IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED

February 13, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**No. 01C01-9604-CC-00168**
Appellee,	)	
	)	**FRANKLIN COUNTY**
VS.	)	
	)	**Hon. Buddy D. Perry, Judge**
PENNY L. STEPHENS,	)	
	)	(Second Offense DUI and
Appellant.	)	Driving on Revoked License)

FOR THE APPELLANT:

PHILIP A. CONDRA
District Public Defender
204 Betsy Pack Drive
P.O. Box 220
Jasper, TN 37347

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

JANIS L. TURNER
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JAMES MICHAEL TAYLOR
District Attorney General

STEVEN M. BLOUNT
Assistant District Attorney General
1 South Jefferson Street
Winchester, TN 37398

OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The appellant, Penny Stephens, was convicted by a jury of her second offense of driving under the influence of an intoxicant and driving on a revoked license. She was sentenced to eleven (11) months and 29 days with all but 180 days suspended for the second offense DUI. On the charge of driving on a revoked license, she received a sentence of 48 hours in the county jail to run concurrently with the other charge. On appeal, Stephens raises two issues for our review: (1) whether the evidence was sufficient for the jury to find her guilty beyond a reasonable doubt; and (2) whether the trial court imposed a proper sentence. We affirm the judgment of the trial court.

I. BACKGROUND OF THE CASE

Officer Danny Mantooth was traveling in the area of Alton Street in Franklin County. He noticed an automobile with its headlights on high beam exiting an apartment complex on Alton Street at a high rate of speed. The driver was later identified at trial as Penny Stephens. When Officer Mantooth flashed his headlights at the driver, the car stopped in the middle of the street. At this point, Officer Mantooth turned into a parking space and signaled to the driver to park her car as well.

When he approached the vehicle, Officer Mantooth noticed that the driver's speech was slurred and her breath smelled of alcohol. He asked her to exit the vehicle in order that she could perform several field sobriety tests. After she failed all three tests, Officer Mantooth placed her under arrest for DUI. Subsequent blood alcohol tests revealed that her blood alcohol level was 0.22%.

Although she claimed that she left her driver's license at home, upon running a driver's license check Officer Mantooth discovered that her license had been revoked. At this point, she was also placed under arrest for driving on a revoked license.

After a jury trial, Stephens was found guilty of driving on a revoked license

and second offense DUI. The original sentencing hearing was postponed because Stephens left the courthouse before the hearing began. She was ultimately sentenced to eleven (11) months and 29 days, with all but 180 days suspended, for second offense DUI concurrent with 48 hours in the county jail for driving on a revoked license.

II. SUFFICIENCY OF THE EVIDENCE

A. Indictment

Stephens contends that the evidence presented at trial was insufficient to support a verdict of guilty beyond a reasonable doubt. More specifically, she urges that because the evidence presented at trial did not conform to the indictment, the state did not prove beyond a reasonable doubt those charges alleged in the indictment. The indictment stated that Stephens was charged with unlawfully driving on a "public highway or road" while under the influence of an intoxicant and driving on a "public highway" with a revoked license. Stephens suggests that the state did not prove that Alton Street was a "public highway or road," but merely a "street"; therefore, her convictions should be overturned.

A variance between the indictment and the proof at trial will result in reversible error only if that variance is deemed to be material and prejudicial. State v. Mayes, 854 S.W.2d 638 (Tenn. 1993). In State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984), the Supreme Court explained what constitutes a material or prejudicial variance:

> A variance between an indictment and the proof in a criminal case is not material where the allegations and proof substantially correspond, the variance is not of a character which could have misled the defendant at trial and is not such as to deprive the accused of his right to be protected against another prosecution for the same offense.

We find that any variance between the indictment and the evidence at trial was not material or prejudicial. T.C.A. § 55-10-401 makes it unlawful to drive on any public road or highway or any street while under the influence of an intoxicant. T.C.A. § 55-50-504(a)(1) makes it unlawful to drive on any "public highway" with a revoked license. There is no question under which statutes she was charged. The

indictment did not mislead Stephens about the offenses she was required to defend, and there is no danger that she will be prosecuted again for these offenses. Therefore, there was no fatal variance between the indictment and the proof.

B. Evidence at Trial

Where sufficiency of the evidence is challenged, the relevant question for an appellate court 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 or crimes beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979); State v. Duncan, 698 S.W.2d 63 (Tenn. 1985).

Officer Mantooth testified that he observed Stephens driving on a public street at a high rate of speed. When he approached Stephens' vehicle, her speech was slurred and she smelled of alcohol. Further, he testified that she failed all of the field sobriety tests administered. Stephens' blood alcohol content was tested and found to be 0.22%. Stephens offered nothing to contradict any of Officer Mantooth's testimony.

Additionally, Officer Mantooth testified that a check on Stephens' driver's license had revealed that her license was revoked. Kenneth Birdwell of the Tennessee Department of Safety also testified that Stephens' license had been revoked. Stephens offered nothing to contradict any of this testimony.

There is sufficient evidence in the record for a jury to convict Stephens for driving on a revoked license and DUI. This issue is without merit.

III. SENTENCING

Stephens also argues that the sentence for DUI, second offense is excessive. She specifically alleges that the sentence was not imposed in accordance with the Criminal Sentencing Reform Act of 1989 because the jail sentence was four (4) times greater than the statutory minimum.

Our review of the sentence imposed by the trial court is *de novo* with a presumption that the determinations of the trial court are correct. T.C.A. § 40-35-401(d); State v. Byrd, 861 S.W.2d 377, 379 (Tenn. Crim. App. 1993). The

presumption of correctness which attaches to the trial court's action is conditioned upon an 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).

State v. Palmer, 902 S.W.2d 391 (Tenn. 1995), requires that misdemeanor sentencing be conducted in accordance with the principles, purposes and goals of the Criminal Sentencing Reform Act of 1989. The sentence imposed by the trial court was within the statutory range for second offense DUI. The trial court based in part the sentence of 180 days in jail on Stephens' past criminal convictions, which is a legitimate enhancement factor under T.C.A. §40-35-114(1). Stephens offered no factors that would mitigate her sentence. The weight given to mitigating and enhancement factors is left to the discretion of the trial court as long as its findings are supported by the record. State v. Moss, 727 S.W.2d 229 (Tenn. 1986); State v. Santiago, 914 S.W.2d 116 (Tenn. Crim. App. 1995). Therefore, we conclude that the trial court acted within its discretion to enhance Stephens' sentence from the statutory minimum. This issue has no merit.

CONCLUSION

There is sufficient evidence in the record to convict Stephens of driving under the influence of an intoxicant and driving on a revoked license. Furthermore, we find no error in the sentence imposed by the trial judge. Accordingly, we affirm the judgment of the trial court.

JOE G. RILEY, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE