

THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
MARCH SESSION, 1995

FILED

September 22, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellant)
)
 vs.)
)
 DARREL JOHN EAST,)
)
 Appellee)
)

No. 01C01-9408-CC-00288

WILLIAMSON COUNTY

Hon. **Henry Denmark Bell**, Judge

(Driving Under the Influence -
Third Offense)

For the Appellant:

Charles W. Burson
Attorney General and Reporter

Merrilyn Feirman
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Joseph D. Baugh, Jr.
District Attorney General

Jeffrey Preston Burks
Asst. District Attorney General
Post Office Box 937
Franklin, TN 37065-0937

For the Appellee:

ON APPEAL:

Darrel John East
(Not Represented By
Counsel On Appeal)

AT TRIAL:

Joe P. Binkley
150 Second Avenue, North
Nashville, TN 37201

OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes
Judge

OPINION

_____The State appeals from an order entered in the Circuit Court of Williamson County imposing a sentence of periodic confinement for driving under the influence, third offense. The State contends that the trial court erred in permitting Darrel John East to serve his sentence for DUI, third offense, on days that East was not working rather than in a consecutive fashion.

After a review of the record, we reverse the judgment of the trial court

I. FACTS

Darrel John East pled guilty to driving under the influence, third offense, in the General Sessions Court of Williamson County on January 12, 1994. East was fined \$1,000.00, his driving privileges were suspended for a period of three years and he was sentenced to 120 days confinement to be served day for day in the Williamson County Jail. After his conviction, East petitioned the General Sessions Court that he be released from confinement in order to continue treatment for an ongoing mental disorder. The motion alleged that East had been diagnosed as Bipolar Affective Disorder - mixed type. Medical reports filed in support of East's motion alleged that "sentencing the defendant to jail at this juncture would undo the therapeutic gains and probably exacerbate his Bipolar Affective Disorder." The General Sessions judge denied the defendant's motion.

East subsequently filed a petition for certiorari and supersedeas to the Circuit Court of Williamson County. The Circuit Court granted East's petition, permitting him to serve his sentence on non-working days.¹ The State now

¹At the time East's petition for certiorari was granted, he had served twenty-four days of his sentence. The State filed a motion to stay the service of

appeals from the Circuit Court's order.²

The State contends that the minimum sentence for driving while intoxicated, third offense, must, by statute, be served consecutively "day for day." We agree.

II. ANALYSIS

Punishment for driving under the influence, third offense is governed by Tenn. Code Ann. § 55-10-403 (1993). The relevant portions of this statute state as follows:

(a)(1) . . . For the third or subsequent conviction, there shall be imposed a fine of not less than one thousand dollars (\$1,000) nor more than five thousand dollars (\$5,000) and the person or persons shall be confined in the county jail or workhouse for not less than one hundred twenty (120) days nor more than eleven (11) months and twenty-nine (29) days, and the court shall prohibit such convicted person or persons from driving a vehicle in the state of Tennessee for a period of time of not less than three (3) years nor more than ten (10) years. After service of at least the minimum sentence day for day, the judge has the discretion to require an individual convicted of a violation of the provisions of Secs. 55-10-401--55-10-404 to remove litter . . . provided, that any person [so] sentenced . . . shall be allowed to do so at a time other than such person's regular hours of employment. . . .

(b)(1) No person charged with violating the provisions of Secs. 55-10-401--55-10-404 shall be eligible for suspension of prosecution and dismissal of charges pursuant to the provisions of Secs. 40-15-102--40-15-105 and 40-32-101(a)(3)-(c)(3) or for any other pretrial diversion program, nor shall any person convicted under such sections be eligible for suspension of sentence or

the remainder of East's sentence pending his appeal. This motion was granted, and East's sentence is currently in abeyance.

² East has failed to file a brief. We will, therefore, decide the merits of the appeal on the record and the State's brief pursuant to Tenn. R. App. P. 29(c).

probation pursuant to Sec. 40-21-101 [repealed] or any other provision of law authorizing suspension of sentence or probation until such time as such person has fully served day for day at least the minimum sentence provided by law.

(emphasis added).

This court has previously held that second and subsequent DUI offenders are required to serve the minimum mandatory sentence provided by law "in succession, without interruption by periodic confinement as would be occasioned by weekend or work release sentences." State v. Gurley, 691 S.W.2d 562, 563 (Tenn. Crim. App. 1984), perm. to appeal denied, (Tenn. 1985); see also State v. McNatt, 693 S.W.2d 917 (Tenn. Crim. App. 1984); State v. Wyatt, #21 (Tenn. Crim. App. at Jackson, Sept. 9, 1987). In so holding, this court reached its conclusion based upon the legislative intent as demonstrated by the language of Tenn. Code Ann. § 55-10-403.

Although the Sentencing Reform Act of 1989 specifically provides for periodic confinement and work release,³ the Tennessee Supreme Court has recently held that the Sentencing Act does not apply to DUI sentences in which the application of the Act would serve to "alter, amend, or decrease the penalties" specifically provided by law. State v. Charles Palmer, #03S01-9407-CR-00068 (Tenn. at Knoxville, June 5, 1995). Based upon this court's previous rulings, imposition of periodic confinement for a DUI, third offender would alter the penalty for the offense.

Moreover, the language of Tenn. Code Ann. § 55-10-403(a)(1) provides for first offenders of DUI "that if such conviction is for forty-eight (48) hours, it shall be served at a time when the person is off from work and when such

³The provisions for work release and period confinement are contained in Tenn. Code Ann. § 40-35-104(c) 3,6.

confinement will not interfere with the person's regular employment." This language, however, is conspicuously absent from the sentencing provisions of DUI, second and subsequent offenses. Furthermore, the "day for day" language included within the sentencing provisions for second and subsequent DUI offenders is not found in the language for those convicted of DUI, first offense.

The maxim expressio unius est exclusio alterius has frequently been applied by our courts as an aid in the construction of statutes. See City of Knoxville v. Brown, 260 S.W.2d 264, 268 (Tenn. 1953); State v. Harkins, 811 S.W.2d 79, 82 (Tenn. 1991). Translated, the maxim provides that where the legislature includes a particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that the legislature acted purposefully in the subject included or excluded. City of Knoxville, 260 S.W.2d at 268.

Accordingly, we hold that had the legislature intended to provide the same sentencing privilege to a second or subsequent offender as it extended to the minimum mandatory first time offender, it would have expressly so stated.

III. CONCLUSION

Based upon the foregoing, we conclude that East, a DUI third offender, must serve the imposed 120 day minimum, mandatory sentence in succession, day for day, without interruption.

The judgment of the trial court is reversed. This case is remanded to the Circuit Court of Williamson County with instructions that the balance of East's sentence be served in a manner consistent with this opinion.

David G. Hayes, Judge

CONCUR:

Jerry Scott, Judge

Joseph M. Tipton, Judge