IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1996 SESSION

FILED

January 31, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 01C01-9602-CC-00064**
Appellee,	)	
	)	**FRANKLIN COUNTY**
VS.	)	
	)	**HON. J. CURTIS SMITH,**
MELVIN D. PRESTON,	)	**JUDGE**
	)	
Appellant.	)	(Driving under the Influence -
	)	6th offense)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted in January 1995 of driving under the influence (DUI), sixth offense, driving on a revoked license, sixth offense, and violation of the habitual traffic offender law. After a trial by jury, the defendant was convicted of driving under the influence only. He received a sentence of eleven months, twenty-nine days with all but one hundred twenty days suspended. The remainder of the sentence was to be served on supervised probation. Additionally, the defendant was fined fifteen hundred dollars ($1500) and his driving privileges were revoked for ten years. In this appeal as of right, the defendant alleges that the trial court erred by instructing the jury on the "physical control" element of the DUI statute when the indictment only charged the defendant with driving the vehicle rather than being in physical control.

On October 19, 1994, Deputy Tim Holt, of the Franklin County Sheriff's Department, was traveling on Highway 130 in the early morning hours when he spotted the defendant's truck on the side of the road. As he approached the vehicle from the opposite direction, he could see that the lights of the truck were on and that the driver's side door was open. Upon passing the vehicle, Holt saw that the defendant was leaning out the driver's side door vomiting. Holt turned his vehicle around and parked directly behind the defendant's truck. He testified that the truck's engine was still running when he approached it.

Upon reaching the truck, Holt saw two men seated in the cab. He detected a strong alcoholic beverage smell on the defendant and noticed a partial six pack of beer on the floor of the truck. Holt testified that he had asked the defendant to turn off the truck's engine, surrender the keys, and step out. Holt then administered three field sobriety tests to the defendant. After the defendant performed poorly on all three, he was

placed under arrest. Both the defendant and the passenger were then taken to a nearby emergency room where they consented to having their blood tested. The alcohol concentration in the defendant's blood was twenty-six hundredths of one percent (.26%).

Holt testified that the defendant had bragged about the size of his truck's engine and had stated that had he not been stopped on the side of road, Holt would still be chasing him. However, Holt also testified that he did not see the defendant driving the truck and that the defendant in fact had said he had not been driving.

Karen Beech, the defendant's girlfriend, testified that on that evening she and the defendant and some other friends had been drinking at a bar called the Thunderbird. She testified that she had consumed nearly a twelve pack of beer herself but that it was she who drove the defendant's truck. She said that she decided to take the "back roads" rather than go through Tullahoma because she had been drinking. When questioned about her route that night, Beech was unable to explain how she got to Highway 130. She testified that she and the defendant had been arguing and that she pulled the truck off the side of the road so that she could exit the truck. Another friend, Michael Sutton, had been following the truck and he too pulled over so that Beech could get in his vehicle. Beech could not describe the area where she pulled the truck off the road. She testified that she left the defendant and his passenger sitting in the truck.

Sutton also testified that Beech was driving the truck when the group left the Thunderbird. He too was unable to describe the route they took or the place where they pulled over. The passenger in the defendant's truck did not testify.

The defendant testified that he did not drive his truck that evening. He testified that Beech drove the truck, got angry at him, and left him and his passenger

sitting in the truck on the side of the road. He further testified that Beech turned off the truck and took her keys when she left. He said that he had been sitting in the middle of the seat of the truck, but that when Beech left he moved over to the driver's side to give the passenger more room. He testified that he thought Beech would return, therefore, he and the passenger just sat in the truck and waited. Some twenty minutes later Deputy Holt arrived. The defendant testified that he did not drive the truck at any time after leaving the Thunderbird.

The defendant contends that the instructions to the jury were erroneous because they alleged an element of DUI not included in the indictment. The indictment charged the defendant as follows: "That MELVIN D. PRESTON heretofore on the 19th day of October, 1994, in the County aforesaid did unlawfully drive a motor vehicle upon a Public highway or road while under the influence of an intoxicant, against the peace and dignity of the State." (emphasis added).

Tennessee Code Annotated § 55-10-401(a) provides as follows:

> It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while (1)Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or (2)The alcohol concentration in such person's blood or breath is ten-hundredth of one percent (.10%) or more. (emphasis added).

The defendant contends that because the indictment charged him only with driving a vehicle, not with being in physical control, the jury should not have been given instructions that it could convict if it found the defendant was either driving the vehicle or in physical control of it. We disagree and find no error in the trial court's instructions to

the jury.

We first point out that T.C.A. § 55-10-401(a) prohibits driving under the influence of an intoxicant or drug. This offense may be committed by alternative means; that is, it may be committed either by driving or being in physical control of a motor vehicle while under the influence. We hold that the statute creates only one offense, not two separate and distinct offenses. Thus, we must determine whether the variance between the indictment and the instruction to the jury was material as to prejudice the defendant.

The Tennessee Supreme Court has developed the following test to determine whether a variance is material:

> Unless substantial rights of the defendant are affected by a variance, he has suffered no harm, and a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense; all other variances must be considered to be harmless error.

State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). Only when the prosecutor has attempted to rely at trial upon theories or evidence that were not fairly embraced in the indictment is there a material variance. State v. Mayes, 854 S.W.2d 638, 640 (Tenn. 1993) *citing* Russell v. United States, 369 U.S. 749, 791-93 (1962). So long as the indictment sufficiently informs the defendant of the charges against him and protects him from subsequent prosecutions for the same offense, any variances are harmless. State v. West, 737 S.W.2d 790, 793 (Tenn. Crim. App. 1987).

In this case, the indictment sufficiently informed the defendant of the

offense with which he had been charged. Furthermore, the defendant had notice of the facts the State intended to prove at his trial. In the arresting officer's affidavit for complaint of arrest, he stated that he found the defendant sitting in his truck which was pulled off the side of the road. The officer did not allege that the defendant was seen driving the truck. This theory, which was used throughout the trial by the State, should have come as no surprise to the defendant. In fact, he makes no argument in this Court that he was misled by the indictment or that he was unable to adequately prepare a defense. Indeed, the record indicates that the defendant mounted a viable defense.

As we pointed out earlier, the offense of driving under the influence is one offense that can be committed by alternative means. The defendant is in no danger that he will be prosecuted again for the same offense because he has already been prosecuted for the one and only offense under T.C.A. § 55-10-401(a). There is not another offense with which he could be charged. Thus, we conclude that the substantial rights of the defendant have not been compromised by the variance between the indictment and the instructions to the jury. See State v. Lawrence, 849 S.W.2d 761, 766 (Tenn. 1993)(finding defendant's argument meritless where the indictment charged him only with driving a vehicle while under the influence and where the jury was instructed on both driving and physical control).

The judgment below is therefore affirmed.

JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JERRY L. SMITH, Judge