IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

March 25, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	No. 03C01-9604-CC-00158
Appellee	)	
	)	BRADLEY COUNTY
vs.	)	
	)	Hon. R. Steven Bebb, Judge
LOWELL B. BENNINGTON,	)	
	)	(D.U.I.)
Appellant	)	

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OPINION FILED: _____

AFFIRMED

William M. Barker

OPINION

The appellant, Lowell B. Bennington, appeals as of right his conviction of driving under the influence of an intoxicant following a bench trial in the Bradley County Criminal Court. The only issue raised on appeal is the sufficiency of the evidence supporting the trial court's verdict. After a thorough review of the record, we find the evidence sufficient and affirm the conviction and sentence of the trial court.

At 12:06 a.m. on May 30, 1995, Sergeant Teresa Coultry of the Bradley County Sheriff's office responded to a call by occupants of a private residence that an unidentified automobile was parked in the driveway of the residence. Upon her arrival, Sergeant Coultry found the appellant passed out in his car with the motor running and the parking lights on.[1] Upon inspection of the interior of the vehicle, Sergeant Coultry discovered numerous alcoholic beverages. She testified that she found one liter bottle of 100 proof schnapps with two cupfuls remaining, a 750 milliliter bottle of 48 proof cinnamon schnapps with one and a half cupfuls remaining, an empty 12 ounce beer bottle, and four unopened beer cans. A plastic cup, containing approximately one inch of cinnamon schnapps, was also located between the front two seats. The appellant was arrested and charged with D.U.I. A blood alcohol test was subsequently performed at 1:35 a.m., an hour and a half after appellant's being discovered behind the wheel. At that time the appellant's blood alcohol level was .26%. Based upon the alcohol missing from the bottles, a T.B.I. agent employed in the Forensic Service Division opined that the appellant had consumed the equivalent of twenty-four to twenty-five drinks.[2]

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[1]At the time, appellant was a state trooper with the Tennessee Highway Patrol. He was subsequently discharged from that employment.

[2]He testified that if that amount had been consumed all in one setting it would result in a maximum blood level of .40%. He also stated that appellant's blood level at 1:00 a.m. was probably .27% and the missing alcohol could "very easily" get a person to this level. Moreover, the agent stated that at a .26% level, it would take approximately ten hours to dissipate the blood alcohol level below .10%. Finally, the agent qualified his testimony by stating that the calculations, as well as a person's blood alcohol level, are dependent upon numerous individual characteristics and other quantitative

In his defense, the appellant testified in his own behalf and also introduced the testimony of several witnesses. Mike Phillips, who resided in the appellant's apartment complex, testified that he was with the appellant from approximately 4:00 p.m. or 5:00 p.m. until approximately 10:30 p.m. on the evening of May 29, 1995. At approximately 10:30 p.m., the appellant left to go to a party which was hosted by a Bradley County Deputy Sheriff. During their time together, Phillips testified that he and the appellant each drank one beer and one small shot of vodka, each less than one ounce. He said they consumed no other alcohol. When questioned about appellant's physical condition and demeanor, Phillips stated that the appellant did not appear to be intoxicated when he left to attend the party, that he would have ridden in an automobile with the appellant, and that the appellant did not appear impaired when he departed for the party.

Prior to leaving the apartment complex, the appellant testified that he called the deputy's house to obtain directions from the host of the party, as he had never been to the home before. Jason Whitamore, a Chattanooga police officer, was present at the party and talked with the appellant by phone. The appellant testified that he wrote down the directions that Whitamore relayed to him.

The appellant testified that sometime prior to 11:00 p.m. he lost his way and made several phone calls from his vehicle in an attempt to find the party. Whitamore and two other law enforcement officials testified that they each spoke with the appellant by phone during his search for the party. Each testified that nothing about appellant's speech indicated that he was intoxicated.

The appellant testified that around 11:00 p.m. he pulled off the public roadway into a private driveway to wait for a friend to pick him up. Appellant testified that he was not intoxicated when he pulled into the driveway, although he admitted that he had already consumed one beer, one shot of vodka, and a few sips of cinnamon

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factors which were unknown in the present case.

schnapps that evening. While sitting in his car in a stranger's driveway, the appellant testified that he drank from two bottles of peach and cinnamon schnapps. At some point, he passed out.

At the conclusion of the evidence presented in this bench trial, the trial court found the appellant guilty of driving under the influence of an intoxicant. The trial court specifically found that the appellant was intoxicated at the time he drove into the private driveway. Appellant received the minimum sentence for this offense.

In order to sustain a conviction for D.U.I., the State was required to prove beyond a reasonable doubt that the defendant drove or was in physical control of a motor vehicle on a public road or any premises generally frequented by the public at large while under the influence of an intoxicant. See Tenn. Code Ann. §55-10-401(a)(1) (Supp. 1996). The appellant argues that the State failed to carry its burden because the only evidence before the court was that he was unimpaired while operating his motor vehicle upon a public roadway and became intoxicated only after entering a private driveway. He contends that the circumstantial evidence of guilt did not exclude every other reasonable hypothesis other than guilt, and that it therefore was insufficient to support his conviction. We disagree.

An appellant challenging the sufficiency of the evidence has the burden of illustrating to this Court why the evidence is insufficient to support the verdict returned by the trier of fact in his or her case. This Court will not disturb a verdict of guilt for lack of sufficient evidence unless the facts contained in the record and any inferences which may be drawn from the facts are insufficient, as a matter of law, for a rational trier of facts to find the defendant guilty beyond a reasonable doubt. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). In our review we must consider the evidence in the light most favorable to the prosecution in determining whether "any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560

(1979). We do not reweigh or reevaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record, as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Although there may be no direct evidence proving a defendant has committed a crime, criminal conduct may be established by circumstantial evidence alone. State v. Tharpe, 726 S.W.2d 896. 899-900 (Tenn. 1987). The circumstantial evidence, however, "must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant." State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971) (emphasis added). We must remember that the trier of fact decides the weight to be given to circumstantial evidence and that the inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence, are questions primarily for the trier of fact. See Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

The appellant admits that he was in physical control of his vehicle and was intoxicated at the time of his arrest. However, when appellant was arrested, he was parked in a private driveway. Therefore, in order to carry its burden of proof, the State had to demonstrate that appellant was intoxicated before he pulled into the private driveway; i.e., while driving on a public road. Our review of the record leads us to conclude that the trial court, the trier of fact, was justified in concluding that the State met its burden by the circumstantial evidence introduced at trial. In his ruling, the trial judge remarked: "I do not believe that any reasonable person, much less a law enforcement officer, would park in someone's driveway and sit there and start drinking if they were not impaired at the time that they started this extra drinking." In other

words, the trial court concluded that any other hypothesis save guilt was an unreasonable hypothesis. That was the prerogative of the trier of fact.

Furthermore, the scientific proof likewise demonstrated the unreasonableness of appellant's theory. The T.B.I. agent testified that, in his opinion, if appellant had consumed all the alcohol that was missing from the liquor bottles only after he pulled into the driveway and before the officers discovered him, approximately one hour, his blood alcohol level would likely have been .40%. In contrast, his blood alcohol level was determined to be .26%. The reasonable inference obviously was that the appellant had been drinking for more than one hour prior to his arrest and therefore was drinking while in control of his automobile on a public roadway. In sum, like the trial court, we find the evidence so strong and cogent as to exclude any other reasonable hypothesis other than the appellant's guilt. Although the scientific evidence at trial did not make appellant's theory impossible, it did make such defense unreasonable and the trial court did not err in finding appellant guilty.

We believe that a "web of guilt" has been woven around the appellant from such facts and circumstances the finder of fact could draw no other reasonable inference save the guilt of the appellant beyond a reasonable doubt. State v. Sexton, 917 S.W.2d 263, 265 (Tenn. Crim. App. 1995).

The judgment of the trial court is affirmed.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge