IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

FILED

December 16, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE	**)**	
	)	
APPELLEE	**)**	
	)	
VS.	**)**	**C.C.A. NO. 03C01-9902-CC-00073**
	)	**BLOUNT CIRCUIT NO. 11201,11202**
RONALD M. WHITE	**)**	**HON. D. KELLY THOMAS, JR.,JUDGE**
	)	
APPELLANT	**)**	

FOR THE APPELLANT:

JULIE A. RICE
P.O. Box 426
Knoxville, Tennessee 37901-0426

MACK GARNER
District Public Defender
419 High Street
Maryville, Tennessee 37804

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH B. MARNEY
Assistant Attorney General
425 Fifth Avenue North
Nashville, Tennessee 37243

WILLIAM REED
Assistant District Attorney
Blount County Courthouse
363 Court Street
Maryville, Tennessee 37804

OPINION FILED:_____

AFFIRMED:
JOE H. WALKER, III, Sp. JUDGE

OPINION

Appellant appeals as of right from the jury verdict finding him guilty of driving under the influence, third offense, and leaving the scene of an accident.

Appellant cites as issues:

1. Whether the evidence was sufficient to find appellant guilty.

2. Whether the trial court erred in admitting evidence of the blood alcohol testing and analysis.

3. Whether the trial court erred in sentencing appellant to a sentence greater than the mandatory minimum sentence for DUI, third offense.

Statement of Facts

Appellant was driving a tractor on a narrow road in Blount County around 11:30 p.m. when he met a pick-up truck approaching in the opposite direction. There was a collision between the two vehicles, causing damage down the side of the pick up truck, and a broken mirror. Appellant continued driving a tractor down the roadway, and Mr. Bivens, the driver of the pick up truck, turned around and pursued the tractor over a mile down the roadway, blowing his horn and flashing his lights. After the tractor stopped, Mr. Bivens approached the appellant, and could smell alcohol and observed that appellant was unsteady on his feet. Appellant was aggressive and belligerent, and began using curse words.

Mr. Bivens called the Sheriff's Department to report the accident, and Officer Patty was dispatched to investigate the accident. Officer Patty testified that appellant was unsteady on his feet and smelled of alcohol, and told the officer that he had drunk "two beers." Appellant initially told Officer Patty that he had not been involved in a traffic accident. Officer Patty observed that the door to the cab of the tractor was folded back with fresh bare metal and loose paint chips. He requested appellant perform field sobriety tests, and observed that he was unsteady on his feet, his eyes were glassy and bloodshot, his speech was slurred, and he was slow responding to the officer's questions. He was unable to perform the field sobriety tests. Appellant stated that he could not perform the test because of a lower back injury.

Appellant agreed to a blood alcohol test, and was transported to Blount Memorial Hospital Emergency Room were a laboratory technician drew appellant's blood from his left arm

in the officer's presence. The technician who drew the blood was Terrance P. Glisson, and the laboratory analysis showed a blood alcohol content of .18 gram percent ethyl alcohol.

Appellant testified to the jury that he had nothing to drink that day and that Bivens truck struck the tractor that appellant was driving, and that he stopped and waited on Bivens to arrive after traveling a short distance down the roadway. Appellant stated that he was belligerent and upset because the damage that had been done to the tractor. He explained his inability to perform the field sobriety test because of an injury he had received to his back, leaving him unable to walk or maintain his balance as well as he could before the injury. Appellant denied he told the officer he had two beers that night, and explained that the smell of alcohol came from the tractor.

I.

Sufficiency of the Evidence

The jury accredited the testimony of the witnesses for the state.

In its review of the evidence, an appellate court must afford the state the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom. State v. Tuggle, 639 S.W.2d 913 (Tenn. 1982). The court may not reweigh or re-evaluate the evidence. State v. Evans, 838 S.W.2d 185 (Tenn. 1992). The reviewing court must resolve conflicts in the trial testimony in favor of the jury verdict. Tuggle, 639 S.W.2nd at 914.

We find that the evidence presented at trial is sufficient to sustain the defendant's convictions. Mr. Bivens testified that the defendant did not stop his tractor after the accident, but drove it for over one mile before Bivens caught up with the defendant at an intersection where the tractor was forced to stop.

The evidence of appellant's intoxication while operating the tractor was likewise sufficient. Officer Patty testified that appellant smelled strongly of alcohol, had blood shot eyes and slurred speech, was unsteady on his feet, and was slow in responding to questions. Appellant was unable to pass field sobriety tests. The evidence was sufficient for a jury to conclude that appellant was intoxicated even without the blood alcohol test results. The blood alcohol test result, of .18, further confirmed that appellant was driving while intoxicated.

A jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the state and resolves all conflicts in favor of the theory of the state. State v. Hatchett, 560 S.W.2d

627 (Tenn.1978).

The court finds that after reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of each crime beyond a reasonable doubt.

II.

Whether the Blood Alcohol Testing and Analysis should have been admitted into evidence.

Officer Patty testified that he placed appellant under arrest and before transporting him to jail, and asked if he would submit to a blood alcohol test. Appellant said that he would, and Officer Patty took him to Blount Memorial Hospital Emergency Room to the lab and blood was drawn for the test. The officer was present and observed the blood being drawn from appellant's left arm. After the blood was drawn into a tube it was sealed, labeled, placed in bubble wrap, and put in a box and sealed with tamper-evident tape. A form was put into the box with the tube that has the date and time the blood was drawn, the name of the lab technician, and other information. Blood was drawn from appellant at 1:35 a.m. by Terrance P. Glisson, MT(ASCP). The blood was then sent to the Tennessee Bureau of Investigation's Lab for analysis.

A special agent forensic toxicologist with the TBI lab testified at the trial conceming the analysis of the blood sample and the results of that analysis.

Appellant contends that T.C.A. 55-10-410(a), requires that the state must prove the identity and qualifications of the person who drew the blood sample, and that it was drawn by a registered nurse, license practical nurse, clinical laboratory technician, or other person listed. Appellant contents there was no proof submitted that the person who drew appellant's blood qualified under any of those designations.

The state contends this issue is waived, since no motion for a new trial was filed, and the issue therefore was not raised in a motion for new trial as required by Rule 3, Tenn.R.App.P. This court agrees that the issue is waived.

The trial court over-ruled the objection and allowed the admission into evidence of the Tennessee Bureau of Investigation report, during the testimony of Alva Smith, T.B.I. special agent forensic toxicologist.

Admission of the report is governed by T.C.A. 55-10-410(d), which provides:

(d) The certificate provided for in this section shall, when duly attested by the director of the Tennessee bureau of investigation or the director's duly appointed representative, be admissible in any court, in any criminal proceeding, as evidence of the facts therein stated, and of the results of such test, if the person taking or causing to be taken the specimen and the person performing the test of such specimen shall be available, if subpoenaed as witnesses, upon demand by either party to the cause, or, when unable to appear as witnesses, shall submit a deposition upon demand by either party to the cause.

The two people required by that statute testified in this trial. Officer Patty was the person who caused the specimen to be taken, and Alva Smith was the person performing the test. The statute only requires those people be available. It is not necessary that they testify for admission of the report.

In State v. Hughes, 713 S.W.2d 58 (S.Ct. 1986), the defendant was convicted in the trial court of driving while intoxicated. The only testimony adduced in the circuit court proceeding was that of Sergeant Ted Boyd of the Loretto, Tennessee Police Department. Sergeant Boyd placed defendant under arrest, advised him of his rights, and transported him to Crockett General Hospital for the blood test. A medical lab technician named Mochelle Barley drew the blood sample. Sergeant Boyd took custody of the sample and sent it to the Tennessee Bureau of Investigation Crime Laboratory where it was analyzed by one Samuel Manuel. Neither party called Manuel to testify.

The Supreme Court held that the Legislature intended to avoid any confrontation violation by providing in T.C.A. 55-10-410(d) that the admissibility of the test results are dependent upon the presence of the laboratory technician who performed the test, if subpoenaed by either party. However, the accused waives the right of confrontation if the laboratory technician is not subpoenaed, or not called to the witness stand by either party.

In this case, Ms. Smith testified that the lab received the tube of blood with the submitted form with the name of the person who drew the blood, and the tube of blood had the initials of the person who drew the blood.

Officer Patty testified he took Mr. White to the Blount Memorial Hospital to the lab and observed blood being drawn from his left arm by the lab technician. The request form set out who the lab technician was that drew the blood.

The state complied with the statutory requirement in this case for the admission of the report.

III.

Whether the Trial Court Erred in Sentencing the Appellant to more than the Mandatory Minimum Sentence for DUI, Third Offense.

The appellant was sentenced to eleven months, twenty-nine days probation after serving 180 days in jail. This is 60 days more jail time than the mandatory minimum jail requirement for DUI third offense. T.C.A. 55-10-403.

The DUI statute mandates a maximum sentence for DUI conviction, 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 720, 724 (Tenn.Crim.App. 1996).

The sentence is reviewed with the presumption of correctness for the determinations made by the trial court. T.C.A. 40-35-401(d).

From a review of the record it is clear that the trial court considered enhancement and mitigating factors, as well as principles related to sentencing. There was property damage involved in the DUI. In addition to two prior convictions for DUI, appellant had several other arrests and convictions, including convictions for assault, worthless checks, disorderly conduct, and public intoxication.

A misdemeanant, unlike a felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829 (Tenn.Crim.App. 1994). The trial court has a wide latitude of flexibility.

This court can not say that the trial court abused its discretion in the sentence imposed in this case. The sentence imposed by the trial court is affirmed.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____

JOE H. WALKER, Sp. JUDGE

CONCUR:

_____

DAVID G. HAYES, JUDGE

_____

ALAN E. GLENN, JUDGE

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

STATE OF TENNESSEE	)	
	)	
APPELLEE	)	
	)	
VS.	)	**C.C.A. NO. 03C01-9902-CC-00073**
	)	**BLOUNT CIRCUIT NO. 11201,11202**
RONALD M. WHITE	)	**HON. D. KELLY THOMAS, JR.,JUDGE**
	)	
APPELLANT	)	

JUDGMENT

Came the appellant, Ronald M. White, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Blount County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is AFFIRMED, and the case is remanded to the Criminal Court of Blount County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

PER CURIAM

DAVID G. HAYES, JUDGE
ALAN E. GLENN, JUDGE
JOE H. WALKER, III, Sp. JUDGE