IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

January 22, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, Appellee V. RICHARD LEE GENTILE, Appellant.	)))))))))))	No. 03C01-9506-CR-00171 KNOX COUNTY HON. RICHARD BAUMGARTNER, JUDGE (DUI, Second Offense; Driving on Revoked License)

For the Appellant:

Paula R. Voss
John Halstead
Assistant Public Defenders
1209 Euclid Avenue
Knoxville, TN 37921

For the Appellee:

Charles W. Burson
Attorney General and Reporter

Hunt S. Brown
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

Randall E. Nichols
District Attorney General

Gregg Harrison
Assistant District Attorney
400 Main Street
Knoxville, TN 37901

OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Richard Lee Gentile, appeals as of right his convictions in the Knox County Criminal Court of driving under the influence, second offense, and driving on a revoked license. He received an effective sentence of sixty (60) days incarceration for these misdemeanor offenses.

Appellant raises two issues on appeal: (1) he argues that he was denied the right to a competent and impartial jury because a note from the jury foreman indicated that two jurors were willing to vote guilty to obtain a hasty verdict; and (2) he claims that the trial court erred in not permitting appellant's counsel to speak with the jurors before they were discharged. Finding both issues to be without merit, we affirm the convictions.

The facts of appellant's case are similar to most DUI scenarios. Appellant was observed driving on Chapman Highway in Knoxville around midnight on May 1, 1994. An officer with the Knoxville Police Department testified that he observed appellant run off the right side of the road four (4) times. The officer had to make two attempts to pull over the appellant, as appellant did not respond to his sirens on the first attempt. He testified that appellant told him that he had drunk three (3) beers in the last two (2) hours. The officer performed three field sobriety tests which, in his opinion, the appellant did not complete successfully. Appellant refused to submit to a breathalyzer test. He was arrested and later indicted for driving under the influence, reckless driving and violation of the driver's license law.

Appellant testified that he was eating a sandwich while operating his vehicle and this caused his improper driving. He further explained that his car had some mechanical difficulties, causing it to veer to the right. Appellant testified that he drank four (4) beers earlier that day, sometime between 2:00 and 3:00 p.m. He denied having ingested any alcoholic beverages after that time.

The jury returned guilty verdicts for driving under the influence and for driving on a revoked license. It assessed fines of $800 and $400, respectively. The appellant then pled guilty to the level of the offense. This conviction was his second offense for driving under the influence. The trial court sentenced appellant to eleven (11) months, twenty-nine (29) days and probation for eleven (11) months, twenty-nine (29) days on the DUI charge. For driving on a revoked license, he received six (6) months and probation for eleven (11) months, twenty-nine (29) days. The sentences were to run concurrently. The trial judge suspended all but sixty (60) days of the sentences and gave appellant credit for twenty-eight (28) days spent in rehabilitation.

Appellant attacks the validity of the jury verdict based on a note the jury foreman sent to the trial judge after two hours of deliberations. He argues that the contents of the note indicate that two jurors had agreed to violate their oath and decide the case based on reasons other than the evidence and the law. We find appellant's argument to be without merit.

The jury foreman submitted a note to the trial judge which stated the following: "I, Homer Russell, as jury foreman do not feel good about our decision. As of now, 6:00 p.m., the decision is 10-2 guilty. But 2 of my jurors are wanting to agree with us (10) just to get out of here today. I request we return tomorrow." The trial judge shared this note with counsel. The judge then spoke with the jury, stating that he received the note and understood that due to the lateness of the hour, they were tired and needed to return the next day to continue deliberations. The foreman agreed and indicated the assent of the other jurors.

Upon their return to court the following morning, the trial judge reiterated a portion of the jury instructions with respect to the jurors' duties. He then returned the jury to deliberate. Very shortly, the jury reported the guilty verdicts.

Based on the record before us, we find no evidence sufficient to attack the jury verdicts. It has long been the law in this State that a jury's verdict is presumed to reflect a decision based on the law and evidence. Smith v. State, 327 S.W.2d 308,

323 (Tenn. 1959), cert. denied 361 U.S. 930, 80 S.Ct. 372, 4 L.Ed.2d 354 (1960). The note from the jury foreman is not sufficient to support a contention that the verdict was based on anything less than the considered judgment of each juror. It was nothing more than an expression of the jury foreman's opinion that two of the jurors wanted to vote guilty in order to go home. The note simply signaled the trial court that a unanimous verdict had not been reached and further deliberations were necessary. In response, the trial judge granted the jury's request to go home and return to deliberate the following day. Upon further deliberations, the jury was able to reach unanimous verdict. We find nothing improper.

The appellant contends that the trial court was without authority to instruct the jury to deliberate further. He argues that declaring a mistrial was the proper remedy because the note evidenced that certain jurors were willing to violate their oath in order to go home. However, case law does not support such a contention. If jurors request an opportunity to deliberate further, it is fully within the trial court's authority to permit them to do so. See State v. Hurley, 876 S.W.2d 57, 68 (Tenn. 1993), cert. denied ___ U.S. ___, 115 S.Ct. 328, 130 L.Ed.2d 287 (1994) (it is not improper for the trial court to excuse jury at 7:00 p.m. and, upon their request, permit them to continue deliberations at the motel). We also observe that prolonged court hours may constitute error. State v. Hembree, 546 S.W.2d 235, 242-43 (Tenn. Crim. App. 1976) (trial court erred in not adjourning at midnight and in permitting the jury to receive evidence until 1:00 a.m.). In light of this, the trial court acted properly in continuing the jury's deliberations.

Furthermore, upon information that the jury is not unanimous, a trial court may return them to deliberate to achieve a unanimous decision. See State v. Mounce, 859 S.W.2d 319, 322 (Tenn. 1993) (where the jury returned a split verdict, the trial judge had the preferred alternative of instructing the jury further and having them continue to deliberate for the purpose of returning a unanimous verdict instead of declaring a mistrial). See also Tenn. R. Crim. P. 31(d); State v. Henley, 774 S.W.2d 908, 915

(Tenn. 1989), cert. denied 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 800 (1990) (upon a poll of the jury, if there is not a unanimous concurrence the jury may be directed to retire for further deliberations); and State v. Nichols, 877 S.W.2d 722, 730 (Tenn. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995) (when the jury reports an incorrect or imperfect verdict, the trial court has both the power and duty to redirect the jury's attention to the law and return them to deliberate). The trial judge acted prudently in continuing deliberations until the following day.

Moreover, there is no evidence in the record that any of the jurors decided upon the appellant's guilt merely for expedience. Before a jury's verdict can be vitiated, it must be shown that some outside influence or some extraneous prejudicial information was improperly brought to bear upon one or more of the jurors. State v. Harris, 637 S.W.2d 896, 899 (Tenn. Crim. App. 1982). Tennessee Rule of Evidence 606(b) outlines the forms of admissible evidence when attacking a jury verdict. This rule permits evidence from jurors only if it can be shown that extraneous prejudicial information was improperly brought to the jury's attention, there was any outside influence on any juror, or whether the jurors agreed in advance to be bound by a quotient verdict. Tenn. R. Evid. 606(b). See also State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984). Such evidence may properly be received through testimony of a juror or an affidavit submitted by a juror. Tenn. R. Evid. 606(b) Advisory Commission Comments.

The record in appellant's case is utterly void of any statements, testimony, or affidavits from any of the jurors reflecting that they were influenced by extraneous prejudicial information or influenced by any outside source. We further find no indication in the record that appellant's counsel attempted to speak with any of the jurors after they were discharged to support his contention, although this is permissible. See Sup. Ct. R. 8, EC 7-29. Without any evidence of outside influence or extraneous prejudicial information, appellant fails to overcome the presumption that

the jury's verdict was based upon reasoned and sound judgment of the facts as applied to the law. We find no error.

Appellant also attacks the trial court's re-reading of a portion of its instructions to the jury on the second day of deliberations. He argues that reading only a portion of the instructions outlined in Kersey v. State, 525 S.W.2d 139 (Tenn. 1975) was reversible error. However, appellant lodged no objection to the re-reading of these instructions at the trial, although the trial court specifically informed counsel he was going to do so. The issue is, therefore, waived on appeal. Tenn. R. App. P. 36(a).

Appellant's remaining issue is likewise without merit. He contends that the trial court erred in not allowing counsel to question the jury about the verdict prior to their discharge from court.

The record reflects that the trial court asked counsel if they were interested in questioning the jurors "before he let them go." The assistant district attorney stated that he did not. The public defender did not answer in the affirmative; in fact he gave no definitive answer at all. The trial court then decided that it would not permit such questioning. This was not error. While Supreme Court Rule 8, Ethical Consideration 7-29 permits counsel in a case to contact jury members after the trial, State v. Thomas, 813 S.W.2d 395, 396 (Tenn. 1991), questioning jurors prior to their discharge is within the discretion of the trial judge. Appellant misconstrues Thomas in his assertion that there is an absolute right to question jurors *before* they are discharged. We find no error in the trial court's decision on this issue.[1]

Appellant has failed to demonstrate that the jury's verdict was infirm. Accordingly, we affirm appellant's convictions.

---

[1] We further note that any inquiry made of the jurors to determine whether their verdict was based upon a desire to go home the night before might have elicited impermissible evidence under Tennessee Rule of Evidence 606(b). See Montgomery v. State, 556 S.W.2d 559, 561 (Tenn. Crim. App. 1977) (applying the principles of Federal Rule of Evidence 606(b) and finding that a juror's affidavit stating he voted in favor of guilt to avoid being "locked up" for a weekend if no verdict were reached could not be considered to render the verdict void).

_____
William M. Barker, Judge

_____
John H. Peay, Judge

_____
David G. Hayes, Judge