IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED

May 30, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 03C01-9503-CR-00075**
Appellee,	)	
	)	**GREENE COUNTY**
VS.	)	
	)	**HON. JAMES E. BECKNER,**
CAREY MONGER,	)	**JUDGE**
	)	
Appellant.	)	(DUI)

FOR THE APPELLANT:

ROGER A. WOOLSEY
118 S. Main St.
Greeneville, TN 37743

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

AMY L. TARKINGTON
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

C. BERKELEY BELL
District Attorney General

CECIL C. MILLS, JR.
Asst. District Attorney General
113 W. Church St.
Greeneville, TN 37743

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted for driving under the influence of an intoxicant (DUI) and found guilty of same after a jury trial. After a sentencing hearing, the defendant was sentenced to eleven months, twenty-nine days, with ten days to be served in confinement. She was also assessed a fine of $260.00.

She now appeals both her conviction and her sentence, alleging in her first issue that the trial court erred when it admitted into evidence certain statements she made to the police. In her second issue she contends that her ten day period of incarceration is excessive. After a review of the record, we find no merit to either of the defendant's grounds for appeal and affirm the judgment below.

During the early morning hours of April 24, 1994, Officers Danny Greene and Rick Coyle responded to a call and found the defendant next to her car on the side of Snapps Ferry Road in Greene County. The car had a flat left front tire and had sustained some damage on the left side. Officer Greene asked the defendant where she had been and she responded that she had been to a party. After being asked if she'd had anything to drink, the defendant stated that she had had two beers. Officer Greene then administered three field sobriety tests, and the defendant failed all three of them. Officer Greene testified that he had also noticed the odor of alcohol around her, that she had been "very unsteady on her feet," that she had had "trouble getting her license out of [her] billfold," and that her eyes had been glassy and bloodshot. After administering the sobriety tests, Officer Greene arrested the defendant.

Following her arrest, the defendant was taken to the detention center.

While there, she refused to take a blood alcohol test. She also gave a statement to Officer Roderick, which was tape recorded.

Prior to the trial and on the defendant's motion, the trial court issued an order which states, in pertinent part, "that the defendant be allowed to inspect [and] copy . . . any recorded testimony of the defendant which relates to the offense(s) charge[d]." This order was in accord with Tenn. R. Crim. P. 16(a)(1)(A) which states, "Upon request of a defendant the state shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant." The defendant now complains that, despite repeated requests, the State never furnished her with a copy of the tape recorded statement she made to Officer Roderick while she was at the detention center. Accordingly, she claims, she was denied a fair trial and is entitled to a new trial.

We disagree. We must also confess to being somewhat confused by the defendant's argument. In her brief she states that "the trial court erred in allowing into evidence statements allegedly made by [her]." However, Officer Roderick, the officer who took the contested statement, did not testify at trial. Nor did the State seek to introduce the tape-recorded statement into evidence. The State did not even use any portion of the statement during its cross-examination of the defendant in an attempt to impeach her.[1] Thus, it does not appear that any portion of the defendant's tape-recorded statement was introduced at trial.

---

[1] In her brief, the defendant complains about the admission of "[i]ncriminating statements [she] allegedly made . . . , including she did not know where she wrecked, that she did not tell the officer that a tire blew out, [and] that she requested a blood test or not [sic]." In our review of the record, however, it does not appear that the State asked her about any statements she made to Officer Roderick. Rather, it appears that the State was asking her questions about what she told the officers at the scene of the accident. The only questions about what occurred after she arrived at the detention center were whether she was informed about the implied consent law, whether she was shown the Intoximeter and asked to take that test, and whether she refused to take any blood alcohol tests. These questions did not involve the admission of any statements the defendant had made to Officer Roderick.

Additionally, the defendant's lawyer knew about the statements contained in the tape prior to the trial. We recognize that the State violated Tenn. R. Crim. P. 16 when it did not produce a copy of the tape. The trial court also recognized the violation and scolded the State accordingly. Given that the State did not use the statement, the trial court did not err by refusing to do more. We fail to see how the defendant was prejudiced in the slightest manner by the State's failure to turn over a copy of the tape to the defendant. This issue is without merit.

Rule 16 (a)(1)(A) also provides that "the substance of any oral statement which the state intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogations by any person then known to the defendant to be a law-enforcement officer" shall be produced "[u]pon request of a defendant." To the extent that the defendant is also attempting to argue that the State failed to produce this information, that is, statements to officers other than Officer Roderick, the defendant did not raise this objection at trial. The only statement about which the defendant objected at trial was the one which was tape-recorded. Moreover, the trial court's order in this matter does not address the production of this information; accordingly, since the defendant's motion is not in the record, we can only presume that the defendant did not request the production of this information. Therefore, the defendant has waived any issue with respect to the State's production of "the substance of any oral statement."

In the defendant's second issue she complains that her sentence is excessive. After a sentencing hearing, the trial court sentenced the defendant to eleven months, twenty-nine days, all suspended except for ten days. The defendant contends that the trial court should have found mitigating factors, and should have sentenced her

to the minimum incarceration period of forty-eight hours.

When a defendant complains of his or her sentence, we must conduct a de novo review with a presumption of correctness. T.C.A. § 40-35-401(d). The burden of showing that the sentence is improper is upon the appealing party. T.C.A. § 40-35-401(d) Sentencing Commission Comments. This presumption, however, "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).

The misdemeanant, unlike the felon, is not entitled to the presumption of a minimum sentence. State v. Creasy, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). 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, and the court should not impose such percentages arbitrarily. T.C.A. § 40-35-302(d).

As required for the presumption of correctness, the trial court considered "the sentencing principles and all relevant facts and circumstances." The sentencing court found no mitigating factors, and one enhancement factor: "the crime was committed under circumstances under which the potential for bodily injury to a victim was great." T.C.A. § 40-35-114(16). Specifically, the trial court was concerned that this DUI offense involved a "wreck." The defendant contends that the trial court should also have found two mitigating factors: that because of her youth she lacked substantial judgment, and that she had no prior criminal record. T.C.A. §40-35-113 (6),(13). We first note that a clean record is not a specified mitigating factor and is more properly taken into

consideration in other aspects of the sentencing calculus.

The defendant was almost twenty years old when she committed this crime. The trial judge specifically found that the defendant's "age and . . . circumstances [don't] fit together to activate" the mitigating factor for lack of substantial judgment due to youth. The evidence does not preponderate against this finding.

The weight to be given each of the mitigating and enhancing factors, if any, is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). We see no abuse of discretion here. Moreover, the trial court took special pains to "highlight" certain sentencing considerations he considered relevant in this case, stating:

> Confinement is necessary to avoid depreciating the seriousness of the offense. Confinement is particularly suited, providing effective deterrence to others likely to commit similar offenses.
> . . . .
> The sentence imposed should be no greater than that deserved for the offense committed. Inequalities in sentences should be avoided, and the sentence imposed should be the least severe measure to achieve the purposes for which the sentence is imposed.

The defendant having failed to show how the evidence preponderates against the propriety of her sentence, this issue is without merit. The judgment below is affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge