

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 6, 2020

FILED
11/10/2020
Clerk of the
Appellate Courts

STATE OF TENNESSEE v. MARVIN GLYNN ALLEN

Appeal from the Circuit Court for Chester County
No. 19-CR-43 Kyle C. Atkins, Judge

No. W2020-00233-CCA-R3-CD

Defendant, Marvin Glynn Allen, appeals his conviction for DUI, fourth offense, arguing that, based on the plain language of Tennessee Code Annotated section 55-10-405(a), his charge should have been DUI, third offense. After a thorough review of the record, applicable case law, and the legislative history, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and ROBERT W. WEDEMEYER, J., joined.

G.W. Sherrod, III, Henderson, Tennessee, for the appellant, Marvin Glynn Allen.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Assistant Attorney General; Jody Pickens, District Attorney General; and Eric V. Wood, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural History

The Chester County Grand Jury indicted Defendant for nine driving offenses including one count of driving under the influence (“DUI”), one count of DUI per se, and one count of DUI, fourth offense. The offense date for all indicted offenses was June 6, 2018.

Defendant filed a pretrial motion to dismiss the indictment for DUI, fourth offense, based upon his interpretation of Tennessee Code Annotated section 55-10-405(a). Defendant argued that his “immediately preceding violation” was the one that

occurred on September 28, 2016;¹ thus, the only violations which could be used to enhance the current conviction were those that fell within ten years of that violation. The prosecutor argued that Defendant must have a ten-year conviction free period, or else the State “could go back as far as twenty years” to count DUI violations as part of the multiple offender enhancement. The trial court denied the motion, stating,

It sounds like to me what [the statute is] saying is that you start with today’s conviction, you go back ten years. And that would be your first -- that would be your first one you look at is if it’s within ten years, then you’d -- it would be a DUI [second offense]. Then you go back ten more years and it would be a DUI [third offense]. And then you go back ten more years and it would be a DUI [fourth offense]. Otherwise you wouldn’t -- again, wouldn’t have a need for the statement about twenty years.

After a jury trial, Defendant was found guilty on seven of the indicted offenses, including DUI and DUI per se.² After the jury returned its verdict, Defendant waived trial by jury for the DUI, fourth offense, and the trial court conducted a bench trial in which Defendant admitted having prior DUI convictions with offense dates of September 28, 2016; March 14, 2009; and June 9, 1999. The trial court found Defendant guilty of DUI, fourth offense.

At a sentencing hearing, the trial court merged the DUI and DUI per se into the DUI, fourth offense and sentenced Defendant to three years’ incarceration at thirty-five percent. The sentences on the other traffic offenses were ordered to be served concurrently with the three-year sentence for DUI, fourth offense.

Defendant filed a timely “Motion for New Trial, Verdict of Acquittal, or Modification of Sentence.” The trial court denied the motion, and Defendant timely appeals.

Analysis

Defendant claims that, based on the “clear and plain language” of Tennessee Code Annotated section 55-10-405(a) (“the multiple DUI offender statute”), the trial court

¹ Defendant’s argument was based on November 28, 2016, which was the date of conviction for this offense date. However, as we will explain later, the relevant date for the purpose of reaching back is the date of offense.

² Because Defendant does not challenge the sufficiency of the evidence, we will limit our discussion of the facts in this case to those necessary to address the sole issue raised on appeal related to the language of Tennessee Code Annotated section 55-10-405(a).

erred in considering his June 9, 1999 DUI violation to find him guilty of DUI, fourth offense. The State responds that the trial court “properly found” that the June 9, 1999 DUI violation could be used to support a conviction of DUI, fourth offense. We agree with the State.

Because this issue concerns the construction of a statute, we review the trial court’s conclusions de novo with no presumption of correctness. *State v. Edmondson*, 231 S.W.3d 925, 927 (Tenn. 2007) (citing *State v. Denton*, 149 S.W.3d 1, 17 (Tenn. 2004)).

The multiple DUI offender statute provides in pertinent part:

(a) . . . [A] person who is convicted of a violation of [section] 55-10-401 shall not be considered a repeat or multiple offender and subject to the penalties prescribed in this part if ten (10) or more years have elapsed between the date of the *present violation and the date of any immediately preceding violation* of [section] 55-10-401 that resulted in a conviction for such offense. If, however, the date of a person’s violation of [section] 55-10-401 is within ten (10) years of the date of the present violation, then the person shall be considered a multiple offender and is subject to the penalties imposed upon multiple offenders by this part. *If a person is considered a multiple offender under this part, then every violation of [section] 55-10-401 that resulted in a conviction for such offense occurring within ten (10) years of the date of the immediately preceding violation shall be considered in determining the number of prior offenses.* However, a violation occurring more than twenty (20) years from the date of the instant violation shall never be considered a prior offense for that purpose. (emphasis added).

Tennessee Code Annotated section 55-10-405(a) (2018) (emphasis added).

The following chart provides the key dates and events applicable to this case:

DATE	EVENT
June 6, 2018	present DUI violation
September 28, 2016	prior DUI violation
March 14, 2009	prior DUI violation
June 9, 1999	prior DUI violation

In *State v. Tracey Gober*, No. E2001-00296-CCA-R9-CO, 2001 WL 1089508, at *1 (Tenn. Crim. App. Sept. 18, 2001), the trial court ordered that the indictment for DUI,

ninth offense be amended to reduce the charge to DUI, third offense. This court granted the State's interlocutory appeal, reversed the trial court's order, and reinstated the original indictment. As quoted by this court in *Tracey Gober*, the DUI multiple offender statute, Section 55-10-403(a)(3)(2000), provided:

For purposes of this section, a person who is convicted of a [DUI] violation . . . shall not be considered a repeat or multiple offender and subject to the penalties prescribed in subsection (a), if ten (10) or more years have elapsed between such conviction and any immediately preceding conviction for a violation. If, however, a person has been convicted of a [DUI] violation . . . within ten (10) years of the present violation, then such person shall be considered a multiple offender and is subject to the penalties imposed upon multiple offenders by the provisions of subsection (a). If a person is considered a multiple offender under this subdivision, then every conviction for a [DUI] violation . . . within ten (10) years of the immediately preceding violation shall be considered in determining the number of prior offenses, but in no event shall a conviction for a violation occurring more than twenty (20) years from the date of the instant conviction be considered for such purpose.

Id. at *1-2.

When *Tracey Gober* was decided, the DUI multiple offender statute was codified at Tennessee Code Annotated section 55-10-403(a)(3), the predecessor statute of section 55-10-405(a). The similarity between the above quoted language of section 55-10-403(a)(3) (2000) and section 55-10-405(a) (2018) is the direct result of the legislature amending section 55-10-403 in 2013 by deleting the section in its entirety and at the same time, amending section 55-10-405 by deleting that section in its entirety and substituting instead the verbatim language of section 55-10-403. *See* 2013 Tennessee Laws Pub. Ch. 154 (S.B. 186). The only meaningful difference between section 55-10-403(a)(3) (2000) and section 55-10-405(a) (2018) is that, before 2016, the number of prior DUI violations was determined by measuring the time between convictions, and after 2016, the number of prior DUI violations was determined by measuring the time between the DUI offense dates. *See* 2010 Tennessee Laws Pub. Ch. 1080 (H.B. 919, S.B. 844); Tennessee Bill Summary, 2010 Reg. Sess. H.B. 919, 2010 Reg. Sess. S.B. 844 (clarifying in the 2010 amendment to the statute that “[t]his bill specifies that the *arrest precipitating a DUI conviction* will toll the running of the 10- and 20-year periods described above for purposes of determining if the person is a multiple offender and, if so, the number of prior convictions for DUI that the person has.”) (emphasis added). *See also State v. Benjamin Tate Brown*, No. M2017-01150-CCA-R3-CD, 2018 WL 993874, at *4 (Tenn. Crim. App. Feb. 20, 2018), *perm. app. denied* (Tenn. June 6, 2018) (concluding that the

word “violation” in the multiple DUI offender statute refers to an offense date rather than the date of conviction). That difference does not affect the calculation of Defendant’s multiple offender status. We determine that the reasoning used by this court in *Tracey Gober* to calculate prior DUI violations was sound and can be used to calculate Defendant’s prior DUI violations.

The argument made by the defendant in *Tracey Gober* was substantially the same as the argument Defendant is making in this case. The defendant argued

that the proper way to calculate which prior convictions should be considered to determine multiple offender status is to determine the date of the first conviction immediately preceding the instant conviction and count back ten years from that date. Only the prior convictions occurring between those dates are appropriate for consideration.

Tracey Gober, 2001 WL 1089508, at *2.

In construing the language of the multiple DUI offender statute, the *Tracey Gober* court reasoned:

As we review the plain language of the statute and the legislative history, it is clear that whenever an offender maintains a ten-year DUI conviction free period, the [S]tate is barred from using any prior convictions beyond that period for purposes of enhanced punishment. This ten-year DUI conviction free period is important in two ways. First, in order to be considered as a multiple offender one must have a prior DUI conviction occurring within ten years from the date of the instant conviction. Second, if at any time a ten-year DUI conviction free period exists between preceding prior convictions, the State is barred from using any prior conviction beyond that ten-year period for the purposes of enhanced punishment[.] We should be clear, however, that in no event may a prior conviction be used for the purpose of enhanced punishment if it occurred more than twenty years before the date of the instant conviction.

*Id.*³

³ The legislative discussions during the passage of the 1998 amendment included the following introduction from the bill’s Senate sponsor:

Under current law, we look at DUI convictions for a ten-year period from the current conviction to determine whether you’re a multiple offender for the purpose of deciding what kind of imprisonment or punishment you’re subject to. We had a situation . . . where a person had a long history of DUI offenses

The *Tracey Gober* court provided the following example to be used to determine the number of prior DUI violations under the multiple DUI offender statute:

Defendant X's instant conviction occurred April 1, 2001. The defendant has four prior DUI convictions, all occurring six years apart; April 1, 1995; April 1, 1987; April 1, 1981; April 1, 1975. First question. Does the defendant have a prior DUI conviction occurring within ten years of the instant offense? The answer is yes, April 1, 1995. Second question. Does the defendant have a ten-year DUI conviction free period between any preceding prior conviction? The answer is no, all convictions are six years apart. Third question. Does the defendant have any prior convictions more than twenty years from the instant conviction? The answer is yes, April 1, 1975. Therefore, the defendant may be charged with fourth offense driving under the influence.

Id.

By substituting the offense dates of Defendant's DUI violations into the *Tracy Gober* example, the number of Defendant's prior DUI violations under the multiple DUI offender statute can be determined. The present violation occurred on June 6, 2018, and Defendant had three prior DUI violations: September 28, 2016, March 14, 2009, and June 9, 1999. First question: Does the defendant have a prior DUI violation occurring within ten years of the present violation? The answer is yes, September 28, 2016. Second question: Does Defendant have a ten-year DUI violation-free period between any preceding prior violation? The answer is no, the longest stretch between violations is nine years and nine months. Third question: Does Defendant have any prior violations

but unfortunately had only had two within the last ten years but had a string of them going back, like, thirty years. And all those were not considered. . . . [T]his bill will say, it creates a rolling ten-year period, so that if you're up on charges in [19]97, and we find within ten years that you have a conviction going back to, say, 1990, we will then look ten years from 1990 back to 1980 and see how many convictions were there. If you had one in 1988, we go ten years back from 1988, and if you had one in 1985, we go ten years back from 1985 and keep going until there's a ten-year window where you've not had a DUI offense. That's what the bill says. So it's what I call "a rolling ten-year review."

Tennessee Laws Pub. Ch. 926, S.B. 998: Hearing Before the Senate Transportation Committee, April 16, 1997. *See also State v. Russell Snider*, No. W2000-01240-CCA-R3-CD, 2001 WL 721030, at *7 (Tenn. Crim. App. June 26, 2001), *perm. app. denied* (Tenn. Oct. 29, 2001). After an amendment to the bill, the following discussion was had: "The way the original bill was worded, you get to go back every ten years indefinitely, and under the amendment . . . then you get a completely clean slate after twenty years." Tennessee Laws Pub. Ch. 926, H.B. 754: Hearing Before the House Judiciary Committee, April 8, 1998.

more than twenty years from the present violation? The answer is no, the June 9, 1999 violation occurred less than twenty years before the instant violation. Thus, the trial court properly determined the instant violation was a DUI, fourth offense. *See also State v. Leodish Coe*, W2006-02481-CCA-R3-CD, 2007 WL 4258179, at *1 (Tenn. Crim. App. Dec. 5, 2007), *perm. app. denied* (Tenn. May 5, 2008) (“conclud[ing that] the logic and reasoning in [*Tracey*] *Gober* is sound and helpful in deciding how to calculate multiple offender status”); *State v. Robert Baker, Jr.*, No. M2008-01454-CCA-R3-CD, 2009 WL 3460427, at *6 (Tenn. Crim. App. Oct. 28, 2009) (applying the analysis as found in *Tracy Gober*).

Using the *Tracey Gober* “logic and reasoning,” we conclude that the trial court properly considered the June 9, 1999 violation in finding Defendant guilty of DUI, fourth offense. Defendant is not entitled to relief.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

ROBERT L. HOLLOWAY, JR., JUDGE