**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**MAY 1994 SESSION**

FILED

**September 27, 1995**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

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| **STATE OF TENNESSEE,** | ) | |
| | ) | **C.C.A. NO. 02C01-9308-CC-00179** |
| Appellee, | ) | |
| | ) | **MADISON COUNTY** |
| VS. | ) | |
| | ) | **HON. JOHN FRANKLIN MURCHISON, JUDGE** |
| | ) | |
| **RAYMOND CARROLL,** | ) | |
| | ) | (DUI, Driving on a Revoked License) |
| Appellant. | ) | |

FOR THE APPELLANT:

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OPINION FILED:_____

**AFFIRMED IN PART, REVERSED AND DISMISSED IN PART**

**JOHN H. GASAWAY III,**
Special Judge

## O P I N I O N

The defendant was charged in the indictment with driving under the influence, (DUI),[1] second offense and driving on a revoked license. On May 19, 1993, the defendant was convicted by a jury on count one of driving under the influence and of driving on a revoked license.[2] The trial judge sentenced the defendant to eleven months and twenty-nine days with all but forty-five days suspended and to a consecutive six month sentence with all but ten days suspended respectively.

In this appeal as of right the defendant raises four issues contending that:

1. the trial court erred by admitting into evidence the driving history of the defendant and the testimony of Officer Donna Turner that defendant's driver's license was in a revoked status on May 4, 1992;

2. the evidence was insufficient to sustain the defendant's conviction for driving on a revoked license;

3. the evidence was insufficient to sustain the defendant's conviction for DUI; and

4. the trial court erred by ordering consecutive sentences and that the sentences imposed were excessive.

Following our review, we affirm the conviction and sentence for driving while under the influence but reverse and dismiss the conviction for driving on a revoked license.

The testimony at trial revealed that on the evening of May 4, 1992, Officer Donna Turner of the Jackson Police Department received information that there was a driver operating a vehicle without a valid license. While driving east on Chester Street,

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[1]Count one of the indictment charged the defendant with driving while under the influence (DUI). Count two charged the defendant with DUI, having previously been convicted of DUI and listed two previous DUI convictions, one in Haywood County General Sessions Court and another in Jackson City Court.

[2]The State presented no further proof as to count two of the indictment; therefore, we presume from the record that the State chose not to pursue that count.

Officer Turner observed a black male sitting behind the steering wheel of a vehicle parked in front of a carwash. Turner went back to the parking lot where the vehicle was located and saw only the defendant inside the vehicle. Prior to turning into the lot she heard the car engine start. Additionally, as she turned into the parking lot Turner saw the brake lights illuminate and the car move slightly as if it had been put into gear. However, Officer Turner testified that she had not seen the car make any forward movement.

Officer Turner turned on her blue lights and observed the defendant quickly move from the driver's seat to the passenger's seat. Thinking the defendant may be attempting to flee, Turner approached the passenger side and placed her hands on the car door. Turner opened the door and the defendant identified himself at her request. As the defendant exited the vehicle, Officer Turner noticed that the defendant had problems keeping his balance, that he strongly smelled of alcohol and that his speech was slurred. When Turner asked the defendant for his license, he responded that he had none and clumsily fumbled through his wallet for other proof of identity. When she further asked if he had been drinking he initially responded that he had not but immediately thereafter admitted that he had consumed a beer.

Based on these observations Officer Turner performed a number of field sobriety tests after which Turner opined that the defendant was under the influence of an intoxicant and placed him under arrest. At the police department the defendant was administered an breathalyzer test which revealed that the defendant's blood alcohol content was .29 percent.

At trial the State introduced, over defense counsel's objection, a certified copy of the defendant's driving history from the Tennessee Department of Safety which revealed that the defendant's license had been previously revoked. Officer Turner testified that she had never observed the defendant driving the vehicle but had observed

him behind the steering wheel with the car in gear, the headlights on and the engine running.

The defendant testified that he had not been driving but instead was sitting in the car eating a sandwich awaiting the return of the car's owner whose name he could not remember. He stated that when he saw the officer approach he moved to the passenger side because the driver's door would not open. The defendant admitted that he had consumed one beer but denied that he was drunk or that the car motor was running at the time Officer Turner arrived.

Because issue two is determinative in this case and because issues two and three both challenge the sufficiency of the evidence we combine them for review and address them first. In his second issue the defendant claims that the evidence was insufficient to convict him of driving on a revoked license. In his third issue, he asserts that the evidence was insufficient to convict him of DUI.

A defendant challenging the sufficiency of the proof has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not

reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

As to issue two Tennessee Code Annotated Section 55-50-504 provides that "[a] person who drives a motor vehicle on any public highway of this state at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor." T.C.A. § 55-50-504(a)(1). The defendant claims that the State failed to present sufficient evidence to show that he was "driving" on a "public highway." We agree. At trial Officer Turner testified that she had not seen the defendant driving the vehicle. Instead, Turner observed the automobile parked in a parking lot. Further, the videotape does not support the State's position that the vehicle was on a public highway at the time Turner approached it.

While we agree with the State's response that driving on a revoked license may be proven by circumstantial evidence we do not find that the evidence excludes every other reasonable theory except that of guilt. See State v. Michael Davidson, No. 03C01-9306-CR-00198, Sullivan County (Tenn. Crim. App. filed Nov. 7, 1994, at Knoxville) and Pruett v. State, 3 Tenn. Crim. App. 256, 460 S.W.2d 385 (1970). As argued by the defendant, the legislature could have provided that being in physical control of the vehicle or driving in any public places would be sufficient to prove that a defendant was driving on a revoked license. However, the legislature failed to so provide. Therefore, we find that the conviction for driving on a revoked license is reversed and dismissed.

In issue three the defendant challenges the sufficiency of the evidence as to his DUI conviction. Tennessee Code Annotated Section 55-10-401 provides that:

> It is unlawful for any person or persons to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state of Tennessee, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while under the influence of an intoxicant ....

T.C.A. § 55-10-401(a). The defendant specifically contends that the proof failed to establish his presence at any of the locations provided in the statute. We disagree. The evidence at trial showed that the defendant was parked in a parking lot in front of a car wash. Further, the video tape showed several vehicles driving by as Officer Turner conducted field sobriety tests. As cited by the State, this Court has held that a night club parking lot was within the purview of this statute. State v. Herbert Roy Dixon, No. 110, Shelby County (Tenn. Crim. App. filed Dec. 3, 1986, at Jackson). We find that the evidence was sufficient to support the DUI conviction.

In his first issue the defendant argues that the trial court errantly admitted both the copy of his driving history in violation of his constitutional right to confront the witnesses as well as the testimony of Officer Turner that the defendant's driver's license was in a revoked status on May 4, 1992. Because we reversed the defendant's conviction for driving on a revoked license, this issue is rendered moot.

In his final issue the defendant contends that the trial court erred by ordering consecutive sentences and that the sentences imposed were excessive. Again, as in issue one, the consecutive sentence portion of this argument is moot due to our findings above. However, we will address the defendant's claim that the sentence imposed for his DUI conviction was excessive.

In misdemeanor sentencing, a separate sentencing hearing is not mandatory, but the trial court is required to allow the parties a reasonable opportunity to

be heard on the question of the length of the sentence and the manner in which it is to be served. T.C.A. § 40-35-302(a). The sentence must be specific and consistent with the purpose and principles of the Criminal Sentencing Reform Act of 1989. T.C.A. § 40-35-302(b). A percentage of not greater than 75% of the sentence should be fixed for service, after which the defendant becomes eligible for "work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d).

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Karl Christopher Davis, No. 01C01-9202-CC-00062, Williamson County (Tenn. Crim. App. filed March 17, 1993, at Nashville); State v. Bernell B. Lawson, No. 63, Cumberland County (Tenn. Crim. App. filed May 23, 1991, at Knoxville). However, in determining the percentage of the sentence to be served in actual confinement, the court must consider enhancement and mitigating factors as well as the purposes and principles of the Criminal Sentencing Reform Act of 1989, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

The defendant contends that the eleven months and twenty-nine day sentence with all but forty-five days suspended was excessive. In support of his argument the defendant cites T.C.A. §§ 40-35-103(2) and 40-35-103(4) which state respectively that "the sentence imposed should be no greater than that deserved for the offense committed," and that "the sentence imposed should be the least severe measure necessary to achieve the purposes for which the sentence is imposed." Further, the defendant claims that the trial court should have considered the factors that he was cooperative with the arresting police officer and was employed at the time of his arrest and sentencing.

The trial court found that the defendant had at least two prior DUI convictions. Although the defendant attacked the conviction in Jackson City Court as

invalid, the additional conviction in Haywood County General Sessions Court sufficiently supports the trial judge's determination. Therefore, we find that the sentence imposed was appropriate in light of the evidence.

The DUI conviction and sentence are affirmed. The conviction and sentence for driving on a revoked license is reversed and dismissed.

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JOHN H. GASAWAY III, Special Judge

CONCUR:

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PENNY J. WHITE, Judge

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DAVID G. HAYES, Judge