

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY SESSION, 1999

**FILED**  
March 31, 1999  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )

Appellee, )

VS. )

LESTER ARNOLD CLOUSE, )

Appellant. )

C.C.A. NO. 01C01-9802 CR 00069

WHITE COUNTY

HON. JOHN A. TURNBULL  
JUDGE

(DUI)

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

FOR THE APPELLANT:

JOE L. FINLEY, JR.  
Assistant Public Defender  
215 Reagan Street  
Cookeville, TN 38501

FOR THE APPELLEE:

JOHN KNOX WALKUP  
Attorney General and Reporter

CLINTON J. MORGAN  
Assistant Attorney General  
425 Fifth Avenue North  
Nashville, TN 37243-0493

BILL GIBSON  
District Attorney General

SAM BENNINGFIELD  
Assistant District Attorney General  
145 South Jefferson Avenue  
Cookeville, TN 38501

OPINION FILED \_\_\_\_\_

CONVICTION AFFIRMED; SENTENCE MODIFIED

DAVID H. WELLES, JUDGE

# OPINION

On January 28, 1998, the Defendant, Lester A. Clouse, was found guilty of driving under the influence (DUI). He was fined \$350.00 plus costs and was sentenced to eight months at 75%. Pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, he now appeals his conviction and his sentence. The Defendant presents three issues for our review: (1) whether the trial court erred in admitting evidence of the Defendant's blood alcohol test; (2) whether the evidence presented at trial was sufficient to support the Defendant's conviction; and (3) whether the sentence imposed is excessive. We affirm the Defendant's conviction, but remand for entry of a new sentencing order.

On February 23, 1997 at 5:21 p.m., Deputy Ron Smith was summoned to an automobile accident in White County. He arrived at 5:28 p.m. and found a 1996 Grand Am, which had "flipped over tearing out about two hundred (200) feet of barbed wire fence," laying on its side. Smith determined that the Defendant, who was driving the vehicle at the time of the accident, had lost control of the vehicle, and the car had skidded approximately six hundred feet before overturning. Smith testified that the asphalt road "plainly" showed approximately six hundred feet of skid marks. Smith also determined that the Defendant was accompanied by three passengers at the time of the accident.

Smith testified that while at the scene of the accident, he observed the Defendant and noticed that "he had bloodshot colored eyes, and he was unsteady on his feet." In answer to questions posed by Smith, the Defendant

admitted that he had been drinking. However, according to Smith, the Defendant did not state that he had consumed alcohol only after the accident; nor did the Defendant mention any mechanical difficulties with the car.

The Defendant was administered three field-sobriety tests — the nine-step walk on the line heel to toe, the one-leg stance, and the nose touch — all of which he failed. Smith therefore arrested the Defendant and transported him to the White County Hospital, where he consented to a blood alcohol test. The test was administered at 6:25 p.m.

Special Agent Michael Little of the Tennessee Crime Laboratory testified about the results of the blood alcohol test. He stated that the test revealed a blood alcohol content of .14% and explained that “[i]t would take approximately seven (7) to ten (10) drinks to get to that level with the drink being twelve (12) ounces of beer, one ounce of hard liquor, or four (4) to five (5) ounces of wine” within an hour and on an empty stomach. However, he also testified that “at 6:25 [the Defendant’s] blood alcohol could have been rising or sinking” and concluded that at the time of the accident, the Defendant’s blood alcohol content “could have been higher; it could have been lower; it could have been the same.” Finally, he stated, “within an hour’s time, assuming that before that time [the Defendant’s blood alcohol content] had reached his maximum level and was coming down, I would expect his range to be a .12 to a .13, one hour prior to the test.”

The Defendant testified that the wreck was caused by problems with the car’s tires which caused the car to “come up on three (3) wheels” and a back tire

to “break down off the rim,” forcing the vehicle into a mailbox before the car flipped. He stated that there were “no black [skid] marks on the road” after the accident. The Defendant further testified that he did not consume any alcoholic beverages prior to the accident and claimed that he had not consumed alcohol for three to four years before the accident because he was a recovering alcoholic. However, he testified that after the accident, he walked behind the wrecked car and consumed almost half a pint of Jim Beam whiskey “to settle [his] nerves down.” He explained that the Grand Am, which was new, belonged to his mother and he was afraid that his “mama was going to flip out.” In answer to the question of why a recovering alcoholic would have liquor in his vehicle, he explained, “I always kept liquor around handy because if I got nervous or whatever, . . . I didn’t crave it if I could get a hold of it to drink.”

Kenneth Mahan, one of the passengers in the car at the time of the accident, testified that he had spent an hour or two hours with the Defendant immediately prior to the wreck. He stated that he did not see the Defendant consume any alcohol during that time or after the accident. Nor did he see any signs that the Defendant had been drinking. However, he also admitted that he left the scene of the accident for twenty to thirty minutes after the accident to find a tow truck. He further testified that the Defendant had been chewing tobacco and had had several “dips” of Skoal before the accident.

Joy England testified that she lived on the road where the accident occurred. She stated that she heard the accident and went to see what had happened. She also maintained that she remained at the scene of the accident

watching the Defendant until the police arrived, and she testified that during that period, she did not see the Defendant consume any alcohol.

#### I. ADMISSIBILITY OF BLOOD ALCOHOL TEST RESULTS

The Defendant first argues that the results of his blood alcohol test should not have been admitted into evidence. He asserts that the test results are not accurate because the blood samples which were tested were collected over an hour after the Defendant last drove the vehicle. He contends that a second test should have been performed to determine whether the alcohol level in his blood was rising or falling at the time of the tests; he claims that a second test would thus have indicated whether his blood alcohol content was higher or lower at the time of the accident. He argues, “Absent the second test, the first test does not make one fact more likely than another and is therefore not relevant.”

We conclude that the blood alcohol test was properly admitted into evidence. In Tennessee, “[i]t is unlawful for any person to drive or be in control of any automobile . . . while . . . [u]nder the influence of any intoxicant . . . or . . . [t]he alcohol concentration in such person’s blood or breath is ten-hundredths of one percent (.10%) or more.” Tenn. Code Ann. § 55-10-401(a)(2). Under our statute, blood alcohol tests are admissible in cases involving driving under the influence of an intoxicant: Tennessee Code Annotated § 55-10-407 states, “Upon the trial of any person charged with a violation of this chapter, the results of any test made of the person so charged shall be admissible in evidence in a criminal proceeding.” *Id.* § 55-10-407 (emphasis added); see also id. § 55-10-406. See generally State v. Cleavor, 691 S.W.2d 541 (Tenn. 1985) (allowing evidence that the defendant had a blood alcohol content of .14% two and one-

half hours after the accident); State v. Frahm, 737 S.W.2d 799 (Tenn. Crim. App. 1987) (allowing evidence that the defendant had a blood alcohol content of .15% one and one-half to two hours after the accident). Because the Defendant was charged with both DUI and DUI per se, see Tenn. Code Ann. § 55-10-401(a); we conclude that the blood alcohol tests were clearly relevant in this case. See Tenn. R. Evid. 401, 402. Therefore, this issue is without merit.

## II. SUFFICIENCY OF THE EVIDENCE

The Defendant next argues that the evidence presented at trial was insufficient to support his conviction. He contends that the trial court based its conclusion on the results of the blood alcohol test, which he argues was inconclusive due to the time at which it was administered, and the court's finding that the Defendant was drinking before the accident. He argues that testimony by Mahan that the Defendant did not consume alcohol for one to two hours before the accident coupled with testimony indicating that the Defendant did not show signs of intoxication or impairment and that evidence of a mechanical defect in the car should serve to set aside the trial court's finding of guilt in this case. We disagree.

Tennessee Rule of Appellate Procedure 13(e) prescribes that “[findings] of guilt in criminal actions whether by the trial court or the jury shall be set aside if the evidence is insufficient to support the finding by the trier of fact beyond a reasonable doubt.” Tenn. R. App. P. 13(e). “Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issue 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) (citing

State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973)). Nor may this Court re-weigh or re-evaluate the evidence in the record below. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992) (citing State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978)).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. Id. (citing State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983)). Moreover, "[t]he findings of a trial judge . . . have the weight of a jury verdict." State v. Tate, 615 S.W.2d 161 (Tenn. Crim. App. 1981). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982) (citing Cabbage, 571 S.W.2d at 835). Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, 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. McBee v. State, 372 S.W.2d 173, 176 (Tenn. 1963); see also Evans, 838 S.W.2d at 191 (citing Grace, 493 S.W.2d at 476); Tuggle, 639 S.W.2d at 914.

Despite the Defendant's claim that he did not consume alcohol until after the accident, there was certainly evidence presented at trial from which a reasonable person could have concluded that the Defendant was intoxicated at the time of the accident. Officer Smith testified that the Defendant showed signs of intoxication when Smith arrived at the accident scene, and he stated that the Defendant failed three separate sobriety tests. He also testified that the Defendant admitted to having consumed alcohol and that the Defendant did not mention that he had drunk whiskey only after the accident. In addition, Agent

Little testified that the Defendant's blood alcohol level could have been .14% or higher at the time of the accident. Furthermore, Joy England testified that she watched the Defendant from the time of the accident until the police arrived and stated that she never saw the Defendant consume any alcohol. The trial judge found the Defendant's testimony to be "incredible." Finally, although Mahan testified that he did not see the Defendant drink before the accident or see any signs of intoxication, he did testify that the Defendant was chewing tobacco before the accident, which the trial judge noted could have masked the odor of alcohol on the Defendant's breath. Thus, viewing the evidence in light most favorable to the State, there is clearly sufficient evidence to support the finding of guilt beyond a reasonable doubt.

### III. SENTENCING

Finally, the Defendant argues that the sentence of eight months at 75% imposed on him by the trial court is too severe for a first-offense DUI conviction. Misdemeanor sentencing is controlled by Tennessee Code Annotated § 40-35-302, which provides in part that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform Act. In misdemeanor sentencing, a separate sentencing hearing is not mandatory, 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 trial court retains the authority to place the defendant on probation either immediately or after a time of periodic or continuous confinement. Id. § 40-35-302(e). Misdemeanor sentencing is designed to provide the trial court with continuing jurisdiction and a great deal of flexibility. One convicted of a misdemeanor, unlike one convicted of a felony, is



not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994).

In determining the percentage of the sentence, the court may consider enhancement and mitigating factors as well as the legislative purposes and principles related to sentencing. However, the enhancement and mitigating factors do not have to be the only factors considered by the trial court in determining the appropriate sentence. Indeed, consideration of the statutory enhancement factors may very well be futile in the area of misdemeanor sentencing since the terms of certain enhancement factors limit their application solely to felony offenses. Accordingly, the court should examine the misdemeanor offense in the light and character of the circumstances of the offense as well as under the mandated sentencing principles.

State v. Gary Lewis Thompson, No. 03C01-9703-CR-00105, 1998 WL 221052, at \*3 (Tenn. Crim. App., Knoxville, May 6, 1998).

Tennessee Code Annotated § 55-10-403 states that a person convicted of a first offense of driving a vehicle under the influence of an intoxicant shall be “fined not less than three hundred fifty dollars (\$350) nor more than one thousand five hundred dollars (\$1,500) [and shall be] confined in the county jail or workhouse for not less than forty-eight (48) hours nor more than eleven (11) months and twenty-nine (29) days . . . .” Tenn. Code Ann. § 55-10-403(a)(1). In essence, this statute, in conjunction with Tennessee Code Annotated § 55-10-403(c), mandates a maximum sentence for a defendant convicted of DUI “with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be suspended.” State v. Combs, 945 S.W.2d 770 (Tenn. Crim. App. 1996).

In the case at hand, it is apparent that the trial judge based his findings upon “[t]he fact that people were endangered by the accident itself,” his

conclusion that the Defendant presented false testimony on the stand, and the Defendant's lengthy prior record. The Defendant had previously been convicted of second degree burglary and grand larceny, concealing stolen property over \$200.00 (twice), possession of property with serial number altered, receiving stolen property, and aiding and abetting grand larceny. The trial judge concluded, "I can't accept [the Defendant's] story. It's incredible, and even if he wasn't a convicted felon, I wouldn't believe it based on the other proof that's here."

It is apparent from the record before us that the trial judge intended for the Defendant to serve six months in confinement. We are unable to conclude that this determination was erroneous. Therefore, to reflect the intentions of both the trial judge and our state legislature, we modify the sentence to eleven months and twenty-nine days with all but six months suspended. The balance of the sentence will be served on probation. This case is remanded to the trial court solely for entry of a new sentencing order, consistent with this opinion.

---

DAVID H. WELLES, JUDGE

CONCUR:

---

JOHN H. PEAY, JUDGE

---

JERRY L. SMITH, JUDGE