

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

<p><b>FILED</b></p> <p>January 22, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9602-CC-00054
	)	
Appellee	)	GREENE COUNTY
	)	
v.	)	HON. JAMES E. BECKNER,
	)	JUDGE
CHARLES RAY POPE,	)	
	)	driving under the influence by
Appellant	)	consent

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

AFFIRMED IN PART,  
REVERSED IN PART  
AND REMANDED

JOHN K. BYERS  
SENIOR JUDGE

**OPINION**

The defendant was convicted of driving under the influence of an intoxicant by consent. He was sentenced to 11 months 29 days in jail with release eligibility set at ten percent, and his license was revoked for one year. Probation beyond the minimum 48 hours in jail was denied. The jury recommended the imposition of a \$360.00 fine.

The defendant appeals, arguing that the evidence preponderates against the jury's finding of guilt and that the sentence is excessive.

We affirm the defendant's conviction, but we modify his sentence to allow him full probation.

Just after midnight on March 13, 1995, Officer Kendall Barham saw a yellow Cadillac leave a night-club called the Hide-Away Club. He followed in his patrol car and saw the yellow Cadillac leave its side of the road completely and travel on the side reserved for oncoming traffic. He continued to follow the car as it turned off the access road and turned onto Kiser Boulevard. The car crossed the center line and drove in the oncoming traffic lane for approximately 70 yards. At that point, Officer Barham turned on his car's blue lights and gave short bursts of his siren to signal the driver of the Cadillac to pull over. The Cadillac continued, with no signs of stopping. Officer Barham turned his siren on continuously and signaled for backup. Both cars turned right at an intersection and, after the intersection, the Cadillac pulled over to the side of the road.

Officer Barham testified that Mary Sue Britt was driving the Cadillac. He testified that he noticed a strong smell of alcohol from the vehicle. He testified that, when he asked her to step out of the car, she grabbed the door for balance while standing up and was unsteady on her feet when walking to the rear of the car. He had her perform three sobriety tests. She performed poorly on all of these tests, which included the one-leg stand, the walk-and-turn and the horizontal-gaze nystagmus. He testified that she exhibited three of four signs of intoxication in the one-leg stand test; she had difficulty performing the walk-and-turn test; and she exhibited all six signs of intoxication on the horizontal-gaze nystagmus test. She

refused a blood test.

The defendant sat next to Ms. Britt, the driver. He admitted that he had been drinking with Ms. Britt at the Hide-Away Club. Based on his observations of the defendant, Officer Barham determined that the defendant was intoxicated. He opined that the defendant was aware that Ms. Britt was intoxicated because he had admitted to drinking with her and because of her demeanor.

The parties stipulated that the defendant owned the yellow Cadillac and that Ms. Britt pled guilty to driving under the influence of an intoxicant.

The defendant testified that he had three or four beers while playing pool at the Hide-Away Club. He testified that he felt he had too much to drink to drive home. He testified that he saw Ms. Britt, a former co-worker he had not seen in a year-and-a-half, and bought her a beer. He testified that he told her he was going home and that he asked her if she would take him home. She agreed. He testified that she did not stagger or appear to be intoxicated.

Ms. Britt testified that she had two or three beers in the defendant's presence. She further testified that she had taken "nerve pills" twice that day. She testified that drinking alcohol while taking these pills normally "messed [her] up." She testified that she felt she was sober enough to drive.

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 State's theory. *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978).

A finding of guilt against the defendant removes the presumption of innocence and raises a presumption of guilt on appeal. *Grace*, 493 S.W.2d at 476. It is the defendant who must overcome this presumption of guilt and carry the burden of demonstrating that the evidence is insufficient. *Williams*, 657 S.W.2d at 410; *State v. Brown*, 551 S.W.2d 329, 330 (Tenn. 1977).

Appellant does not dispute the sufficiency of the evidence to show that Ms. Britt drove a car on a public road while under the influence of an intoxicant or drug or that the defendant had custody and control of the car and knowingly permitted Ms. Britt to operate it. He argues only that the evidence preponderates against the jury's finding that the defendant knew at the time he gave Ms. Britt permission to drive the car that she was under the influence of an intoxicant.

Officer Barham testified that Ms. Britt was obviously unsteady on her feet when he stopped her a few minutes after she and the defendant had left the Hide-Away Club. He further testified that defendant admitted that the two of them had been drinking together. Ms. Britt testified that she drank two or three beers in the defendant's presence and that drinking beer in combination with taking her "nerve pills" usually "messed [her] up." We conclude that there is sufficient evidence upon which a rational trier of fact could find beyond a reasonable doubt that defendant knew that Ms. Britt was intoxicated.

Review of the length, range or manner of service of a sentence is *de novo* on the record, accompanied by a presumption that the determinations of the trial court are correct. T.C.A. § 40-35-401(d). However, the presumption of correctness only applies upon an affirmative showing that the trial court considered the relevant sentencing principles. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

There is no presumption that an offender convicted of a misdemeanor is entitled to the minimum sentence. *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App.), *per. app. denied* (Tenn. 1994). Instead, the trial court must consider enhancement and mitigating factors as well as the sentencing principles. T.C.A. § 40-35-302(d).

The defendant was sentenced to 11 months and 29 days, the maximum sentence permitted by statute. T.C.A. § 40-35-111(c)(1). The trial judge found one enhancement factor: the potential for bodily harm to a victim was great. The trial judge also found one mitigating factor: the defendant lacked a prior criminal record.

In other words, the defendant had no previous convictions for driving under the influence of an intoxicant.

The trial judge recognized that driving under the influence of an intoxicant necessarily involves great danger to the public, but he distinguished this case due to Ms. Britt's extreme intoxication and the extreme recklessness of her driving. He also considered the fact that this was her third offense and that she did not have a driver's license in applying this enhancement factor.

This Court has recognized that factors inherent in a particular offense, even if not designated as an element, should not be given substantive weight in increasing a sentence. *See, e.g., State v. Scott*, 735 S.W.2d 825, 830 (Tenn. Crim. App. 1987). Every incidence of driving under the influence involves risk of bodily injury, since intoxication impairs reflexes and judgment and increases the risk of a car accident. The trial judge found that this factor applied under these facts because Ms. Britt's driving was particularly reckless. However, Officer Barham also testified that, at least on the first road, there is no center line and there was no oncoming traffic. There is no indication that Ms. Britt interrupted any oncoming traffic. Certainly the situation involved potential for bodily injury, but no more so than any other incidence of driving under the influence. As to Ms. Britt's prior convictions and the loss of her license, there is no indication that the defendant was aware of these circumstances or should have been. This enhancement factor was inappropriately applied under the circumstances of this case.

We do not find the sentence to be inappropriate or excessive in this case. However, we find this to be an appropriate case for granting full probation beyond the minimum 48 hours that the defendant is required to serve. As a misdemeanor, the defendant is presumed to be a favorable candidate for alternative sentencing. He has no prior criminal record and a good employment history.

The trial court's judgment is affirmed, except for the denial of probation. We reverse this denial and grant the defendant full probation beyond the minimum 48 hours of service required by law.

We remand this case to the trial court for entry of such orders as are necessary to carry out the judgment of this court.

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John K. Byers, Senior Judge

CONCUR:

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Joseph B. Jones, Presiding Judge

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Paul G. Summers, Judge