IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

April 26, 1996

Cecil W. Crowson
Appellate Court Clerk

MICHAEL A. FOURNIER,	)
	) C.C.A. No. 01C01-9502-CC-00046
Appellant,	)
	) Marshall County
V.	)
	) Hon. Charles Lee, Judge
	)
STATE OF TENNESSEE,	) (Post-Conviction)
	)
Appellee.	)

FOR THE APPELLANT:

Andrew Jackson Dearing, III
117 S. Main Street, Suite 101
Shelbyville, TN 37160

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

William David Bridgers
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

William Michael McCown
District Attorney General

Weakley E. Barnard
Asst. Dist. Attorney General
Marshall County Courthouse
Lewisburg, TN 37091

OPINION FILED: _____

RECKLESS DRIVING JUDGMENT VACATED;
REVERSED AND REMANDED WITH INSTRUCTIONS

PAUL G. SUMMERS,
Judge

O P I N I O N

The petitioner, Michael A. Fournier, was tried in the general sessions court for Marshall County on a warrant charging him with driving under the influence (fifth offense).[1] Following the proof, the judge took the case under advisement. Two weeks later, the judge announced that he had found the petitioner guilty of DUI. Petitioner's counsel was shocked because he had had ex parte communications with the judge and thought the judge was going to find the petitioner not guilty. Counsel approached the bench and reminded the judge of his earlier statement. The judge agreed to find the petitioner guilty of reckless driving and noted such on the warrant.

The petitioner did not appeal the conviction to the circuit court but later filed a petition for post-conviction relief attacking the reckless driving conviction. Following a hearing, the circuit judge dismissed the petition. From that dismissal he appeals claiming that the trial judge erred in dismissing the petition. We reverse and remand with instructions as set out below.

The state initially argues that the petitioner has waived his right to post-conviction relief. A ground for relief is waived " if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1) (1990). Here, the petitioner was convicted of reckless driving in general sessions court. He failed to exercise his right to appeal to the Marshall County Circuit Court for a trial de novo. However, because this defense of waiver was not presented prior to the hearing, the trial judge's hearing on the merits "pretermitted consideration of the procedural bar" and likely precluded application of this waiver defense. Coker v. State, 911 S.W.2d 357, 366 (Tenn. Crim. App. 1995). Thus, we will address his petition on

[1]We note that the DUI statute provides for a "third or subsequent" violation rather than DUI (5th Offense). See Tenn. Code Ann. § 55-10-403 (1993 & Supp. 1995).

its merits.

The testimony at the post-conviction hearing revealed that defense counsel and the general sessions judge spoke briefly at a restaurant some time after the judge had taken the petitioner's case under advisement. Counsel understood the judge to say that he was going to find the petitioner not guilty of the DUI charge. However, when the court reconvened some two weeks later for the announcement in the petitioner's case, the judge said he had found the petitioner guilty of DUI. Somewhat stunned, counsel remarked that he "just about choked" when the announcement was made. Unwittingly, counsel had told the petitioner that the judge was not going to find him guilty. Defense counsel approached the bench and reminded the trial judge of his earlier ex parte statement. He also informed the judge that he had relayed the substance of their conversation to his client.

The general sessions judge testified at the post-conviction hearing that he told counsel the earlier statement was not on the record and had been misunderstood. He added that he had not intended to give counsel the impression that his client would be found not guilty. However, because it was his policy "not to make attorneys look bad," he agreed to find the petitioner guilty of reckless driving. Though the testimony conflicted as to how this transpired, the post-conviction judge found that defense counsel and petitioner had suggested the reckless driving alternative. He also found that based upon the petitioner's suggestion, the general sessions judge had agreed to find the petitioner guilty of reckless driving.[2]

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899-900 (Tenn. 1990). This Court may not reweigh or reevaluate

[2]The record also shows that the district attorney's representative was not in the courtroom when these negotiations took place.

the evidence, nor substitute its inferences for those drawn by the trial judge. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Questions concerning the credibility of witnesses and the weight and value to be given to their testimony are resolved by the trial court, not this Court. Id. The petitioner carries the burden of establishing that the evidence preponderates otherwise. Id.

We note the highly irregular circumstances surrounding this case and the impropriety of ex parte communications between a judge and counsel.[3] Although no rule of law is designed to apply precisely to the facts of this case, our goal is to provide equitable relief to all parties. We also acknowledge the various constitutional rights of the petitioner as well as the interest of the state in exercising its duty to represent its citizens. With these underlying concerns in mind, we address the merits of petitioner's claim.

The petitioner argues that he never consented to nor was he aware of an amendment to the DUI charge to reckless driving. Thus, he seeks to have the reckless driving conviction rendered void but wants to be rid of the DUI charge as well. The petitioner, in effect, has gotten out of the trap but now wants to return for the cheese.[4]

The petitioner correctly cites Murff v. State, 425 S.W.2d 286, 288 (Tenn. 1967) for the proposition that a warrant cannot be amended if the nature of the offense is changed or a new offense added. Further, we recognize that reckless driving is not a lesser included offense of DUI. Ray v. State, 563 S.W.2d 218, 219 (Tenn. Crim. App. 1977) (holding that a warrant charging DUI could not be amended to charge reckless driving). However, we find neither holding useful in the present case.

---

[3] See Tenn. R. S. Ct. 10.

[4] The petitioner is no neophyte to the legal system. In 1990, he was similarly charged with DUI, which apparently was "amended" to reckless driving. He has been in this situation before.

Looking specifically at the pertinent events surrounding the conviction, we see that the general sessions judge, having had the case under advisement, announced in open court that he had found the petitioner guilty of DUI. This decision followed a full hearing on the merits. Only when counsel reminded the court of the ex parte communication, did the trial judge charitably decide to rescue him. The assistant district attorney general was not present when the announcement was made. We agree with the petitioner that the DUI conviction should not have been changed to reckless driving. Accordingly, the judgment of conviction for reckless driving is rendered void and is vacated.

However, the state should not be penalized nor should the petitioner benefit from the unusual turn of events. As noted above, the petitioner is no novice to the legal system. Our aim is to put the parties in the position they occupied at the time of the proper announcement of the verdict. In the interest of justice and equity to all parties, we, therefore, remand to the Circuit Court for Marshall County with instruction to further remand to the general sessions court for the entry of judgment of the appropriate disposition as to the original DUI charge. More specifically, we return the status of this case to the point where the general sessions judge was prepared to announce his decision after having had the case under advisement. The general sessions judge shall then render a verdict. Let the chips fall as they may.

The petitioner has partially met his burden in that the reckless driving conviction is void. However, the remaining matter is remanded to the Circuit Court for Marshall County with instructions as set forth in this opinion.

PAUL G. SUMMERS, Judge

CONCUR:

_____
JOSEPH M. TIPTON, Judge

_____
DAVID H. WELLES, Judge