IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH SESSION, 1995

STATE OF TENNESSEE,	)	**C.C.A. NO. 03C01-9406-CR-00231**
	)	
Appellee,	)	
	)	
	)	**WASHINGTON COUNTY**
VS.	)	
	)	**HON. LYNN W. BROWN**
FREDRICK A. WHITSON,	)	**JUDGE**
	)	
Appellant.	)	(DUI, Second Offense)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CRIMINAL COURT OF WASHINGTON COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant was convicted on a jury verdict of the offense of driving under the influence of an intoxicant, second offense.[1] In addition to a fine, he was sentenced to eleven months and twenty-nine days in the county jail, with all but fifty days suspended. The Defendant appeals his conviction and his sentence. We affirm the judgment of the trial court.

The Defendant requested to be represented by court appointed counsel both at his trial and on this appeal. The trial court determined that the Defendant was not indigent and refused to appoint counsel. This court likewise determined that the Defendant was not indigent and, therefore, not entitled to court appointed counsel on this appeal.[2]

The Defendant apparently argues in his pro se brief that the trial court erred by not appointing counsel to represent him. It is evident from this record that at all times material to the trial and appeal of this case, the Defendant was not indigent and possessed the means to employ counsel to represent him. Instead, the Defendant chose to forego counsel and represented himself.

We first point out that the record on appeal is totally inadequate to allow meaningful appellate review of most of the issues raised in the Appellant's pro se brief. We glean from the record on appeal that the Defendant refused to pay the court

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[1]Tenn. Code Ann. § 55-10-401 & 403.

[2]Order filed Aug. 25, 1994.

reporter for preparation of a complete transcript. As we have previously noted, the Defendant possessed the means to acquire a complete transcript of the trial.

The record of the trial consists of two volumes of the technical record and a transcript of the direct testimony and part of the cross-examination of the State's first witness, the arresting officer. We also have a transcript of the sentencing hearing and a transcript of a hearing to determine the Defendant 's indigency status for purposes of appeal. Contained with the record are some ten audio tapes, apparently the recordings of various proceedings on motions and perhaps portions of the trial, along with other writings filed by the Defendant.

In State v. Ballard, 855 S.W.2d 557 (Tenn. 1993), our Supreme Court stated as follows:

> When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal. State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983). Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Cr. App. 1988). Absent the necessary relevant material in the record an appellate court cannot consider the merits of an issue. See T.R.A.P. 24(b). The defendant has failed to properly preserve this issue for appeal.

855 S.W.2d at 560-61.

Issues which are not supported by appropriate references to the record are treated as waived in this court. Tenn. Ct. Crim. App. R. Proc. 10(b). The failure to cite authority in support of one's argument is a basis for waiver of the issue. Tenn. Ct. Crim. App. R. Proc. 10(b), State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1988).

One of the issues presented by the Defendant on this appeal is the sufficiency of the convicting evidence. We, therefore, review the testimony of the arresting officer, which is the only testimony contained in the record on appeal.

A policeman employed by the Johnson City, Tennessee Police Department testified that he was on patrol during the early morning hours of March 6, 1993. At about 2:10 a.m., he observed a vehicle make a left turn and "as it made the turn, it made a real wide turn and almost ran up on to the sidewalk." He said that after almost striking the sidewalk, the vehicle came back over into the left hand lane and then went back to the center and straddled the center line as the car sat at a red light. The policeman stopped the vehicle, and the Defendant was the driver. When the Defendant got out of the vehicle, the policeman stated that he noticed a strong odor of an alcoholic beverage on the Defendant. He said the Defendant was unsteady on his feet and that the Defendant could not successfully complete two separate field sobriety tests. When the policeman placed the Defendant under arrest, the Defendant started cursing both the policeman and the Johnson City Police Department. He transported the Defendant to the Police Department where the Defendant refused to take a breathalizer test. The Defendant kept insisting that he wanted a blood test and the officer said he told the Defendant that after he took the breathalizer test, the policeman would transport the Defendant to the hospital so that he could get a blood test.

The officer introduced the "implied consent form." The Defendant signed the form indicating his refusal to submit to the test and wrote on the form, "but I will take a blood test at 3:58 a.m. 3-6-93." The implied consent form indicates that it was signed at 2:55 a.m.

The witness also introduced a video tape made of the Defendant while he was being processed at the jail. The video tape was viewed by the jury, but is not contained

in the record on appeal. The officer further stated that based on his observation of the Defendant's actions, including the Defendant's performance during the field sobriety tests, he was of the opinion that the Defendant was driving under the influence of an intoxicant. The Defendant made no objections to any testimony presented by this witness.

When an accused challenges the sufficiency of the convicting evidence, this court must review the record to determine if the evidence presented during the trial was sufficient "to support the finding of the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e). This rule is applicable to findings of guilt predicated upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990).

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). Nor may this court substitute its inferences for those drawn by the trier of fact from circumstantial evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956). This court is required to afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Herrod, 754 S.W.2d 627, 632 (Tenn. Crim. App. 1988).

Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact, not this court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). In State v. Grace, 493 S.W.2d 474 (Tenn. 1973), the Tennessee Supreme Court said, "A guilty verdict by the jury, approved by the trial judge, accredits the

testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." Id. at 476.

Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, id., the accused has the burden in this court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This court will not disturb a verdict of guilt due to the sufficiency of the evidence unless the facts contained in the record and the inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of fact to find the accused guilty beyond a reasonable doubt. Matthews, 805 S.W.2d at 780.

It is obvious that the testimony of the arresting officer is sufficient to sustain the jury's finding of guilt beyond a reasonable doubt. T.R.A.P. 13(e).

The Defendant argues that his constitutional rights were violated when the policeman tape recorded their conversation during his initial stop without first advising him of his Miranda rights. Because the record does not reflect that an audio tape was introduced as evidence against the Defendant, we will not address this issue further.

The Defendant next argues that the policeman violated his constitutional rights by asking him if he had been drinking and requiring him to take a field sobriety test prior to advising him of his Miranda rights. We conclude that the officer was not required to do so. State v. Snap, 696 S.W.2d 370 (Tenn. Crim. App.), perm to appeal denied, id. (Tenn. 1985); Trail v. State, 526 S.W.2d 127, 129 (Tenn. Crim. App. 1974), cert. denied, id. (Tenn. 1975).

The Defendant argues that the inventory search of his vehicle following his arrest was improper. The State presented no evidence obtained as a result of this search. On cross-examination, the officer stated that an empty beer bottle was found in the automobile. The officer stated the bottle was in plain view. It also appears that under the circumstances the officer had the right to conduct an inventory search. Based on these facts, this issue has no merit.

The Defendant next argues that the Johnson City Police Department should have offered him a blood test rather than the breathalizer test. The officer testified that he advised the Defendant that he would transport him to a hospital for a blood test, but only after he took the breathalizer test. This was in accordance with police policy. The Defendant cites no authority that this action of the police constitutes reversible error. We conclude that it does not.

The Defendant also argues that the trial judge erred in allowing a police officer with the Johnson City, Tennessee Police Department to sit on the jury. This juror stated that he was the supervisor of the officer who arrested the Defendant and who subsequently testified at trial. This fact was made known to the parties during voir dire. The juror testified that he could serve as a fair and impartial juror. The Defendant asked the juror if he would be biased and the juror replied that he would not. The trial judge told the Defendant that all he had to do to remove this juror was to write his name on a piece of paper and hand it to the judge. The judge explained exactly what a preemptory challenge was and how it was exercised. The Defendant said "I'll sit down. He'll do." The judge then asked "you are going to keep him?" The Defendant replied "yes, sir." The Defendant exercised none of his preemptory challenges. Under these circumstances, we find no error committed by the trial court. This issue has no merit.

Among many other allegations, the Defendant argues that his rights were violated when he entered his not guilty plea in General Sessions Court, that the grand jury proceedings resulting in his indictment were flawed, that he was not provided with a complete list of jurors or notes made by the arresting officer, that the State should have been required to offer an expert witness concerning the reliability of the field sobriety tests, that the State erred in suggesting to the trial court that the Defendant might need a mental evaluation (this was outside the presence of the jury before the trial began), and that his rights were violated when he was interviewed for purposes of preparing the presentence report without being advised of his Miranda rights. Again, we note that the record is totally inadequate to review many of the Defendant's assignments of errors. Based on the record before us, we are unable to conclude that any of the Defendant's issues merit reversal. We cannot conclude that the trial judge erred or that the Defendant's rights have in any way been prejudiced. In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were correct. State v. Oody, 823 S.W.2d 554, 559 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1991).

The Defendant next argues that the trial judge erred by not allowing him to serve his sentence on "work release." The minimum sentence for DUI, second offense, is forty-five days of confinement, day by day. The trial court enhanced the Defendant's sentence slightly to fifty days. The Defendant is not entitled to work release. This issue has no merit.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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WILLIAM M. BARKER, JUDGE