

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1997 SESSION

**FILED**

November 7, 1997

Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 KERRY D. GARFINKLE, )  
 )  
 Appellant. )

NO. 01C01-9611-CC-00484

RUTHERFORD COUNTY

HON. J. S. DANIEL, JUDGE

(Felony Evading Arrest and  
Reckless Driving)

**FOR THE APPELLANT:**

**GERALD D. MELTON (on appeal)**  
District Public Defender

**JEANNIE A. KAESS (at trial)**  
Assistant District Public Defender  
201 West Main Street, Suite 101  
Murfreesboro, TN 37130

**FOR THE APPELLEE:**

**JOHN KNOX WALKUP**  
Attorney General and Reporter

**LISA A. NAYLOR**  
Assistant Attorney General  
450 James Robertson Parkway  
Nashville, TN 37243-0493

**WILLIAM C. WHITESELL, JR.**  
District Attorney General

**DALE ROBINSON**  
Assistant District Attorney General  
303 Rutherford Cty. Judicial Bldg.  
Murfreesboro, TN 37130

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

**AFFIRMED IN PART; REVERSED IN PART**

**JOE G. RILEY,  
JUDGE**

## **OPINION**

The defendant, Kerry D. Garfinkle, was convicted by a Rutherford County jury of evading arrest, the Class D felony, and reckless driving, a Class B misdemeanor. He was sentenced to concurrent sentences of four (4) years for evading arrest and six (6) months for reckless driving. On appeal, he presents the following issues for our review: (1) whether the evidence is sufficient to support the conviction of evading arrest; (2) whether convictions for both evading arrest and reckless driving violate due process; and (3) whether the trial court erred in allowing testimony concerning the radar reading of the speed of defendant's vehicle without requiring the state to establish an evidentiary foundation for such testimony. We find that the conviction for reckless driving must be reversed as violating due process and double jeopardy. Otherwise, the judgment of the trial court is AFFIRMED.

## **FACTS**

The state's proof at trial showed that on the morning of September 23, 1995, Tennessee Highway Patrolmen Joe Smith and Robert Dunlap were traveling eastbound on Interstate 24 when they noticed a purple Chevrolet truck traveling westbound at a high rate of speed. Trooper Smith activated his radar, which indicated that the vehicle was traveling at a speed of 92 miles per hour in a 65 miles per hour zone. Smith turned on his blue lights and crossed into the median as the truck was passing.

Smith accelerated and followed the truck. He activated his siren and "wigwags" after the truck appeared to accelerate. Smith and Dunlap observed the truck driving in the median on the left shoulder of the road while passing two (2) cars. When the truck returned to the road, it began sliding and skidding back and forth in its lane. Sergeant Dunlap testified, "I observed vehicles go off on the shoulder. I observed vehicles slam on their brakes, go off onto the median. He was running vehicles off both sides of the road just zig-zagging and all like that."

While in the left lane of traffic, the truck made a sharp right turn onto an exit ramp of the interstate. Smith testified that he [Smith] was traveling at approximately 120 miles per hour. The truck continued on the exit ramp traveling at a speed in excess of 100 miles per hour, failed to yield to oncoming traffic and turned right onto Church Street. Because the traffic was heavy on Church Street, the truck passed other automobiles in the left turn lane.

At the intersection of Sanbyrn and Church, the stoplight turned red. Smith, Dunlap and another witness at trial testified that the truck did not slow down at the red light. Eventually, the truck slammed on its brakes in the left lane and made a sharp right into the parking lot of the Farmer's Credit Building. The vehicle went around to the back of the building.

When Smith and Dunlap arrived, defendant had his door open and was exiting the purple Chevrolet truck. Defendant told the officers that he was out of his car because he was reaching for his driver's license.

Defendant testified on his own behalf at trial. He stated that he was on his way to a meeting at the Farmer's Credit Building on the morning of September 23. He admitted that he was traveling between 92 and 97 miles per hour on the interstate. However, he denied driving in the median and running the red light on Church Street. He claimed that he never saw the troopers until he was arrested behind the Farmer's Credit Building.

The jury returned guilty verdicts for the Class D felony of evading arrest and misdemeanor reckless driving.<sup>1</sup> The trial court sentenced defendant to concurrent sentences of four (4) years for evading arrest and six (6) months for reckless driving. From these convictions, defendant now brings this appeal.

### **SUFFICIENCY OF THE EVIDENCE**

---

<sup>1</sup> Defendant was also indicted on one (1) count of reckless endangerment. That count was dismissed upon motion of the state on the date of trial.

**A.**

In his first issue, defendant challenges the sufficiency of the evidence for the evading arrest conviction. He argues that there is no proof that he intentionally fled or attempted to elude the officers due to his testimony that he never saw the officers prior to his arrest. As a result, he claims that the record does not support his conviction for evading arrest.

**B.**

Where sufficiency of the evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. Tenn. R. App. P. 13(e); Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); State v. Abrams, 935 S.W.2d 399, 401 (Tenn. 1996). The weight and credibility of the witnesses' testimony are matters entrusted exclusively to the jury as the triers of fact. State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996).

Great weight is given to the result reached by the jury in a criminal trial. A jury verdict accredits the state's witnesses and resolves all conflicts in favor of the state. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn therefrom. Id.; State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Moreover, a guilty verdict removes the presumption of innocence which the appellant enjoyed at trial and raises a presumption of guilt on appeal. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

**C.**

The pertinent provision of the evading arrest statute reads as follows:

(b)(1) It is unlawful for any person, while operating a motor vehicle on any street, road, alley or highway in this state, to intentionally flee or

attempt to elude any law enforcement officer, after having received any signal from such officer to bring the vehicle to a stop.

.....

(3) A violation of subsection (b) is a Class E felony unless the flight or attempt to elude creates a risk of death or injury to innocent bystanders or other third parties, in which case a violation of subsection (b) is a Class D felony.

Tenn. Code Ann. § 39-16-603(b).

#### **D.**

In the case *sub judice*, both Smith and Dunlap testified that they were in the median with the blue lights activated when defendant passed them in the westbound lanes of traffic. After they proceeded to follow defendant, he accelerated. Defendant drove in the median in an effort to pass other vehicles on the interstate. He drove at speeds exceeding 100 miles per hour while passing other vehicles and ran other vehicles off the road. Smith testified that once they reached Church Street, they were within one-eighth of a mile from the defendant. Defendant ran a red light and made a sharp right turn into a parking lot in an attempt to elude the officers.

Although defendant claims that he never saw the officers' repeated signals to stop, this was a question of credibility for the jury. See State v. Sheffield, 676 S.W.2d at 547; State v. Brewer, 932 S.W.2d at 19. The jury accredited the testimony of the officers over that of the defendant. We find that the evidence is sufficient to support the conviction for evading arrest and that defendant created a risk of death or injury to third persons. This issue is without merit.

#### **DUE PROCESS AND DOUBLE JEOPARDY**

Defendant contends that there is insufficient evidence to sustain convictions for both evading arrest and reckless driving. Relying on State v. Anthony, 817 S.W.2d 299 (Tenn. 1991), he claims that evading arrest was merely incidental to his reckless driving. Therefore, he asserts that the evading arrest conviction must be dismissed as violating due process. Further, based upon State v. Denton, 938

S.W.2d 373, 381 (Tenn. 1996), we will examine these dual convictions under principles of double jeopardy.

**A.**

The assistant district attorney at the Motion for New Trial contended the facts supporting reckless driving occurred prior to the officer's activation of the blue lights and, therefore, were totally separate and distinct from the facts supporting evading arrest. However, as noted by the assistant public defender, the record does not reflect any kind of election as to which conduct the state relied upon for the reckless driving conviction.

In its brief before this Court, the state does not argue that the conduct of the defendant prior to the activation of the blue lights alone constituted reckless driving. The state simply contends that defendant's entire course of criminal conduct justifies both convictions. Certainly, it is questionable as to whether evidence of defendant's conduct prior to the activation of the blue lights justifies a reckless driving conviction. See State v. Ronald Mitchell, C.C.A. No. 02C01-9702-CC-00070 (Tenn. Crim. App. filed September 15, 1997, at Jackson).

For purposes of our analysis of the due process and double jeopardy issues, we will, therefore, examine the evidence of defendant's conduct from the time of activation of the blue lights.

**B.**

In State v. Anthony, our Supreme Court addressed the issue of whether dual convictions of armed robbery and aggravated kidnapping arising out of the same criminal episode could constitutionally stand as a matter of due process. The Court held that when kidnapping is "essentially incidental" to another offense, due process prohibits a conviction for kidnapping. Id. at 306-307. The relevant inquiry is whether, under the facts of each case, "the confinement, movement or detention is essentially incidental to the accompanying felony and is not, therefore, sufficient to support a separate conviction for kidnapping, or whether it is significant enough, in and of itself, to warrant independent prosecution and is, therefore, sufficient to support such a conviction." Id. at 306.

The holding in Anthony focused on the dangers of dual convictions where proof of one crime would necessarily involve some detention or asportation of the victim, giving rise to a kidnapping conviction. Although this case does not involve kidnapping, similar due process principles underlying Anthony must be applied.

Generally, evading arrest in a motor vehicle is a Class E felony.<sup>2</sup> However, if the flight or attempt to elude the officers creates a risk of death or injury to third parties, then it becomes a Class D felony. Tenn. Code Ann. § 39-16-603(b)(3). Defendant was convicted of the Class D felony.

Reckless driving is defined as driving in “willful or wanton disregard for the safety of persons or property.” Tenn. Code Ann. § 55-10-205(a). Anyone who is driving a vehicle in an attempt to flee or elude law enforcement authorities while creating a risk of death or injury to third parties is necessarily driving in “willful or wanton disregard” for the safety of others. In other words, reckless driving is “essentially incidental” to the Class D felony of evading arrest. Therefore, due process mandates that defendant’s conviction for reckless driving be reversed and the charge dismissed.

Defendant argues that evading arrest is incidental to misdemeanor reckless driving, and the felony evading arrest conviction should be overturned. We disagree. The less serious charge of reckless driving is incidental to the more serious charge of evading arrest.

### C.

Furthermore, we find that double jeopardy principles are offended by defendant’s convictions for reckless driving and felony evading arrest involving a risk of death or injury to third persons. In State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996), our Supreme Court held that the determination of the double jeopardy issue rests on the following: (1) an analysis of the statutory offenses; (2) an analysis of the evidence used to prove the offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes

---

<sup>2</sup> Under Tenn. Code Ann. § 39-16-603(a), evading arrest by means of locomotion other than a motor vehicle is a Class A misdemeanor. However, defendant was convicted under subsection (b).

of the respective statutes.

We begin with an analysis of the statutory offenses and the evidence used to prove the offenses. To prove that an accused commits the Class D felony of evading arrest, the state must first show that the accused drove a vehicle in an attempt to elude or flee from law enforcement officers after receiving a signal from the officers to stop the vehicle. Secondly, the state must also prove that the flight created a risk of death or injury to third parties. As previously noted, the elements of reckless driving are encompassed in the second aspect of this offense. Additionally, the state relied upon the same evidence to establish both crimes at trial. The state did not rely upon separate acts to support each conviction.

Moreover, the purpose of the respective statutes is the same. At first glance, it would seem that the statutes serve different purposes as the reckless driving statute punishes those who drive while disregarding the safety of persons or property,<sup>3</sup> while the evading arrest statute attempts to deter those who flee from law enforcement officers. However, under the felony evading arrest statute, the legislature obviously intended to punish those who drive “recklessly” by upgrading the offense to a Class D felony when the flight creates a risk of death or injury to third parties. Tenn. Code Ann. § 39-16-603(b)(3).

Therefore, we find that defendant’s convictions for reckless driving and the Class D felony of evading arrest violate double jeopardy principles under State v. Denton.<sup>4</sup> As a result, defendant’s conviction for reckless driving must be reversed and the charge dismissed.

#### **EVIDENTIARY FOUNDATION FOR SPEED OF VEHICLE**

In his final assignment of error, defendant asserts that the trial court erred in allowing testimony concerning the radar reading of defendant’s speed without

---

<sup>3</sup> See State v. Gilboy, 857 S.W.2d 884 (Tenn. Crim. App. 1993).

<sup>4</sup> We should note that we find that the foregoing applies only to the Class D felony of evading arrest.



requiring that the state establish an evidentiary foundation for such testimony. He argues that the state did not show, nor did the court require the state to show, that the radar unit employed by Trooper Smith had been tested for accuracy, that the unit was functioning properly and that Smith was trained to use the radar device. Therefore, he claims that the trial court committed reversible error.

We need not reach the question of whether a proper foundation was established for the admission of radar evidence. The speed of defendant's vehicle was not an issue at trial. Defendant readily admitted that he was traveling "between 92 and 97" miles per hour on the interstate. Defendant suffered no prejudice by the failure to introduce evidence concerning the accuracy of the radar device, whether it was functioning properly on the date in question, and whether Trooper Smith was properly trained to use the unit. If there was error, it certainly was harmless beyond a reasonable doubt. Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). This issue is without merit.

### **CONCLUSION**

Because we find that defendant's convictions for reckless driving and the Class D felony of evading arrest violate principles of due process and double jeopardy, defendant's conviction for reckless driving is reversed and the charge dismissed. In all other respects, the judgment of the trial court is affirmed.

---

**JOE G. RILEY, JUDGE**

**CONCUR:**

---

**JOE B. JONES, PRESIDING JUDGE**

---

**WILLIAM M. BARKER, JUDGE**