IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

FILED

December 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**NO. M1998 00259 CCA R3 CD**
Appellee,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. FRANK G. CLEMENT, JR., JUDGE**
WILLIAM M. NEELY,	)	
	)	
Appellant.	)	(Driving Under the Influence)

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY, JUDGE

OPINION

A Davidson County jury convicted defendant of driving under the influence (DUI.) The sole issue in this appeal as of right is sufficiency of the convicting evidence. Upon our review of the record, we **AFFIRM** the judgment of the trial court.

FACTS

In the early morning hours of May 27, 1997, Metro Police Officer Arthur Messmer discovered defendant in the driver's seat of a Dodge minivan in a Waffle House restaurant parking lot. Defendant appeared to be asleep and had half a bottle of beer between his legs. Officer Messmer reached through the van's open window, removed the keys from the ignition and placed them on top of the vehicle. When the officer finally succeeded in awakening defendant, defendant immediately reached for the ignition and tried to start the van.

Officer Messmer smelled the strong odor of alcohol, and defendant's speech was slurred. Exiting the van, defendant moved slowly and deliberately, having to lean on the van for support. At one point, Officer Messmer assisted defendant to ensure he did not fall down.

Defendant failed two field sobriety tests administered by Officer Messmer, and refused a blood alcohol test at the police station. In response to an inquiry about how many drinks he consumed, defendant stated, "the standard answer is two, so I guess I've had two."

Defendant offered no proof at trial.

SUFFICIENCY OF THE EVIDENCE

Defendant challenges the sufficiency of the convicting evidence in this case. Specifically, defendant claims that the state failed to carry its burden of proof by failing to prove beyond a reasonable doubt that the van in which he was asleep was operational at the time of his arrest.

A defendant is guilty of DUI if he drives or is in physical control of an automobile while on any premises "generally frequented by the public at large," while under the influence of an intoxicant. *See* Tenn. Code Ann. § 55-10-401(a)(1). Guilt of this offense may be proven circumstantially. State v. Harless, 607 S.W.2d 492, 493 (Tenn. Crim. App. 1980).

A. Standard of Review

In Tennessee, 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. 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.*

Although the evidence of the defendant's guilt is circumstantial in nature, circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). However, in order for this to occur, the circumstantial evidence

must be not only consistent with the guilt of the accused but it must also be inconsistent with innocence and must exclude every other reasonable theory or hypothesis except that of guilt. Tharpe, 726 S.W.2d at 900. In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 900 (quoting Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970)).

While following the above guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that "[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury." Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); *see also* State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d at 391.

B. Analysis

In State v. Lawrence, the Tennessee Supreme Court adopted a totality of the circumstances approach to assess whether an accused was in physical control of an automobile for purposes of the DUI statute. 849 S.W.2d 761, 765 (Tenn. 1993). The Lawrence court found that the jury may consider *all* circumstances surrounding an offense in determining whether a defendant is in control of an automobile for purposes of the DUI statute, and as circumstantial evidence that defendant actually drove the vehicle. *Id.* Such circumstances may include "the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, . . . the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved." *Id.*

In this instance, the proof showed that a Metro Police officer found defendant asleep behind the wheel of a minivan with half a bottle of beer in his lap. Upon awakening, defendant immediately attempted to start the vehicle. He failed two field sobriety tests and refused a breath alcohol test.

Defendant argues that, in addition to showing control of a vehicle in an intoxicated state, the prosecution must also prove that the vehicle was operable at the time. *See* State v. Carter, 889 S.W.2d 231 (Tenn. Crim. App. 1994)(reversing DUI conviction where there was affirmative proof that the vehicle was inoperable at the time of defendant's arrest). However, unlike the Carter case, here there was no proof to suggest that the van was inoperable. Thus, the jury could reasonably infer that the van was operable.

Under the "totality of the circumstances" approach adopted by the court in Lawrence, the jury clearly had sufficient evidence from which to reasonably infer that the van was, indeed, operable and that defendant was in physical control of it while under the influence of an intoxicant.

CONCLUSION

Based upon the foregoing, we AFFIRM the judgment of the trial court.

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JOE G. RILEY, JUDGE

CONCUR:

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THOMAS T. WOODALL, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE