IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1996

FILED

February 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9602-CC-00071**
	)	
Appellee,	)	
	)	
	)	**SEVIER COUNTY**
V.	)	
	)	**HON. REX HENRY OGLE**
BOBBY TEASTER,	)	**JUDGE**
	)	
Appellant.	)	**(SUBORNATION OF PERJURY,**
	)	**BRIBERY)**

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SEVIER COUNTY

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, Judge

OPINION

The Appellant, Bobby Teaster, appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. He was convicted by a jury of bribery and subornation of perjury in the Sevier County Criminal Court. Teaster was assessed a fine of $10,000.00 for the bribery and $2,500.00 for the subornation of perjury. He was also sentenced to consecutive sentences of ten years for the bribery conviction and eleven months and twenty-nine days for the subornation of perjury conviction. We affirm Teaster's convictions and sentence.

Teaster argues four issues to this court: (1) The trial court erred by failing to dismiss this prosecution on the grounds of double jeopardy; (2) the evidence is insufficient as a matter of law to support a verdict of guilty, specifically, (a) the record does not contain evidence of perjury and (b) there is no support of the accomplice's testimony sufficient to support a verdict; (3) the trial court erred in failing to charge the jury on attempted bribery; and (4) the trial court erred in sentencing Teaster.

In the early morning hours of May 4, 1993, a Pigeon Forge police officer spotted a 1984 white Monte Carlo weaving in the road. The police officer was able to see the driver of the car and at trial identified Teaster as the driver. The officer chased the car at a high speed until the car encountered a curve, where the car flipped over, ending up in a ditch. As the officer approached the accident, he found Teaster in the middle of the road. Teaster was charged with D.U.I. and evading arrest.

During the summer of 1993, Teaster ran into a friend of his, Chris Hermann. He told Hermann that he was in trouble because of an accident he had been in and that he needed help to get out of trouble. Teaster asked his friend to say that he was the one driving the car in exchange for some money and an automobile. Teaster then took Hermann to an attorney's office where Hermann signed an affidavit that stated he was the driver of the car, not Teaster. Teaster also showed his friend where the accident happened.

Hermann was working with a Pigeon Forge police officer on the drug task force. Hermann spoke with this officer after being asked by Teaster to help him out of trouble. Hermann wanted to find out how serious the situation was. Hermann was also unable to tell the officer the date or time of the accident. The officer checked the report and called Hermann back. The officer became suspicious when Hermann stated that he had been driving a dark-colored Ford Thunderbird, and the car in the accident report was a white Monte Carlo. Hermann persisted with the story for a few minutes more, but the officer eventually persuaded Hermann to tell him the truth. The officer then sent Hermann to talk with Teaster while wearing a transmitter. The conversation was recorded. Teaster was then charged with bribery and subornation of perjury.

At Teaster's first trial, he was tried for D.U.I., evading arrest, bribery and subornation of perjury. The jury found Teaster guilty of D.U.I. and evading arrest, but was unable to come to a decision on the bribery and subornation of perjury. A mistrial was declared on the bribery and subornation of perjury charges. Teaster was convicted of bribery and subornation of perjury at a second trial, which is the basis for this appeal.

I.

Teaster's first issue is whether the trial court erred by failing to dismiss the prosecution on the grounds of double jeopardy. At the end of Teaster's first trial, the jury was unable to agree on a decision as to the charges on bribery and subornation of perjury. The trial judge declared a mistrial and defense counsel raised questions concerning the declaration of a mistrial. The mistrial was included as an issue in Teaster's motion for new trial following the first trial.

Our supreme court has stated:

> [A] retrial is permitted where there is a "manifest necessity" for the declaration of the mistrial, regardless of the defendant's consent or objection. United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267, 273 (1976); Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1978). . . .The impossibility of a jury reaching a verdict has long been recognized as a sufficient reason for declaring a mistrial. Jones v. State, 218 Tenn. 378, 403 S.W.2d 750, 754 (1966); State v. Freeman, 669 S.W.2d 688, 692 (Tenn. Crim. App. 1983); Arnold, 563 S.W.2d at 794. When the mistrial is declared because of manifest necessity, double jeopardy is not violated when the defendant is retried, even if he objected to the mistrial. Dinitz, 96 S.Ct. at 1079; Freeman, 669 S.W.2d at 692; Donaldson v. Rose, 525 S.W.2d 853, 855 (Tenn. Crim. App. 1975). The granting of a mistrial is within the sound discretion of the trial court, which will not be disturbed on appeal absent a finding of abuse of discretion. Jones, 403 S.W.2d at 753; Freeman, 669 S.W.2d at 692; State v. Compton, 642 S.W.2d 745, 746 (Tenn. Crim. App. 1982). In making this determination, "no abstract formula should be mechanically applied and all circumstances should be taken into account." Jones, 403 S.W.2d at 753.

State v. Mounce, 859 S.W.2d 319, 321-22 (Tenn. 1993).

In the case sub judice, the jury at the first trial went out for deliberation and returned to ask a question concerning the trial judge's instructions. The jury again deliberated and returned with guilty verdicts on the D.U.I. and evading

arrest charges. However, the foreman stated that they were unable to agree concerning the bribery and subornation of perjury. The record reflects the following exchange:

> THE COURT: Okay. In -- in #5675, as to the charge of bribery how does the Jury find?
> FOREMAN [ ]: The Jury could not make a decision, Your Honor. They were split.
> THE COURT: Okay. All right. Do you feel like that it would do you any good to deliberate further on those charges, or are you hopelessly deadlocked, in your opinion?
> FOREMAN [ ]: We appear to be deadlocked.
> THE COURT: Okay. All right, sir.
> As to the charge of subornation of perjury, has the Jury reached a verdict?
> FOREMAN [ ]: Same verdict on that one, also, Your Honor.
> THE COURT: Okay. Unable to reach a verdict?
> FOREMAN [ ]: Yes, sir.

It is clear from the proceedings at trial that the jury was deadlocked as to the bribery and subornation of perjury charges. The foreman did not think that further deliberations would remedy the problem. We find that there was no abuse of discretion by the trial judge and, therefore, hold that the declaration of a mistrial was a manifest necessity. There is no danger of double jeopardy when a mistrial is declared due to manifest necessity.

This issue is without merit.

II.

Teaster's second issue is that there was insufficient evidence to support his conviction for subornation of perjury. When an accused challenges the sufficiency of the evidence, this court must review the record to determine if the

evidence adduced during the trial was sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). To the contrary, this court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence as well as all factual issues raised by the evidence are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), the Tennessee Supreme Court stated, "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State."

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, State v. Grace, 493 S.W.2d at 476, the

accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Matthews, 805 S.W.2d 776, 780 (Tenn. Crim. App. 1990).

A.

Teaster first argues that the record does not contain evidence of perjury. Teaster argues that because Hermann testified at trial that he did not take an oath concerning the truth of the affidavit, and the affidavit does not contain a statement concerning perjury on its face, there is no evidence of perjury.

Subornation of perjury occurs when, "a person . . . who, with the intent to deceive, induces another to make a false statement constituting perjury or aggravated perjury." Tenn. Code Ann. § 39-16-705(a). Perjury is defined as:

> (a) A person commits an offense who, with intent to deceive:
> (1) Makes a false statement, under oath;
> (2) Makes a statement, under oath, that confirms the truth of a false statement previously made and the statement is required or authorized by law to be made under oath; or
> (3) Makes a false statement, not under oath, but on an official document required or authorized by law to be made under oath and stating on its face that a false statement is subject to the penalties of perjury.

Tenn. Code Ann. § 39-16-702(a).

The Affidavit reads:

> I, Christopher Bradford Herman [sic] who, after being sworn, do state as follows:
>
> At approximately 1:00 a.m. the morning of May 4, 1993, I was driving a 1984 Monte Carlo belonging to Pearl Dillinger [Teaster's mother]. I had been to Gatlinburg, Tennessee, with Bobby Teaster. I drove out of Gatlinburg, took the Spur, and drove up by the Pantry. I did not see the law behind me but was doing approximately 50 downhill and flipped the car. I was shook up and left the scene of the accident. I caught a ride on the Spur and went back to Gatlinburg.
>
> Sworn this 22 day of June, 1993.
>
> s/Chris Hermann
> Christopher Bradford Herman [sic]
>
> Sworn to before me and signed in my presence this 22 day of June, 1993
>
> [Signature of notary public]

We find that there is sufficient circumstantial evidence to support a finding by a rational trier of fact that there was an oath. The document states that it was sworn to, and it was also notarized, including a statement that the document had been sworn to before the notary. "An affidavit is an oath reduced to writing." Dep't of Human Servs. for Martin v. Neilson, 771 S.W.2d 128, 130 (Tenn. Ct. App.), perm. to appeal denied, id. (Tenn. 1989); Grove v. Campbell, 17 Tenn. (9 Yer.) 7, 10 (1836). Therefore, there is sufficient evidence to find that Hermann made a false statement under oath.

In addition, even if there was not an oath, it would not be a defense to perjury. An irregularity of an oath is not a defense to perjury:

> It is no defense to prosecution for perjury or aggravated perjury that:
> . . . .

> (2) The document was not sworn to if the document contained a recital that it was made under oath, the defendant knew or should have known of the recital when the defendant signed the document, and the document contained the signed jurat of a public servant or notary public authorized to administer oaths.

Tenn. Code Ann. § 39-16-706. If this argument is not a defense for Hermann to perjury, we do not see how it could be a defense for Teaster to subornation of perjury.

Hermann testified that Teaster offered him money and a truck if he would tell the police that he, and not Teaster, was driving the car the night of the accident. Hermann also testified that Teaster took him to the lawyer's office where he made a false affidavit. The fact that Hermann made a false statement under oath, because of Teaster's offer, is sufficient evidence to prove that Teaster induced a false statement and, therefore, suborned perjury. Therefore, we find that there is sufficient evidence for a rational trier of fact to find that Teaster suborned perjury.

This issue is without merit.

B.

Teaster also argues that the evidence is insufficient because there is no support of the accomplice's testimony. A defendant may not be convicted of a crime on the uncorroborated testimony of an accomplice. State v. Adkisson, 899 S.W.2d 626, 643 (Tenn. Crim. App. 1994). "An accomplice is one who knowingly, voluntarily and with common intent unites with the principal offender

in the commission of the crime." Conner v. State, 531 S.W.2d 119, 123 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1975). In State v. Adkisson, this court addressed what is necessary to corroborate an accomplice's testimony:

> [T]he evidence must confirm in some manner that (a) a crime has been committed and (b) the accused committed the crime. [Boulton v. State, 214 Tenn. at 98, 377 S.W.2d at 938.] Evidence which merely casts a suspicion on the accused or establishes that he had an opportunity to commit the crime in question is inadequate to corroborate an accomplice's testimony. [Boulton v. State, 214 Tenn. at 99, 377 S.W.2d at 939.] If the state introduces evidence to corroborate the accomplice's testimony, the jury, as the trier of fact, must determine whether the evidence is sufficient to corroborate the testimony. [Sherrill v. State, 204 Tenn. at 434, 321 S.W.2d at 814.]

899 S.W.2d at 644.

In the case sub judice, Hermann agreed to meet Teaster and wear a recording device to the meeting. Tim Trentham, the officer with whom Hermann was working, listened to and recorded the conversation between Teaster and Hermann. At trial, the jury heard the tape and was given a transcript of the tape. The relevant portion of the transcript reads as follows (Hermann is represented by "CH," Teaster is represented by "BT"):

> Officer: "Today's date is August 11, 1993. The time is approximately 2:50 p.m. The following will be a consensual recorded conversation between a cooperating individual, Chris Hermann, and Bobby Teaster from Gatlinburg, Tennessee."
> . . . .
> CH: "The [expletive] laws watching me big time, they think I'm a drug dealer or something."
> BT : "[Expletive]."
> CH: Tim Trentham and Dennis and the cop that busted you came over to my house (Inaudible). I gotta give you your money back and there ain't no way I can do it."
> BT: "You shouldn't done signed that there dude, (inaudible) that's going to get us perjury in court and everything else."
> CH: "[Expletive] man, they're after me for some [expletive] that happened a long time ago."

BT: "[Expletive], don't worry about the [expletive] there ain't nothing they can do about it, I mean, you know. It's like this, all we gotta do is go down to court and just stand by our stories and it'll be all [expletive] dismissed and we'll be out of it, both of us. You'll have a truck then hell, I'll be [expletive] out and I won't have to go back to prison."
CH: (Inaudible) "They came by my house (inaudible) Arizona (inaudible) all that [expletive] you know about it."
Unknown male: "How's everybody"
BT: "Pretty good."
BT: (Inaudible) "Everything I got."
CH: If I had Tim Trentham knocking on my door, you'd be panicking too."
BT: "No, (inaudible)"
CH: "There's no way its going to work man, the dude saw you (inaudible) the car and [expletive]."
BT: (Inaudible) "No, he didn't. (Inaudible) All they are trying to do is scare you, that's it, that's all they are trying to do. Don't listen to that [expletive] Chris. Now listen to what I'm telling you man, just hold tight and don't listen to that [expletive] because see, the only [expletive] thing they're trying to do is scare you and make you [expletive] panic where you'll [expletive] up in court. They've tried that [expletive] on me. (Inaudible) It's like whenever it went to court and everything, there wasn't a [expletive] thing done about nothing cause they lied, the whole [expletive] (Inaudible) that's just what he said. I know Tim Trentham real well."
CH: (Inaudible)
BT: "Just hold tight, it will work out. Just whenever we go to court, don't panic just stay calm. Just stay calm and when they start talking [expletive], don't [expletive] listen to it and don't let them intimidate you, that's what they're trying to do right now, intimidate you. That's [expletive]."
CH: "(Inaudible) come by my house and they're like, you know, what are you doing in this, we know you weren't driving. I mean I would expect them to do that, that's not it. What it is is [expletive] they think I'm a drug dealer or something. They're [expletive] watching me, I can tell they're watching me."
BT: "(Inaudible) you know, they're just full of [expletive], don't worry about it. There ain't a [expletive] thing they can do about it as long as we hold tight. You didn't tell them you wasn't driving did you?"
CH: "No"
BT: "Well, just don't, when they come to you [sic] house, just tell them if they've got something to talk about, go get a warrant to come talk to me and whenever they do I'll get you out of jail, I'll make your bond and then by god, we will . . ."

The recording and transcript stops at this point.

We conclude that there are several statements made by Teaster that link him with the charge at hand. Teaster clearly states that if they both stand by their stories, his friend will have a truck and Teaster will be out of prison. We find that there is sufficient evidence in this transcript to prove to a rational trier of fact that a crime was committed, and the accused committed the crime. Therefore, there is sufficient corroboration of the accomplice testimony to convict Teaster.

This issue is without merit.

III.

Teaster's third argument is that the trial court erred by failing to charge the jury on attempted bribery. Only when there is some evidence upon which reasonable minds could convict the defendant of a particular lesser offense is the court required to instruct regarding that offense. Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975); State v. Atkins, 681 S.W.2d 571, 577 (Tenn. Crim. App. 1984), cert. denied, 470 U.S. 1028 (1985).

Teaster was charged with bribery of a witness. An individual is guilty of bribery of a witness if he "[o]ffers, confers or agrees to confer any thing of value upon a witness or a person the defendant believes will be called as a witness in any official proceeding with intent to: (A) Corruptly influence the testimony of a witness . . . ." Tenn. Code Ann. § 39-16-107(a)(1)(A). Criminal attempt is defined as:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

> (1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101(a).

We do not conclude that a rational trier of fact could find that Teaster was guilty of attempted bribery. Hermann testified that Teaster offered him money and a truck if he would testify in court that he, and not Teaster was driving the car. There was also evidence in the transcript of the recorded conversation of Teaster stating that his friend would get a truck out of the deal. From this evidence,Teaster was guilty of bribery or no offense at all. We find no evidence to justify an instruction for attempted bribery.

This issue is without merit.

IV.

Teaster's fourth issue is that the trial court erred in his sentencing. Teaster argues that he should not have been sentenced consecutively because the trial court used the same facts to justify a maximum sentence on a Class C felony, enhance his range from Range I to Range II, and also impose a consecutive sentence.

When a challenge is made to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a "de novo review . . . with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. There are, however, exceptions to the presumption of correctness. First, the record must demonstrate 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). Second, the presumption does not apply to the legal conclusions reached by the trial court in sentencing. Third, the presumption does not apply when the determinations made by the trial court are predicated upon uncontroverted facts. State v. Smith, 898 S.W.2d 72, 745 (Tenn. Crim. App. 1994), perm. to appeal denied, id. (Tenn. 1995).

Our review requires an analysis of: (1) The evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, & -210.

Teaster was sentenced to ten years as a Range II offender on the bribery conviction to run consecutively with eleven months and twenty-nine days on the subornation of perjury conviction. These sentences were ordered to run concurrently with other sentences Teaster was serving at the time of sentencing.

The trial judge stated that there were no mitigating factors. Enhancement factors were that Teaster had a history of criminal convictions or criminal behavior in addition to that needed to establish the appropriate range, Teaster was on probation at the time of the offense, and he has a previous history of unwillingness to comply with the conditions of release, based on his violation of probation.

When a defendant is convicted of more than one offense a "court may order sentences to be run consecutively if the court finds by a preponderance of the evidence that: (6) The defendant is sentenced for an offense committed while on probation." Tenn. Code Ann. § 40-35-115(b)(6). Teaster was on probation at the time this offense was committed. The imposition of a consecutive sentence is in the discretion of the trial judge where he finds a criteria such as the one above. Tenn. Code Ann. § 40-35-115, Sentencing Commission Comments. We agree that with the presence of this factor Teaster can properly be sentenced to consecutive sentences.

Teaster was sentenced as a Range II offender based on three prior convictions. To be found a Range II Multiple Offender, a defendant must have been convicted of two (2) to four (4) prior felony convictions in a conviction class higher or within the next two (2) lower conviction classes of the felony for which he is being sentenced. Tenn. Code Ann. § 40-35-106(a)(1). Bribery of a witness is a Class C felony. The prior convictions used to enhance his range are: (1) Possession with intent to sell schedule IV drugs, a Class D felony; (2) Possession with intent to sell cocaine, a Class B felony; and (3) Possession with intent to sell marijuana in excess of ½ ounce, a Class E felony. We note that the second two

convictions relied upon occurred on the same day and are considered one conviction, when determining prior convictions. Tenn. Code Ann. 40-35-106(b)(4). However, a minimum of two prior felony convictions are required for Range II, and there are clearly two prior felony convictions here. Teaster clearly meets the criteria to be sentenced as a Range II offender.

We now turn to the application of enhancement factors to give Teaster the maximum sentence in his range. The trial judge found no mitigating factors and three enhancement factors. The enhancement factors are: (1) The defendant has a previous history of criminal convictions and criminal behavior in addition to that needed to establish the range of punishment; (2) the felony was committed while the defendant was on probation; and (3) the defendant has a previous unwillingness to comply with the conditions of a sentence involving release in the community. Tenn. Code Ann. § 40-35-114(1), (13)(C), & (8).

Teaster has an extensive criminal record, even if the three prior felony convictions are removed from the list. There is adequate additional criminal behavior to warrant the use of the first enhancement factor. Teaster was on probation at the time of this offense, therefore, the second enhancement factor applies. There is support in the record for the third enhancement factor. Among Teaster's many previous convictions is a conviction for Reckless Driving on August 29, 1991 where he was given ninety (90) days probation. On October 3, 1991, a mere thirty-five (35) days later, Teaster was arrested on felony drug charges for which he was later convicted. This arrest shows an obvious unwillingness to comply with the conditions of release in the community. Therefore, enhancement factor three applies. Because there were no mitigating

factors and three enhancing factors that have correctly been applied, there is sufficient reason to sentence Teaster to the maximum sentence of ten (10) years in his range.

Teaster argues that the same factors were used to give him a consecutive sentence, enhance his range and give him the maximum sentence within the appropriate range. There was only one factor used more than once by the trial court in sentencing Teaster. Teaster's status of being on probation at the time of commission of the offenses was used to justify consecutive sentencing and also to enhance his sentence within the range. This court has held on many occasions that the use of enhancement factors to increase within the range does not bar the use of the same factors in determining whether a consecutive sentence should be imposed. State v. Melvin, 913 S.W.2d 195, 205 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1995). Therefore, Teaster's sentence is entirely correct as it stands.

This issue is without merit.

We affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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DAVID H. WELLES, Judge

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DAVID G. HAYES, Judge