

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1997 SESSION

FILED
September 23, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 APPELLEE,)
)
)
v.)
)
)
THOMAS LEE SWEATMAN,)
)
 APPELLANT.)

No. 03-C-01-9701-CR-00015

Hamilton County

Stephen M. Bevil, Judge

(Driving While under the Influence)

FOR THE APPELLANT:

Barbara S. Arthur
Attorney at Law
P.O. Box 758
Rossville, GA 30741

FOR THE APPELLEE:

John Knox Walkup
Attorney General & Reporter
500 Charlotte Avenue
Nashville, TN 37243-0497

Michael J. Fahey, II
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

William H. Cox, III
District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

Tammy M. Harrington
Assistant District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

John A. Bobo, Jr.
Assistant District Attorney General
600 Market Street, Suite 310
Chattanooga, TN 37402

OPINION FILED: _____

AFFIRMED

Joe B. Jones, Presiding Judge

OPINION

The appellant, Thomas Lee Sweatman (defendant), was convicted of driving while under the influence, third offense, a Class A misdemeanor, following a bench trial. The trial court imposed a sentence consisting of a \$2,000 fine and confinement for eleven months and twenty-nine days in the Hamilton County workhouse. In this Court, the defendant contends the evidence is insufficient to support his conviction, Tenn. Code Ann. § 55-10-401 is unconstitutionally vague, and the sentence imposed by the trial court was excessive. After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this Court the judgment of the trial court should be affirmed.

During the early evening hours of July 3, 1995, Officer Randall Bryant, an East Ridge police officer, was utilizing a radar device to clock the speed of motor vehicles on Keeble Street in East Ridge. When the defendant passed Officer Bryant, he was clocked at 46 miles per hour. The posted speed limit was 30 miles per hour. Officer Bryant activated his emergency lights and siren and pursued the defendant.

The defendant refused to stop. He proceeded to Roper Street and made a right-hand turn. He then turned into an apartment complex and parked his vehicle. Officer Bryant testified the defendant traveled one-eighth of a mile between the radar set and Roper. Apparently there were two or three blocks between the intersection of Keeble and Roper and where the defendant parked his vehicle.

Officer Bryant testified the defendant “stumbled as he exited the vehicle,” and he “appeared very unsteady on his feet” after exiting the vehicle. The defendant “fumb[le]d with his wallet” as he attempted to find his driver’s license. There was a moderate odor of an intoxicating beverage on the defendant’s breath. Officer Bryant observed the defendant’s speech was slurred, his eyes were glassy and bloodshot, and the defendant failed all of the field sobriety tests administered by the officer. The defendant refused to submit to a chemical, blood-alcohol breath test.

The defendant initially told the officer he had not consumed an alcoholic beverage that day. Later, he told the officer he was not going to tell him how many alcoholic

beverages he had consumed. During the trial, the defendant testified he had consumed two mixed drinks while dining at a local bar. On the way home, the defendant stopped at a liquor store and purchased a half-pint of bourbon. He admitted he consumed half of the bottle that afternoon. Based on the defendant's testimony, it is obvious he has had an alcohol abuse problem for several years.

Officer Bryant testified the defendant was "very intoxicated" and his ability to operate a motor vehicle was definitely impaired.

The defendant made an effort to explain every event that occurred. He testified he could not stop on the side of Keeble because of the terrain. He drove to the apartment complex because he lived there, and he did not want his vehicle towed. He was afraid towing would ruin the vehicle's alignment. He also attempted to explain why he was stumbling as he exited the vehicle and gave specific reasons why he failed each of the field sobriety tests. He denied he was intoxicated or his ability to operate a motor vehicle was impaired. The trial court made a specific finding that it did not believe the defendant's testimony.

I.

The defendant contends the evidence is insufficient to support a finding by a rational trier of fact that he was guilty of driving while under the influence of an intoxicant. He argues he was a credible witness notwithstanding the trial court's finding to the contrary. He also argues the trial court did not draw the proper conclusions based upon the evidence adduced during the trial.

When an accused challenges the sufficiency of the convicting evidence, this Court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by the trier of fact of guilt beyond a reasonable doubt." Tenn. R. App. P. 13(e). This rule is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App.), per. app. denied (Tenn. 1990).

In determining the sufficiency of the convicting evidence, this Court does not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim.

App.), per. app. denied (Tenn. 1990). 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, cert. denied, 352 U.S. 845, 77 S.Ct. 39, 1 L.Ed.2d 49 (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. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

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. Cabbage, 571 S.W.2d at 835. In State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973), our Supreme Court said: "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."

Since a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the defendant in this case has the burden 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 are insufficient, as a matter of law, for a rational trier of fact to find that the accused is guilty beyond a reasonable doubt. Tuggle, 639 S.W.2d at 914.

The evidence contained in the record is clearly sufficient to support a finding by a rational trier of fact that the defendant was guilty of driving while under the influence beyond a reasonable doubt. Officer Bryant testified to what he observed and concluded the defendant was "very intoxicated," and his ability to operate a motor vehicle was impaired because of his intoxication.

This issue is without merit.

II.

The defendant contends Tenn. Code Ann. § 55-10-401 is void because it is vague in a constitutional sense. The basis of his contention is the fact the statute does not contain a “definition of the phrase ‘under the influence of any intoxicant.’”

In State v. James R. Baldwin, Jefferson County (Tenn. Crim. App., Knoxville, November 8, 1985), this Court addressed the very issue raised by the defendant in this case. This Court said: “The defendant’s third issue challenges the constitutionality of T.C.A. § 55-10-401. In particular, he claims that the phrase ‘under the influence of an intoxicant’ is void for vagueness.” (Footnote omitted). Id. at 2. This Court held: “A statute which proscribes against the driving of a motor vehicle while ‘under the influence of an intoxicant’ is sufficiently precise to give fair warning as to the prohibited conduct. Further, this same phrase has withstood vagueness attacks in other jurisdictions.” Id. at 3.

This issue is without merit.

III.

The defendant contends the sentence imposed by the trial court was “grossly excessive.” The defendant argues his age, lack of record other than DUI convictions, and the lack of aggravating circumstances warrant a lesser sentence.

A.

When an accused challenges the length and manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record 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). 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. 1994). The presumption does not apply to the legal conclusions reached by the trial court in sentencing the accused

or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App.), per. app. denied (Tenn. 1994); State v. Bonestel, 871 S.W.2d 163, 166 (Tenn. Crim. App. 1993). However, this Court is required to give great weight to the trial court's determination of controverted facts as the trial court's determination of these facts is predicated upon the witnesses' demeanor and appearance when testifying.

In conducting a de novo review of a sentence, this Court must consider (a) any evidence received at the trial and/or sentencing hearing, (b) the presentence report, (c) the principles of sentencing, (d) the arguments of counsel relative to sentencing alternatives, (e) the nature and characteristics of the offense, (f) any mitigating or enhancing factors, (g) any statements made by the accused in his own behalf, and (h) the accused's potential or lack of potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-103 and -210; State v. Scott, 735 S.W.2d 825, 829 (Tenn. Crim. App.), per. app. denied (Tenn. 1987).

The party challenging the sentences imposed by the trial court has the burden of establishing that the sentences are erroneous. Sentencing Commission Comments to Tenn. Code Ann. § 40-35-401; Ashby, 823 S.W.2d at 169; Butler, 900 S.W.2d at 311. In this case, the defendant has the burden of illustrating the sentences imposed by the trial court are erroneous.

B.

Contrary to the argument advanced by the defendant, he has a prior conviction for driving while license revoked. While this is his third conviction for driving while under the influence, the two prior convictions cannot be used to enhance the sentence since these convictions have already been used to elevate the sentence imposed.

The defendant acknowledges he has an alcohol abuse problem. This problem has existed for many years. However, it has been several years since he sought help for this problem.

There are several reasons why a lengthy period of incarceration is mandated in this case. First, measures less restrictive than a lengthy confinement have been applied

unsuccessfully. Tenn. Code Ann. § 40-36-103(1)(C). The defendant obviously refuses to conform his conduct, and, as a result, he continues to violate the laws of this State. Second, confinement is necessary to avoid depreciating the seriousness of the offense. This Court can take judicial knowledge of its calendars. There are a multitude of driving while under the influence offenses appealed each year. It is common to have several of these cases set each session. In addition, there are numerous vehicular homicide cases involving driving while under the influence which appear on the calendars of this Court. Third, confinement is particularly suited to provide an effective deterrence to the defendant and others given the vast number of driving while intoxicated offenses and related offenses committed each year. Finally, confinement is necessary to protect society by restraining the defendant. Since the defendant has failed to seek assistance for his addiction in recent years, he must be restrained before he strikes a vehicle while under the influence and kills the occupants riding in the other vehicle.

This issue is without merit.

JOE B. JONES, PRESIDING JUDGE

CONCUR:

JOSEPH M. TIPTON, JUDGE

CURWOOD WITT, JUDGE