



## OPINION

The defendant, Kenneth L. Warren, pleaded guilty in Williamson County Circuit Court to one count of driving under the influence, fourth offense, and one count of driving on a revoked license. Both are Class A misdemeanors. The trial court sentenced the defendant to serve eleven months and twenty-nine days for the fourth offense of driving under the influence, assessed a fine of \$1,100, and revoked his driver's license for five years. On the second count, the trial court imposed an additional eleven months and twenty-nine days to be served consecutively to the sentence in the first count. However, the trial court suspended the second sentence and ordered the defendant to serve the time under intensive probation. As a condition of his probation, he must attend at least 90 Alcoholics Anonymous meetings within the first 90 days of his release from custody.

In this direct appeal, the defendant contends that the sentence imposed by the trial court is not in accord with the requirements of Tennessee Code Annotated Section 40-35-114.<sup>1</sup> We affirm the judgment of the trial court but remand the case for preparation of an amended judgment form that accurately reflects the sentence imposed in the conviction for driving under the influence, fourth offense.

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<sup>1</sup> We note that the notice of appeal was not timely filed in this case. The trial court entered its judgment order on February 15, 1996, and the notice of appeal was not filed until March 21, 1996. The rules of appellate procedure require that a notice of appeal be filed within 30 days after the judgment at issue is entered. Tenn. R. App. P. 4(a). However, in criminal cases, the notice of appeal is not jurisdictional, and this court may waive the requirement in the interests of justice. Tenn. Code Ann. § 27-1-123 (Supp. 1996); Tenn. R. App. P. 4(a). The state has not raised this issue, nor are we able to discern any prejudice which may have resulted from the late filing of the notice. Therefore, in the interests of justice, we ignore the late filing of the notice of appeal in this case.

When an accused challenges 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 trial court are correct. Tenn. Code Ann. § 40-35-401(d)(Supp. 1996). This presumption 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 conducting our de novo review, we must consider the evidence at sentencing, the presentence report, the sentencing principles, the arguments of counsel, the statements of the defendant, the nature and characteristics of the offense, any mitigating and enhancement factors, and the defendant's amenability to rehabilitation. Tenn. Code Ann. § 40-35-210(b) (Supp. 1996); State v. Ashby, 823 S.W.2d at 168. The burden for showing that the sentence is improper is on the appealing party. Tenn. Code Ann. § 40-35-210 sentencing commission comments.

A misdemeanor, unlike a felon, is not entitled to the presumption of a minimum sentence. State v. Randall C. Conner, No. 03C01-9401-CR-00024, slip op. at 6 (Tenn. Crim. App., Knoxville, Aug. 12, 1994); State v. Bernell B. Lawson, No. 63, slip op. at 7 (Tenn. Crim. App., Knoxville, May 23, 1991). In misdemeanor sentencing, a separate sentencing hearing is not mandatory (one was held here), but the court is required to provide the defendant with a reasonable opportunity to be heard as to the length and manner of the sentence. Tenn. Code Ann. § 40-35-302(a). The sentence must be a "specific number of months, days or hours . . . consistent with the purposes and principles of [the Criminal Sentencing Reform Act of 1989]." Tenn. Code Ann. § 40-35-302(b); State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995). The trial court must determine the percentage of the sentence which the misdemeanor must serve before becoming eligible for certain release

programs. Tenn. Code Ann. §§ 40-35-302(b),(d). Generally, a percentage of not greater than 75% of the sentence should be fixed for a misdemeanor offender; however, a DUI offender may be required to serve the full 100% of his sentence. Palmer, 902 S.W.2d at 393-94; Tenn. Code Ann. § 40-35-302(d). In determining the percentage of the sentence, the court must consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. Tenn. Code Ann. § 40-35-302(d); Palmer, 902 S.W.2d at 393-94; State v. Gilboy, 857 S.W.2d 884, 888-889 (Tenn. Crim. App. 1993).

Upon service of that percentage, the administrative agency governing the rehabilitative programs determines which among the lawful programs available is appropriate. Tenn. Code Ann. § 40-35-302(d). The trial court retains the authority to place the defendant on probation either immediately or after a period of periodic or continuous confinement. Tenn. Code Ann. § 40-35-302(e). The trial court maintains jurisdiction over a defendant placed in jail and may reduce or modify the sentence or place the defendant on probationary supervision. Tenn. Code Ann. § 40-35-314(c). The statute is designed to provide a trial court with continuing jurisdiction in misdemeanor cases and a wide latitude of flexibility. State v. Dwight Johnson, No. 03C01-9209-CR-00320, slip op. at 7 (Tenn. Crim. App., Knoxville, May, 18, 1993) perm. to appeal denied (Tenn. 1994).

Our review of the record in this case indicates that the trial court did not err in sentencing the defendant to the maximum sentence on each conviction. The sentences are consistent with the legislative purposes and principles related to sentencing. This defendant has a lengthy history of criminal conduct and has been unsuccessful in his attempts to overcome his addiction to alcohol. Tenn.

Code Ann. § 40-35-102(3)(B). The trial court was properly concerned about protecting the public. Tenn. Code Ann. § 40-35-103(1)(A) (1990 Repl.).

However, the trial court did not indicate on the judgment form the fixed service percentage of the eleven month and twenty-nine day sentence for driving under the influence, fourth offense. It may be that the trial court intended that the defendant serve the sentence in its entirety. The record is not clear, and we may not presume that intent from the blank judgment form.<sup>2</sup> This case must be remanded to the trial court so that the trial court can determine and place on the judgment form the percentage of the eleven month and twenty-nine day sentence the defendant is required to serve.<sup>3</sup>

Since the trial court must consider the appropriate enhancement factors in determining the percentage to be served, we will consider whether the record supports the application of two enhancement factors to the sentences.<sup>4</sup>

The defendant does not challenge the use of factor (1) to enhance his sentence. Nor could he. The defendant's extensive prior record which includes two misdemeanor assault convictions and at least six prior convictions for driving under

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<sup>2</sup> We cannot determine the percentage of service from the video-tape record of the sentencing hearing. At one point, the trial judge mistakenly told the assistant district attorney that he could not require 100% service of the sentence because only 120 days were required by law. Later, he sentenced the defendant to eleven months and twenty-nine days with the option of suspending the "last" 28 days upon petition to the court.

<sup>3</sup> According to Tennessee Code Annotated Section 55-1-403(a)(1), the defendant must serve at least 120 days.

<sup>4</sup> The trial court found and our review of the record has disclosed no mitigating factors.

the influence is more than sufficient to support a finding that “[t]he defendant has a previous history of criminal convictions . . . in addition to those necessary to establish the appropriate range.” Tenn. Code Ann. § 40-35-114 (1)(Supp. 1996) as amended in 1994.

The defendant, however, does argue that the trial judge erred in finding that he had committed “the offense under circumstances which constituted a substantial risk that someone would suffer bodily injury.” The defendant contends that such a consideration is not an enhancing factor under Tennessee Code Annotated Section 40-35-114. We disagree.

The statute provides that a proper enhancing factor is one in which the crime “was committed under circumstances under which the potential for bodily injury to a victim was great.” Tenn. Code Ann. § 40-35-114(16) (Supp. 1996) as amended in 1994. This court has previously found this factor may be appropriate in determining the service percentage of a sentence for driving under the influence. State v. Dockery, 917 S.W.2d 258, 263 (Tenn. Crim. App. 1995). The record clearly shows the trial court was referring to factor (16). The fact that the trial court’s language does not precisely track the language of the statute does not invalidate the use of the enhancement factor. The defendant drove down a busy highway while intoxicated. He was observed weaving back and forth across the center line into the on-coming traffic. Certainly the potential for bodily injury to other drivers and their passengers was great. The trial court did not err in applying factor (16).

We also find that the evidence in the record does not preponderate against the trial court's order that the sentences be served consecutively.<sup>5</sup> Tennessee Code Annotated Section 40-35-115(b) provides that a court may order consecutive sentencing if a defendant has an extensive history of criminal activity. The defendant has at least seven convictions for driving under the influence and committed this offense while he was released on bond in a Davidson County arrest for the same offense. He has two convictions for driving on a revoked license. A lengthy period of incarceration followed by a year of intensive probation is appropriate given this defendant's long history of alcohol abuse and disregard for the law and the safety of others.

For the reasons discussed above we affirm the defendant's sentences in their entirety. However, we must remand the case so that the trial court may fix the percentage of time the defendant must serve in the conviction for driving under the influence and record that determination on the judgment form.

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CURWOOD WITT, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID G. HAYES, Judge

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<sup>5</sup> We address the merits of this issue although the appellant has waived it by failing to address it in his brief. Tenn. R. Crim. App. P. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988).