IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1998 SESSION

FILED

September 3, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. 02C01-9710-CC-00396**
Appellee,	)	
	)	**HENRY COUNTY**
VS.	)	
	)	**HON. C. CREED McGINLEY, JUDGE**
RICKY WAYNE COOPER,	)	
	)	
Appellant.	)	(DUI)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, Ricky Wayne Cooper, appeals as of right his conviction by a Henry County jury for driving under the influence of an intoxicant. The defendant was sentenced to eleven (11) months and twenty-nine (29) days to be served on probation after ten (10) days continuous confinement. The trial court also affirmed the jury's fine of $700. The defendant contends on appeal that:

> (1) the trial court erred in allowing testimony that the defendant was administered the horizontal gaze nystagmus (HGN) test;
>
> (2) the evidence presented at trial was insufficient to support a verdict of guilty; and
>
> (3) the court's sentence of ten (10) days continuous confinement and its affirmance of the jury's fine of $700 were improper.

Although we find the trial court erred by allowing testimony that an HGN test was given, we find the error harmless. The judgment of the trial court is AFFIRMED.

FACTS

The defendant was involved in an altercation at the Foxy Lady, a Henry County nightclub.[1] The defendant left the club with two (2) companions after the disturbance. Officer Mike Davis of the Paris Police Department heard the Henry County Sheriff's dispatcher broadcast that three (3) males left the scene in a black Chevrolet truck. Shortly thereafter, Officer Davis observed a vehicle matching that description and followed it to a convenience store.

Officer Davis parked his vehicle behind the defendant's truck and

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[1] According to the defendant, the genesis of the altercation was his Samaritan attempt to give one of the club's dancers "information to be able to go to another place and go to work at a more sophisticated place." A dispute arose as to the cost of a beer he purchased for the dancer. This led to the bouncer "cussing and telling me a few things and I was cussing and telling him a few things." Upon being told by the bouncer that "he would blow my brains out if I didn't leave," the defendant departed the scene in his truck.

approached to determine if the defendant was the suspect identified by the dispatcher. The defendant exited his vehicle in an excited state, complaining about an incident at the Foxy Lady. Because Officer Davis was out of his jurisdiction at this point, he told the defendant to await the arrival of a sheriff's deputy.

Officer Davis testified that as he waited with the defendant, Davis noticed the smell of alcohol on the defendant's breath and that his eyes were glassy. Based upon these observations, Officer Davis asked the defendant to perform field sobriety tests. Officer Davis administered the one-leg stand test, the heel-to-toe test, and the HGN test.

Officer Davis testified that he instructed the defendant to stand with one leg raised, his arms at his side and count to thirty (30). The defendant repeatedly lost his balance and had to put his foot down. By the end of the test, the defendant was hopping on one foot. Officer Davis stated that, based upon the defendant's performance on this test, he concluded the defendant was "definitely intoxicated."

During the final part of the one-leg stand test, another Paris police officer arrived as backup. This officer was also of the opinion that the defendant was under the influence. The officer had a cameraman with him who was videotaping. The cameraman videotaped the remainder of the field sobriety tests.

The defendant was next asked to perform the heel-to-toe test, placing the heel of one foot to the toe of the next in a straight line for nine (9) steps. The defendant was then asked to turn around and walk back in the same manner. The defendant stumbled on his first step and did not touch heel to toe on any of the remaining steps. Officer Davis stated the defendant's performance on this

test bolstered his belief that the defendant was intoxicated.

Officer Davis then administered the HGN test to the defendant. Officer Davis did not testify to the results of this test as the defendant's attorney objected to its admissibility. The admissibility of the HGN test is addressed *infra.*

The defendant was arrested for driving under the influence and transported to the Henry County Sheriff's Office where he refused to take a blood alcohol test. The defendant signed an implied consent form indicating his refusal.

The defendant denied consuming any alcohol that day. He testified his poor performance of the field sobriety tests was caused by the boots he was wearing at the time.[2] The defendant further claimed his performance was hampered because the tests were administered on an inclined surface that was also uneven due to an expansion joint. The defendant explained that he declined to take a blood alcohol test because he felt that he had been treated unfairly by the arresting officers.

The jury convicted the defendant of driving under the influence of an intoxicant. This appeal followed.

HORIZONTAL GAZE NYSTAGMUS TEST

The defendant contends the trial court erred by allowing the officer to testify that a HGN test was given because it did not require the state to comply with the requirements for the admissibility of scientific evidence. Officer Davis was allowed to testify that he gave the defendant the HGN test, but was not

[2] The boots are part of the record. Our examination of them reveals nothing remarkable.

allowed to testify as to the results of the test. The defendant argues that allowing the Officer to testify that the test was given, not divulge the results, and then testify that the defendant was arrested for DUI creates an inference that the results of the test were positive for intoxication.

The Tennessee Supreme Court held, in a case filed after the trial in the instant case, that testimony concerning the horizontal gaze nystagmus test constitutes "'scientific, technical, or other specialized knowledge.' As such, it must be offered through an expert witness and meet the requirements of Tenn. R. Evid. 702 and 703 as explained in McDaniel v. CSX Transportation, 955 S.W.2d 257 (Tenn. 1997)." State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997).

The trial court sustained the defendant's objection to Officer Davis' testimony regarding the results of the HGN test. The trial court did allow the officer to testify that the test was given. We agree with the defendant that this has no real probative value and invites jury speculation. Accordingly, we must examine the error to determine if it was prejudicial to the defendant.

The defendant filed a motion *in limine* challenging the admissibility of the HGN testimony. This motion was never ruled upon by the trial court. At trial, Officer Davis was asked by the state's attorney, "Now, there was a third test you gave. What was that?" The officer responded, "That was the eye gaze nystagmus." The defendant objected and a bench conference was held. The trial court held the officer could state that the test had been given, but not what the results were.

Firstly, the defendant never secured a ruling on his motion *in limine* prior to trial. Several weeks before trial a ruling had been deferred pending the filing of briefs by the parties. Even though a ruling was never made, there is nothing to indicate the motion was brought to the trial court's attention on the morning of

trial. Thus, the question was asked and answered before the trial court could properly deal with the issue.

Secondly, the trial court instructed the jury as follows:

> Ladies and gentlemen of the jury, I want to instruct you at this time. There's been proof offered that a certain test was given to the defendant that is known as the Horizontal Gaze Nystagmus Test.
>
> Based upon certain legal grounds, the Court has ruled that the admissibility of this test will not be allowed. So you are not to consider in any way that test either positive or negative. You're not to consider in any way the results of that test. The testimony now is being offered to simply show what the officer did, not the results of that test. Do each of you understand that?

Jurors are presumed to follow instructions given to them by the trial court. Henley v. State, 960 S.W.2d 572, 581 (Tenn. 1997).

Thirdly, in considering the whole record, we are unable to find that the outcome of the trial would have been any different absent this brief testimony. The jury saw the videotape of the defendant performing the heel-to-toe test and the final part of the one-leg stand test. Our review of the videotape reveals a less than admirable performance. The jury obviously rejected the defendant's testimony and accredited the testimony of the officers. This Court has found HGN testimony harmless in other cases involving this issue. *See* State v. Jackie W. Kestner, C.C.A. No. 03C01-9611-CR-00390, Washington County (Tenn. Crim. App. filed June 30, 1998, at Knoxville); State v. William F. Hegger, C.C.A. No. 01C01-9607-CR-00283, Davidson County (Tenn. Crim. App. filed March 4, 1998, at Nashville); State v. Mark Summers, C.C.A. No. 03C01-9606-CR-00235, Hamilton County (Tenn. Crim. App. filed December 4, 1997, at Knoxville); State v. Clinton Darrell Turner, C.C.A. No. 03C01-9604-CC-00151, Cocke County (Tenn. Crim. App. filed July 9, 1997, at Knoxville).

The error was harmless. Tenn. R. App. P. 36(b).

SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence presented at trial is insufficient to sustain his conviction for DUI. In determining the sufficiency of the evidence, this Court does not reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). A jury verdict approved by the trial judge 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 legitimate or reasonable inferences which may be drawn therefrom. Id.

As stated above, the jury had the opportunity to view the videotape of the defendant on the night in question. The jury also heard the testimony of the defendant and the officers. The jury chose to believe the officers. Clearly there is sufficient evidence to support the jury's verdict.

SENTENCING

The defendant contends the trial court's failure to consider the sentencing principles and all relevant facts and circumstances overcomes the sentence's presumption of correctness and this Court's review should be *de novo*.

The defendant faced possible confinement between two (2) days and eleven (11) months and twenty-nine (29) days. Tenn. Code Ann. § 55-10-403(a)(1). The defendant was sentenced to eleven (11) months and twenty-nine (29) days to be served on supervised probation after ten (10) days continuous confinement.

The defendant had a prior robbery conviction. This is an enhancement factor. Tenn. Code Ann. § 40-35-114(1). This factor alone is enough to justify the requirement of ten (10) days confinement.

The defendant faced a fine from $350 to $1,500. Tenn. Code Ann. § 55-10-403(a)(1). The jury imposed a fine of $700, and the trial court approved it. *See* Tenn. Code Ann. § 40-35-301(b). The fine is not excessive, and we see no reason to reduce it. *See generally* State v. Alvarado, 961 S.W.2d 136, 153 (Tenn. Crim. App. 1996).

CONCLUSION

Although it was error for the trial court to allow testimony that the HGN test was given, the error was harmless. Finding no other error, we AFFIRM the judgment of the trial court.

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JOE G. RILEY, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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DAVID H. WELLES, JUDGE