

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

FILED

October 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)

APPELLEE,)

v.)

JOSEPH A. MILLS, JR.,)

APPELLANT.)

No. 03-C-01-9506-CC-00177

Blount County

D. Kelly Thomas, Jr., Judge

(Driving While Under the Influence)

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OPINION FILED: _____

AFFIRMED AND REMANDED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Joseph A. Mills, Jr., was convicted of driving while under the influence, a Class A misdemeanor, by a jury of his peers. It is not clear whether the appellant was sentenced for a second or third offense. The trial court imposed a sentence consisting of a fine in the amount of \$1,350 and confinement for eleven months and twenty-nine days in the Blount County Jail. The trial court suspended all but 180 days of the sentence and placed the appellant on probation for the balance of the sentence. In this Court, the appellant contends that the evidence is insufficient to support his conviction and the sentence imposed is excessive. After a thorough review of the briefs submitted by the parties, the record, and the authorities that control the issues presented for review, it is the opinion of this Court that the appellant's conviction should be affirmed. This cause is remanded to the trial court for a determination of whether the appellant was sentenced as a second or third offender.

On May 19, 1994, at approximately 8:00 p.m., a Maryville police officer saw a pickup truck being driven in a reckless manner. The truck, which was being driven at an excessive rate of speed, would pull close to the rear of another vehicle and make an abrupt lane change. The officer pursued the truck. When the emergency lights on the patrol car were activated, the truck pulled to the side of the road.

The officer went to the truck and asked the appellant, who was driving, for his driver's license. The appellant apparently did not have a driver's license. He fumbled with his wallet and finally gave the officer a State of Tennessee employee identification card. The officer immediately noticed a strong odor of an intoxicating beverage. When the appellant exited the truck, he was unsteady on his feet. His speech was slurred. He failed the field sobriety tests administered by the officer. An open can of beer was found inside the truck. It was the opinion of the officer that the appellant was "under the influence, he was intoxicated." The appellant refused to submit to a blood test or chemical breath test to determine the degree of his intoxication.

The appellant's fiancée testified that she was eight and one-half months pregnant. She and the appellant had gone to the lake that morning to fish. The appellant stopped at a convenience store and purchased two cans of beer. He drank one can of beer at the

lake. When she began to have severe pains, which she thought were labor pains, they loaded the vehicle and were en route to the hospital when they were stopped by the officer. She stated that the appellant had just opened the second can of beer and had one sip before he was stopped. The officer called an ambulance to ensure her safety. The officer testified that she could not permit the appellant to take his fiancée to the hospital due to his intoxication.

There is a discrepancy of several hours between the testimony of the officer and the appellant's fiancée. As previously stated, the officer testified that she stopped the appellant shortly after 8:00 p.m. The appellant's fiancée testified that they left the lake between 12:30 p.m. and 1:00 p.m. This would have placed the appellant in Maryville in the middle of the afternoon.

I.

The appellant contends that the "officer did not provide adequate evidence that the Appellant was intoxicated." He argues that "[t]his case is a travesty of the justice system" and this case "abounded with reasonable doubt that the jury simply and obviously chose to ignore."

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced during the trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App.), per. app. denied (Tenn. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (1956). To the contrary, this Court is required to afford the State of Tennessee the strongest

legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1993), our Supreme Court said: “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.”

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused, as the appellant, has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond doubt. Tuggle, 639 S.W.2d at 914.

The evidence of the appellant’s guilt is sufficient to support a finding by a rational trier of fact that he was guilty of driving under the influence beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, 573 (1979). The state established that the appellant was operating a motor vehicle, it was being operated on a public roadway, and he was under the influence of an intoxicant while operating the vehicle. In other words, the jury accredited the testimony of the officer and rejected the testimony of the appellant’s fiancée. The jury obviously believed the officer and did not believe the appellant’s fiancée.

This issue is without merit.

II.

The appellant contends that the trial court should have imposed the minimum sentence for the offense in question. Based upon a de novo review of the record pursuant

to Tenn. Code Ann. § 40-35-401(d), this Court is of the opinion that the sentence imposed was proper. Moreover, the appellant has failed to overcome the presumption afforded the findings of the trial court.

The appellant has a history of criminal convictions. Tenn. Code Ann. § 40-35-114(1). The appellant has five (5) prior convictions for driving while under the influence. If the appellant is sentenced as a third offender, there are two remaining offenses that can be used to enhance his sentence. He has also been convicted of public intoxication, six counts, driving while license revoked, five counts, burglary second degree, possession of marijuana, petit larceny, criminal trespass, and disrupting a meeting. He has previously been declared a habitual motor offender and was convicted of violating the restraints upon his operation of a motor vehicle. He admits that this factor was established.

The appellant admits in his brief that he has a previous history of failing to comply with the conditions of a sentence involving release into the community. Tenn. Code Ann. § 40-35-114(8).

The trial court also found that the appellant had no hesitation about committing a crime when the risk to human life was high. Tenn. Code Ann. § 40-35-114(10). In this case, the appellant's intoxication coupled with the manner in which he was driving placed every citizen using the roadway in jeopardy of sustaining serious injury or being killed. This was a proper factor for the trial court to consider in determining the length of the appellant's sentence. Based upon these factors and the additional evidence contained in the record, the trial court also properly considered Tenn. Code Ann. § 40-35-114(16) because the potential for injury to these citizens was exceptional.

The appellant lists several mitigating factors that he feels should have been applied by the trial court. The appellant did not present any evidence at the sentencing hearing. He did not testify during the trial. Consequently, the record does not support these factors. Assuming arguendo that some of the mitigating factors should have been applied, the manner in which the appellant was operating his motor vehicle and his prior history of criminal convictions would far outweigh any mitigating factors.

This Court views the sentence imposed in this case as lenient given the appellant's prior convictions, the length of the previous sentences, and the failure of the appellant to

rehabilitate himself when released into the community. It is obvious that the appellant has absolutely no respect for the laws of this state. When released for an offense, he returned to the community and committed another offense.

In this case, a lengthy confinement is necessary to protect society. Tenn. Code Ann. § 40-35-103(1)(A). Confinement is also required to avoid depreciating the seriousness of the offense the appellant committed as well as to deter the appellant and others from engaging in like or similar conduct. Tenn. Code Ann. § 40-35-103(1)(B). Also, harsh sentences and prior releases into the community have not curbed the appellant's criminal conduct. Tenn. Code Ann. § 40-35-103(1)(C). Finally, the appellant is beyond the stage of life where the potential for rehabilitation or treatment would assist either the appellant or society. Tenn. Code Ann. § 40-35-103(5).

III.

The order accepting the plea of guilty and the judgment on sentence states that the appellant was being sentenced as a second offender. However, the transcript of the sentencing hearing reveals that the trial court sentenced the appellant as a third offender. The appellant was indicted as a third offender. Two prior convictions are alleged in the indictment.

The appellant did not object to being sentenced as a third offender. Moreover, this is not an issue in this Court. Both parties have briefed this case based upon a finding that the appellant was sentenced as a third offender.

It is a well-established rule of law that when conflicts appear between what used to be called the "technical record" and what was known as the "bill of exceptions," the version contained in the bill of exceptions prevailed. However, it is doubtful that this rule should be applied in this case. Today, there is no distinction between the papers filed in the trial court and the transcription of the proceedings. Both are included in what is called the "record." Furthermore, the Supreme Court has enacted a rule that makes the use of the standard judgment form mandatory in criminal cases. Tenn. Sup. Ct. R. 17. Thus, this document is an integral part of the sentencing record.

This case is remanded to the trial court for a resolution of the conflict appearing in the record. If the appellant was properly sentenced as a second offender, the judgment is correct. However, if the appellant was sentenced as a third offender as the indictment, transcript, and briefs indicate, the trial court should vacate the judgment and enter an amended judgment form that reflects the appellant was being sentenced as a third offender.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

GARY R. WADE, JUDGE

PAUL G. SUMMERS, JUDGE