IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 18, 2003 Session

STATE OF TENNESSEE v. STEPHEN EUGENE DAVIS

Direct Appeal from the Criminal Court for Hamilton County
No. 236861 Stephen M. Bevil, Judge

No. E2002-02680-CCA-R3-CD
August 8, 2003

Defendant, Stephen Eugene Davis, was convicted of violating Tenn. Code Ann. § 55-10-401, which prohibits driving under the influence of an intoxicant. Following a bench trial, Defendant was fined $360 and sentenced to eleven months and twenty-nine days to be suspended after serving thirty days in jail. In this appeal as of right, Defendant argues that the period of confinement imposed is excessive for a first offense and that the trial court placed undue emphasis on Defendant's former employment as a police officer. We agree and conclude that the trial court improperly considered Defendant's failure to accept the State's plea offer. Accordingly, we reduce the period of confinement involved in Defendant's sentence to fifteen days of continuous confinement and affirm the judgment of the trial court in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court Affirmed as Modified

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

W. Gerald Tidwell, Jr., Chattanooga, Tennessee, for the appellant, Stephen Eugene Davis.

Paul G. Summers, Attorney General and Reporter; Christine M. Lapps, Assistant Attorney General; William H. Cox III, District Attorney General; and Ben Boyer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Officer Joe Warren of the Chattanooga Police Department testified that he was operating a stationary radar on Interstate 75 on the evening of July 12, 2000. At around 11:15 p.m., he observed Defendant's vehicle traveling sixty-seven miles per hour in a forty-five miles per hour construction zone. Officer Warren did not observe Defendant driving erratically. He turned on his blue lights and attempted to stop Defendant's vehicle. Officer Warren testified that Defendant drove approximately a half mile before pulling over near an exit ramp. Officer Warren testified that Defendant "had trouble figuring out how to roll [his window] down." Defendant was "real

talkative," although his speech was not slurred. Officer Warren smelled a strong odor of alcohol. Officer Warren did not observe any open containers of alcohol inside Defendant's vehicle. Officer Warren asked Defendant to exit his vehicle, and he noticed that defendant was unsteady on his feet. Officer Warren asked Defendant if he had been drinking any alcohol, and Defendant responded that he had drunk two or three beers. Officer Warren performed three field sobriety tests and concluded that Defendant was too impaired to drive.

At the police station, Defendant consented to a Breathalyzer test. Officer Warren testified that Defendant appeared to read and understand the implied consent form. The test showed that Defendant's blood alcohol level was .15 percent. Officer Warren testified that Defendant was cooperative.

Defendant testified that he lived in Salisbury, North Carolina. Defendant was fifty years old at the time of the offense. His occupation requires that he travel a lot throughout the southeast. Defendant testified that on the date of the offense, he had driven from Nashville to Knoxville, and then from Knoxville to Chattanooga, where he played twenty-seven holes of golf with some of his customers. He also testified that he woke up at 4:30 a.m. that morning, and he was "exhausted" when he was pulled over at 11:15 p.m. Defendant testified that he drank three or four beers while playing golf over a period of six hours. After leaving the golf course, Defendant checked into his hotel, and later met the customers for dinner at a restaurant. Defendant drank one beer with dinner. Defendant was pulled over on his way back to his hotel. Defendant testified that he could not pull over immediately when he noticed blue lights because of the construction barricades on the interstate. Defendant did not notice the posted speed limit. Defendant explained that the reason he had trouble rolling down the car window was that he was driving a rental car and he was not familiar with the controls. Defendant also testified that he was not wearing his contacts.

Defendant was employed as a police officer in Lexington, North Carolina, from 1971 until 1976. During his training at the police academy, Defendant was certified to operate a Breathalyzer machine. Defendant testified that he consented to taking the Breathalyzer test because he believed "there's no way I'm going to blow over .04 or .05." Defendant testified that he had been chewing gum, which could have distorted the results of the test.

Following a bench trial, the trial court found Defendant guilty of driving under the influence of an intoxicant. Our legislature has provided that a defendant convicted of a first offense DUI shall be fined not less than $350 and not more than $1,500 and shall be confined for a period of not less than two days and not more than eleven months and twenty-nine days. Tenn. Code Ann. § 55-10-403(a)(1) (1997 & Supp. 2002). Furthermore, a person convicted of the offense must be prohibited from driving in Tennessee for one year. *Id*.

Defendant complains that the trial court's imposition of a thirty day period of confinement is excessive and that he should have received the minimum sentence of forty-eight hours incarceration. Defendant argues that: (1) his sentence should have been mitigated by his age and lack of a criminal record; and (2) the trial court erred by improperly considering Defendant's former

employment as a police officer and punishing Defendant for his failure to enter a guilty plea and accept the minimum sentence.

Our review of the sentence imposed by the trial court is *de novo* with a presumption that the trial court's findings are correct. Tenn. Code Ann. § 40-35-401(d) (1997). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If the trial court fails to comply with the statutory directives, our review is *de novo* with no presumption of correctness. *State v. Poole*, 945 S.W.2d 93, 96 (Tenn. 1997). The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d) (1997) Sentencing Commission Comments.

The trial court stated its reasons for ordering Defendant to serve thirty days in confinement as follows:

> I've found people who come in who have been arrested and admit their guilt and enter a plea. I think through the years the court's recognized that they are accepting responsibility for their action and willing to move and should be given some consideration for that. Mr. Davis, as I'm sitting here listening to the proof, I'm wondering why is this case being tried? You failed two field sobriety tests. You had a strong odor of alcohol. He was unsteady on his feet. He was very talkative, and he tested .15 on the Breathalyzer.
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> Maybe because of his experience – I don't know – he thought there was a chance that he could beat the case. At any rate, I find for – a prior officer of the law who knows better than to drive and drink, who has arrested people for drunk driving, driving in a construction zone at that time, which he knew was a construction zone – whether it was posted or not, he knew he shouldn't have been going 67 miles an hour, and I have some problem – as I said, I have some problems with his credibility in his testimony. I think due to all those factors, he's not like an ordinary citizen who doesn't know the law. He knows it, and he's arrested people for DUI and he's administered the Breathalyzer test, I think he deserves more than the minimum.

The trial court further emphasized Defendant's former employment as a police officer:

> [W]e are inundated with DUI cases, and people – you know, it just seems to me that people who are in a position that Mr. Davis is in, who knows better than to do that – he's had experience in doing this – should be held to a higher degree of accountability than somebody else who doesn't know the difference, who are lay citizens who [do not] know what the law is. . . .

At the conclusion of the hearing on Defendant's motion for new trial, the trial judge further explained:

> [W]hen a person [charged with a DUI] chooses to reject [the State's offer to plead guilty] and require[s] the State to prove their guilt, and there is a trial, then the court, oftentimes, has the advantage of hearing some facts about the person and about the case that the court would not otherwise hear, and which oftentimes results in the necessity for a stiffer sentence than the minimum sentence of forty-eight hours, which I found to be true in Mr. Davis' case. Because I felt like, first of all, he wasn't honest with the court. . . . [T]hat, coupled with the fact that Mr. Davis is not a neophyte to the system; he was a police officer, . . ., and I firmly believe that Mr. Davis thought with all of his experience that he could beat the case and was willing to take his chance and try the case and see if he could beat it.
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> For all those reasons, I felt like he should be held to a higher standard than a person who is not familiar with the system, a lay person who hasn't been in law enforcement. . . . [Defendant] knew and should have known that he was operating his vehicle under the influence. And as I said, he had every opportunity in the world to come in and plead guilty and take his sentence and go on. And now that he's been convicted, he's saying, well, I'd like the forty-eight hours. But it just doesn't work that way.

It appears from the record that the trial court placed the greatest emphasis on Defendant's employment as a police officer from 1971 to 1976. "Fairness dictates [that Defendant's] sentence should not be out of line with defendants similarly situated." *State v. Joe Hillis*, 1991 Tenn. Crim. App. LEXIS 376, No. 01-C-01-9009-CC-00237 (Tenn. Crim. App. filed at Nashville, May 16, 1991) *perm to app. not filed*. Furthermore, Defendant's decision to reject the State's plea offer is not a factor that should be used to increase the amount of incarceration. It is clear, however, that the trial court considered this factor in its sentencing decision. In fact, at a post-trial hearing on Defendant's motion for a new trial, the following transpired:

> [THE COURT]: Mr. Tidwell, was there an offer from the state in this case to plead guilty to a first offense DUI and take the forty-eight hours?
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> [DEFENSE COUNSEL]: I believe there was. Yes, sir, there was.
>
> [THE COURT]: And had he done that, he could have done the forty-eight hours and kept his job, couldn't he?
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> [DEFENSE COUNSEL]: Yes, your honor, he could have.

> [THE COURT]: So he had the opportunity. It's not like the court's taking that away from him, he had that opportunity --
>
> [DEFENSE COUNSEL]: I didn't mean to imply.
>
> [THE COURT]: -- to admit his guilt, take the forty-eight hours, the minimum sentence, keep his job, and go on about his business.

For the forgoing reasons, our review of Defendant's sentence is *de novo* without a presumption of correctness. In conducting a *de novo* review, we must consider: (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any mitigating or statutory enhancement factors; (6) any statement that the defendant made on his own behalf; (7) the potential for rehabilitation or treatment. Tenn. Code Ann. § 40-35-102, -103, -210 (1997); *see Ashby*, 823 S.W.2d at 168; *State v. Moss*, 727 S.W.2d 229, 238 (Tenn. 1986).

The statute pertaining to driving under the influence of an intoxicant provides for a maximum punishment of eleven months and twenty-nine days and a mandatory minimum period of confinement of forth-eight hours for a first offender. Tenn. Code Ann. § 55-10-403(a)(1) (1997 & Supp. 2002). The only function of a trial court in ordering the sentence of a DUI offender is to determine the period of incarceration above the minimum mandated by statute that is to be suspended. Tenn. Code Ann. § 55-10-403(c); *State v. Combs*, 945 S.W.2d 770, 774 (Tenn. Crim. App. 1996); *State v. David T. Jones*, No. 01C01-9710-CC-00445, 1998 Tenn. Crim. App. LEXIS 1303 (Tenn. Crim. App. at Nashville, filed December 21, 1998), *no perm. to app. filed*. Therefore, the issue before this Court is whether the trial court erred in sentencing Defendant to a period of confinement above the statutory minimum.

The trial court also found that Defendant lacked candor at trial. The trial court's finding that Defendant was untruthful at trial is a proper sentencing consideration. *State v. Chestnut*, 643 S.W.2d 343, 353 (Tenn. Crim. App. 1982). Furthermore, uncontroverted facts in the record that Defendant was speeding in a construction zone and that he had received two prior speeding tickets justify a sentence with 15 days confinement in our *de novo* review.

CONCLUSION

For the forgoing reasons, we reverse the Judgment insofar as it orders 30 days of confinement and remand this case to the trial court for entry of an amended judgment including all existing provisions except incarceration of 15 days confinement rather than 30 days.

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THOMAS T. WOODALL, JUDGE