IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9512-CC-00423**
	)	
Appellee,	)	
	)	
	)	**STEWART COUNTY**
VS.	)	
	)	**HON. ALLEN W. WALLACE**
SARA A. GOODMAN,	)	**JUDGE**
	)	
Appellant.	)	(DUI)

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF STEWART COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. The Defendant, Sarah A. Goodman, was convicted by a Stewart County jury of one count of driving under the influence of an intoxicant.[1] She was sentenced to the county jail for eleven months and twenty nine days, suspended with probation after forty-eight hours. Her license was revoked for one year and she was ordered to attend alcohol safety school. She appeals her conviction, presenting two issues for review: (1) That the trial court erred by admitting a photograph taken of the Defendant while in custody; and (2) that the trial court erred by denying the Defendant's motion to suppress admissions made to the arresting officer. After a careful review of the record, we affirm the judgment of the trial court.

The facts are as follows according to the Defendant's arrest warrant and pursuant to an agreed statement of the evidence.[2] At approximately 2:17 a.m. on April 16, 1994, Deputy Tim Dennis of the Stewart County Sheriff's Department was driving east on Highway 79 when observed a vehicle traveling in excess of the speed limit. He clocked the car at eighty (80) miles per hour. The red plastic covers over the taillights were broken out. Deputy Dennis pulled the vehicle over at a nearby ball park. The Defendant, Sarah A. Goodman, was the driver of the vehicle. The Deputy administered three field sobriety tests, which she failed. The Defendant refused an intoximeter test. She was arrested and transported

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[1] Tenn. Code Ann. § 55-10-401.

[2] A transcript was not generated from the trial. An agreed order summarizing the evidence at trial was submitted to and approved by the trial court on March 18, 1995 to supplement the record for this appeal.

to the Stewart County Jail. While using the phone at the jail, the Defendant fell to the floor and said she had been knocked down. She complained that she could not get off the floor. The Sheriff's personnel called an ambulance and the Defendant was treated by an emergency medical technician. There is no record of the type of treatment that was administered. Afterwards, the Defendant appeared to "pass out" as she lay on the floor. A photograph was taken of the Defendant in this condition. She was convicted by a jury verdict on May 18, 1995, of driving while under the influence of an intoxicant.

As her first issue, the Defendant contends that the court erred in admitting a photograph taken of her while she lay on the floor at the Sheriff's Department. The admissibility of photographs is governed by Tennessee Rule of Evidence 403 and State v. Banks, 564 S.W.2d 947 (Tenn.1978). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Tenn. R. Evid. 403. Whether to admit photographs is within the discretionary authority of the trial court and will not be reversed absent a clear showing of an abuse of discretion appearing on the face of the record. Banks, 564 S.W.2d at 949; State v. Braden, 867 S.W.2d 750, 758 (Tenn. Crim. App. 1993); State v. Dickerson, 885 S.W.2d 90, 92 (Tenn. Crim. App. 1993); State v. Allen, 692 S.W.2d 651, 654 (Tenn. Crim. App. 1985). The Defendant argues first that the photograph is not relevant to the determination of her intoxication. She claims that a "myriad of reasons" could account for her lying on the floor at the Sheriff's department. Yet, she proffers no other theories or proof to support this contention. The photograph was admitted for the purpose of demonstrating the level of the Defendant's intoxication. It corroborates the testimony of Deputy

Dennis. In this jurisdiction, evidence is deemed relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. In the case at bar, the Defendant failed the field sobriety tests, admitted drinking beer, and appeared to pass out while in custody. The photograph supports the State's contention that the Defendant was intoxicated and is relevant to demonstrate that fact.

Beyond this, the Defendant also contends that the prejudicial effect of showing the photograph to the jury substantially outweighed its probative value. Although relevant evidence is generally admissible under Tennessee Rules of Evidence 402, it may be excluded under the provisions of Rule 403. The Defendant asserts that the probative value of the photograph is slight in that a still photograph cannot accurately portray her appearance and demeanor. We agree that the photograph is not the most probative piece of evidence because a still shot cannot completely portray the Defendant's demeanor. Yet, when we consider the context in which the photograph was taken, we cannot conclude that the prejudicial effect of the photograph substantially outweighed its probative value such that the Defendant was deprived of a fair trial. The fact that relevant evidence is prejudicial does not mean the evidence must be automatically excluded. "Any evidence which tends to establish the guilt of an accused is highly prejudicial to the accused, but this does not mean that the evidence is inadmissible as a matter of law." State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989); see State v. Gentry, 881 S.W.2d 1, 6 (Tenn. Crim. App.1993). As Rule 403 states, the "danger of unfair prejudice" must "substantially outweigh" the probative value of the evidence before the accused

is entitled to have the evidence excluded. Here, we have the testimony of the arresting officer that the Defendant failed field sobriety tests, admitted to drinking beer, and that she lost consciousness while in custody. There is evidence that paramedics were called to attend to the Defendant immediately before she "passed out" and the record is devoid of evidence that the problem was medical, rather than a result of the Defendant's apparent intoxication. The Defendant did submit a statement from a physician that she suffered from back problems that may influence performance on field sobriety tests , but this does not address the incident at the Sheriff's Department. At most, any error in admitting the photograph was that it was cumulative evidence in light of the Deputy's testimony. Even if the probative value is slight, it does not appear that any prejudice suffered was substantial. We cannot conclude that the trial judge abused his discretion in admitting the photograph and, therefore, this issue is without merit.

In her second issue, the Defendant argues that the trial court erred by failing to grant her motion to suppress admissions she made to Deputy Dennis. The testimony by Deputy Dennis regarding the Defendant's statements is conflicting. According to the statement of the evidence, after the Deputy stopped the Defendant in her vehicle and pursuant to arrest, she admitted drinking "a couple" of beers. At that time, she was not Mirandized. Yet, upon cross-examination, the Deputy stated that the statement was actually made after the stop and prior to the Defendant's arrest. Furthermore, at a preliminary hearing, the Deputy stated that the Defendant admitted to drinking "one beer." The Defendant contends that because Deputy Dennis' testimony was inconsistent, the trial court erred by accepting the State's version of the facts.

A trial judge's factual findings on a motion to suppress have the weight of a jury verdict and are conclusive on appeal unless the evidence clearly preponderates against them. State v. Tuttle, 914 S.W.2d 926, 931 (Tenn. Crim. App. 1995); State v. Woods, 806 S.W.2d 205, 208 (Tenn. Crim. App. 1990), perm to appeal denied (Tenn.1991), cert. denied, 502 U.S. 1079, 112 S.Ct. 986, 117 L.Ed.2d 148 (1992); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App.1990). The suppression issue in the case sub judice was heard on an oral motion and the record does not reflect the trial court's findings of fact. However, by denying the Defendant's motion, the trial court apparently resolved any conflicts in favor of the State.

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, September 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).

Moreover, the need for Miranda warnings presumes that statements are elicited through interrogation or questioning. “Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. . . . Volunteered statements of any kind are not barred by the Fifth Amendment . . . .” Miranda, 384 U.S. at 478, 86 S.Ct. at 1630; see State v. Hurley, 876 S.W.2d 57, 65-6 (Tenn. 1993), cert. denied, 115 S.Ct. 328, 130 L.Ed.2d 287 (1994); State v. McNish, 727 S.W.2d 490, 496 (Tenn.), cert. denied, 484 U.S. 873, 108 S.Ct. 210, 98 L.Ed.2d 161 (1987).

In the case at bar, the Defendant alleges that she made two unwarned statements about her drinking that should properly be excluded. The first

occurred when she admitted to drinking “a couple” of beers. The testimony is conflicting as to whether the statement was made pursuant to the arrest or before the arrest when the officer stopped the Defendant. However, there is no evidence in the record that the admission was elicited pursuant to questioning by the arresting officer. Whether the admission was made prior to or after the arrest, without evidence of questioning by the Deputy, any statement made by the Defendant must be considered to have been given freely and voluntarily. This does not implicate the need for Miranda warnings nor does it justify excluding the Defendant’s statement. Even if we assume the admission was made as a result of the Deputy’s questioning, if the interrogation occurred prior to the arrest as part of the traffic stop, no violation has taken place. Obviously, the trial court evaluated the testimony at the suppression hearing and resolved the issue in favor of the State. As for the second statement made by the Defendant after arrest and while riding to the Sheriff’s office, again we see no evidence in the record that an interrogation took place. It appears that this also was a spontaneous admission and was properly admitted at trial. We cannot conclude that the evidence preponderates against the facts which support the ruling of the trial court. Therefore, this issue is without merit.

Accordingly, we affirm the judgment of the trial court.

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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