IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST SESSION, 1999

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9811-CC-00476**
	)	
Appellee,	)	
	)	**COFFEE COUNTY**
V.	)	
	)	
	)	**HON. JOHN W. ROLLINS, JUDGE**
JAMES CLIFFORD WRIGHT,	)	
	)	
Appellant.	)	**(DUI)**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

THOMAS T. WOODALL, JUDGE

OPINION

The Defendant, James Clifford Wright, pled guilty to second offense DUI relating to an incident which occurred in February, 1997. Two months later, he was convicted of second offense DUI following a jury trial for an offense which occurred in December, 1996. After the guilty plea and the jury trial, but prior to sentencing, his present counsel on appeal was allowed to be substituted for his retained trial counsel on the two cases. There was a consolidated sentencing hearing on October 30, 1998, and the trial court imposed a sentence of eleven (11) months and twenty-nine (29) days on each conviction, with ninety (90) days incarceration on each conviction followed by the balance of the sentence on probation. Also, the trial court ordered the sentences to be served consecutively. Defendant appeals, raising the following issues:

1) whether the length of each sentence is excessive; and

2) whether consecutive sentencing is appropriate.

After a review of the record, we affirm the judgment of the trial court.

I. FACTS

We note initially that while there is a transcript of the sentencing hearing in the record, there is no trial transcript or statement of the evidence regarding either the trial on the December, 1996 offense or the guilty plea hearing regarding the February, 1997 incident. A complete record on appeal is necessary for adequate appellate review of sentences imposed by the trial court. State v. Troutman, 979 S.W.2d 271, 274 (Tenn. 1998). The trial court's ruling is presumed correct in the absence of a complete record on appeal. Id.

In consideration of the above constraints, we will nevertheless review this case with the information available in the record.

On December 1, 1996, law enforcement officers discovered Defendant in control of a vehicle while he had slurred speech and the odor of an intoxicant on his breath. Defendant subsequently failed a field sobriety test and he refused to submit to an intoximeter test.

On February 2, 1997, law enforcement officers discovered Defendant standing next to his vehicle that was parked in a highway median. The officers also observed that Defendant smelled of alcohol, had slurred speech, had bloodshot eyes, and was unsteady on his feet. Defendant subsequently submitted to an intoximeter test and the results indicated that Defendant had a blood alcohol level of .16%.

II. LENGTH OF SENTENCES

Defendant contends that the trial court imposed sentences of excessive length. We disagree.

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) (1997) (Sentencing Commission Comments). Ordinarily, a trial court is required to make specific findings on the record with regard to sentencing determinations. See Tenn. Code Ann. §§ 40-35-209(c), -210(f) (1997 & Supp. 1998). However, the Tennessee Supreme Court has stated that review of misdemeanor sentencing is de novo with a presumption of correctness even if the trial court did not make specific findings of fact on the record because "a trial court need only consider the principles of sentencing and enhancement and mitigating factors in order to comply with the legislative mandates of the misdemeanor sentencing statute." Troutman, 979 S.W.2d 274.

Misdemeanor sentencing is controlled by Tennessee Code Annotated section 40-35-302, which provides that the trial court shall impose a specific sentence consistent with the purposes and principles of the 1989 Criminal Sentencing Reform

Act. See State v. Palmer, 902 S.W.2d 391, 392 (Tenn. 1995). A defendant convicted of a misdemeanor, unlike a defendant convicted of a felony, is not entitled to a presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). Misdemeanor sentences do not contain ranges of punishments, and a misdemeanor defendant may be sentenced to the maximum term provided for the offense as long as the sentence imposed is consistent with the purposes of the sentencing act. Palmer, 902 S.W.2d at 393.

In this case, Defendant received two convictions for second offense DUI, which is a Class A misdemeanor. See Tenn. Code Ann. § 55-10-403(m) (1998). Under the applicable statute, a defendant convicted of second offense DUI is to be confined "for not less than forty-five (45) days nor more than eleven (11) months and twenty-nine (29) days." Tenn. Code Ann. § 55-10-403(a)(1) (1998). Furthermore, "all persons sentenced under subsection (a) shall, in addition to the service of at least the minimum sentence, be required to serve the difference between the time actually served and the maximum sentence on probation." Tenn. Code Ann. § 55-10-403(c) (1998). In effect, the DUI statute mandates a maximum sentence for a DUI conviction with the only function of the trial court being to determine what period above the minimum period of incarceration established by statute, if any, is to be served in confinement. See Troutman, 979 S.W.2d at 273; State v. Combs, 945 S.W.2d 770, 774 (Tenn. Crim. App. 1996).

In determining that Defendant should serve 90 days of his sentences in jail, the trial court did not expressly identify the specific factors upon which it was basing its decision. However, the record indicates that the trial court based its determination at least partially on Defendant's record of DUI offenses.

We conclude that, in observance of the less stringent standards attached to misdemeanor sentencing, and also in light of the requirement that we must presume the sentence to be correct when the transcript of a trial or guilty plea hearing is not

included, the trial court's order that Defendant serve 90 days of his sentences by incarceration was neither arbitrary nor an abuse of discretion. The record indicates that in addition to the previous DUI conviction from 1990 that was used as the basis for enhancing Defendant's convictions in this case to second offense DUIs, Defendant was also convicted of DUI in 1984. Further, Defendant also has a previous conviction for driving on a suspended license. In addition, Defendant admitted during the sentencing hearing that when he was approached by police officers on February 2, 1997, he was combative and he attempted to flee the scene. Finally, we note that Defendant committed the two offenses in this case within a relatively short time period. Under these circumstances, we conclude that the sentences which include 90 days incarceration in jail are entirely appropriate in this case. Defendant is not entitled to relief on this issue.

III. CONSECUTIVE SENTENCING

Defendant contends that the trial court erred when it imposed consecutive sentencing. We disagree.

Consecutive sentencing is governed by Tennessee Code Annotated section 40-35-115. The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. State v. Black, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995).

In imposing consecutive sentences, the trial court made no express finding as to which of section 40-35-115's factors applied. However, we find from the record that is available that consecutive sentencing is appropriate as Defendant is an offender whose record of criminal activity is extensive. Tenn. Code Ann. § 40-35-115(b)(2) (1997). Defendant was convicted of DUI in June, 1984, and again convicted of DUI in September, 1990 in another county. He was convicted of driving while his license was suspended in June, 1992, and had a conviction of speeding

(50 miles per hour in a 30 mile per hour zone) in May, 1996. These preceded his two convictions for DUI second offense which are the subject of this appeal, for one offense occurring in December, 1996, and another offense occurring two months later in February, 1997.

From a review of the applicable law and the record on appeal, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, Judge

CONCUR:

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JOE G. RILEY, JR., Judge

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L.T. LAFFERTY, Judge