IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

October 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE, Appellee,

v.

RANDY A. McDONALD, Appellant.

No. 01C01-9506-CC-00189

Williamson County

Honorable Donald P. Harris, Judge

(Driving under the influence, fourth offense, driving on a revoked license, second offense, reckless driving, evading arrest and resisting arrest)

For the Appellant:

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OPINION FILED:____________________

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Randy A. McDonald, was convicted in the Circuit Court of Williamson County for driving under the influence of an intoxicant (D.U.I.), fourth offense, driving on a revoked license (D.O.R.L.), second offense, and evading arrest, Class A misdemeanors, and reckless driving and resisting arrest, Class B misdemeanors. For the D.U.I. conviction, he was fined one thousand dollars and sentenced to eleven months and twenty-nine days in the county jail with all but nine months at seventy-five percent suspended. The trial court fined the defendant five hundred dollars and sentenced the defendant to eleven months and twenty-nine days in the county jail to be suspended for the evading arrest and D.O.R.L. convictions, respectively. For the reckless driving and resisting arrest, the court imposed fines of five hundred dollars and sentences of six months each to be suspended. The trial court ordered the defendant to serve his sentences for D.O.R.L., evading arrest, reckless driving and resisting arrest concurrent with each other but consecutive to the D.U.I.

> In this appeal as of right, the defendant essentially contends:
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> (1) that the evidence is insufficient to support his convictions for D.U.I., fourth offense, D.O.R.L., second offense, and reckless driving, and
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> (2) that the trial court erred by ordering the defendant to serve nine months at seventy-five percent before being placed on probation and by imposing consecutive sentences.

We hold that the evidence supports the defendant's convictions and that the trial court did not err in its sentencing decisions.

Deputy Barry Kinkaid of the Williamson County Sheriff's Department testified that he was on patrol on May 22, 1993, when he was flagged down by a motorist at approximately 11:00 a.m. He stated that as a result of his conversation with the motorist, he drove in search of two men in a red Isuzu truck with temporary tags.

He said that he saw the truck occupied by two men about one-half mile away. Deputy Kinkaid testified that the truck was crossing the center line, and stopping and starting suddenly. He stated that he activated his blue lights, but the truck drove off at a high rate of speed. Deputy Kinkaid said that he recognized the defendant as the driver when the defendant, who was wearing a baseball cap, looked at the passenger. He stated that he knew the defendant from earlier dealings and that there was no doubt in his mind that the defendant was driving the truck. He said that he did not recognize the passenger, although he later discovered that the passenger was Taylor Greer, to whom the temporary tags were registered. Deputy Kinkaid testified that he turned on his siren, but the defendant did not stop. He said that two oncoming vehicles were forced off the road into a ditch to avoid the defendant, who was traveling in the opposite direction. He stated that the defendant ran a stop sign at an intersection before driving out of sight.

Deputy Kinkaid testified that he then drove to the defendant's home, where he was advised that the red truck had just driven by at a high rate of speed. He stated that he continued to drive to Logan Veach's residence where he found the red truck parked in the driveway and the defendant and Mr. Greer standing outside the residence. Deputy Kinkaid said that the defendant was staring at a posthole digger that he had in his hands. He testified that he told the defendant that he was under arrest for driving on a revoked license, but the defendant told him that he was not going to be arrested. Deputy Kinkaid stated that the defendant and Mr. Greer then got into the truck and drove away. According to Deputy Kinkaid, Mr. Greer was the driver at this time. He said that he followed the truck to a residence owned by a Mr. Buttrey. Deputy Kinkaid stated that he waited inside his patrol car until Deputy Chris Kyger arrived. He testified that he then walked into Mr. Buttrey's garage where the defendant, Mr. Greer and some other people were standing. He said that the defendant resisted when he and Deputy Kyger tried to place handcuffs on the defendant. According to Deputy

Kinkaid, the defendant threw him against the freezer. He stated that he smelled a strong odor of alcohol on the defendant. Deputy Kinkaid also testified that he discovered a partially consumed bottle of whiskey inside the truck. He said that he did not conduct field sobriety tests or request that the defendant submit to a breathalyzer test or blood alcohol test because he did not believe they were necessary based on the defendant's conduct. Deputy Kinkaid stated that the defendant's driver's license was revoked at the time of the offense.

Deputy Chris Kyger of the Williamson County Sheriff's Department testified that he was on patrol on May 22, 1993, when he received a call at approximately 11:30 a.m. that Deputy Kinkaid was in pursuit of a truck and needed backup. He stated that he arrived at the Buttrey residence, and he and Deputy Kinkaid approached the defendant and Mr. Greer who were inside the garage. Deputy Kyger testified that the defendant said that he was not going to jail, although other people in the garage were telling the defendant to calm down. He stated that the defendant began fighting after he and Deputy Kinkaid got one handcuff on the defendant. He said that they had to carry the defendant to the patrol car and that the defendant smelled of alcohol.

Logan Veach, Sr., a friend and neighbor of the defendant, testified that on May 22, 1993, at approximately 10:00 or 11:00 a.m., he saw a red truck drive up to his residence while he was sitting in his living room. He stated that he saw the defendant and Mr. Greer exit the truck, and he testified that Mr. Greer was driving and the defendant was in the passenger seat. Mr. Veach said that the defendant grabbed a posthole digger and started hitting it into the ground. He stated that approximately three to four minutes later, a patrol car with its blue lights activated drove up to his residence.

The state also introduced certified copies of the defendant's prior convictions for D.U.I. and D.O.R.L. The certified copies reflect that the defendant was convicted of D.U.I. on September 27, 1988, in Marshall County, on December 24, 1988, in Davidson County, and on October 13, 1993, in Davidson County. The copies also show that the defendant was convicted of D.O.R.L. on May 13, 1990, in Williamson County.

I. SUFFICIENCY OF THE EVIDENCE

The defendant contends that the evidence is not sufficient to establish his guilt beyond a reasonable doubt for the offenses of D.U.I., fourth offense, D.O.R.L., second offense, and reckless driving. He argues that the state failed to establish that he, not Taylor Greer, was driving the truck. 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 do not reweigh the evidence, but 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).

When the evidence is viewed in the light most favorable to the state, the evidence establishes that the defendant was the driver of the truck. Deputy Kinkaid testified that he was positive that the defendant was driving the truck. The jury was entitled to accredit the officer's testimony. We conclude that the defendant's convictions for D.U.I., fourth offense, D.O.R.L., second offense and reckless driving are fully supported by the evidence.

II. SENTENCING

The defendant contends that the trial court erred by ordering him to serve seventy-five percent of nine months in the county jail before being placed on probation and by ordering consecutive sentencing. The state responds by asserting that the sentence of incarceration in the county jail for nine months at seventy-five percent is "wholly inadequate" and that the trial court should not have granted probation. The state also argues that the trial should have ordered all of his sentences to be served consecutive to each other.[1] We hold that the record supports the trial court's sentencing decision.

At the sentencing hearing, Holly Carmack, a former girlfriend of the defendant and the mother of the defendant's son, testified that she lived with the defendant in 1990 to 1991. She stated that the defendant had a serious drinking problem when she first met him in January 1990. She said that in February 1993 the defendant came to her house and kicked in her door, and in May 1993 the defendant broke her front window with his fist. Ms. Carmack testified that she obtained an order of protection in June 1993 but the defendant drove through her yard and ran over her son's swing set in September 1993 in violation of the order of protection. She stated that the defendant's conduct resulted in convictions for vandalism and trespass. She described other instances of the defendant's domestic violence and said that each time the defendant had been drinking a lot of alcohol.

Ms. Carmack acknowledged that the defendant was in the military, but she recalled that the defendant told her that he had been discharged because of his

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[1] We may not increase a sentence upon a defendant's appeal. See T.C.A. § 40-35-401(c). However, if the state presents the question of an increased sentence as a separate issue for appellate review, we may increase the sentence in the appropriate case. See T.C.A. § 40-35-402(c). On the other hand, the state's argument in the present case that the sentences imposed were wholly inadequate and its position relative to no probation and consecutive sentencing are all contained in one sentence in the argument portion of its brief responding to the defendant's sentencing issue. The state's brief titles the argument "The Trial Court Did Not Commit A Sentencing Error." This does not constitute the raising of a separate issue that would allow us to increase the defendant's sentences above those imposed by the trial court. See State v. Hayes, 894 S.W.2d 298, 300-01 (Tenn. Crim. App. 1994).

alcoholism. She said that the defendant told her that he had been involved in car accidents on the base because of his drinking and that some disciplinary action had been taken against the defendant. Ms. Carmack testified that the defendant has sought treatment for his alcohol abuse on three separate occasions. She said that the defendant remained sober for eighty-nine days after treatment at a V.A. hospital. She stated that on another occasion, the defendant did not complete the treatment. Ms. Carmack stated that she is afraid of the defendant and that she and her son currently have no contact with the defendant.

The then thirty-five-year-old defendant testified that he dropped out of high school in the tenth grade but that he obtained his G.E.D. in the late 1970's because a G.E.D. was a prerequisite to joining the United States Air Force. He said that he served in the Air Force and that he received an honorable discharge in 1980. Regarding the car accident while in the Air Force, the defendant conceded that the incident involved alcohol and fighting, but he asserted that it did not occur on the military base. However, he acknowledged that he was disciplined for his actions. He stated that he has worked as a carpenter for approximately seventeen years. The defendant conceded that he has convictions for assault, disorderly conduct, simple possession, destruction of private property, and several convictions for D.U.I. The defendant also admitted that he had been convicted of vandalism and trespassing for which he received an effective sentence of one year in the Davidson County Workhouse. He said that he received trusty status and was allowed work release, though he conceded that he was disciplined for smuggling cigarettes while in the county workhouse. He stated that he attended more than a dozen Alcoholics Anonymous classes while incarcerated.

The defendant acknowledged that he has a drinking problem and that it has destroyed his life. He claims that the time he spent in jail has changed his drinking

habits, although he admitted drinking alcohol since leaving the county workhouse. He claimed that he no longer wants to drink and that he will never buy another automobile. According to the defendant, he has received treatment for his alcohol abuse at two different V.A. hospitals and has also been treated for depression and anxiety. Regarding the present offense, the defendant testified that he had been drinking for two days and that he and Mr. Greer were intoxicated, but he denied driving the truck.

The presentence report reflects that the defendant has several prior convictions. It shows that the defendant's prior criminal record consists of convictions for D.U.I., D.O.R.L., disorderly conduct, assault, simple possession, destruction of private property, possession of an open container of alcohol, public drunkenness, and driving without a license.

In sentencing the defendant, the trial court considered the defendant's previous history of criminal convictions and behavior and his commission of the offenses under circumstances under which the potential for bodily injury was particularly great. See T.C.A. § 40-35-114(1) and (16). It also ruled that the defendant's criminal record is sufficient to justify some consecutive sentencing though it recognized that the sentence imposed must be the least severe measure necessary to achieve the purposes for which the sentence is imposed. See T.C.A. §§ 40-35-103(4) and -115(2). The court stated that the defendant had recently been incarcerated for a significant period of time and believed that it may have had an effect on the defendant. The defendant complains that his sentencing is too severe and should be reduced. However, he points out nothing particularly to support his claim and only refers us generally to the evidence in the record.

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)

and -402(d). 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). As the Sentencing Commission Comments to T.C.A. § 40-35-401(d) and -402(d) note, the burden is now on the appealing party to show that the sentencing is improper. We note that there is no presumptive minimum sentence provided by law for misdemeanor sentencing. See, e.g., State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). However, the sentence must comply with the misdemeanor sentencing requirements of the Criminal Sentencing Reform Act of 1989. See State v. Palmer, 902 S.W.2d 391, 393 (Tenn. 1995).

In this case, the record demonstrates that the trial court followed the requirements of the Sentencing Act and exercised solid judgment in its determinations. The defendant has failed to show that the sentences imposed by the trial court are improper.

The judgments of conviction are affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

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David H. Welles, Judge