

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FILED
March 6, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee,)
)
 V.)
)
 JAMES RUSSELL NEILL, JR.,)
)
 Appellant)

NO. 02C01-9503-CC-00067

HARDIN COUNTY

HON. JULIAN GUINN, JUDGE

(Driving Under the Influence
of an Intoxicant)

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OPINION FILED: _____

AFFIRMED AS MODIFIED

William M. Barker, Judge

OPINION

Following a trial before a Hardin County jury, the appellant, James Russell Neill, Jr., was found guilty of driving under the influence of an intoxicant. He was sentenced to eleven months and twenty-nine days with all but ten days suspended. In this appeal as of right, the appellant alleges that the evidence was insufficient to support his conviction. Upon a review of the record in this case, we agree that the evidence is insufficient as a matter of law to sustain a conviction for driving under the influence of an intoxicant. However, the evidence is more than sufficient to sustain a conviction for the lesser included offense of driving while impaired in violation of Tennessee Code Annotated section 55-10-415(a)(1)(A). Accordingly, the appellant's conviction for driving under the influence of an intoxicant is reversed and dismissed, and this cause is remanded to the trial court for a new sentencing hearing for the appellant's conviction of driving while impaired.

The evidence in this case established that the appellant, who was under the age of twenty-one years at the time of the offense, was observed by Officer Victor Cherry operating his 1993 Thunderbird automobile near the Hardin County High School. When first observed by the officer, the appellant was proceeding out of a parking lot near a store which had recently experienced a break-in. It was nighttime, the business was closed, and Officer Cherry made the decision to stop the vehicle based upon his suspicion that another break-in might have occurred. Officer Cherry observed the moving automobile for a very short distance before he stopped the appellant. During that brief time, the operation of the vehicle appeared normal. When the officer approached the vehicle, he found that it was occupied by the appellant, who was the driver, and two passengers in the front seat. He detected an odor of alcohol emanating from the appellant, and when asked if he had been drinking, the appellant responded affirmatively. The officer shined his flashlight in the appellant's car and "saw some beer in the vehicle." He recovered thirteen unopened bottles of beer, two open containers of beer, and a half-empty pint of vodka from the pocket of a

coat belonging to one of the passengers. The beer was on the floorboard on the passenger side of the vehicle.

Officer Cherry testified that he administered the appellant a horizontal gaze nystagmus test. Although the officer attempted to explain to the jury the procedure used in conducting such a test, he was unable to explain the test other than to say its purpose is to observe jerking eye motions. He did not testify as to the results of the test given to this appellant. Officer Cherry administered no further field sobriety tests to the appellant, and explained that the appellant's speech was not slurred, his gait was normal, and he had no difficulty with his motor skills. After the appellant was arrested and transported to jail, he was given an intoximeter breath test, the results of which indicated that the appellant's blood alcohol level was .09 percent. The appellant was thereafter charged with driving under the influence of an intoxicant.

Significantly, the arresting officer testified that the appellant was driving in a normal manner, had not violated any traffic law at the time he was stopped, and that he did not observe anything which would indicate to him that the appellant's driving ability was impaired.

The appellant did not testify at trial.

The appellant argues that the evidence is insufficient as a matter of law to support a conviction for the offense of driving under the influence of an intoxicant. The State argues that evidence of the odor of alcohol, the open containers of beer and vodka in the automobile, coupled with the results of the intoximeter test, was legally sufficient upon which to base a guilty verdict.

A jury conviction, approved by the trial judge, resolves all conflicts in favor of the State. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Although it is unnecessary for the prosecution to prove that a driver of a motor vehicle was in a drunken stupor before a conviction for driving under the influence may be obtained, it is necessary for the State to prove beyond a reasonable doubt that the driving ability of the accused was impaired or influenced by the alcohol, "making it less safe for him to operate a motor vehicle than it would be if he was not affected by an intoxicant." State v. Powers, No. 01C01-9011-CC-00288, slip op. at 3 (Tenn. Crim. App., May 23, 1991).

In this case, the only evidence of the defendant's guilt for driving under the influence of an intoxicant was the odor of alcohol on his breath, an intoximeter test result of .09 percent, two open bottles of beer on the passenger side of the automobile, and a partially consumed pint of vodka found in the possession of one of the two passengers. There was no evidence that the appellant was under the influence of alcohol at the time of his arrest. In fact, the evidence affirmatively established that the appellant was operating his vehicle in a normal manner, that he did not have slurred speech, and that his motor skills were not diminished.

The mere odor of alcohol upon one's breath is insufficient to sustain a conviction for driving under the influence of an intoxicant. Hurt v. State, 201 S.W.2d 988 (Tenn. 1947). Moreover, a blood-alcohol level of .09 percent does not create an inference or presumption of guilt. See Tenn. Code Ann. § 55-10-408 (1993 Repl.). Certainly a defendant may be convicted of the offense of driving while under the influence of an intoxicant where the results of the breath test show a blood-alcohol level of less than .10 percent, but in such cases, there must also be evidence of the defendant's impaired driving ability. In this case, the record is simply devoid of such evidence. Accordingly, the appellant's conviction for driving under the influence of an intoxicant cannot stand.

However, as previously noted, we find that the evidence in this record is more than sufficient to establish the appellant's guilt of the lesser included offense of driving

while impaired. Tenn. Code Ann. § 55-10-415 (1993 Repl.). A violation of that statute may be established when a person over the age of sixteen (16) years but under the age of twenty-one (21) years is found driving or in physical control of a motor vehicle when that person's blood-alcohol level is greater than .02 percent. In this case, the appellant was indeed over the age of sixteen (16) years but under the age of twenty-one (21) years, and his blood-alcohol level was greater than .02 percent. Clearly, the appellant is guilty of driving while impaired, a Class A misdemeanor.

In summary, we reverse and dismiss the appellant's conviction for the offense of driving while under the influence of an intoxicant, and remand this cause to the trial court for sentencing of the appellant for his conviction of the lesser included offense of driving while impaired.

WILLIAM M. BARKER, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

MARY BETH LEIBOWITZ, SPECIAL JUDGE