IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

January 14, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9604-CC-00156**
Appellee,	)	
	)	**HAMBLEN COUNTY**
VS.	)	
	)	**HON. JAMES E. BECKNER,**
DALE KEVIN WATTERSON,	)	**JUDGE**
	)	
Appellant.	)	(DUI)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted in October 1995 for driving under the influence (DUI). The indictment included a second count alleging that the defendant had been previously convicted three times of DUI in violation of T.C.A. § 55-10-403. On November 9, 1995, he was convicted by a jury of DUI. The defendant waived a bifurcated trial as to the issue of his fourth offense and pled guilty to that offense. In exchange for this plea, the trial court agreed to impose the minimum fine for the fourth offense. The defendant was sentenced to eleven months and twenty-nine days with a release eligibility date of seventy-five percent.

In this appeal as of right, the defendant contends that the evidence presented at trial was insufficient to support the jury's verdict and that reversible error was committed when the defendant was denied compulsory process by the State in his effort to obtain the testimony of a material witness. We find the defendant's issues are without merit, and his conviction is therefore affirmed.

On the night of May 7, 1995, Mark Campbell and Dan Cliff, patrol officers with the Morristown Police Department, were parked in a convenience store parking lot. The officers were in separate vehicles that were parked side by side, facing in opposite directions. Officer Campbell testified that at about 10:30 p.m. he observed a vehicle come down Third Street and turn onto a nearby road leading to an apartment building. He continued to watch the vehicle as it parked in front of the apartments. As he watched, he saw the defendant exit the driver's side of the car with a Michelob beer in his hand. At that time, Officer Campbell reported to Officer Cliff what he had just seen. Officer Cliff used his rear view mirror to see the car and the defendant. The officers then drove to where the car was parked and upon their arrival, the defendant began to run. Officer Cliff detained the defendant on a stair landing not far from the defendant's car.

As the officers approached the defendant, they detected a strong odor of alcohol. When Officer Campbell asked the defendant where he had been, the defendant replied that he had dropped off a friend and that he had been at the Eagle's Nest prior to that. Officer Cliff testified that the defendant was asked several times whether he was driving and the defendant replied that he was.

A field sobriety test was then administered. Officer Campbell testified that the defendant performed poorly on the one-leg balance test and that he could not recite the alphabet in its correct order. From his performance, the officers determined that the defendant was intoxicated and placed him under arrest. Later, at the Morristown Police Department, the defendant consented to an Intoximeter breath test which revealed him to have a level of 0.24 blood alcohol content.

Officer Cliff testified that although it was about 10:30 p.m. the area was well lit by lights from the convenience store and from street lights. He further testified that he had been close enough to the defendant to be able to see that the beer in the defendant's hand was a Michelob. Neither officer saw anyone else in the area from the time the defendant's car was first noticed.

The defendant tells a different story. At the trial, he admitted that he had been drinking that evening but testified that he had asked a friend, Kevin Green, to drive him home. He said his friend exited the vehicle and went into his apartment before the officers arrived. The defendant further testified that he did exit the driver's side but that was only because the passenger side had been damaged and the door would not open. Photographs in the record verified that the passenger side did have extensive damage.

A defendant challenging the sufficiency of the proof has the burden of

illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

The defendant claims sufficient evidence was not introduced to allow a rational trier of fact to conclude that he was the driver of the vehicle. However, two officers testified that, when asked, the defendant said he had been driving. The officers also testified that the defendant was the only person in the area at the time. Officer

Campbell testified that he had the car in his sight from the time he first saw it until he approached the defendant and that no one but the defendant was in the area. No one disputes that the defendant was indeed intoxicated. Although the defendant offered an explanation in an attempt to rebut the State's evidence, the jury verdict accredits the testimony of the officers and discredits the testimony of the defendant. From a review of the entire record, we can only conclude that there is sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt.

In his second issue, the defendant contends that he was denied compulsory process by the State in his effort to obtain the testimony of a material witness. The defendant requested a subpoena be issued for Kevin Green, the man the defendant testified drove him home that night. The subpoena was issued, however, it was not served because Mr. Green could not be located by the sheriff's department. The defendant now argues that the failure to locate Mr. Green denied him the right to compulsory process. The defendant was clearly afforded his right to have a subpoena issued.

At trial, but while the jury was out, counsel for the defendant told the court on the record that she had spoken to Mr. Green earlier in the week and that he expressed his desire to not become involved in the case. Defense counsel said she believed that Mr. Green would testify that he was driving but admitted that she had not been told that by Mr. Green. The trial judge said he did not know what to do except proceed unless defense counsel had a suggestion. She replied that she had none and the trial continued.

An accused in a criminal trial has a constitutional right to the compulsory attendance of witnesses under the Sixth Amendment of the United States Constitution

and under Article I, Section 9, of the Constitution of Tennessee. When the witness is shown to be material, the trial court has no discretion as to the issuance of such process. State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991); see also Bacon v. State, 215 Tenn. 268, 385 S.W.2d 107 (1964). A reasonable opportunity for such process must be afforded and if necessary, a reasonable adjournment of the trial should be granted in order to make process effective. Morgan, 825 S.W.2d at 117.

In Morgan, the defendant complained that the trial court erred when it refused to grant a continuance so that a witness could be located. As in the case sub judice, the defendant in Morgan was afforded his right to have a subpoena issued. However, the subpoena was not served because the witness could not be located. In explaining the case, the court said:

> The record does not contain any indication that discovery of the witness was probable nor was there any complaint that the best efforts were not being made by those who might be charged with a duty to serve process. We are not told of potential leads . . . or any other circumstance which might indicate that the witness could or should be found at any time, much less within a reasonable time. In fact, . . . the record reflects that defense counsel did not believe the witness would be found.

Morgan, 825 S.W.2d at 118. Thus, the court concluded that the trial court did not err when it denied the defendant's motion for a continuance and proceeded with the trial.

In this case, the defendant did not ask for a continuance nor did he complain that the sheriff's office had not used its best efforts to locate the witness. Furthermore, defense counsel told the court that the witness had expressed to her that he did not want to be involved in the case. Defense counsel also told the court that she spoke to Mr. Green earlier that day while he was at his apartment. However, when the sheriff's department tried to serve him at his apartment, Mr. Green did not answer the door or the telephone. The defense counsel could not offer any suggestion as to how to

remedy the situation. Absent any indication in the record of any potential that Mr. Green could have been served, we cannot hold that the trial court erred when it proceeded with the trial.

For the reasons set out above, we find that the defendant's issues on appeal lack merit, and we hereby affirm the judgment of the trial court.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge