IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1997 SESSION

FILED

October 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 01C01-9609-CC-00392**
Appellee,	)	
	)	**WILLIAMSON COUNTY**
VS.	)	
	)	**Hon. Cornelia A. Clark, Judge**
TONEY L. MOORE,	)	
	)	(Motor Vehicle Habitual Offender)
Appellant.	)	

FOR THE APPELLANT:

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OPINION FILED: ______________________

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, Toney L. Moore,[1] was convicted by a Williamson County jury of driving after having been declared a Motor Vehicle Habitual Offender pursuant to Tenn. Code Ann. § 55-10-616. He was sentenced to four (4) years in the Tennessee Department of Correction. On appeal, he challenges the sufficiency of the convicting evidence and argues that the trial court erred in denying alternative sentencing. We affirm the judgment of the trial court.

FACTS

The state's proof at trial showed that on August 15, 1995, Officer Chris Thompson was dispatched to assist a disabled motorist on Highway 31 in Williamson County at approximately 9:00 p.m. As she approached the vehicle, she saw someone walking on the side of the road approximately one-tenth of a mile from the disabled vehicle. She asked him (defendant) if he was with the disabled vehicle. The defendant told her that he had a flat tire. Because his jack was broken, he told her that he was walking to find a phone or someone with a jack.

Officer Thompson drove the defendant back to his car, where defendant used the officer's jack to fix the tire. After the tire was fixed, the officer asked to see defendant's driver's license. Defendant looked around in his car and presented an identification card only. Upon checking the status of the license, Officer Thompson learned that defendant's license was revoked.

As Officer Thompson was placing defendant under arrest, the defendant told her that he had not driven the car. He claimed that a "buddy" or "buddies" were driving him and were looking for help. Officer Thompson did not see anyone other than defendant around the vicinity of the vehicle.

When Officer Thompson returned home the next morning, defendant's car

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[1] The defendant's name is spelled "Toney" on the indictment and other court documents. We note that he spells his name "Tony." Various court documents also refer to him as "Anthony."

was on the side of Highway 31 as it was the previous evening.

The parties further stipulated outside of the jury's presence that the defendant's license had been revoked, and he had been declared a Motor Vehicle Habitual Offender.

Theresa Cotham testified on defendant's behalf. She stated that she was driving defendant's car on the night of August 15. After they discovered they had a flat tire, she left to get assistance. An elderly couple gave her a ride to her home in Columbia, where she got into her car and picked up defendant's father. When she and defendant's father returned, defendant was no longer there. Cotham claimed that she and defendant's father brought the car back to Columbia that night. No other evidence was offered by the defense.

The jury found defendant guilty of driving after having been declared a Motor Vehicle Habitual Offender. The trial court sentenced him as a Range II, Multiple Offender to four (4) years in confinement. From the conviction and sentence, defendant brings this appeal.

SUFFICIENCY OF THE EVIDENCE

In his first issue, defendant challenges the sufficiency of the convicting evidence. More specifically, he contends that there is no proof in the record that he was driving on the night of August 15. As a result, he claims that the evidence is insufficient as a matter of law to support the finding of guilt.

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).

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 (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 (Tenn. 1973). The appellant has the burden of overcoming this presumption of guilt. Id.

"Any person found to be an habitual offender under the provisions of this part who thereafter is convicted of operating a motor vehicle in this state while the judgment or order of the court prohibiting such operation is in effect commits a Class E felony." Tenn. Code Ann. § 55-10-616(b). The state and defendant entered into a stipulation that he had been declared a Motor Vehicle Habitual Offender in December 1991, and that his driver's license was in a revoked status on the date of this incident. Therefore, the only issue before the jury was whether defendant operated the vehicle on August 15.

We find that there is sufficient evidence for the jury to conclude that defendant drove his car on the subject date. Officer Thompson did not observe anyone other than defendant around the car. Furthermore, while they were changing the tire, defendant explained to Officer Thompson that he had been "driving along" when he heard something. In her trial testimony, she was certain that defendant told her that he was driving. Only after she arrested defendant for driving on a revoked license did he mention that someone else was driving the car.

Although Theresa Cotham's testimony is contradictory to the finding of guilt, obviously the jury discredited her testimony. 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 (Tenn. 1984); State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). This issue is without merit.

ALTERNATIVE SENTENCING

In his second assignment of error, defendant complains that the trial judge erred in denying alternative sentencing. He maintains that he could "successfully serv[e] his sentence on the Community Corrections Program or on Intensive Probation." Therefore, he insists that the trial court did not properly consider alternative sentencing.

This Court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tenn. Code Ann. § 40-35-210, to consider the following factors in sentencing:

> (1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in his own behalf about sentencing.

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6). A trial court must presume that a defendant sentenced to eight years or less and who is not an offender for whom incarceration is a priority is subject to alternative sentencing. State v. Byrd, 861 S.W.2d 377, 379-80 (Tenn. Crim. App. 1993). It is further presumed that a sentence other than incarceration would result in successful rehabilitation unless rebutted by sufficient evidence in the record. Id. at 380.

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); *see also* State v. Ashby, 823 S.W.2d at 169. Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996).

Because defendant was convicted of a Class E felony, he is presumably entitled to alternative sentencing. However, the trial court found sufficient evidence to rebut that presumption and determined that defendant was not a good candidate for alternative sentencing. We agree.

Initially, we note that defendant has a long history of criminal conduct in addition to his numerous driving offenses which led to his being declared a Motor Vehicle Habitual Offender.[2] Indeed, he was on probation for another offense when he was arrested for the current charge. Moreover, his parole had been revoked three (3) times previously. He has shown an unwillingness to comply with the conditions of release in the community and very little potential for rehabilitation. The trial court did not err in ordering that defendant serve his sentence in confinement.

Defendant suggests that the trial court improperly relied on Tenn. Code Ann. § 55-10-616(c) in finding that he was not eligible for probation.[3] However, because we find that the trial court properly denied alternative sentencing on other grounds,

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[2] The presentence report lists his convictions for such offenses as third degree burglary, grand larceny, assault, evading arrest, felony escape, criminal impersonation, petit larceny, and contributing to the delinquency of a minor.

[3] Tenn. Code Ann. § 55-10-616(c) provides that the trial court "shall have no power to suspend any such sentence or fine, . . ." Prior opinions of this court have held that this provision has been superseded by the Criminal Sentencing Reform Act of 1989; accordingly, a trial court may suspend all or part of a motor vehicle offender's sentence. *See* State v. Timothy Lee Alexander, C.C.A. No. 02C01-9412-CR-00286 (Tenn. Crim. App. filed October 11, 1995, at Jackson); State v. Ricky Fife, C.C.A. No. 03C01-9401-CR-00036 (Tenn. Crim. App. filed June 15, 1995, at Knoxville).

we need not reach this issue.

CONCLUSION

We find that there is sufficient evidence for a rational trier of fact to conclude that defendant is guilty of driving after having been declared a Motor Vehicle Habitual Offender. Furthermore, the trial court appropriately denied alternative sentencing. Accordingly, the judgment of the trial court is affirmed.

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JOE G. RILEY, JUDGE

CONCUR:

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J. CURWOOD WITT, JUDGE

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JOE H. WALKER, III, SPECIAL JUDGE