IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1995 SESSION

FILED

February 13, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9505-CC-00138
	)	
	)	Williamson County
v.	)	
	)	Hon. Donald P. Harris, Judge
	)	
DAVID W. SEIBER,	)	(Driving Under the Influence, Second Offense,
	)	and Violating the Motor Vehicle Habitual
Appellant.	)	Offenders Act)
	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, David W. Seiber, was convicted by a jury in the Williamson County Circuit Court for second offense driving under the influence of an intoxicant (D.U.I.), a Class A misdemeanor, and for driving after having been declared an habitual motor vehicle offender, a Class E felony. See T.C.A. §§ 55-10-401 (1993), -616. For the D.U.I. conviction, he received a sentence of eleven months and twenty-nine days to be suspended after the service of one hundred and twenty days in the Williamson County Jail and a fine of $1,000. For the habitual motor vehicle offender offense, he received a sentence of fifteen months as a Range I, standard offender to be served in the custody of the Department of Correction. The sentences are to be served concurrently. In this appeal as of right, the defendant contends that:

> (1) the evidence is insufficient to support his convictions,
>
> (2) the trial court erred in overruling his motion for a mistrial based upon the state's improper comments made during its opening statement, and
>
> (3) the trial court imposed an excessive sentence.

We disagree and affirm the defendant's convictions.

In the early morning hours of June 14, 1993, a car was found parked in the middle of Nolensville Road in Triune, a residential area in Williamson County. Sharon Puckett testified that she was on her way to work around 4:00 a.m. when she came upon the car parked diagonally across her lane of traffic. She stated that the rear end of the car was slightly over the middle line but was not on the shoulder of the road. Ms. Puckett testified that she slowed down, thinking that the driver might move ahead. Realizing that the car was not going to move, she drove around the car. As she passed the car, Ms. Puckett saw a white person behind the wheel of the car with an arm partially hanging out of the window. She could not recall whether the ignition or the

lights of the car were on. Ms. Puckett immediately called the Williamson County Sheriff's Department on her car phone and continued her drive to work.

Kevin Archey, a deputy sheriff with the Williamson County Sheriff's Department, responded to a report of a "suspicious vehicle" and arrived on the scene at approximately 4:21 a.m. to find a 1978 Ford Thunderbird parked across one lane of the road. He described the vehicle as being parked "erratically" in the roadway. Deputy Archey stated that about three-fourths of the car was in the roadway with the remainder parked on the shoulder. He approached the car and saw two individuals, one in the driver's seat and another in the front passenger seat. He stated that the defendant was in the driver's seat and that he had his back slightly turned away from the car door. The passenger was Joao de Oliveira.

Deputy Archey reported that there was no movement within the vehicle when he arrived and that he was unsure whether the defendant was awake. He said that he asked to see the defendant's hands three times with no response and then called for additional back-up. After Deputy Archey asked to see his hands two more times, the defendant cooperated. Deputy Archey described the defendant as being confused, dazed and in a stupor. He also testified that when he approached the car, he smelled a strong odor of alcohol and noticed that the lights were on and the keys were in the ignition. When Deputy Archey asked the defendant for his driver's license, the defendant told him that he did not have one. Deputy Archey further testified that the passenger was intoxicated but cooperative.

Once other officers arrived, the defendant was removed from the vehicle and asked to perform four field sobriety tests. Deputy Archey testified that the defendant failed all tests that were administered: the alphabet test, the counting test, the heel to toe test, and the finger to nose test. He said that the defendant had difficulty

following instructions, was unsteady on his feet, and spoke incoherently. He also stated that the defendant told him that he had not had anything to drink and that he had not been driving the car. Although the defendant told him that the car had broken down, Deputy Archey said that he never tested the car. He noted that the car was towed to a service station. A search of the car revealed a cooler, fishing poles and other fishing materials. Deputy Archey further testified that the defendant consented to a breathalyzer test and that the results showed a blood alcohol content of .17 when administered at 5:37 a.m. He stated that there was never any indication that a third person was driving the car.

Deputy Archey admitted on cross-examination that the defendant told him that the car was out of gas. He also acknowledged that the motor of the car was not running when he arrived.

Joao de Oliveira, the passenger of the car, testified for the defense. He stated that he had known the defendant about two months prior to the night of the offense. Oliveira testified that on the evening before the defendant's arrest, the defendant and his brother, Chris Seiber, came to his house, and they decided to go fishing at the lake. Oliveira said that they used his car for the trip but that Chris drove because Oliveira had been drinking all day. He also testified that he had been asleep about five hours before the police arrived. Although Oliveira claimed that Chris was the last person he remembered driving the car, he admitted that he initially told Deputy Archey that the defendant had been driving the car but explained that he made the statement only because he did not know where Chris was and the defendant was behind the wheel of the car. He stated that he never actually saw the defendant drive the car. Oliveira also said that when he and the defendant's parents picked up his car approximately three days later, it would not start because it was out of gas and the battery needed to be recharged. On cross-examination, he admitted that he could not

remember most of the weekend of the offense, that he had blacked out due to his intoxication, and that he had pieced the events of the weekend together based mostly on what the defendant's parents and other friends had told him.

Carolyn Seiber, the defendant's mother, testified that she lived six to seven miles from Triune. She stated that the defendant, Chris and Oliveira left together in Oliveira's car at about 4:00 p.m. the evening before the offense and that Chris was driving. At approximately 2:15 a.m. on the morning of the offense, Ms. Seiber received a phone call from the defendant. She also said that she saw Chris that morning around 6:00 a.m. at her home. Ms. Seiber confirmed that when she and her husband went to pick up Oliveira's car almost three days later, it was out of gas and required recharging of the battery.

Deputy Archey testified in rebuttal that Oliveira told him that he asked the defendant to drive, because he wanted some sleep before going to work. He acknowledged that Oliveira was intoxicated when he told him that the defendant was the driver of the car. The defendant stipulated that he had an earlier conviction for driving under the influence.

Regarding the habitual offender offense, the state introduced an order dated March 22, 1985, declaring the defendant to be an habitual offender and revoking his license. A certified copy of the defendant's driving history with the State of Tennessee Department of Safety reflected that the driver's license of the defendant had not been reinstated prior to the offense. Deputy Archey also testified that the defendant informed him that he did not have a driver's license at the time of the offense.

I. SUFFICIENCY OF THE EVIDENCE

In his first issue, the defendant contends that the evidence is insufficient to support his convictions for driving under the influence and violating the Motor Vehicle Habitual Offenders Act. The state responds that there is sufficient evidence to support the defendant's convictions.

Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing 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, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

A. DRIVING UNDER THE INFLUENCE OF AN INTOXICANT

First, the defendant asserts that the state failed to prove his guilt for D.U.I. beyond a reasonable doubt in that there is insufficient evidence to prove that he either drove or was in physical control of the vehicle. See T.C.A. § 55-10-401(a) (1993). The state argues that the circumstantial evidence in this case supports a finding that the defendant was the driver of the automobile and also that the car was under the defendant's physical control while he was under the influence of an intoxicant. Viewing the evidence in the light most favorable to the state, we hold that the defendant's conviction is supported by the evidence.

Initially, the defendant argues that the state failed to prove that he intended to operate or to be in physical control of the vehicle. However, the offense of D.U.I. does not require a showing of a specific intent to drive the vehicle. State v.

James Isaac Mabe, No. 03C01-9402-CR-00051, Hamblen County, slip op. at 5 (Tenn. Crim. App. Oct. 25, 1994); see also State v. John Russell Turner, No. 03C01-9510-CC-00321, Blount County, slip op. at 4-5 (Tenn. Crim. App. Oct. 1, 1996), applic. filed (Tenn. Nov. 25, 1996) (holding that the legislature intended to create a crime imposing strict liability for the offense of D.U.I.); State v. Cathy A. Fiorito, No. 03C01-9401-CR-00032, Blount County, slip op. at 5 (Tenn. Crim. App. Nov. 27, 1995).

Also, although the defendant acknowledges that alternative means for a conviction of D.U.I. are provided in T.C.A. § 55-10-401(a) (1993), he incorrectly contends that actually "driving" the automobile while under the influence is an essential element of the offense. See State v. Ronald K. Taylor, No. 3, Decatur County (Tenn. Crim. App. Dec. 14, 1988). Driving a vehicle is not necessary for a conviction of driving under the influence of an intoxicant. See State v. Lawrence, 849 S.W.2d 761, 763, 765 (Tenn. 1993); see also State v. James W. Starnes, No. 01C01-9408-CC-00279, Coffee County, slip op. at 4 (Tenn. Crim. App. July 14, 1995). Pursuant to T.C.A. § 55-10-401(a) (1993), it is unlawful for any person or persons "to drive or to be in physical control of any automobile" while under the influence of an intoxicant on premises generally frequented by the public at large. (emphasis added); see State v. Lawrence, 849 S.W.2d at 766. In State v. Lawrence, our supreme court analyzed what activity constituted being in physical control of a vehicle and applied a totality of the circumstances approach:

> Thus, when the issue is the extent of the accused's activity necessary to constitute physical control . . ., the test allows the trier of fact to take into account all circumstances, i.e., the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise.

849 S.W.2d at 765. These circumstances also provide circumstantial evidence that the defendant actually drove the vehicle. Id.

We conclude that the evidence is sufficient to support a finding that the defendant drove the vehicle while under the influence of an intoxicant. Driving under the influence is a continuing offense and can be established by circumstantial evidence. State v. Ford, 725 S.W.2d 689, 690-91 (Tenn. Crim. App. 1986). The defendant was found either asleep or passed out behind the wheel of the vehicle with the headlights on and the key in the ignition. Under these circumstances, the jury was entitled to reject the defendant's claim that his brother drove the vehicle to the location and to find that the defendant was the driver of the vehicle. Also, Deputy Archey testified that he smelled a strong odor of alcohol coming from the car, that the defendant failed four field sobriety tests, and that the breathalyzer test results reflected a blood alcohol content of .17. These facts are sufficient to establish beyond a reasonable doubt that the defendant drove the car while under the influence of an intoxicant and, as well, that the defendant exercised physical control over the vehicle. Therefore, we hold that a rational trier of fact could have found the defendant guilty of D.U.I. beyond a reasonable doubt.

B. VIOLATION OF THE MOTOR VEHICLE HABITUAL OFFENDERS ACT

Next, the defendant argues that the evidence is insufficient to establish his guilt beyond a reasonable doubt for the offense of driving a motor vehicle after having been declared an habitual motor vehicle offender. He asserts that his convictions must be reversed because the state failed to prove that he drove the car. We disagree.

Pursuant to T.C.A. § 55-10-616, it is unlawful for a person to operate a motor vehicle after having been adjudged an habitual offender under the Motor Vehicle Habitual Offenders Act. The evidence presented at trial reflects that the defendant was found to be an habitual motor vehicle offender in 1985 and that his driver's license had not been reinstated at the time of the offense. As already stated, there is sufficient

evidence to prove that the defendant drove the car on the night of the offense. Therefore, we hold that any rational trier of fact could have concluded beyond a reasonable doubt that the defendant operated a vehicle after having been declared an habitual motor vehicle offender.

II. DENIAL OF MOTION FOR MISTRIAL

The defendant also contends that the trial court erred in overruling his motion for a mistrial after the state commented that Oliveira had pled guilty to driving under the influence by consent during its opening statement. The state responds that the defendant has waived this issue by failing to include it in his motion for a new trial. See T.R.A.P. 3(e).

In Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976), this court listed five factors to be considered in assessing the prejudicial effect of improper argument or conduct:

> 1. The conduct complained of viewed in the context and in light of the facts and circumstances of the case.
>
> 2. The curative measures undertaken by the court and the prosecution.
>
> 3. The intent of the prosecutor in making the improper statement.
>
> 4. The cumulative effect of the improper conduct and any other errors in the record.
>
> 5. The relative strength or weakness of the case.

Id. at 344. The decision to grant a mistrial rests within the discretion of the trial court. See State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Freeman, 669 S.W.2d 688, 692 (Tenn. Crim. App. 1983). Absent an abuse of discretion, the decision of the trial court will not be reversed on appeal.

During opening statements, the state commented that Oliveira had pled guilty to D.U.I. by consent. Although not explained to the jury, the conviction was based upon Oliveira's ownership of the vehicle and his allowing the defendant to drive the vehicle. The defendant did not immediately object to the statement but instead requested a mistrial outside the presence of the jury after completing his own opening statement. The trial court stated that the comment was unfortunate, but it did not think that the jury understood the meaning of D.U.I. by consent. The trial court denied the motion for a mistrial at that time, stating that the jury probably did not understand what the offense meant. However, the trial court agreed to reassess its determination at the conclusion of the trial if the statement became material to the defendant receiving a fair trial. There was no request for a curative instruction. At the conclusion of the state's proof, the defendant asked the court to reconsider the motion for a mistrial. The trial court once again denied the motion. However, the defendant did not renew his motion for a mistrial after presenting his case and failed to include the issue in his motion for a new trial.

The defendant's failure to raise the issue in his motion for a new trial waives the issue on appeal. See T.R.A.P. 3(e) and 36(a). Regardless, the trial court instructed the jury at the end of the trial that statements, arguments and remarks by counsel were intended merely to assist them in understanding the evidence and applying the law and should not be considered as evidence. Furthermore, the strong evidence that the defendant was under the influence and that Oliveira was drunk and not driving his own car, coupled with the state not explaining the significance of the codefendant's guilty plea to D.U.I. by consent renders the brief, although inappropriate, statement harmless beyond a reasonable doubt. See T.R.A.P. 36(b). Under these circumstances, it was not an abuse of discretion for the trial court to refuse to grant a mistrial.

III. SENTENCING

Next, the defendant contends that the trial court erred (1) by incarcerating the defendant for more than the statutory minimum period of confinement for his D.U.I. conviction, forty-five days, rather than granting intensive probation and (2) by denying him alternative sentencing for his habitual offender conviction. For the second offense D.U.I. conviction, the defendant was sentenced to eleven months and twenty-nine days of which one hundred and twenty days is to be served in confinement. The trial court also sentenced the defendant to serve a sentence of fifteen months as a Range I, standard offender in the custody of the Department of Correction for the habitual offender conviction. The trial court also ordered the sentences to be served concurrently.

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d), -402(d). However, "the presumption of correctness which accompanies the trial court's action 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 this respect, for the purpose of meaningful appellate review,

> the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. T.C.A. §§ 40-35-210(f) (1990).

State v. Jones, 883 S.W.2d 597, 599 (Tenn. 1994). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentencing is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that

are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991).

Also, in conducting a de novo review, we must consider (1) the evidence, if any, received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. T.C.A. §§ 40-35-102, -103, -210; see Ashby, 823 S.W.2d at 168; State v. Moss, 727 S.W.2d 229 (Tenn. 1986).

Regarding the defendant's Class E felony conviction for violating the Motor Vehicle Habitual Offenders Act, the sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. See T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d)-(e). The weight to be afforded an existing factor is left to the trial court's discretion as long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; Moss, 727 S.W.2d at 237; see Ashby, 823 S.W.2d at 169.

Relative to the D.U.I. sentence, we note that although a sentence in a D.U.I. case must meet certain mandatory restrictions provided in the D.U.I. statutes, the sentence must otherwise comply, as well, with the misdemeanor sentencing requirements of the Criminal Sentencing Reform Act of 1989. See T.C.A. §§ 40-35-104(a), -302(b); State v. Palmer, 902 S.W.2d 391 (Tenn. 1995). We also recognize

that a misdemeanant, unlike a felon, is not entitled to a statutory presumption of a minimum sentence, State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994), although the sentence imposed should be the least severe measure necessary to achieve the sentencing purpose. See T.C.A. § 40-35-103(4).

A. DRIVING UNDER THE INFLUENCE OF AN INTOXICANT

The defendant complains that the trial court should have granted intensive probation sentence for the second offense D.U.I. conviction after the service of the statutory minimum period of confinement of forty-five days rather than requiring the defendant to serve one hundred and twenty days of his eleven months and twenty-nine day sentence in confinement with the remaining period suspended. The state contends that the defendant has waived any claims regarding alternative sentencing for the D.U.I. conviction by failing to include the issue as error in his motion for new trial. See T.R.A.P. 3(e). However, sentencing issues are not required to be included in the motion for new trial. State v. Draper, 800 S.W.2d 489, 497 (Tenn. Crim. App. 1990).

The mandatory period of confinement for a second offense D.U.I. is forty-five days. T.C.A. § 55-10-403(a). In sentencing the defendant, the trial court generally relied upon the fact of his previous history of criminal convictions and criminal behavior. See T.C.A. § 40-35-114(1). The defendant had been released less than one month from the Department of Correction following a conviction for aggravated sexual battery when the present offense was committed. Other than his conviction for aggravated sexual battery, the defendant has a history of alcohol-related convictions dating back to 1980 in addition to those necessary for his conviction. These facts weigh considerably against the defendant's potential for rehabilitation. Therefore, we conclude that the trial court acted reasonably in imposing a period of confinement greater than the mandatory minimum for his conviction of second offense D.U.I.

B. VIOLATING THE MOTOR VEHICLE HABITUAL OFFENDERS ACT

The defendant also contends that he should have been placed on intensive supervised probation or community corrections for his felony conviction of violating the Motor Vehicle Habitual Offenders Act. The state responds that the trial court did not err in denying alternative sentencing because the defendant is statutorily ineligible for probation and community corrections under T.C.A. § 55-10-616(c).

Pursuant to T.C.A. § 55-10-616(c), the trial court is prohibited from suspending any sentence or fine unless there is an extreme emergency requiring the suspension to save life or limb. The defendant argues that this portion of the Motor Vehicle Habitual Offenders Act was repealed by operation of law because the Tennessee Criminal Sentencing Reform Act of 1982 controls probation eligibility for all crimes committed after July 1, 1982. See T.C.A. §§ 40-35-112(a) (1982), -303(a) (1982). By analogizing to State v. Lowe, 661 S.W.2d 701 (Tenn. Crim. App. 1983), the state contends that the provision was not impliedly repealed. In State v. Lowe, our court concluded that the amendments to the D.U.I. law were an exception to the more general sentencing provisions and thus the D.U.I. provisions controlled for purposes of determining whether the defendant was precluded from immediate work release eligibility. Id. at 703-04. Contrary to the situation before us, the Lowe court was interpreting two acts, one specific and the other general in scope, that became law on the same date. Id. at 703.

Although we agree with the defendant that T.C.A. § 55-10-616(c) was impliedly repealed, the Criminal Sentencing Reform Act of 1989 controls rather than the 1982 Act as argued by the defendant because the offense was committed in 1993. See T.C.A. § 40-35-117(a). This court has resolved the issue of whether the Criminal Sentencing Reform Act of 1989 supersedes the sentencing provisions of T.C.A. § 55-10-616(c) so as to allow a trial court to suspend all or part of a motor vehicle habitual

offender's sentence. In State v. Ricky Fife, No. 03C01-9401-CR-00036, Blount County, slip op. at 3 (Tenn. Crim. App. June 15, 1995), the court held that the Reform Act supersedes the earlier provision and that all or part of a motor vehicle habitual offender's felony sentence could be suspended pursuant to T.C.A. § 40-35-303(a). It relied upon the reasoning in State v. Hicks, 848 S.W.2d 69 (Tenn. Crim. App. 1992), in which this court reached a similar result relative to the offense of driving on a revoked license. Therefore, both probation and community correction sentences are sentencing alternatives that could have been considered by the trial court. However, eligibility does not equate to entitlement. See State v. Taylor, 744 S.W.2d at 922.

We acknowledge that the defendant does not meet the description of one who should be given first priority regarding a sentence involving incarceration under T.C.A. § 40-35-102(5) and that he has been convicted of a Class E felony as a standard offender. Therefore, he is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. See T.C.A. § 40-35-102(6). The presumption in favor of alternative sentencing may be rebutted if: (1) confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct, (2) confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses, or (3) measures less restrictive than confinement have been frequently or recently applied unsuccessfully to the defendant. T.C.A. § 40-30-103(1); State v. Ashby, 823 S.W.2d at 169; State v. Fletcher, 805 S.W.2d at 787-88.

As we previously noted, the trial court relied generally upon the fact that the defendant had a prior history of criminal convictions. See T.C.A. § 40-35-114(1). In our de novo review, we note that the defendant suffers from depression for which he receives clinical treatment and medication. The defendant also receives disability

payments. However, he has convictions of aggravated sexual battery and for several alcohol-related crimes other than those necessary to establish his status as an habitual offender. See T.C.A. § 40-35-103(1)(A). Moreover, the defendant was arrested for the present offense within one month of his release from confinement for the aggravated sexual battery sentence. In addition, the defendant admitted that after his trial for the present offense, he was arrested following an argument with his brother over beer. Therefore, we hold that the trial court's denial of alternative sentencing options was reasonable in light of these circumstances. For these reasons, the defendant has failed to establish that the sentence imposed by the trial court was improper.

In consideration of the foregoing and the record as a whole, the judgments of the trial court are affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Joe B. Jones, Presiding Judge

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Paul G. Summers, Judge