

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,)
)
 Appellee,)
)
 VS.)
)
 JAMES KENNETH WALKER, JR.,)
)
 Appellant.)

NO. 02C01-9707-CC-00258
HARDIN COUNTY
HON. JULIAN P. GUINN,
JUDGE
(Sales Tax Evasion)

FOR THE APPELLANT:

RON E. HARMON
(Trial Only)
618 Main Street
P.O. Box 968
Savannah, TN 38372

MIKE MOSIER
(Appeal Only)
204 W. Baltimore
P.O. Box 1623
Jackson, TN 38301-1623

FOR THE APPELLEE:

JOHN KNOX WALKUP
Attorney General and Reporter

DOUGLAS D. HIMES
Assistant Attorney General
Cordell Hull Building, 2nd Floor
425 Fifth Avenue North
Nashville, TN 37243-0493

G. ROBERT RADFORD
District Attorney General

JOHN W. OVERTON, JR.
Assistant District Attorney General
P.O. Box 484
Savannah, TN 38372-0484

OPINION FILED: _____

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

The defendant, James Kenneth Walker, Jr., appeals as of right his convictions for seven (7) counts of sales tax evasion by a Hardin County jury. The defendant was sentenced to seven concurrent one (1) year terms with sixty days to be served in the county jail and the remainder on Community Corrections. The defendant presents the following issues for review:

- (1) whether the evidence presented at trial was sufficient to support a guilty verdict;
- (2) whether the jury was properly charged as to the elements of sales tax evasion; and
- (3) whether the trial court erred in denying total probation.

After a review of the record, the judgment of the trial court is AFFIRMED.

FACTS

The defendant began selling computers under the name Dixie Computer in August 1992. The defendant made taxable sales of \$6,418.90 in August 1992, and collected \$353.04 in sales tax.

In September 1992, the Tennessee Department of Revenue opened a sales tax account for Dixie Computer Corporation. Businesses are required to file monthly sales and use tax returns with the Department of Revenue. The defendant did not file a return in September for his August sales.

The defendant made taxable sales of \$10,267.15 and collected \$623.16 in sales tax in September; however, he reported on the tax return that no sales were made, and no sales tax was collected or due.

The defendant made taxable sales of \$893.97 and collected \$67.05 in

November 1992. The defendant's sales tax return filed in December showed no sales made, and no sales tax collected or due.

In December 1992, the defendant made taxable sales of \$13,551.67 and collected \$1,012.57 in sales tax. The defendant filed a return in January 1993 showing no sales, and no sales tax collected or due.

Over the next three (3) months the defendant had combined sales of \$47,264.69. He collected sales tax over that period of \$3,475.43, yet he filed three (3) returns stating that he had no sales, no sales tax was collected, and no sales tax was due the State of Tennessee.

The Tennessee Department of Revenue, Sales Tax Division, began an investigation of the defendant's business in late 1993. No sales tax had been paid. In May 1994, the Department's Special Investigations Unit began an investigation after a referral from the Sales Tax Division. Investigator David Remke found in the seven (7) month period investigated by the Department of Revenue, the defendant made taxable sales of \$78,396.38 and collected \$5,531.25 from his customers as sales tax. The defendant reported \$0.00 in collected sales tax over the same period.

Investigator Remke testified that the defendant stated during the investigation that he did not open his business until September 1992, made no sales until December 1992, and did not report sales until March 1993. The defendant produced invoices for Investigator Remke from December 1992 to March 1993; however, Remke obtained earlier invoices directly from the defendant's customers. Those invoices showed the customers paid sales tax to the defendant on the items they purchased.

The defendant testified at trial that Dixie Computer Corporation had been

chartered but not capitalized during the months of August 1992 through March 1993. The defendant stated that he believed the business was operating as a sole proprietorship or partnership prior to capitalization in April 1993. The defendant further testified that he was awaiting the outcome of the Department of Revenue's audit to remit the amount owed in sales taxes.

SUFFICIENCY OF THE EVIDENCE

The defendant contends the evidence adduced at trial is insufficient to sustain his convictions for sales tax evasion. The defendant alleges the state failed to prove he had the requisite intent to avoid paying the taxes, and that counts one (1) through seven (7) of the indictment contained fatal variances.

A.

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. This Court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the defendant demonstrates that the facts contained in the record and the inferences which may be drawn therefrom are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. State v. Brewer, 932 S.W.2d 1, 19 (Tenn. Crim. App. 1996). Accordingly, it is the appellate court's duty to affirm the conviction if the evidence, viewed under these standards, was sufficient for any rational trier of fact to have found the essential elements of the offense beyond a reasonable doubt. Tenn. R. App. P.

13(e); Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789, 61 L. Ed.2d 560 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994).

B.

The defendant was convicted of violating Tenn. Code Ann. § 67-1-1440(d), which makes it unlawful for any person to “delay, hamper, hinder, impede, obstruct or thwart the State of Tennessee in the collection of any of its lawful revenue.” The failure to pay sales taxes on the sales of tangible personal property can subject one to prosecution under this statute. State v. Sanders, 923 S.W.2d 540, 542 (Tenn. 1996).

The defendant told Investigator Remke that his business made no sales until December 1992. The investigator introduced invoices obtained from the defendant’s customers showing sales made as early as August 1992. Further, the defendant testified that although he collected sales tax from his customers on items sold during all months in question, the returns filed with the Department of Revenue for those months recited \$0.00 tax collected and \$0.00 tax due. The jury had before it sufficient evidence to convict on all seven (7) counts.

This issue is without merit.

C.

The defendant further contends that counts 1-7 of the indictment contain fatal variances from the proof presented at his trial. Specifically he contends the indictment charges he failed to both file returns and remit taxes. Because the defendant did in fact file returns, he contends he was prejudiced by the variance and is entitled to a judgment of acquittal.

In order for a variance between the indictment and the proof to be fatal, the variance must be both material and prejudicial to the defendant. State v. Mayes, 854 S.W.2d 638, 640-41 (Tenn. 1993); State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). A variance is not material “where the allegations and proof substantially correspond, the variance is not of a character which could have misled the defendant at trial and is not such as to deprive the accused of his right to be protected against another prosecution for the same offense.” State v. Moss, 662 S.W.2d at 592.

The defendant has failed to demonstrate the variance between the indictment and the proof was material. The defendant was fully aware that he was charged with failing to remit sales taxes under Tenn. Code Ann. § 67-1-1440(d). Further, there is nothing in the record to indicate that the language in the indictments stating that the defendant failed to file returns in any way prejudiced him. Moreover, he would not be deprived of a double jeopardy defense should he be prosecuted for these offenses in the future.

This issue is without merit.

JURY INSTRUCTIONS

The defendant alleges the trial court committed error by prefacing the jury instruction defining the elements of sales tax evasion with the sentence, “I charge you that any person who fails or refuses to remit taxes due to the State of Tennessee is guilty of a crime.” Although we agree this instruction failed to incorporate all elements of sales tax evasion, it was immediately followed by a full explanation to the jury of the proper elements of sales tax evasion. The jury was further instructed that the defendant must have acted “knowingly or intentionally.” The defendant was not prejudiced by this jury instruction.

This issue is without merit.

SENTENCING

A.

The defendant contends the trial court erred by not sentencing him to full probation. The defendant received concurrent terms of one (1) year for each offense with a requirement that he serve sixty (60) days in the county jail and the balance on Community Corrections.

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).

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 166, 169 (Tenn. 1991); State v. Grigsby, 957 S.W.2d 541, 545 (Tenn. Crim. App. 1997).

B.

The trial court correctly noted the defendant's presumptive candidacy for alternative sentencing. He, in fact, received alternative sentencing in the form of split confinement. However, the defendant has the burden of establishing suitability for total probation. State v. Boggs, 932 S.W.2d 467, 477 (Tenn. Crim. App. 1996). The trial court stated it had given serious consideration to sentencing the defendant to total probation. However, the trial court determined that a period of incarceration was needed to avoid depreciating the seriousness of the offense. The trial court further found the defendant's testimony to be untruthful, and he did not accept responsibility for his actions. A defendant's lack of credibility is an appropriate consideration and reflects on a defendant's potential for rehabilitation. State v. Chestnut, 643 S.W.2d 343, 353 (Tenn. Crim. App. 1982). The trial court is in a much better position to assess credibility than this Court since it can assess the appearance and demeanor of the defendant. The defendant has not met his burden of establishing suitability for total probation. We see no reason to disturb the sentence imposed by the trial court.

Accordingly, the judgment of the trial court is AFFIRMED.

JOE G. RILEY, JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

DAVID H. WELLES, JUDGE