

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1996 SESSION

FILED

July 26, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

*

C.C.A. # 02C01-9501-CC-00002

Appellee,

*

HARDIN COUNTY

VS.

*

Hon. C. Creed McGinley, Judge

BRENDA J. SMITH,

*

(Bribery and DUI)

Appellant.

*

For Appellant:

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OPINION FILED _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The defendant, Brenda J. Smith, was convicted of bribery and driving under the influence. The trial court imposed consecutive sentences of three years and 11 months and 29 days respectively. Probation was granted after a term of jail of six months for the bribery and 60 days for the DUI. In this appeal of right, the defendant challenges the sufficiency of the evidence on the bribery offense and claims that the trial court should have granted a new trial because the audio tapes of her trial had been lost. We find no error and affirm the judgment.

Pursuant to Tenn. R. App. P. 24(c), the defendant submitted the following statement of evidence in lieu of a transcript of the trial:

[Although charged with two counts of each offense, t]he jury found Ms. Smith guilty in Count 3, bribery [(December 7, 1993, incident)] ... and Count 2, DUI [(November 30, 1993, incident)]....

* * *

...Walstein Jagers of the Savannah Police Department ... testified that on November 30, 1993, he was patrolling on Main Street in Savannah when he noticed a white Honda Prelude run through a red light. Officer Jagers got in behind the vehicle and engaged his blue lights. The vehicle ran off the road twice and came to a stop on Church Street.

Officer Jagers identified Brenda J. Smith as the driver of the vehicle. He testified that she was disoriented and was unable to stand without assistance. Officer Jagers placed Ms. Smith under arrest and transported her to the Hardin County Hospital, where she submitted to [a] drug screen and blood alcohol test.

...Amy Welch ... testified that she had seen the white Prelude leave the road and enter a ditch. On cross examination Ms. Welch testified that Ms. Smith did not appear unsteady or particularly disoriented.

Agent Brian Huggins of the 24th Judicial District Task Force ... testified that on December 2, 1993, he received a telephone call from Brenda Smith asking [t]hat he get a D.U.I. charge against her dropped and that she would pay him to get it done. Agent Huggins reported this matter to the Savannah Chief of Police

Agent Huggins [recorded subsequent] ... telephone calls from the defendant and ... agreed that the two of them would meet At this meeting, there was [a taped] conversation concerning the amount of money to be paid and whether or not it could be taken care of. Agent Huggins testified that Ms. Smith paid him \$200.00 cash and gave him a post dated check in the amount of \$300.00. Ms. Smith requested that Agent Huggins sign a receipt for the money and check. Agent Huggins promised to take care of the matter....

...Agent Huggins testified that Ms. Smith had [also] telephoned Officer Jaggars[, who] ... advised Ms. Smith that Agent Huggins was handling her D.U.I. charge.

Agent Huggins stated that on December 7, 1993, he [recorded] another call from Ms. Smith. At that time she advised him that she had received another D.U.I. charge and that she expected him to get it dismissed....

It was agreed that Agent Huggins and Ms. Smith would meet on December 7, 1993, at the Wal-Mart parking lot and that Ms. Smith would pay Agent Huggins \$300.00.

This [wired] meeting took place under the observation of [the police].... Agent Huggins testified that Ms. Smith gave him the ... \$300.00.... Ms. Smith was taken into custody.

Each tape recording was played for the jury and each of the ... documents were introduced into evidence.

On cross examination Officer Huggins stated that he had [met with] Ms. Smith ... on numerous occasions to [discuss] ... information of drug activity involving her daughter's boyfriend. ... Officer Huggins ... had referred to Ms. Smith as a "flake" [and] ... stated that Ms. Smith had a general reputation for being somewhat "nutty."... Officer Huggins had this impression at the time he was investigating this case....

...Officer Rick Moore of the Savannah Police Department ... testified that on December 6, 1993 he received a call ... that Ms. Smith was driving under the influence. [He] contacted Ms. Smith on Alabama Street, engaged his blue lights and followed her some distance to Hardin County Bank where she did pull over. Officer Moore state[d] that ... Ms. Smith perform[ed poorly on] certain Field Sobriety Test ... and was arrested for D.U.I. [She] ... submitted to a blood test.

...[TBI] Special Agent Jeff D. Crews[,] ... introduced the Official Toxicology report concerning the incident on November 30, 1993 ... [and] ... testified ... that the quantities of medication found in the defendant were within therapeutic range. On cross examination, Agent Fields testified that he could not state with any certainty, the effects of the medications at these specific levels.

...[TBI] Special Agent Terry Fields ... introduced the Official Toxicology Report concerning the incident of December 6, 1993 ... [and] ... testified ... that some of the medications were beyond the therapeutic range. On cross examination, Agent Fields testified that he could not state with any certainty, the effects of the medications at these specific levels.

* * *

...Nicole Briley[,],... the daughter of the defendant[,],... testified that on the morning of November 30, 1993, she and her mother had gone shopping in order for [her] mother to buy her a birthday present. She stated that ... her mother had just left her prior to being stopped by the police [and] ... that she had observed her mother driving and that there was nothing erratic or unusual concerning her ability to operate her vehicle....

Ms. Briley also testified that her mother had been under tremendous stress in the months preceding her arrest. She further stated that her mother had been involved in abusive relationships and that her mother appeared to act on occasion without an appreciation of the consequences.

...Doris Scott ... testified that on the morning of November 30, 1993, the defendant, her daughter, and her grandchild shopped in her store for approximately one hour. Ms. Scott testified that she did not observe any unusual or erratic behavior on the defendant's part. Ms. Scott was asked specifically about the defendant's speech and balance. Ms. Scott noticed nothing unusual about her behavior.

Sherry Briley[,a friend of the defendant,] ... testified that on the morning of December 6, 1993, she spoke with the defendant by telephone Ms. Briley testified that she noticed nothing unusual about her conversation with the defendant. She indicated that the defendant sounded rational, her speech was not slurred and that she did not appear to be under the influence of any medication.

* * *

[Brenda] Smith testified that she had been taking "somas" for an extended period of time. She stated that at no time did she exceed the dosage as prescribed by her physician.

Ms. Smith ... reiterated the prior defense witnesses and stated that while she was under a lot of stress due to conditions within her family, her driving ability was not impaired by the use of her medications.

Concerning the bribery charges, the defendant stated that she had known Officer Huggins ... [and] had worked with him relative to investigating her daughter's boyfriend.... Ms. Smith ... felt that Officer Huggins had offered to assist her because she had assisted him in this regard.

Through tears, the defendant said that her life was in extreme turmoil. She was suffering physical assaults from both her husband and [her] daughter. The father of her child had threatened to take custody away from her and that the thought of being sent to jail, terrified her. This was her explanation for how she had become involved in the bribery charges.

...Dr. Lorne Semarau[,] ... an expert in the field of clinical psychology ... began seeing the defendant in February 1994.

Dr. Semarau testified that Ms. Smith had given him a history of abusive relationships extending well back in her life.... Dr. Semarau described her behavior as extremely agitated and that she had been basically unresponsive to this therapy. He stated that she was suffering from severe depression and extreme anxiety. He felt that while these conditions were now magnified due to the criminal charges, s[o]me had existed for a considerable period of time.

He went on to state that he believed Ms. Smith was addicted to the medication that had been prescribed for her. Dr. Semarau testified that she was emotionally unbalanced to the point of not being concerned about the consequences of her actions. That while she may have comprehended what she was doing and even understood the potential consequences, she was nevertheless, incapable of adapting her behavior accordingly.

Finally, Dr. Semarau stated that he did not believe that the defendant could be a danger to herself or others under certain conditions. The defendant had threatened to take her own life and the lives of other individuals. Dr. Semarau recommended long term therapy.

First, the defendant claims that the state did not introduce either lay or expert testimony to rebut "expert testimony as to her diminished capacity at the time of the offense of bribery." There is reference in the defendant's brief to the issue of sanity but there is no indication in the record that the defendant gave notice of or raised an insanity defense at trial. See Tenn. R. Crim. P. 12.2(a) (defense of insanity requires notice). The defendant contends she did not possess the requisite mens rea because of her distressed emotional state. She points out that a witness for the state had described the defendant as a "flake" and "nutty." There were, however, defense witnesses who testified that the defendant was acting in a normal way on the dates of each of the DUI offenses. Moreover, Dr. Lorne Semarau, the

defense expert, held the opinion that while the defendant "may have comprehended what she was doing and even understood the potential consequences, she was nevertheless, incapable of adapting her behavior accordingly." According to the summary of the evidence, a tape of the actual act of bribery was played for the jury. That tape is not part of the appellate record.

...[D]iminished capacity is not a defense that absolves the accused from culpability; rather, it is a rule of evidence which allows the introduction of evidence to negate the existence of specific intent when a defendant is charged with a specific intent crime.

* * *

... Tennessee, like the majority of states and federal circuits that have considered the issue, does not accept diminished capacity as a defense, that is, diminished capacity is not a means "to defeat a criminal charge." Black's Law Dictionary 377 (5th ed. 1979)... [E]vidence of diminished capacity is relevant not to excuse or defeat a criminal charge but to lessen the offense when it serves to negate mens rea.

* * *

...Consequently, when the general law provides that "[n]o person may be convicted of an offense unless ... [t]he culpable mental state required ... is proven beyond a reasonable doubt," Tenn. Code Ann. Sec. 39-11-201(a)(2) (1991 Repl.), evidence tending to make the existence of that mental state "more probable or less probable" is relevant. Tenn.R.Evid. 401. As such, it is admissible. Tenn.R.Evid. 402.

... While the law presumes sanity it does not presume mens rea. Due process requires that the government prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 363-64, 90 S.Ct. 1068, 1072-73, 25 L.Ed.2d 368 (1970).

State v. Phipps, 883 S.W.2d 138, 143-149 (Tenn. Crim. App. 1994).

On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom.

State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the

witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as triers of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983), cert. denied, 465 U.S. 1073 (1984); Tenn. R. App. P. 13(e).

Bribery, as charged in the indictment, is the knowing or intentional offering, conferring, or agreeing to confer "any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in the public servant's official capacity[.]" Tenn. Code Ann. § 39-16-102(a)(1). Here, there was testimony that the defendant approached the officer about getting a DUI charge dismissed in exchange for money. There was expert testimony of possible diminished capacity; yet, this witness conceded that the defendant may have known what she was doing and understood the potential consequences of her acts. A tape of the offense which was available to the jury is not attached to the appellate record and is, thus, not available for our review. Under all circumstances, we cannot agree with the defendant's argument that there was no evidence to support the jury's finding that the defendant possessed the necessary criminal intent to commit the crime of bribery.

Next, the defendant argues that the trial court erred by denying her motion for a new trial. She complains that she did not learn that the trial tapes had been lost until some six or seven months after the case had been concluded and asserts a denial of due process because her counsel could not possibly recall, in

order to adequately prepare a statement of the evidence, the details of the trial. The trial court denied the motion because (1) the Tennessee Rules of Appellate Procedure provide for instances when no transcript is available, and (2) the motion for new trial was not timely filed. See Tenn. R. App. P. 24(c).

Tenn. R. Crim. P. 33(b) requires that a motion for a new trial be filed within thirty days after the verdict without regard to when the judgment is entered upon the verdict. See also Committee Comments to Tenn. R. Crim. P. 33. Here, the defendant did not file her motion for a new trial until several months after the judgments had been entered and the notice of appeal had been filed. The motion was, therefore, untimely. Further, because the defendant had already filed a notice of appeal, the trial court was without jurisdiction to hear the motion. See State v. Peak, 823 S.W.2d 228, 228-30 (Tenn. Crim. App. 1991). Thus, procedural guidelines preempt our consideration of the issue. Moreover, the loss of the tapes would not have served as a meritorious basis for a new trial. Defense counsel was unable to identify any issues of consequence which were unavailable due to the lack of a verbatim transcript. A statement of the evidence is an acceptable means of preparing a record on appeal. Under these circumstances, we can find no prejudice to the defense.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

Joe B. Jones, Presiding Judge

Jerry L. Smith, Judge
