustified and contrary to the law. As a basis for his argument, the appellant contends that this is his first DUI, he has no prior criminal record, and the court found no enhancement factors to allow upward deviation.

When a sentencing issue is appealed, this Court shall conduct a de novo review with the presumption that the trial court's findings are correct. State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The presumption of correctness is conditioned upon an affirmative showing that the trial court considered the sentencing principles and all relevant facts and circumstances. State v. Ashy, 823 S.W.2d 166, 169 (Tenn. 1991).

Misdemeanor sentencing is controlled by Tennessee Code Annotated Section 40-35-302, which provides in part that the trial court shall impose a sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. In determining the correct sentence, the trial court should examine the case in light of the nature and character of the offense. State v. Gilboy, 857 S.W.2d 884, 889 (Tenn. Crim. App. 1993). However, 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).

At the time the appellant committed the offense the minimum sentence for a first offense DUI is forty-eight hours in confinement and a \$250 fine. Tenn. Code Ann. § 55-10-403. The maximum sentence is confinement for eleven months and twenty-nine days and a fine of \$1,000. Id. In addition to fines and confinement, a one year suspension of an offender's license is mandatory. Tenn. Code Ann. § 55-10-403.

In conducting our de novo review, we find that the fine assessed by the jury was within their discretion. The appellant's fine was assessed at \$1,000. This is the maximum within the allowable statutory range. This was the jury's prerogative. The appellant's contention as to his fine is without merit.

Also, we find that the confinement imposed upon the appellant was proper. The record reveals that the appellant has a history of serious traffic violations and showed no remorse for his conduct. The imposition of a sixty day sentence is supported by the need for deterrence and for not depreciating the seriousness of the offense. The appellant has failed to show an abuse of discretion. Accordingly, we affirm the appellant's sentence in this regard.

This Court, however, finds that the trial court erred in suspending the appellant's drivers license for a two year period. Tennessee Code Annotated

Section 55-10-403 states that for first offense DUI the “court shall prohibit such convicted person from driving a vehicle in the state of Tennessee for a period of time of one (1) year.” This statute does not allow discretionary deviation. Therefore, the appellant’s two year license suspension is modified to one year in compliance with the statute. The trial court should enter an order modifying the suspension consistent with this opinion.

PAUL G. SUMMERS, Judge

CONCUR:

JOHN H. PEAY, Judge

DAVID G. HAYES, Judge