

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY SESSION, 1995

**FILED**

September 8, 1995

Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE )  
)  
                          APPELLEE )  
)  
V. )  
)  
TOMMY L. BROWN )  
)  
                          APPELLANT )

NO. 03C01-9407-CR-00250  
GREENE COUNTY  
HON. BEN K. WEXLER, JUDGE  
(Driving Under the Influence  
of an Intoxicant)

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FOR THE APPELLEE:

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AFFIRMED

OPINION FILED: \_\_\_\_\_

JERRY SCOTT, PRESIDING JUDGE

## OPINION

The appellant was convicted of driving while under the influence of an intoxicant, for which he received a jail sentence of eleven months and twenty-nine days and a fine of \$250.00. Since this is his first DUI offense, he was ordered to serve forty-eight hours in jail, after which he will be placed on probation. On appeal he has presented two issues.

First he contends that the trial judge erred by admitting evidence of the results of the intoximeter test because there was, in his view, evidence that revealed that external factors could have interfered with the machine's operation and skewed the results of the test. The officer testified that the Intoximeter 3000 testing device was in the small booking room adjacent to the room where electronic and communications equipment was in operation and that jailers and prisoners smoke in the booking room. The appellant presented the testimony of Darrell Stills, a Lieutenant at the Greene County Detention Center, who testified that revision E to the operator's manual for the Intoximeter 3000 provides as follows:

Proper environmental conditions: The testing room should be free of radio transmission equipment, including walkie-talkies, sources of organic fumes, including cigarettes -- pipe or cigarette smoke, cleaning chemicals or solutions and chemical fumes coming from an evidence room.<sup>1</sup>

In State v. Johnson, 717 S.W.2d 298, 305 (Tenn.Crim.App. 1986), this Court noted that the state must establish the competency of the operator of a breath testing device, the proper operation of the machine and that the testing procedures were properly followed. The defense is then free to rebut the state's evidence by calling witnesses to challenge the accuracy of the particular machine, the qualifications of the operator and the degree to which established testing procedures were followed. This Court went on to note that "any

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<sup>1</sup>The manual provisions were admitted as an exhibit, but the exhibits were not forwarded to this Court with the record.

inaccuracies in particular test results go to the weight of the evidence, not to admissibility. The weight of any given evidence is a question of fact for the trier of fact in each case."

Thus, the appellant's challenge is to the weight of the evidence not to its admissibility. The trial judge properly admitted the evidence and the jury, as was their prerogative, weighed the evidence about the test results, giving the test results whatever weight they were worth in light of the defense challenge to the accuracy of the test. The trial judge properly admitted the test results and this issue has no merit.

In his other issue, the appellant contends that the trial judge erred by admitting twelve photographs of Highway I07 showing the area where he was arrested. The appellant contends that since the proof showed that the road was misty with sleet and rain, that there had been snow flurries off and on during the day and that the offense occurred "in the dead of winter at a time when there was no foliage on the trees," the photograph taken in the daytime in the summertime should not have been admitted.

The determination of the relevance and materiality of photographs is left to the sound discretion of the trial judge whose ruling in that regard will not be disturbed on appeal unless there has been an abuse of that discretion. Cagle v. State, 507 S.W.2d 121, 132 (Tenn.Crim.App. 1973). As our Court of Appeals has noted, "(t)he real basis for the admission of any photograph in evidence is to assist the jury in finding the true facts and to decide the issues involved." Strickland Transport Company v. Douglas, 37 Tenn.App. 421, 264 S.W.2d 233, 239 (1953).<sup>2</sup>

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<sup>2</sup>Of course, the term "true facts" is redundant. "Facts" are true by definition. Webster's New World Dictionary of the American Language 220 (1983).

In this case the trial judge properly admitted the photographs of the roadway to assist the jury. There was no allegation that the roadway was the same as it was on the night of the appellant's arrest. Indeed, to require that the photographs precisely replicate the weather and other conditions at the time of the offense would eliminate the admissibility of any photographs which were not taken contemporaneously. That would produce an absurd evidentiary rule. This issue has no merit.

Finding no merit to either issue, the judgment is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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WALTER C. KURTZ, SPECIAL JUDGE