ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR 08-1413

	Opinion Delivered September 2, 2009
JAMES O. WILLIAMS APPELLANT	APPEAL FROM THE SALINE COUNTY CIRCUIT COURT, [NO. CR-2007-641-T]
V.	HONORABLE GRISHAM PHILLIPS, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

M. MICHAEL KINARD, Judge

James O. Williams appeals from his convictions for first-offense driving while intoxicated (DWI) (Ark. Code Ann. § 5-65-103), refusal to submit to a chemical test (Ark. Code Ann. § 5-65-205), and contempt of court. Following a jury trial, he was sentenced to six months' imprisonment in the county jail for DWI and thirty days for contempt, to be served consecutively. A $1000 fine was imposed. He asserts the following two points on appeal: (1) the trial court erred in permitting his prior refusal-to-submit violations to be admitted into evidence during the sentencing phase of the trial; (2) the trial court erred in finding him guilty of criminal contempt without first obtaining a knowing, intelligent, and voluntary waiver of his right to a trial by jury. We affirm.

On December 8, 2006, appellant was arrested in Saline County. He was found guilty in Saline County District Court, Benton Division, of driving with a suspended

license due to DWI, a violation of the Omnibus DWI Act (first offense), disorderly conduct, and refusal to submit to a chemical test. Appellant appealed to the Saline County Circuit Court, where he received a trial de novo in front of a jury,[1] which found him guilty of DWI (first offense) and refusal to submit to a chemical test. Because of statements made by appellant during a discussion of an appeal bond, the circuit court found appellant to be in contempt of court and sentenced him to an additional thirty days' imprisonment in the county jail. Appellant timely filed a notice of appeal.

Appellant does not challenge the sufficiency of the evidence. Briefly, the facts are these. Deputy Ted Berg of the Saline County Sheriff's Department was working DWI task force around 1:30 a.m. on December 8, 2006. Officer Berg testified that he noticed a vehicle pulling out onto the road that did not have a license plate light on the rear, so he turned around to follow it. The suspect, appellant, pulled over before Officer Berg had turned on his blue lights; he got out of his vehicle and placed his hands on his vehicle before Officer Berg could get out of his patrol car. Upon exiting his patrol car, Officer Berg could smell the odor of intoxicants coming from appellant. The first thing appellant said was that he was "not taking none of [Officer Berg's] tests." Appellant in fact refused both the breathalyzer and field sobriety tests, and Officer Berg placed him under arrest. Officer Berg testified that in addition to the strong odor of intoxicants, appellant had slurred, slow speech and was "very uncooperative" at the jail.

[1] The charges of driving with a suspended license due to DWI, disorderly conduct, and defacing objects of public respect (less than $500) were nolle prossed.

Appellant's first point on appeal is that the trial court erred in permitting his prior violations to be admitted into evidence during the sentencing phase of the trial. Appellant contends that while the statute concerning sentencing evidence allows evidence of a defendant's prior felonies and misdemeanors to be admitted during the sentencing phase, it does not authorize prior *violations* to be admitted. Arkansas Code Annotated section 16-97-103 (Repl. 2006) provides in pertinent part:

> Evidence relevant to sentencing by either the court or a jury may include, *but is not limited to*, the following […]:
>
> (2) Prior convictions of the defendant, both felony and misdemeanor. The jury may be advised as to the nature of the previous convictions, the date and place thereof, the sentence received, and the date of release from confinement or supervision from all prior offenses;
>
> ....
>
> (5) Relevant character evidence;
>
> (6) Evidence of aggravating and mitigating circumstances. The criteria for departure from the sentencing standards may serve as examples of this type of evidence[.]

(Emphasis added.) In the case at hand, the judge allowed into evidence, over the defense's objection, a hand-written document summarizing appellant's previous convictions, which included two prior refusal-to-submit convictions. The exhibit listed the following: (1) a 4/22/99 conviction for refusal to submit to a chemical test; (2) 5/10/99 convictions for DWI and refusal to submit to a chemical test; (3) a 7/26/03 conviction for DWI; (4) 4/19/04 convictions for possession of methamphetamine ("C" felony), unauthorized use of another person's property to facilitate a crime ("B" felony), and possession of drug paraphernalia ("C" felony); (5) an 11/15/07 conviction for DWI.

Appellant argues that his two prior refusal-to-submit convictions should not have been allowed into evidence, as they were neither felonies nor misdemeanors, which are specifically allowed into evidence under the statute. Appellant correctly argues that refusal to submit to a chemical test is a "violation" because no term of imprisonment or confinement is authorized upon conviction. *See* Ark. Code Ann. § 5-1-108(b) (Repl. 2006).[2] Appellant characterizes this point as one of statutory interpretation to be reviewed de novo; the State cites to case law stating that a circuit court's decision to admit evidence in the penalty phase of a trial is reviewed for abuse of discretion. We apply an abuse-of-discretion standard to a trial court's decision to admit evidence in the penalty phase of a trial. *See Crawford v. State*, 362 Ark. 301, 208 S.W.3d 146 (2005).

Appellant contends that if the legislature had intended for violations to be admitted during the sentencing phase of the trial, "it would have plainly so stated." Appellant's argument ignores that the statute expressly states that admissible evidence is not limited to the types of evidence listed. Furthermore, it would be contrary to common sense to allow all other types of criminal convictions except "violations." We will not interpret a statute, even a criminal one, so as to reach an absurd conclusion that is contrary to legislative intent. *Harness v. State*, 352 Ark. 335, 101 S.W.3d 235 (2003).

Our supreme court has stated that "[t]his statutory scheme [of section 16-97-103] simply allows the jury or court to exercise its discretion in considering all evidence relevant to sentencing." *Davis v. State*, 330 Ark. 76, 953 S.W.2d 559 (1997). The

[2] Ark. Code Ann. § 5-65-205 (Supp. 2007) provides that upon refusal to submit to a chemical test a person's driving privileges will be suspended.

Arkansas Rules of Evidence apply during the penalty or sentencing phase of trial. *Buckley v. State*, 349 Ark. 53, 76 S.W.3d 825 (2002). Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Ark. R. Evid. 401. Pursuant to section 16-97-103, certain evidence is admissible at sentencing that would not have been admissible at the guilt phase of the trial. *Buckley*, *supra*. Evidence of uncharged and subsequent misconduct has been held admissible as relevant to sentencing. *See*, *e.g.*, *Rhodes v. State*, 102 Ark. App. 73, 281 S.W.3d 758 (2008) (fifteen-year-old girl's testimony that she also had been raped by appellant–for which appellant was not on trial–was admissible during penalty phase of trial as relevant evidence of appellant's character); *Davis v. State*, 60 Ark. App. 179, 962 S.W.2d 815 (1998) (finding no error in trial court's admission of prior uncharged misconduct during sentencing phase); *Crawford, supra* (evidence of subsequent drug offenses admissible during sentencing). Past criminal behavior proven by a preponderance of the evidence may be considered by a sentencing court even where no conviction resulted. *Marshall v. State*, 342 Ark. 172, 27 S.W.3d 392 (2000). Thus, a broad range of evidence has been held to be admissible during the sentencing phase of trials. The evidence of appellant's prior convictions for refusal to submit to a chemical test was relevant to his sentencing as either character evidence or aggravating circumstances. We hold that admitting appellant's prior refusal-to-submit violations was not an abuse of the circuit court's discretion.

After sentencing, the trial court raised the issue of setting an appeal bond. Appellant inquired whether he was going to have the same lawyer on appeal and told the judge twice "you must of lost your mind" to "saddle" him with the same lawyer on appeal. The court held him in contempt of court and assessed an additional thirty-day sentence for the contempt. Appellant's second point on appeal is that the trial court erred in finding him guilty of criminal contempt without first obtaining a knowing, intelligent, and voluntary waiver of his right to a trial by jury. However, the point is moot, as appellant concedes in his brief that he has already served his sentence for the criminal contempt. The general rule regarding contempt orders is that where the terms of a contempt order have been fulfilled, the issue of the propriety of the contempt order is moot. *Swindle v. State*, 373 Ark. 518, 285 S.W.3d 200 (2008). We decline to address appellant's point under either of the two exceptions to the mootness doctrine. *Id.*

Affirmed.

HENRY and BAKER, JJ., agree.