

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY 1999 SESSION

<p>FILED</p> <p>September 30, 1999</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

STATE OF TENNESSEE,	*	C.C.A. # 01C01-9806-CR-00265
Appellee,	*	SUMNER COUNTY
VS.	*	Honorable Jane Wheatcraft, Judge
JACKIE DEAN MAYES, JR.	*	(Driving Under Influence--Third Offense)
Appellant.	*	

FOR THE APPELLANT:

SAM E. WALLACE, SR.
SAM E. WALLACE, JR.
227 Second Avenue North
Nashville, TN 37201

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

MARVIN E. CLEMENTS, JR.
Assistant Attorney General
425 Fifth Avenue North
Nashville, TN 37243

LAWRENCE RAY WHITLEY
District Attorney General

LYTLE ANTHONY JAMES
Assistant District Attorney
113 East Main Street
Gallatin, TN 37066

OPINION FILED: _____

AFFIRMED

JOHN EVERETT WILLIAMS,
Judge

OPINION

The defendant, Jackie Dean Mayes, Jr., appeals his conviction from a Sumner County jury guilty verdict of D.U.I., third offense. See Tenn. Code Ann. §§ 55-10-401, -403(a). He was sentenced to eleven months and twenty-nine days at seventy-five percent release eligibility. He appeals on the following grounds:

1. Whether the trial court erred in denying the defense counsel's motion for continuance;
2. Whether the trial court erred in failing to suppress the testimony of the police officers;
3. Whether a violation of the sequestration rule occurred that would require a mistrial; and
4. Whether the jury verdict should be set aside because one juror slept through much of the defendant's case.

After a review of the record, the briefs of the parties, and the applicable law, we conclude that the judgment of the trial court is AFFIRMED.

BACKGROUND

The defendant, Jackie Dean Mayes, Jr., was arrested on April 3, 1997, in Hendersonville, Tennessee. He was initially stopped by police when they noticed that the temporary tag on his car had expired. Upon further investigation, the officers observed that the defendant was glassy-eyed and unsteady on his feet. There was a strong odor of alcohol about the defendant's person. The defendant performed poorly on a field sobriety test administered by the officer, and he refused to submit to a blood alcohol test.

On November 10, 1997, the defendant agreed to allow the General Sessions Court to conduct a hearing on the merits. The defendant was found guilty of D.U.I., third offense. On the same day, the defendant filed a notice to appeal, requesting a jury trial, to the Circuit Court. During docket call on

December 12, 1997, the defendant's case was set for jury trial on March 23, 1998.

Sam Wallace, Sr., the defendant's retained counsel, suffered congestive heart failure on February 18, 1998, and was hospitalized for approximately one week. Mr. Wallace, Sr., filed a motion for a continuance approximately four (4) days before the March 23, 1998, trial date.

The trial court allowed Mr. Wallace, Sr., to withdraw, although he had not sought permission to withdraw, and ordered the defendant to appear with new counsel on or by April 3, 1998. On April 14, 1998, Sam Wallace, Jr., appeared with the defendant at his suppression hearing. When asked by the court whether he was ready to proceed, Mr. Wallace, Jr., answered in the affirmative.

At the suppression hearing, Officer Timothy Roller testified that he had observed a red Camaro traveling in the left lane ahead of him. He said the Camaro abruptly changed lanes, thereby causing him to brake in order to maintain the proper interval. At this time, he observed that the temporary tag displayed in the red Camaro had expired, and he therefore stopped the vehicle. Further, he stated that he would have stopped the vehicle for the hazardous illegal lane change, but the expired tag is what really stuck out in his mind.

After the suppression hearing, the trial court found probable cause for the stop and overruled the defendant's motion to suppress.

ANALYSIS

The defendant first contends that the trial court erred in denying his motion for continuance filed by counsel, Sam Wallace, Sr. We note the record reveals that the trial court granted a continuance because the senior Wallace

was ill. The need for a further continuance was never asserted. The defendant also failed to include this issue in his motion for new trial. Therefore, this issue is waived. Tenn. R. App. P. 3(e); State v. Clinton, 754 S.W.2d 100, 103 (Tenn. Crim. App.), permission to appeal denied, (Tenn. 1988).

Next, the defendant contends that the trial court erred in failing to suppress the testimony of the police officers that was allegedly the fruit of an illegal traffic stop. The defendant contends that the police officer did not pull his vehicle over because of the expired temporary tag. The defendant notes he was not ticketed for driving with an expired tag. However, at the suppression hearing and in his incident report the officer stated that he stopped the vehicle because the defendant's temporary tag had expired. In the defendant's brief, the defendant attacks the officer's credibility without any offer of proof. For example, the brief alleges that what the officer said he saw was impossible, that the officer's eyesight must be truly amazing, and that the officer was making a feeble attempt to justify the stop.

The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this Court unless the evidence contained in the record preponderates against these findings. See State v. Henning, 975 S.W.2d 290, 299 (Tenn. 1998). The trial court, as the trier of fact, assesses the credibility of the witnesses, determines the weight and value to be afforded the evidence and resolves any conflicts in the evidence. See State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). However, this Court is not bound by the trial court's conclusions of law. See State v. Simpson, 968 S.W.2d 776, 779 (Tenn. 1998). The defendant has the burden of establishing that the evidence contained in the record preponderates against the findings of fact made by the trial court. See Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Crim. App. 1975).

Clearly, the defendant requests this Court to ignore our standard of review and simply substitute our judgment for that of the trial court. This we are unwilling to do. We conclude that the record does not preponderate against the findings of fact made by the trial court. On this issue, we find no error.

Next, the defendant contends that the circumstance of the officer's testimony violated the sequestration rule and that the trial court erred in failing to declare a new trial. Rule 615 of the Tennessee Rules of Evidence provides:

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before *voire dire*, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness.

The sequestration rule prevents witnesses from hearing testimony of other witnesses and subsequently adjusting testimony. See State v. Harris, 839 S.W.2d 54, 68 (Tenn. 1992). The "rule" is mandatory and may be invoked at any time. State v. Anthony, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992).

Various sanctions exist for violations of the rule. A trial judge may declare a mistrial or preclude a witness from testifying in the most egregious cases. Anthony, 836 S.W.2d at 605. However, the witness may be cross-examined regarding the violation, and the jury may be instructed to consider the violation in assessing the witness' testimony. Id. When the issue of a violation of the "rule" is raised on appeal, this Court considers the seriousness of the violation and the

prejudice, if any, suffered by the defendant. Harris, 839 S.W.2d at 68-69; Anthony, 836 S.W.2d at 605.

The record reflects that the first time the defendant contended that he was entitled to a mistrial because of a violation of the sequestration rule occurred during defense counsel's cross-examination of Officer Littrell. The following colloquy occurred:

Cross-Examination By Mr. Wallace:

Q: Mr. Littrell, after opening statement and during that last recess when you were sitting in that chair next to Mr. Roller, you and Mr. Roller were having a whispered conversation head to head. Is that correct?

A: Yes, sir.

Q: And were you talking about this case?

A: Yes, sir.

Mr. Wallace: Your Honor, I move that his statements be stricken and that a mistrial be declared. The jury had been sworn, opening statements had been made, and these two witnesses were in the courtroom, in the presence of the jury, and the other witnesses had been excluded. We move for a mistrial.

The Court: That will be overruled.

By Mr. Wallace:

Q: And before the opening statement, you and Mr. Roller were in this little hallway here, and you were again whispering to each other. Were you talking about the case then?

A: I'm sure we probably did, sir.

Q: If you're just telling the truth, why do y'all have to get your statements together like that?

A: Actually, we were talking about something you said, sir.

At the hearing on the motion for new trial, Officer Roller testified that the gist of his conversation with Officer Littrell was over the fact that Littrell had forgotten about the case and had to be called away from fishing to appear. They were not discussing what their testimony would be. After the hearing on the motion for a new trial, the trial court found that the officers were merely discussing why one of them had forgotten the case. We agree with the trial court's findings. Therefore, we conclude that the violation, if any, was slight and

the defendant suffered no prejudice. Therefore, the trial court did not err in refusing to grant a mistrial.

Finally, the defendant contends that he did not receive a fair trial because a juror slept during much of the defendant's proof. The defendant identifies nothing in the record to show that this issue was raised at trial. Failure to make a contemporaneous objection waives this issue on appeal. See Tenn. R. App. P. 36(a); Teague v. State, 772 S.W.2d 915, 926 (Tenn. Crim. App. 1988); State v. Killebrew; 760 S.W.2d 228, 235 (Tenn. Crim. App. 1988).

CONCLUSION

Finding no reversible error, we AFFIRM the judgment from the trial court.

JOHN EVERETT WILLIAMS, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JAMES CURWOOD WITT, JR., Judge

