IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1999

FILED

December 7, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO.**
M1998 O0376 CCA R3 CD	)	
Appellee,	)	
	)	**BEDFORD COUNTY**
VS.	)	
	)	
DAVID KEITH KEARNEY,	)	**HON. WILLIAM CHARLES LEE,**
	)	**JUDGE**
Appellant.	)	
	)	(Public Intoxication)

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF BEDFORD COUNTY

FOR THE APPELLANT:

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FOR THE APPELLEE:

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MIKE McCOWN
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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

On July 20, 1998, the Bedford County Grand Jury indicted the Defendant, David Keith Kearney, for public intoxication. In August 1998, he was tried by jury and found guilty of public intoxication. In addition to fining the Defendant $50.00, the trial court sentenced him to twenty days incarceration, with all but ten days suspended, and thirty-two hours of public service. Pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure, the Defendant now appeals his conviction and sentence. The Defendant presents three issues for our review, two of which we have consolidated: (1) whether the Defendant was entitled to a dismissal of the charges against him or an acquittal due to the State's failure to follow the procedural requirements set forth at Tennessee Code Annotated § 68-24-202 and in Rule 5(a) of the Tennessee Rules of Criminal Procedure; and (2) whether the sentence imposed was excessive. We affirm the judgment of the trial court.

No transcript of evidence was filed in this case. However, pursuant to Rule 24(c) of the Rules of Appellate Procedure, the Defendant filed a statement of the evidence, in which he summarized the facts of this case as follows:

> At trial on August 14, 1998, the arresting officer, Officer Leeman testified that he was in his patrol car when he was radioed by Chris Baltimore, Bedford County Jailor, from the Texaco Station on the corner of Highway 231 N, approximately one block from the Bedford County Jail. Officer Baltimore testified that he was on his way to pick up some food for himself and other officers at the County Jail at a nearby restaurant and had stopped at the Texaco Station to purchase drinks. Officer Leeman testified, and Officer Baltimore verified this testimony, that Mr. Baltimore told Officer Leeman that he had just seen an individual cross Highway 231 N. headed east who appeared to be staggering and that this individual tripped on the curb and fell down upon crossing said 4 lane to the corner of the lot upon which the Texaco Station is located. Officer Leeman testified that upon approaching Mr. Kearney, Mr. Kearney appeared drunk in that Officer Leeman testified that Mr. Kearney was "staggering all over the place". Further the officer testified that vehicles in the lanes of traffic on this 4 lane were having to move to avoid Mr. Kearney. This occurred at approximately 11:00 p.m. on March 6th, 1998. Officer Leeman testified that he "blue lighted" Mr. Kearney and pulled over to talk to him. The Officer indicated at trial that Mr. Kearney appeared to be attempting to thumb a ride and

upon approaching him Mr. Kearney commented that "I'm proud to see you. I've been trying to get a ride and you're the first to stop to help me." Upon exiting his vehicle, Officer Leeman testified that he approached Mr. Kearney and in doing so smelled a strong odor of alcohol about his person. Additionally, Officer Leeman testified that upon questioning Mr. Kearney, Mr. Kearney became evasive in that he would not identify himself nor produce identification. Officer Leeman testified that he arrested Mr. Kearney and transported him to the Bedford County Jail where he required the assistance of Mr. Chris Baltimore, who had at that time returned to the jail from the Texaco Station, in that officer Leeman testified that Mr. Kearney could not walk without assistance. Mr. Leeman admitted that no blood-alcohol test, breathalyser [sic] test, or any other tests of any sort whatsoever were administered or conducted. When questioned by defense counsel regarding specific training received in identifying the smell of alcoholic beverages about the person of an individual, both officers admitted of no such training. Further, neither officer would or could admit to being able to distinguish between the smell of beer and other alcoholic beverages, and neither officer would or could speculate as to what type of alcoholic beverage Mr. Kearney has [sic] supposedly been imbibing in [sic] to be publicly intoxicated. Further, Officer Leeman testified that Mr. Kearney did in fact repeatedly demand to be taken before a "Supreme Court Judge", that it was his right to be taken before a Judge upon being arrested and that he, Officer Leeman, had in fact not taken him before a Judge. Upon questioning by defense counsel as to why at the preliminary hearing in the General Sessions Court for Bedford County he had indicated the Defendant had asked to be taken before a magistrate and now at trial he was testifying before the jury that Mr. Kearney had "demanded" to be taken before a "Supreme Court Judge", officer Leeman testified, in essence, that he did not know, however he insisted that Mr. Kearney had so demanded. Officer Leeman testified in response to defense counsel's questions concerning the Statute referenced herein that he had never learned, or been made aware of the Statute or its' [sic] procedural requirements.

The testimony of Jailor Chris Baltimore reiterated what has been referenced herein with the exception that Chris Baltimore testified that when Mr. Kearney crossed the intersection at Highway 231 N. heading east, two other individuals were walking beside or with him, that these two individuals upon seeing Mr. Baltimore in uniform approached him and indicated that someone needed to do something about Mr. Kearney, whom they apparently did not know, that these individuals were gone before he exited the Texaco Station after radioing for a patrol car, and further that these individuals were never identified and therefore could not be brought forward to give testimony at trial. Officer Leeman indicated that he did not see nor talk to these two other unknown individuals. On cross examination of the State's Officer witnesses neither Officer could remember what articles of clothing Mr. Kearney was wearing.

Upon taking the stand, Mr. Kearney, [sic] testified that he had walked from Unionville, approximately 10 miles away, to look at a motorcycle that was for sale. Additionally, Mr. Kearney admitted to drinking three (3) beers over a period of time prior to leaving Unionville. He testified that the long walk exhausted him and while walking across the intersection at Highway 231 N. headed east, approximately one (1) city block from the Bedford County Jail, he tripped on the curb on the corner of the lot on which the Texaco Station is located after crossing the Highway, and fell to one knee.

> Mr. Kearney testified that he immediately recovered and continued walking east toward the County Jail just off the Public Square in downtown Shelbyville. Mr. Kearney testified that he was stopped shortly thereafter as he was approaching the Bedford County Jail by Officer Leeman at which time he asked Officer Leeman why he was stopping him and asked him if he had a warrant for his arrest. Mr. Kearney admitted that he refused to give his name and/or any identification inasmuch as he indicated to the officer that he thought this was an unlawful action upon the part of the officer. Mr. Kearney also testified that the officer never indicated to him why he was being stopped and arrested. Mr. Kearney testified that the officer knocked him to the ground when he would not stop walking. Mr. Kearney testified that upon being arrested by Officer Leeman he demanded to be taken before a Magistrate or a Judge. Mr. Kearney testified that he was taken to the Bedford County Jail where he continued to request to be taken before a Magistrate. Mr. Kearney further testified that he requested to make a phone call and that this phone call was denied him and that thereafter he was jailed while he continued to demand to be taken before a Magistrate. Mr. Kearney testified that he was allowed to make a telephone call at 8:00 a.m., some nine (9) hours later by the morning shift Jailor and that after his phone call he identified himself and thereafter he was booked. Mr. Kearney identified exactly what he was wearing on the night in question. Mr. Kearney indicated that no tests for intoxication of any sort were administered or conducted.
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> Upon cross-examination by the Assistant Attorney General for Bedford County, Ms. Hollynn Hewgley, Mr. Kearney admitted to a prior DUI, admitted that he had no valid Tennessee Drivers license in that he had never attempted to have it reinstated after his DUI conviction, and that he currently had an International Drivers license that authorized him to operate an automobile in most countries of the world, including the United States. Mr. Kearney also admitted to pleading guilty to a Driving on a Revoked license charge within the last year, in spite of his contention that his international license was valid, saying that he did so on the bad advise [sic] of counsel, as he was not guilty and should have taken it to trial. Mr. Kearney testified that his prior counsel advised him that if he pled he would receive a spank on the hand and if he took it to trial and lost the court would punish him severely for exercising his right to a trial by jury. Assistant District Attorney, Hollynn Hewgley asked Mr. Kearney if he had been offered a fifty ($50.00) dollar fine if he pled guilty in the General Sessions Court to which Mr. Kearney answered in the affirmative.

The State did not object to this characterization of the facts.

I. CONVICTION

The Defendant was convicted of public intoxication, codified at Tennessee Code Annotated § 39-17-310. He argues that his charges should have been dismissed or, in the alternative, that he should have been acquitted of all charges because the State failed to comply with Tennessee Code Annotated § 68-24-202 and with Rule 5(a) of the Tennessee Rules of Criminal Procedure. The

Defendant argues that law enforcement officials failed to follow the procedural requirements of the rule and statute by not taking him before a magistrate on the night of his arrest. He argues that had he been taken before a magistrate immediately after his arrest, the magistrate could have determined whether he was "(1) under the affect [sic] of an intoxicant and (2) whether [he was] under the affect [sic] of an intoxicant to such a degree that the Defendants [sic] condition fit[] at least one of the criteria . . . set forth at T.C.A. §39-17-310." He contends that "failure to require adherence to the procedural safeguard set forth in the rule and statute referenced herein invites arbitrary and capricious abusive [sic] of power by policing authorities."

Tennessee Code Annotated § 68-24-202 provides as follows:

> (a) Whenever any citizen is taken into custody solely because of a condition of intoxication or similar condition, it shall be the duty of the arresting officer to promptly present such citizen before a judicial officer.
>
> (b) If the judicial officer finds that such citizen is in need of and willing to accept medical treatment for the citizen's condition, then the judicial officer shall order the arresting officer to conduct the citizen to a place of treatment if available, and the delivery of the citizen to the designated place of treatment shall effectively release and discharge the arresting officer and judicial officer from any further duties or liability in connection with the arrest.

Tenn. Code Ann. § 68-24-202 (emphasis added).

This statute is codified in the portion of our code entitled "Health, Safety and Environmental Protection" and more specifically, within a section concerning "Alcohol and Drug Treatment." In enacting this legislation, the legislature was obviously concerned with the treatment of alcohol and drug related illnesses. Clearly, the legislature's intent in enacting this legislation was to encourage treatment of such illnesses. We therefore conclude that Tennessee Code Annotated § 68-24-202 is not pertinent to the disposition of any issue presented in this case. However, even assuming that it is, we conclude that a violation of this statute does not mandate an acquittal or a dismissal of criminal charges.

We now turn to Rule 5(a) of the Tennessee Rules of Criminal Procedure. Rule 5 requires, in pertinent part, that

> [a]ny person arrested except upon a capias pursuant to an indictment or presentment shall be taken without unnecessary delay before the nearest appropriate magistrate of the county from which the warrant for arrest issued, or the county in which the alleged offense occurred if the arrest was made without a warrant unless a citation is issued pursuant to Rule 3.5.

Tenn. R. Crim. P. 5(a) (emphasis added).

Issues concerning violations of Rule 5 are typically raised in cases involving suppression of evidence, statements or confessions; the right to counsel; and other Fourth Amendment rights. We note that no such issues were raised here. In cases where a Rule 5 violation is found, or in other words, cases in which an arrestee is not taken before a magistrate without unnecessary delay, "the 'unreasonable delay' is but one factor to be taken into account in evaluating the voluntariness of the confession; and if the totality of the surrounding circumstances indicated that a confession was voluntarily given, it shall not be excluded from evidence." State v. Don Edward Carter, No. 02C01-9711-CC-00424, 1998 WL 460326, at * 8 (Tenn. Crim. App., Jackson, Aug. 10, 1998); State v. Huddleston, 924 S.W.2d 666, 671 (Tenn. 1996); State v. Readus, 764 S.W.2d 770, 774 (Tenn. Crim. App. 1988).

Initially, we find no violation of Rule 5 in this case. As stated by this Court in State v. Readus, "[t]he most prevalent ill that [the rule's] explicit condemnation of unnecessary delay was meant to help prevent was the practice of some officers of making arrests, locking the arrestees in jail without benefit of a mittimus, and often not bothering to take the accused before a magistrate for days." 764 S.W.2d at 774. Here, the Defendant was taken into custody at 11:00 p.m. and brought before a magistrate the following morning, approximately nine hours later. This was not a lengthy delay considering the circumstances of this particular case. There was likely no magistrate on duty overnight in this county, and it is doubtful that it would be "necessary" to roust a magistrate or judicial officer from his or her bed on every occasion that an intoxicated arrestee is presented at the county jail during the night.

Moreover, were we to assume that law enforcement officials violated Rule 5 by not taking this Defendant before a magistrate without unnecessary delay, we must conclude that the violation does not result in an abatement or dismissal of the underlying charge. Defense counsel cites no authority, nor have we found

any, in support of this proposition. As previously stated, a more appropriate remedy for violation of Rule 5, assuming that the Rule 5 violation was of such an egregious nature as to implicate Fourth Amendment protections, would involve suppression of any evidence obtained between the time of the defendant's arrest and his presentation before a magistrate or judicial officer. We thus conclude that the Defendant is not entitled to an acquittal or a dismissal of the charges against him. This issue is without merit.

II. SENTENCING

The Defendant next argues that "the sentence imposed by the Trial Court was cruel and unusual in being excessive as an intended deterrent to prevent the defendant, and others similarly situated, from exercising the right in a misdemeanor case to a Trial by Jury in the future." However, the Defendant has not included in the record a transcript or summary of the sentencing hearing, nor does he cite to any authority in support of his argument. It is the appellant's responsibility to preserve an adequate record for review on appeal. See Tenn. R. App. P. 24(a). The Defendant has failed to preserve a record of the sentencing hearing in this case, to make appropriate references to the record, and to cite authority in support of his argument. This issue is therefore waived. See Tenn. Ct. Crim. App. R. 10(b); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988); Tenn. R. App. P. 27(a)(7), (g).

The judgment of the trial court is accordingly affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

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JOHN EVERETT WILLIAMS, JUDGE