

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1997 SESSION

FILED

January 9, 1998

**Cecil W. Crowson
Appellate Court Clerk**

STATE OF TENNESSEE,

Appellee,

VS.

GARY LOUIS MIGGIO,

Appellant.

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C.C.A. # 01C01-9611-CR-00478

DAVIDSON COUNTY

Hon. Seth Norman, Judge

(DUI)

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Gary Louis Miggio,¹ entered a plea of guilt to driving under the influence of an intoxicant, first offense. The trial court imposed a sentence of eleven months and twenty-nine days and suspended all but four days, which were to be served in jail. There was a \$250.00 fine. The defendant reserved the right to appeal a certified question of law. Tenn. R. Crim. P. 37(b)(2).

The question reserved in this appeal is whether the detention of the defendant for a period of twelve hours following a refusal to take a breath test bars subsequent prosecution for DUI on double jeopardy grounds.

We affirm the judgment of the trial court.

On February 23, 1993, Officer David Reynolds of the Nashville Metropolitan Police Department observed a motor vehicle driven by the defendant travel in the wrong direction on a one-way street, strike a curb, weave down Third Avenue, and make a wide turn onto Broadway. Officer Reynolds described the defendant as "reeking of alcohol." The defendant was unable to complete a field sobriety test administered by the officer and refused to take a breath-alcohol test.

The officer charged the defendant with driving under the influence and violation of the implied consent law. The defendant refused the breath-alcohol test at approximately 9:30 P.M. and was placed in jail approximately thirty minutes later. That the defendant was able to make bail is not in dispute. He was released at 9:00 A.M. the following morning. It was stipulated that the judges of the general sessions

¹The record indicates various spellings of the defendant's name; this court uses the defendant's name as it appears on the indictment.

court had adopted the mandatory twelve-hour detention for those refusing to submit to a breath-alcohol test.

Clifford Holcomb, an operations supervisor with the Metropolitan Police Department, testified that the twelve-hour detention policy was designed to allow defendants to metabolize the alcohol. He explained that if a person refuses to take the test, the detention of twelve hours is based upon an assumed blood-alcohol content of .24. He asserted that the purpose of the policy was to avoid releasing intoxicated persons onto the street, where they could be a danger to themselves or others.

The trial court denied a motion to dismiss. Contending that the detention was reasonable based upon the defendant's condition at the time of his arrest, the trial court determined that the policy was remedial in nature and cited as controlling the decision of this court in State v. Coolidge, 915 S.W.2d 820 (Tenn. Crim. App. 1995).

On September 8, 1997, our supreme court filed an opinion in State v. Pennington, 952 S.W.2d 420 (Tenn. 1997). In that case, Pennington was arrested for driving under the influence and driving on a revoked license. Because he refused to submit to a breathalyzer examination, he was not permitted to make bail on policy grounds until he had remained in custody for eleven hours. The court ruled as follows:

[T]he parties stipulated that one of the purposes of the detention policy was to keep suspected drunk drivers off the road for a period of time after their arrest. In other words, the policy was intended, at least in part, to protect the public from individuals who had been arrested on suspicion of driving under the influence. This is a remedial purpose, not a punitive one, and therefore, the defendant's initial appearance before the judicial

commissioner does not constitute an essentially criminal proceeding brought to "vindicate public justice."

Finally, assuming solely for the sake of argument that jeopardy did attach at Pennington's initial appearance and that the detention could be construed as punishment, the punishment was for refusing to submit to the breathalyzer test--not for the offenses for which Pennington was later indicted. Under our analysis in State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996), refusal to submit to a test to determine blood-alcohol content, Tenn. Code Ann. § 55-10-406(a)(3), is not the same offense as driving under the influence, Tenn. Code Ann. § 55-10-401, or driving on a suspended or revoked license, Tenn. Code Ann. § 55-50-504. The elements of the offenses are distinct from one another; the same evidence would not be used to prove the offenses; and the statutes serve different purposes.

Pennington, 952 S.W.2d at 422-23.

The supreme court concluded that a post-arrest detention based upon remedial rather than punitive aims is permissible so long as the defendant is afforded adequate procedural due process. Thus, the post-arrest detention did not preclude a subsequent prosecution for driving under the influence. Id.

In our view, the ruling in Pennington controls in this case. Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Thomas T. Woodall, Judge

Curwood Witt, Judge