IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9510-CR-00348**
	)	
Appellee,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. JAMES R. EVERETT, JR.**
JERRY DOUGLAS FRANKLIN,	)	**JUDGE (Deceased)**
	)	
Appellant.	)	(Vehicular Homicide)

ON APPEAL FROM THE JUDGMENT OF THE PROBATE COURT OF DAVIDSON COUNTY

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OPINION FILED _____

AFFIRMED AND REMANDED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant, Jerry Douglas Franklin, was convicted by a Davidson County jury of one count of vehicular homicide. He was sentenced to three years split confinement, with one year of confinement to be served at one hundred percent. His driver's license was revoked for three years. He challenges both his conviction and sentence.

In this appeal, the Defendant presents seven issue for review:

(1) That the trial court erred by denying the Defendant's motion to suppress the results of a blood alcohol test because the sample had been destroyed and the Defendant was unable to conduct an independent blood test;

(2) that the trial court erred by dismissing the motion to suppress the results of the blood alcohol test without a hearing;

(3) that the trial court erred by admitting an excerpt of a television interview given by the Defendant;

(4) that the trial court erred by denying the Defendant's motion to suppress his statement made to the investigating police officer at the accident scene;

(5) that the sentence imposed was excessive;

(6) that, without the blood test results, the evidence is insufficient to support a verdict of guilt beyond a reasonable doubt; and

(7) that the trial judge committed prejudicial error by commenting on the evidence.

After careful consideration of the issues on appeal, we find no reversible error and affirm the judgment of the trial court. We remand solely for the purpose of entering an order consistent with our findings regarding the Defendant's driver's license revocation.

We begin with a discussion of the facts. On January 9, 1994, the Defendant and a friend, Dwight Tankersley, spent the evening socializing. The Defendant visited Mr. Tankersley at his parents' house sometime around 10:00 p.m., where they watched television. The Defendant denies drinking any alcoholic beverages while he was there. At some point, the two decided to go to Rodeos, a Nashville country-western bar. When they arrived, they spoke briefly with the Defendant's uncle, who worked as a security guard in the parking lot of the bar. They then entered the bar, walked around the establishment, played darts and shot pool. The Defendant admits to drinking three beers and one "shooter." The Defendant met his girlfriend at the bar and made plans to see her later at his house.

At some point after midnight, the Defendant decided to return home and he and Mr. Tankersley left the bar. Several witnesses testified that the Defendant either was not drinking or that he did not appear intoxicated. The Defendant was driving his sister's vehicle, a grey, Nissan sports car, and Mr. Tankersley was in the front passenger seat. Mr. Tankersley lived several miles from the bar and they proceeded on Murfreesboro Road and turned left on McCory Creek Road. It is at this point that the Defendant and the victim, Mr. Tankersley, were involved in a one-car accident. The Defendant testified that he does not remember any of the events that caused his car to veer off the road.

At approximately 1:30 a.m. on January 10, 1994, Michael Crockett was traveling on McCory Creek Road and noticed a car in a ditch. He had gotten off work shortly before that time, stopped briefly at Rodeos and had one-half beer before going home. He saw the car on the left side of the road, pulled his truck over on the shoulder and turned his high-beam headlights on the car. He saw the Defendant in the driver's seat and went over to the vehicle. He knocked on the window and attempted to awaken the Defendant, who was initially unresponsive, but who eventually rolled down his window. Mr. Crockett helped the Defendant from the car, at which time he heard a noise from the passenger seat. Mr. Crockett had the Defendant sit in his truck while he returned to the car. He flagged down a passing motorist to call 911, then attempted to help the victim in the passenger seat. He testified that it was apparent that the victim had sustained severe injuries to his chest and head. He was unable to elicit a response from the victim, who was having difficulty breathing. The paramedics arrived and the victim was transported to the hospital. Mr. Tankersley was pronounced dead upon arrival to the hospital as a result of injuries to his chest and head.

The officer who responded to the call proceeded to investigate the circumstances of the accident. He approached the Defendant, still seated in Mr. Crockett's truck. The officer opened the passenger door, and noticed a strong odor of alcohol. The Defendant's eyes appeared watery. He asked the Defendant for his license. He was initially unresponsive, then attempted to reach for his wallet. It was also apparent that he was injured. The officer then asked him whether he had been drinking. Although at trial it was disputed whether the officer asked "have you been drinking?" or "how much have you had to drink?,"

the Defendant replied: “Yes, I’ve been drinking. I won’t deny that. But I didn’t start out drinking and driving.” The officer conducted no field sobriety tests because he did not want to exacerbate the Defendant’s injuries.

The officer summoned the paramedics and the Defendant was transported to a hospital for evaluation and treatment of his injuries. Because there had been an accident involving a fatality and there was evidence of alcohol use, the officer ordered a blood alcohol test. Two samples were drawn, one for medical purposes at the hospital, and one for testing at the Tennessee Bureau of Investigation laboratory. The hospital blood test revealed a .20% blood alcohol level. The T.B.I. test showed a level of .19%. The expert testifying for the State stated that these levels suggest that the Defendant had consumed at least ten alcoholic beverages.

An accident investigator for the police department evaluated the scene of the incident and determined that the car the Defendant was driving skidded off at a curve in the roadway. The vehicle left the road and hit several trees. The primary impact was sustained on the passenger side of the car. The estimated speed the car was traveling at the time it left the road was 59 miles per hour while the speed limit was 40 miles per hour.

On May 4, 1994, the Defendant was indicted for vehicular homicide by intoxication and vehicular homicide by reckless driving, both Class C felonies.[1] The Defendant attempted a plea bargain agreement which the trial court rejected. He was tried by a Davidson County jury and convicted of vehicular homicide by

[1] Tenn. Code Ann. §§ 39-13-213(a)(2) and -213(a)(1).

intoxication on May 17, 1995. He was fined five thousand dollars ($5000) by the jury. The Defendant was sentenced on June 13, 1995 to three years split confinement, to be incarcerated for one calendar year with the remainder to be served on probation. His driver's license was revoked for three years, although the judgment filed by the trial court on July 3, 1995, states that the Defendant received a ten year revocation.

I.

As his first issue, the Defendant contends that the trial court erred by denying his motion to suppress the results of the blood alcohol test conducted by the TBI laboratory. He asserts that he attempted to obtain a sample of the blood collected by the TBI, but was informed that the blood was not available because it had been destroyed in accordance with a laboratory policy. The Defendant subsequently filed a motion to suppress the blood alcohol test results. He alleged that because the sample had been destroyed before he was charged and he was thus unable to conduct his own test, this deprived him of due process and the right to confrontation guaranteed by the Fifth and Sixth Amendments to the United States Constitution and Article I, Sections 8 and 9 of the Tennessee Constitution.

The Defendant argues that he has a right to a sample of the blood specimen with which to conduct an independent test. This is supported by rules of discovery pursuant to Tennessee Rules of Criminal Procedure 16(a)(1)(C) which provides that a defendant has a right to "tangible objects . . . which are within the possession, custody, or control of the State." This includes the

production of a blood sample for independent testing. See State v. Gaddis, 530 S.W.2d 64 (Tenn. 1975). Furthermore, an accused has a statutory right to demand and receive such a specimen of blood when the State procures a sample for testing pursuant to Tennessee Code Annotated section 55-10-410(e). The Defendant acknowledges that the State is not required to preserve samples extracted only for a blood alcohol test. See California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); State v. Gilbert, 751 S.W.2d 454, 461 (Tenn. Crim. App. 1988). Furthermore, there is no statutory right to be advised of the privilege to obtain a sample of blood for independent testing. State v. McKinney, 605 S.W.2d 842, 846 (Tenn. Crim. App. 1980).

The Defendant argues that, unlike Gilbert in which the defendant did not file a Rule 16 request for discovery, he has filed a motion to produce a blood sample for testing. However, we find in the record no motion for discovery filed in the trial court. There is evidence that the Defendant filed an affidavit and a motion to suppress the blood test results because the sample had been destroyed. The Defendant had a statutory right to request a sample at any point after which it was obtained and could have submitted a Rule 16 motion. He complains that the State did not contact the TBI laboratory, but we cannot conclude this was an error if the State had no discovery request.

The Defendant argues that the destruction of the blood sample after sixty days was an improper procedure that prejudiced him, particularly because the State did not indict him until May 4, 1994, and he had no reason to request a sample prior to that time. As a result, he asserts that this infringed upon his constitutional rights. A distinction exists between a statutory right to discovery,

and the constitutional right to the production of exculpatory evidence. State v. Brownell, 696 S.W.2d 362, 363 (Tenn. Crim. App. 1985); Hamilton v. State, 555 S.W.2d 724, 730 (Tenn. Crim. App. 1977). The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, regardless of whether the prosecution acts in good faith or bad faith. Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 1197, 10 L.Ed.2d 215 (1963). Yet, there is no general constitutional right to discovery in a criminal case, see Weatherford v. Bursey, 429 U.S. 545, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977), and the State is not obligated to make an investigation, or to gather evidence, for the defendant. See State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App.1984).

Here, the Defendant implies that the State failed to contact the laboratory to determine whether the sample existed because TBI Agent Harrison testified that he did not recall any such request. However, we are not convinced that a request from the State to produce the blood sample was mandated because we have no evidence that the Defendant submitted such a motion. Furthermore, failure to produce a blood sample for independent testing does not necessarily implicate a Brady violation. See Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct 333, 102 Led 2d 281 (1988). When the State fails to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the Defendant must demonstrate bad faith on the part of the police. Youngblood, 488 U.S. at 58, 109 S.Ct at 337.

In the case sub judice, Agent Harrison of the T.B.I., testified concerning the routine practice of the laboratory to destroy blood samples after sixty days. He

did admit that some samples may be preserved for several months, or may not be destroyed exactly at the sixty-day point. The Defendant submitted an affidavit from an independent laboratory that states that blood may be preserved for testing for as long as ten months. The T.B.I. agent could not say with certainty when the Defendant's blood sample was destroyed, but said that it was destroyed within the parameters of the laboratory policy. The Defendant suggests that this practice is undesirable and resulted in prejudice to him. We do agree that the lack of documentation regarding when samples are destroyed invites confusion and a lack of confidence. It seems more prudent to document when each sample is destroyed. Yet, we cannot conclude that the T.B.I. or the police acted in bad faith regarding the blood sample extracted from the Defendant.

Beyond this, the Defendant also complains that the timing of his indictment, well after sixty-days from when the blood sample was drawn, precluded him from obtaining an independent test. The offense occurred on January 10, 1994 and the indictment was issued on May 4, 1994. In order for the Defendant to establish a violation of his due process rights caused by a delay of presenting charges against him, the evidence must show three things: (1) That there was a delay; (2) that the Defendant was prejudiced by the delay; and (3) that the State intentionally delayed the prosecution in order to gain a tactical advantage. State v. Tuttle, 914 S.W.2d 926, 930 (Tenn. Crim. App. 1995); State v. Paul Ray Jones, C.C.A. No. 01-C-01-9212-CR-00384, Davidson County, slip op. at 3 (Tenn. Crim. App., Nashville, Sept. 9, 1993) (citing United States v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)); State v. Dykes, 803 S.W.2d 250 (Tenn. Crim. App. 1990); see also State v. Baker, 614 S.W.2d 352 (Tenn.1981). The State is not constitutionally required to prosecute as soon as probable cause

exists nor must the State file charges when evidence exists to prove the offense beyond a reasonable doubt. United States v. Lovasco, 431 U.S. 783, 791, 97 S.Ct. 2044, 52 L. Ed.2d 752 (1976). An investigative delay does not deprive a defendant of due process absent bad faith. Lovasco, 431 U.S. at 796, 97 S.Ct. at 2052. Although the Defendant did not obtain a blood sample for testing, there is no indication that an independent test would have yielded exculpatory evidence, especially when a test conducted by the hospital produced a consistent result. He has demonstrated no actual prejudice. See Lovasco, 431 U.S. at 790, 97 S.Ct. at 2049. Furthermore, the Defendant has not provided any evidence that the State delayed indictment to gain a tactical advantage, even if the blood sample was destroyed.

After careful consideration, we cannot conclude that the Defendant's inability to procure a blood sample infringed upon his rights under the Tennessee and United States constitutions. Nor does it warrant the suppression of the T.B.I. blood test results. This issue is without merit.

II.

Next, the Defendant contends that the trial court erred by striking his motion to suppress on the grounds that the Defendant was not present in the courtroom. The trial court cited Rule 14.03 of the Davidson County Local Rules of Practice, which states: "If counsel for a movant does not appear at a scheduled hearing on a motion or any other matter scheduled to be heard on the motion docket, the court may strike, deny or otherwise dispose of the motion." The Defendant notes, and we agree, that Rule 14.03 refers to counsel not being

present and that the trial court erred in applying Rule 14.03. Yet, the State contends that the trial court was warranted in striking the motion to suppress pursuant to Rule 43 of the Tennessee Rules of Criminal Procedure. The rule provides that the Defendant's presence is not required "(3) At a conference or argument upon a question of law." Tenn. R. Crim. P. 43(c)(3). The State claims that the motion hearing consisted of determinations of fact, while the Defendant argues that the motion was purely an issue of law.

In our view, the disposition of this issue does not depend upon the interpretation of Rule 43. Rather, we are reluctant to find that a Defendant may waive a constitutional right simply because he is not present when a suppression motion is argued. Courts should indulge every reasonable presumption against waiver of fundamental constitutional rights. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019,1023, 82 L.Ed. 1461 (1938); Lee v. State, 560 S.W.2d 82 (Tenn. Crim. App.1977).

However, we have reviewed the Defendant's claim on the merits and have concluded that the blood sample was properly admitted at trial. Therefore, although the trial court committed error by striking the motion based solely on the Defendant's absence, after considering the entire record in the case sub judice, we are satisfied that this was harmless error. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

III.

As his third issue, the Defendant asserts that the trial court erred by admitting into evidence an excerpt of a statement the Defendant made in a television interview. He contends that the entire interview should have been made available to the defense and that the portion shown to the jury was an admission or evidence of a prior bad act which was improperly admitted during the State's case in chief.

Just prior to an appearance at court for consideration of a plea agreement, the Defendant made a statement to a television news reporter. Two sections of the Defendant's statement were aired as part of a news story with accompanying commentary about the Defendant's criminal case. At trial, the State elected to introduce a portion of the Defendant's statement as part of its case in chief. Defense counsel was notified and requested that the State produce the entire interview with the Defendant. This included parts of the interview that were not aired on television. The trial court granted the State's motion for a subpoena for the television station to produce the additional footage pursuant to Rule 17(c) of the Tennessee Rules of Criminal Procedure.

The State was unable to procure the rest of the videotaped interview because the television station administrators refused to produce the tape. The Defendant contends that he was prejudiced because he did not have access to the entire interview to clarify the context in which he made the statement. The statement in question which was introduced by the state reads:

> Well, I feel I should do jail time if it was an innocent bystander. If I, you know, skipped a curb and hit the lawyer down on Church Street or if I hit a car head on, you know, but we had both driven drunk. I was a passenger, he was a passenger. I mean, my luck ran out and his luck ran out, you know. It just happened to me while I was driving.

We first address whether this videotaped statement, standing alone, should have been admitted by the trial court. Before a photograph or videotape may be admitted as evidence, it must be relevant to an issue that the jury must decide, and the probative value of the photograph or video tape must outweigh any prejudicial effect that it may have upon the trier of fact. State v. Aucoin, 756 S.W.2d 705, 710 (Tenn. Crim. App.1988), cert. denied, 489 U.S. 1084, 109 S.Ct. 1541, 103 L.Ed.2d 845 (1989). The question of whether a photograph or videotape should be introduced into evidence addresses itself to the sound discretion of the trial court. State v. Banks, 564 S.W.2d 947, 949 (Tenn.1978). Yet, beyond its relevance, the Defendant argues that the videotaped statement made by him is proof of other crimes, wrongs or acts which are not admissible to prove his character such that it conformed with the criminal act in question. He cites Rule 404(b), Tennessee Rules of Evidence, to support his argument. We do not agree. Rather, it is clear that the taped statement the Defendant made is a party admission highly relevant to the issues at trial. An admission by a party-opponent may be introduced at trial when it is "[a] statement offered against a party that is (A) the party's own statement in either an individual or representative capacity." Tenn. R. Evid. 803(1.2). Here, the State offered the Defendant's own statement regarding his opinion and the circumstances surrounding the incident. The trial court did not err by admitting the Defendant's statement.

Although the statement was admissible, the Defendant contends that because the jury did not hear the question asked by the interviewer, jurors could not understand the proper context in which he made the statement. As a result, he claims he was required to testify to explain the situation surrounding the statement, and that this infringed upon his Fifth Amendment right against self-incrimination.

He complains that the State failed to but should have followed through with the Rule 17 subpoena, regardless of the resistance on the part of the television station. However, news organizations are protected by a statutory privilege, which states that a news reporter "shall not be required by a court . . . to disclose before . . . any Tennessee court . . . any information or the source of any information procured for publication or broadcast." Tenn. Code Ann. § 24-1-208(a). This applies to nonconfidential as well as confidential information. Austin v. Memphis Publ'g Co., 655 S.W.2d 146, 150 (Tenn. 1983). The portions of the videotaped interview with the Defendant that were not broadcast consist of information procured by a news reporter. Although the format is videotape, the questions and answers elicited by the news reporter and preserved on tape are not unlike notes that were made or other information known by the newsgatherer that would be protected under the statute. Therefore, even if the State served the Rule 17 subpoena, it might well have been fruitless because the television station intended to invoke the statutory shield.

The Defendant claims that the failure to provide the entire interview forced him to testify in violation of his Fifth Amendment right against self-incrimination in order to explain the context in which he made the statement. However, he

cites no authority for this proposition and thus we are unable to adequately address the issue in this appeal. Because the defendant has failed to cite authority to support his argument, we consider this issue to be waived. Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).

IV.

In his next issue, the Defendant argues that the trial court erred in admitting a statement he made to the investigating officer at the scene of the accident. He asserts that before the officer elicited any incriminating statements from him, Miranda warnings should have been issued. Because no warnings were administered, the Defendant contends that the use of his statement violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

The privilege against self-incrimination protects an accused from being compelled to testify against himself. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Miranda court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. At a minimum, the Court held that the procedural safeguards must include warnings prior to any custodial questioning that the accused has the right to remain silent, that any statement he makes may be used as evidence against him, and that he has the

right to have an attorney present during questioning, whether retained or appointed. Id.

The test for determining whether the Miranda warnings should have been given by a law enforcement officer in this state is whether there has been a "custodial interrogation." See State v. Joe L. Anderson, -- S.W.2d --, No. 02-S-01-9511-CC-00121 (Tenn., Jackson, Sept. 16, 1996). The United States Supreme Court has defined this phrase as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444, 86 S.Ct. at 1612, 16 L.Ed.2d at 706. In other words, Miranda warnings are required when "there [has been] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' " California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275, 1279 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714 50 L.Ed.2d 714, 719 (1977)).

In the case sub judice, the first officer at the scene of a serious accident conducted an investigation to determine the facts surrounding the incident. This included assisting the paramedics and talking with the driver of the wrecked vehicle, the Defendant. The Defendant contends that the officer's question "How much have you had to drink?" was intended to elicit a statement by the Defendant for the purpose of a criminal prosecution and was not merely investigatory. He cites Pennsylvania v. Muniz, 496 U.S. 582, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) for the proposition that the statement he made to the officer was testimonial in nature and should have properly been suppressed. However, the

nature of the statement elicited from the Defendant is not the determinative factor in this case; it is clear that his statement "Yes. I've been drinking. I won't deny that. But I didn't start out drinking and driving." is testimonial. What determines whether the Defendant's rights were violated by the lack of Miranda warnings is whether the incriminating statement was made while he was "in custody."

The U.S. Supreme Court has held that questioning pursuant to a routine traffic stop does not implicate the protections required by Miranda. Berkemer v. McCarty, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed 2d 317 (1983). In such a situation, an officer is permitted to "ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." McCarty, 468 U.S. at 439; see also State v. Snapp, 696 S.W.2d 370 (Tenn. Crim. App. 1985). In State v. Randall L. McFarlin, C.C.A. No. 01C01-9406-PB-00202, Davidson County (Tenn. Crim. App., Nashville, June 13, 1995), an officer stopped a truck driver whom he observed driving erratically. After the stop, but before any arrest, the defendant admitted to drinking two beers. Id. at 3, 7. This Court held that because the statement was elicited before the defendant was in custody, Miranda warnings were not required. Id. at 6, 7. Likewise, in the case at bar, the Defendant's statement about drinking was not made while he was in custody. In fact, no traffic stop was initiated. The Defendant was sitting in a witness' truck while the officer asked a few investigatory questions. We cannot conclude that, when considering the totality of the circumstances, the Defendant would reasonably consider himself deprived of freedom such that it functioned as an arrest. Therefore, we find this issue to be without merit.

V.

In his fifth issue, the Defendant contends that the trial court erred in determining his sentence. When an accused challenges the length, range, or the manner of service of a sentence, this court has a duty to conduct a de novo review of the sentence with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption 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 conducting a de novo review of a sentence, this court must consider: (a) the evidence, if any, received at the trial and the sentencing hearing; (b) the presentence report; (c) the principles of sentencing and arguments as to sentencing alternatives; (d) the nature and characteristics of the criminal conduct involved; (e) any statutory mitigating or enhancement factors; (f) any statement that the defendant made on his own behalf; and (g) the potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, and -210; see State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

If our review reflects that the trial court followed the statutory sentencing procedure, imposed a lawful sentence after having given due consideration and proper weight to the factors and principals set out under the sentencing law, and that the trial court's findings of fact are adequately supported by the record, then we may not modify the sentence even if we would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

In the case sub judice, the trial court sentenced the Defendant to a three year sentence to be served in split confinement, one year incarceration at a CCA facility at one-hundred percent (100%) followed by two years probation. He was also to complete an alcohol abuse rehabilitation program. The jury fined the Defendant five thousand dollars ($5000). Also, the trial judge revoked the Defendant's driver's license for three years, although the judgment reflects a ten-year revocation. The Defendant does not challenge the length of his sentence, but questions the trial court's requiring him to serve one year in confinement. He notes that in prior plea agreement negotiations, the State offered a three-year suspended sentence with only 120 days to be served in confinement. He contends that the trial court offered no explanation why it imposed a sentence of one year incarceration. We agree that the trial court did not properly follow the sentencing guidelines; there is no affirmative showing on the record that the trial judge considered the applicable factors. Therefore, we review the Defendant's sentence de novo without the presumption of correctness.

Nevertheless , we believe that the record and the applicable sentencing guidelines support the sentence imposed by the trial court. The presentence report reflected that the Defendant was a 25 year-old unmarried male. He had some college education and had a steady work history. He had lived in an apartment prior to the offense, but afterwards moved in with his father and was living there at the time the report was prepared. He reports that his family is supportive. The Defendant began drinking alcohol at age 17 and he drank socially and with varied frequency. He reported drinking three beers and one

"shooter" on the night of the incident. The Defendant denies illegal drug use. There are no prior convictions.

The evidence at trial showed that the Defendant consumed alcoholic beverages and was driving his sister's car home after leaving the nightclub. At some point, the Defendant lost control of the vehicle and ran off the road, hitting several groups of trees. The passenger died as a result of injuries suffered in the accident. The Defendant's blood alcohol level tested by the TBI was .19%. The Defendant admitted to a history of drinking and driving. Prior to trial and at the sentencing hearing, the Defendant indicated that he regretted the accident but felt he should not spend time in jail.

Defense counsel filed notice of four mitigating factors for consideration by the court. First, that the Defendant " because of his youth . . . lacked substantial judgment in committing the offense." Tenn. Code Ann. § 40-35-113(6). The Defendant was twenty-five years old at the time of the offense, had some college education and held a job. We do not believe that, when considering the evidence, the Defendant did not have the capacity to make a judgment regarding his actions. The second factor presented was that the Defendant was suffering from a mental condition which reduced culpability for the offense. Tenn. Code Ann. § 40-35-113(8). However, he has presented no evidence of mental impairment and the voluntary use of intoxicants is excluded from this factor. The Defendant also raised two other factors for consideration; that he had no prior criminal record and that he attempted to accept responsibility by accepting a plea agreement. See Tenn. Code Ann. § 40-35-113(13). We believe that it is appropriate to consider the Defendant's lack of a prior criminal record as a factor

bearing on his sentence. However, there is evidence in the record which contradicts the Defendant's desire to take responsibility for the incident. Namely, the statements made before trial and at the sentencing hearing in which he maintained that he should serve no time for the offense. We find this proposed factor inapplicable.

The State presented two enhancement factors for the trial court's consideration. First, it argued that the Defendant "had no hesitation in committing an offense in which the risk to human life is high." Tenn. Code Ann. § 40-35-114(10). In order to apply this enhancement factor, we must determine whether there was risk to the life of a person other than the victim. State v. Bingham, 910 S.W.2d 448, 452-53 (Tenn. Crim. App. 1995). In Bingham, the driver was convicted of vehicular homicide by recklessness after crossing a four-lane major thoroughfare in Sevier County in the early morning hours. The court applied enhancement factor (10). Id. at 453. Here, the Defendant was traveling on a two-lane rural road around 1:30 a.m. Although late at night, there is evidence of at least two other cars traveling on that road, that the Defendant was driving nearly twenty miles over the speed limit, and that the potential for crossing the center line placed other drivers at great risk. Therefore, we find that the record supports the application of this enhancement factor.

The State also proposed the application of the Defendant's past criminal behavior as an enhancement factor. Tenn. Code Ann. § 40-35-144(1). However, the only evidence presented at trial was the Defendant's own admission that he had "driven drunk." There is no indication of specific instances of drunk driving, and without more, we cannot conclude that enhancement factor (1) should be

applied. After consideration of the other statutory mitigating and enhancement factors, we find no other factors applicable.

When there are both enhancement and mitigating factors present, the sentencing court must start at the minimum sentence in the Range, enhance the sentence within the Range as appropriate for the enhancement factors, and then reduce the sentence within the Range, as appropriate, for the mitigating factors. Tenn. Code Ann. § 40-35-210(e). Upon de novo review, we conclude that the presumptive minimum sentence of three years is appropriate.

A defendant who "is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary." Tenn. Code Ann. § 40-35-102(6). Our sentencing law also provides that "convicted felons committing the most severe offenses, possessing criminal histories evincing a clear disregard for the laws and morals of society, and evincing failure of past efforts at rehabilitation, shall be given first priority regarding sentences involving incarceration." Tenn. Code Ann. § 40-35-102(5). Thus, a defendant sentenced to eight years or less who is not an offender for whom incarceration is a priority is presumed eligible for alternative sentencing unless sufficient evidence rebuts the presumption. However, the act does not provide that all offenders who meet the criteria are entitled to such relief; rather, it requires that sentencing issues be determined by the facts and circumstances presented in each case. See State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987).

Additionally, the principles of sentencing reflect that the sentence should be no greater than that deserved for the offense committed and should be the least severe measure necessary to achieve the purposes for which the sentence is imposed. Tenn. Code Ann. §§ 40-35-103(3) - (4). The court should also consider the potential for rehabilitation or treatment of the defendant in determining the sentence alternative. Tenn. Code Ann. § 40-35-103(5).

Here, the trial court imposed a sentence alternative consisting of split confinement, but the Defendant argues that he should serve only 120 days incarceration rather than the full year. He contends that his situation is like that in Bingham, where the defendant received 120 days incarceration. Bingham, 910 S.W.2d at 457. He also notes that serving 120 days was also offered as part of the plea agreement rejected by the trial court. The State argues that Bingham differs from the Defendant's situation because Bingham showed great remorse and had spoken to high school student groups. The State contends that the Defendant, on the other hand, has expressed little remorse, has not spoken to the victim's family and maintains that he deserves no jail time. We find the State's argument persuasive. In addition, the guidelines for split confinement sentences support the trial court's imposition of one year of incarceration. Tenn. Code Ann. § 40-35-306(a). Likewise, we agree that one year of confinement followed by two years of probation is an appropriate sentence that avoids depreciating the seriousness of the offense and will facilitate deterrence and rehabilitation. See Tenn. Code Ann. §§ 40-35-103(1)(B),(5). We also must emphasize that trial judges possess significant discretion in determining appropriate sentences, and here we defer to that discretion.

Finally, the Defendant challenges the ten-year revocation of the Defendant's driver's license as is reflected on the judgment. The State concedes and it is apparent from the record, that the trial court intended to impose the three-year statutory minimum, not a ten-year revocation. See Tenn. Code Ann. § 39-13-213(c). It appears that the ten-year revocation was a typographical error. The State does not argue that a longer period should be imposed. Therefore, the Defendant's license shall be revoked for a period of three years.

VI.

In his sixth issue, the Defendant asserts that the evidence was insufficient to support a guilty verdict for vehicular homicide by means of intoxication. He states that, without the blood alcohol test results, the evidence does not support the verdict. However, the evidence presented included the blood test results. We decline to reassess the evidence in this manner, because we have determined that the trial court properly admitted the blood alcohol test. Therefore, we consider the evidence presented including those results.

When an accused challenges the sufficiency of the convicting evidence, the standard 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, 319 (1979). 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. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this court reweigh or

reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused 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); Grace, 493 S.W.2d at 476.

The Defendant argues that the evidence regarding his intoxication would not support a verdict of guilt for vehicular homicide by means of intoxication. Tenn. Code Ann. § 39-13-213(a)(2). He claims that Mr. Crockett, the person who first discovered the wrecked vehicle and helped the Defendant, did not testify that he smelled alcohol on him. Also, he notes that Mr. Crockett also had one-half beer to drink before he found the Defendant. He asserts that the officer on the scene could not indicate whether the smell of alcohol came from the Defendant or from Crockett's truck when he first opened the vehicle's door. The officer who was present with the Defendant at the hospital stated he smelled alcohol on the Defendant, but did not testify regarding intoxication.

However, there was testimony at trial confirming that the Defendant was at Rodeos nightclub and that he was seen consuming alcoholic beverages. There is a statement by the Defendant that he had driven drunk in the past and

that with the offense charged, his "luck ran out." Two police officers smelled alcohol when in contact with the Defendant. Furthermore, the results of two separate blood alcohol tests revealed a .19% (from the TBI) and .20% (from the hospital) level for the Defendant. These results were consistent and well above the presumptive limit of .10%. See Tenn. Code Ann. § 55-10-408(b)(1990 repl.). We conclude that the evidence is sufficient to support the verdict of guilt beyond a reasonable doubt.

VII.

As his final issue, the Defendant argues that the trial judge commented on the evidence and made negative comments directed at defense counsel, depriving him of a fair trial. He refers to several statements the trial judge made that reflected negatively on defense counsel. Specifically, that the trial judge admonished him in front of the jury in this manner: "Now Mr. Fowlkes, you know. You've got how many clients, 500? Could you tell everything about that one client if I called the name out? No, you couldn't. This police officer has got I don't know how many. And you want him to tell us by independent recollection." Also, the Defendant claims that the judge improperly commented on the evidence. The trial judge interjected comments regarding evidence on two isolated occasions. The first comment was made in response to testimony by a nurse regarding the proper procedure for drawing a blood sample. The trial court stated: "That's what it says. It doesn't say use soap and water." Defense counsel clarified this by examination of the witness who stated that "soap and water is preferred." Also, when the Defendant was being cross-examined regarding whether he had consumed alcohol on prior occasions, defense counsel

asked about "what occasion" and the trial judge stated "The night of the accident." However, this was an inaccurate statement that the State's attorney corrected as "prior occasions." The Defendant argues that this disparaged defense counsel. However, these were isolated incidents and the inaccuracies were corrected immediately after the trial judge made the statements, arguably in favor of the Defendant. The Defendant also notes the trial judge's statement about a witness: "She's doing alright, General." Yet, in context, this was more an admonishment of the State and beneficial to the Defendant. Finally, the Defendant claims the statement "The Court will admit the copy, the T.B.I. is going to give us the original, go ahead." made an assumption not in evidence. Yet the Defendant inaccurately cites the record, which reads: "the T.B.I. is not going to give us the original." This appears merely a ruling on admissibility of a duplicate, rather than any comment about the evidence.

The Defendant cites Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7 (Tenn. 1948), cert. denied, 340 U.S. 837, 71 S.Ct. 21, 95 Led 614 (1950), for the proposition that "the jurors were likely influenced by the actions of the judge and the feeling manifested in his words and rulings during the trial." 187 Tenn. at 74, 213 S.W.2d at 10. A trial judge should avoid expression of thoughts that would indicate to the jury his opinion either against or in favor of a defendant. Id.

We obviously agree that a trial judge should exercise care not to express any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial. Brooks, 187 Tenn. at 74, 213 S.W.2d at 10. Yet, "[t]he issue to be determined is not the propriety of the judicial conduct of the trial judge, but whether he committed an error which resulted in an unjust

disposition of the case." State v. Baker, 785 S.W.2d 132, 135 (Tenn. Crim. App. 1989). While we caution restraint in a trial court's interjections and comments during trial, in the overall context of this case, the trial court's behavior in the cited instances did not so clearly violate the mandate of impartiality as to infringe upon the Defendant's right to a fair trial. Any comments regarding the evidence were isolated incidents that were clearly corrected on the record. Although the trial judge appeared "testy" on occasion, his statements did not permeate the trial such that the that the Defendant did not receive a fair trial. Furthermore, the Defendant has shown no prejudice. See State v. Caughron, 855 S.W.2d 526, 537 (Tenn. 1993); State v. Jenkins, 733 S.W.2d 528, 532 (Tenn. Crim. App. 1987); State v. Howell, 698 S.W.2d 84, 86-87 (Tenn. Crim. App.1985); State v. Hardin, 691 S.W.2d 578, 581 (Tenn. Crim. App. 1985). This issue is without merit.

The Judgment is affirmed. This case is remanded solely for the purpose of correcting the period of revocation of the driver's license to reflect three years.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JERRY L. SMITH, JUDGE