IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1995 SESSION

STATE OF TENNESSEE,	)	**C.C.A. No. 03C01-9311-CR-00365**
	)	
Appellee,	)	**GREENE COUNTY**
	)	
VS.	)	**Hon. James E. Beckner**
	)	
PATRICK MEAGHER,	)	**(Driving Under the Influence)**
	)	
Appellant.	)	**No. C 11232 BELOW**

For the Appellant:

Roger A. Woolsey
118 South Main Street
Greeneville, TN 37743

For the Appellee:

Charles W. Burson
Attorney General and Reporter
and
Christina S. Shevalier
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

C. Berkeley Bell, Jr.
District Attorney General
and
Cecil C. Mills, Jr.
Assistant District Attorney General
Greene Co. Office Complex
113-JW Church Street
Greeneville, TN 37743

OPINION FILED:_____

AFFIRMED

Cornelia A. Clark, Special Judge

OPINION

The appellant, Patrick Meagher, was indicted by the Greene County Grand Jury on one count of driving under the influence. He was convicted by a jury on June 1, 1993. He was sentenced to eleven months, twenty-nine days with a release eligibility date of five percent (5%), and fined $1,000.00. He also had his driver's license suspended for one year and was ordered to attend DUI school.

The appellant raises three issues on appeal. First, appellant contends the trial court erred in allowing the state to present two witnesses who were not properly revealed to him under Rule 16, T.R.Cr.P. Second, he contends that the trial court erred in allowing his mug shot into evidence. Third, appellant contends that the trial court erred in imposing sentence. We affirm the judgment of the trial court in all respects.

On December 25, 1992, Officer James Humbert of the Greeneville Police Department was dispatched to Tusculum Boulevard in Greene County, given the description of a car and a tag number, and told that it was being driven erratically. Officer Humbert testified that he first observed appellant's car in front of Hardee's on Tusculum Boulevard, approaching the red light at Grove and Tusculum. Three vehicles were stopped at the traffic light and the appellant's vehicle cut through a parking lot to the right of Tusculum Boulevard exiting onto Grove Street. The officer activated his emergency lights in an attempt to keep the oncoming traffic on Grove Street from colliding with the appellant's vehicle. The officer stated that the appellant did not stop, but continued up West Grove Street, driving first in the center of the street and then more on the wrong side of the road. He then turned left onto Cypress Street, running a stop sign and "almost cutting into the grass". Appellant then turned left onto Sevier Avenue, "almost cutting into the grass again," and running a second stop sign.

Tennessee Highway Patrolman Ivan Williamson also heard the dispatcher's call, spoke to a private motorist, and proceeded to the scene. He testified that he first fell in behind Officer Humbert, then pulled alongside the appellant's car, and ultimately pulled in front of him in order to slow him down. Appellant ignored the Trooper until he hit his air horn twice. He did eventually slow down, but did not come to a complete stop. Officer Humbert got out of his car and approached appellant's car while it was still rolling Officer Humbert testified that he asked the appellant to stop the car, but appellant did not. Officer Humbert opened the door and braked the car himself, to prevent him from striking Trooper Williamson's car.

The appellant was unresponsive. He continued to sit behind the wheel of the car, and did not appear to understand what was going on. Officer Humbert asked appellant to step out of the car several times, but he refused to do so. Officer Humbert then grasped appellant by the shoulder and helped him out of the car. Appellant did not resist. He was limp and could not stand on his own. Once out of the car, he staggered, was very unstable, and almost fell. He leaned on his car to hold himself up, and Officer Humbert ultimately had to assist him to the patrol car. Officer Humbert determined that he was not capable of performing any field sobriety tests, and placed him under arrest for driving under the influence. He then handcuffed him and placed him in the police car. Trooper Williamson testified that the appellant was one of the most intoxicated persons he had ever observed.

Appellant was transported to the jail. Officer Humbert testified that jail personnel had to assist appellant. Appellant was read his implied consent rights. He initially refused to take a breathalizer test, but ultimately agreed. He then signed an implied consent form, and his signature was witnessed by Officer James Seay. Officer Humbert, who is certified, verified that the machine was in working order. He administered the test after observing appellant for thirty to thirty-five minutes. Officer Humbert did not ask appellant if he had anything in his mouth, but during the

observation period he did not observe any foreign matter, and appellant did not regurgitate. The test result was a breath alcohol reading of .16.[1]

Officer James Seay testified that he arrived on the scene after Officer Humbert had stopped Meagher's vehicle. He confirmed that Humbert asked appellant to exit the vehicle and that appellant would not comply. His response to all questions posed was to "just look at" Humbert. Upon being taken out of the vehicle, Seay testified that appellant was very unsteady on his feet and had a very strong odor of alcohol about his person. There was also a strong odor of alcohol in the car. Seay confirmed that there were beer cans in the vehicle and that the vehicle was in disarray. He stated that appellant's clothing was disarranged and that he was unkempt. Officer Seay did not observe any pursuit of the vehicle or any driving violations. He did participate in the inventory search of the vehicle. Officer Seay testified that at the jail Mr. Meagher was very unsteady on his feet and walked with a staggering gait. He did not recall, however, that he had to be assisted by jail personnel.

Grady Dugger testified for the appellant that he had known him for twenty-five years and that appellant was at his house on Christmas Eve and Christmas Day, 1992. On Christmas morning Mr. Dugger woke up at approximately 10:30 a.m., and appellant woke up at 1:30 p.m. Dugger did not drink that day, nor did he see the appellant drink. Dugger testified that appellant left his house at approximately 3:30 p.m., saying that he was going to the store. Dugger testified that appellant did not look any different on Christmas Day than he did in the courtroom on the day of trial. The appellant always wore glasses.

On cross-examination, Mr. Dugger was shown a mug shot of the appellant

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[1]The transcript of Officer Humbert's testimony contains the statement "We got .16 back from the intoximeter test." Exhibit 4, which is the actual machine printout, shows a reading of .26. This court cannot discern whether the transcript recitation is a typographical error by the court reporter or a misstatement by the officer.

taken shortly after his arrest. Mr. Dugger agreed that the picture showed Mr. Meagher's hair being messed up and unkempt, and that it did not depict the Meagher he had known for the last twenty-five years.

Appellant testified that he had broken up with his girlfriend during the Christmas season of 1992. He came to Greeneville on Christmas Eve and Christmas Day to visit his friend Grady Dugger. He arrived at approximately 5:00 p.m. on Christmas Eve. He denied drinking anything that day. He admitted on cross examination that he consumed about four beers before going to bed at 2:00 or 3:00 a.m. on Christmas Day. He had not had much sleep over a three-day period. He woke up at approximately 1:30 p.m. that day. He ate, then left the house at about 3:25 p.m. While driving around, he found a ten ounce can of Busch beer under the seat and drank it in ten to fifteen minutes. Appellant admitted that he did not stop at the stop signs, but he denied swerving across lanes of traffic. He also denied almost colliding with other vehicles. He was not aware that the blue lights were intended for him. When he realized the officer wanted him to stop, he drove on toward Mr. Dugger's house, so that "we could sort all of this out and find out what was wrong." He contended that he was in the process of stopping the car when the officer did it for him. He stated that the officer used an obscenity, grabbed him out of the car, never gave him a chance to walk or stagger, failed to administer field sobriety tests or Miranda warnings, and searched his car without permission. He admitted there were beer cans in the car.

Concerning the results of the breathalizer test, appellant testified that he had Skoal tobacco in his mouth when he took the test, but that he was never asked if he had anything in his mouth. Concerning the mug shot, appellant stated that he never goes anywhere without his glasses. He took them off for the picture because he was instructed to do so.

DISCOVERY

Appellant first asserts that the trial court erred in allowing the state to present the testimony of Officer James Seay and Trooper Ivan Williamson in violation of Rule 16, T.R.Cr.P. and the local rules of court, which require all potential witnesses to be added to the state's witness list no later than forty-eight (48) hours before trial.

T.C.A. §40-17-106 provides that the district attorney general must endorse on the indictment names of such witnesses as he intends to call in the case. The indictment in this case names only Officer James Humbert. Further, a Discovery Order was entered on May 3, 1993, permitting the appellant to inspect, copy, or photograph a list of names and addresses of the state's witnesses. The Local Rules of Court require that any potential witnesses must be provided at least forty-eight (48) hours before trial. The names of the proposed additional witnesses were actually provided to the appellant on Friday afternoon, May 28, which was the beginning of the Memorial Day weekend. The local rule does not include Saturday, Sunday, or holidays, in its forty-eight (48) hour calculation. The trial in this case began on Tuesday, June 1. Thus defendant contends that Officer Seay and Trooper Williamson should not have testified.

The provisions of T.C.A. §40-17-106 are directory only and do not necessarily disqualify a witness whose name does not appear in the indictment from testifying. State v. Harris, 839 S.W.2d 54, 69 (Tenn. 1992). Moreover, T.R.Cr.P. 16 does not authorize the pretrial discovery of the names and addresses of the state's witnesses. State v.Craft, 743 S.W.2d 203, 204 (Tenn. Cr. App. 1987). This court has in the past actually held that a trial court erred in entering an order requiring the state to furnish the names of the witnesses pretrial. State v. Martin, 634 S.W.2d 639, 643 (Tenn. Cr. App. 1982).

The purpose of furnishing names is to prevent surprise to defense counsel.

State v. Melson, 638 S.W.2d 342, 364 (Tenn. 1982). Evidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with discovery and that the prejudice cannot otherwise be eradicated. State v. Baker, 751 S.W.2d 154, 164-65 (Tenn. Cr. App. 1987); State v. Morris, 750 S.W.2d 746, 749 (Tenn. Cr. App. 1987); State v. James, 688 S.W.2d 463, 466 (Tenn. Cr. App. 1984). No such prejudice has been established in this case.

Although the forty-eight (48) hour local rule was technically violated, information about the additional witnesses was actually provided to defense counsel on Friday before a Tuesday trial. The trial court found further that Officer Seay's name was contained in discovery materials and that the possibility of his testimony was not a surprise. The implied consent form itself contains Officer Seay's signature as a witness indicating his presence during the events in question. The trial court also found that Officer Williamson was an obvious witness, since he was present at the scene of the stop. Apart from his bare allegation that these witnesses were critical to the state's case and instrumental in convicting him, appellant has not presented any evidence of actual prejudice because of the delay in being advised that they would testify. No allegation is made that counsel tried to contact the witnesses and was prevented from doing so because of the intervening holiday. No request for a continuance was made. Defense counsel was able thoroughly and competently to cross-examine these witnesses. This issue is without merit.

INTRODUCTION OF MUG SHOT

Appellant next contends that the state violated Rule 16(c), T.R.Cr.P., by failing to permit inspection and copying of the mug shot taken at the time of appellant's arrest. In particular appellant contends that it shows him in an unfavorable light and that had he had it in advance he could have prepared and presented evidence to counter the state's assertion that it showed him in an intoxicated state. He points out that he has one glass eye, and that he was

emotionally upset at the time of the arrest because of the breakup with his girlfriend.

The mug shot was not introduced by the state during its case in chief. It was initially introduced during the cross-examination of Grady Dugger, a defense witness, following direct examination of Mr. Dugger concerning the appellant's appearance as he left the Dugger house on the day he was arrested. Rule 16, T.R.Cr.P., provides that upon request, the state shall permit a defendant to inspect and copy photographs "which are material to the preparation of his defense or are intended for use by the state as evidence in chief at the trial". The discovery order entered by the trial court in this case states in pertinent part that the defense is allowed to inspect or copy photographs "material to the preparation of his defense which the state intends to use as evidence in chief at trial".

The state did not use the mug shot during its case in chief, and there is no evidence in the record that it intended to do so. The picture became relevant only after a defense witness testified about the appellant's appearance when he last saw him before the arrest. Further, the appellant ultimately took the stand and testified thoroughly about the breakup with his girlfriend, his glass eye, his regular use of glasses, and the fact that he removed the glasses only upon instruction of the officers. This issue also is without merit.

SENTENCING

Appellant contends the trial court erred in imposing sentence because it considered improperly (1) that appellant had previously been charged with marijuana, even though the charge was dismissed; (2) that he had previously been charged with driving under influence when he was actually convicted of reckless driving; and (3) that he failed to complete the presentence questionnaire.

In reviewing sentencing issues, this court conducts a de novo review on the

record, with a presumption that the trial court determinations are correct. T.C.A. §40-35-401(d). If the trial court properly considered the relevant factors, and the findings of the trial court are adequately supported by the record, then the appellate court must affirm, even if it would have preferred a different result. State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Cr. App. 1991). The burden is on the appellant to show that the sentence imposed is improper. Id. at 786.

T.C.A. §40-35-210(c), establishing the minimum sentence as the presumptive sentence, does not apply to misdemeanor sentencing. See State v. Ronnie McKnight, 900 S.W.2d 36 (Tenn. Cr. App. 1994); State v. Karl Christopher Davis, No. 01C01-9202-CC-00062 (Tenn. Cr. App., Nashville, March 17, 1993). 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. The court should not impose such percentages arbitrarily. T.C.A. §40-35-302(d).

No mitigating factors were argued to the court or presented on appeal. Three enhancement factors were considered.

As to the presentence questionnaire, the court did find appellant's failure to complete it a "negative factor" in sentencing. The state concedes on appeal that this is not a statutory enhancement factor and therefore should not be considered in determining the length of sentence. We agree. See State v. Dykes, 803 S.W.2d 250, 258 (Tenn. Cr. App. 1990). This reliance, alone, however, does not invalidate the sentence that was imposed.

The trial court found as an enhancement factor under T.C.A. §40-35-114(1) that the appellant had a previous history of criminal convictions or behavior.

Appellant contends that the court inappropriately relied on an earlier charge for possession of marijuana and driving under the influence. The actual language used by the court was as follows:

> It may not be a long record as I often see, but it shows you were charged with possession of marijuana, a hallucinogen, back on 7-29-78, but that was dismissed, but you were charged on April 3, 1983, with driving under the influence in Knox County. I understand that Knox County has a regular practice to reduce driving under the influence cases from DUI to reckless driving and it was, in fact, reduced to reckless driving. We don't do that here. And then, of course, this conviction for driving under the influence.

Notwithstanding some ambiguity in the statements made by the court, it is clear that the use of this enhancement factor is supported by the prior conviction for reckless driving.

The court also found that enhancement factor number sixteen (16) applied, in that the crime was committed under circumstances under which the potential for bodily injury to a victim was great. The use of that enhancing factor is not challenged on appeal, and is supported by the fact that the appellant's blood alcohol level was well over the legal limit and that he almost collided with several cars as he cut through a parking lot and ran two stop signs. See State v. Elizabeth A. Green Fobber, No. 03C01-9112-CR-00410 (Tenn. Cr. App., Knoxville, July 23, 1992).

Having found the presence of two enhancement factors and no mitigating factors, and having further determined that deterrence was an important factor and that confinement was necessary in order to prevent the depreciation of the seriousness of the offense, the court was justified in imposing a sentence higher than the minimum for this offense.[2] Since the evidence does not preponderate against the sentence imposed, the statutory presumption of correctness has not

[2]The method of articulation of sentence utilized by the trial court is unusual. However, the parties appear to agree that the imposition of a sentence of eleven (11) months, twenty-nine (29) days with a release eligibility date of five percent results in an effective sentence of eighteen (18) days.

been rebutted. The sentence was not excessive.

For all the foregoing reasons, the judgment of the trial court is affirmed.

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CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
GARY R. WADE
JUDGE

_____
JOSEPH M. TIPTON
JUDGE

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	)	
Appellee,	)	**C.C.A. No. 03C01-9311-CR-00365**
	)	**GREENE COUNTY**
VS.	)	**Hon. James E. Beckner, Judge**
	)	**Driving Under the Influence**
PATRICK MEAGHER,	)	**No. C 11232 BELOW**
	)	
Appellant.	)	

AFFIRMED

JUDGMENT

Came the appellant, Patrick Meagher, by counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Greene County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

In accordance with the Opinion filed herein, it is therefore, ordered and adjudged that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Greene County for the execution of judgment and the collection of costs accrued below.

Costs of the appeal are taxed to the Appellant, Patrick Meagher, for which let execution issue.

Judge Gary R. Wade
Judge Joseph M. Tipton
Special Judge Cornelia A. Clark