IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1999 SESSION

FILED

December 3, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	C.C.A. No. 03C01-9811-CR-00411
	)	
vs.	)	Hamilton County
	)	
JOHNNY WADE MEEKS,	)	Hon. Rebecca J. Stern, Judge
	)	
Appellant.	)	(DUI)
	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The defendant, Johnny Wade Meeks, appeals from his conviction of driving under the influence. Meeks received his conviction in the Hamilton County Criminal Court at the conclusion of a jury trial. The trial court sentenced him to serve 48 hours in the county jail, with the balance of the eleven-month, 29 day sentence to be served on probation. In this appeal, the defendant raises three issues for our consideration

1. Whether the evidence sufficiently supports his conviction.
2. Whether the state proved venue.
3. Whether the trial court erred in its instruction on the definition of "physical control" as used in the driving under the influence statute.

Having reviewed the record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

This interesting case tests the boundaries of the driving under the influence statute, which allows a conviction not only where there is evidence of actual driving while under the influence, but also upon mere evidence that a defendant was in "physical control" of a vehicle while under the influence. In accord with previous decisions of this court and the Tennessee Supreme Court, we hold that the defendant who drank alcohol, went to his parked vehicle to sleep it off, and fell asleep with the car engine running is within the reach of the driving under the influence statute. This case also presents the question whether the pattern jury instruction on "physical control" is inadequate because it does not include Tennessee's totality-of-the-circumstances test for "physical control." However, we are unable to reach the merits of this issue because the record does not reflect that it was presented to the court below.

The facts presented at trial revealed that shortly after 3:00 a.m. on July 10, 1997, Officer Gerry Davis of the Chattanooga Police Department was patrolling the area around Brainerd Road and Lee Highway. He noticed a vehicle on the parking lot of Ankar's, a restaurant and bar, with steam or smoke coming out of the tail pipe and its lights on. Upon further inspection, Officer Davis discovered the defendant slumped over the steering wheel asleep. Officer Davis returned to

his patrol vehicle, where he retrieved and set up a video camera. In the four to five minutes it took him to complete this task, the defendant did not stir.

After he set up the video camera, Officer Davis awakened the defendant by knocking on the window. The defendant turned off the ignition and got out of his van. The defendant was somewhat confused and said he thought he was in a hospital parking lot. The defendant also said something about his mother.[1] The defendant told Officer Davis he had consumed two screwdrivers in Ankar's earlier that evening. Officer Davis observed the defendant's eyes to be very red, his movements to be delayed, and he smelled of alcohol. The officer gave the defendant several field sobriety tests, and the defendant performed poorly. Believing that the defendant exhibited a high level of impairment, Officer Davis arrested him. Thereafter, the defendant performed a breathalyser test at 4:49 a.m. which indicated his blood alcohol level to be .10.

To counter the state's proof, the defendant offered evidence that he had been extremely tired on the evening in question, having worked that day, visited his mother in the hospital until 9:00 or 10:00 p.m., and eaten dinner and listened to karaoke at Ankar's. When the defendant exited Ankar's around 12:00 or 1:00 a.m., he was extremely tired. Therefore, he turned on the engine of his car, reclined his seat, and took a nap. The defendant travels extensively in his employment, and he often took afternoon naps at rest stops with his vehicle running. When the defendant was awakened by Officer Davis, he was startled. He did the best he could on the field sobriety tests; however, he wondered whether his sleepy state and the effects of his childhood case of polio had affected his balance. The defendant recalled having at least two drinks at Ankar's. The defendant said he took a nap because he was tired, not because he had been drinking.

Four witnesses who had known the defendant for many years testified that the defendant had a very good reputation in the community. All of the

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[1]According to defense proof, the defendant's mother was hospitalized on the date in question. The defendant testified he had visited her earlier that evening.

witnesses affirmed that they would believe the defendant's testimony under oath. None of the witnesses had ever observed the defendant consume alcohol.

After the jury returned its verdict of guilt, it asked to make a statement to the court. The court allowed the jurors to speak, and they indicated their dissatisfaction with the driving under the influence law. They perceived the definition of "physical control" to be so broad that it could result in convictions of individuals who had no intent to drink and drive, such as the defendant. The jurors actually commended the defendant for trying to "sleep it off," rather than drinking and driving. Further, the jurors indicated they had no choice about their verdict given the broad definition of "physical control."

Against this factual backdrop, the defendant appeals.

I

The defendant challenges the sufficiency of the convicting evidence. When an accused challenges the sufficiency of the evidence, an appellate court's standard of review is whether, after considering the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Dykes, 803 S.W.2d 250, 253 (Tenn. Crim. App. 1990).

In determining the sufficiency of the evidence, this court should not reweigh or reevaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Nor may this court substitute its inferences for those drawn by the

trier of fact from the evidence. Liakas v. State, 199 Tenn. 298, 305, 286 S.W.2d 856, 859 (1956); Farmer v. State, 574 S.W.2d 49, 51 (Tenn. Crim. App. 1978). On the contrary, this court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. Cabbage, 571 S.W.2d at 835.

With respect to driving under the influence, and as pertinent to the present case, the Code provides

> It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:
>
> (1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system. . . .

Tenn. Code Ann. § 55-10-401 (1998).

Where the issue is whether the defendant was in "physical control" of the vehicle, the proper methodology for analyzing the facts is a "totality of the circumstances" approach. State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993). Under this framework, such factors as "the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle, or the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise" are relevant. Id.

In the light most favorable to the state, the defendant was alone and in the driver's seat of his van, which was parked on the parking lot of a commercial establishment, an area "generally frequented by the public at large." The motor was running, and the vehicle lights were on. The defendant exhibited signs of intoxication, including slurred speech, red eyes, delayed movement, failure of field sobriety tests, and the smell of alcohol on his person. The defendant admitted consuming two screwdrivers in a restaurant/bar earlier that evening. After he was taken to the jail and given an intoximeter test, his test result was .10 percent. These

facts sufficiently support a finding of guilt of the crime of driving under the influence beyond a reasonable doubt. Cf. id. at 762 (defendant convicted on evidence that he was asleep at wheel, truck parked in the road, motor off and keys in defendant's pocket); State v. Roger David Browder, No. 02C01-9606-GS-00201, slip op. at 14-16 (Tenn. Crim. App., Jackson, Feb. 9, 1998) (defendant convicted of being in physical control despite lack of evidence that he drove to parking lot and in face of evidence that he was unable to drive away from parking lot due to intoxication and injury), perm. app. denied (Tenn. 1998); State v. James Issac Mabe, No. 03C01-9402-CR-00051, slip op. at 5 (Tenn. Crim. App., Knoxville, Oct. 25, 1994) (DUI evidence sufficient when Mabe was found slumped over steering wheel of car parked in a lot at a closed business, engine running; court indicates state is not required to prove that defendant intended to drive the vehicle).

II

Next, the defendant claims the state failed to prove venue. At trial, the state is required to prove venue by a preponderance of the evidence. Tenn. Code Ann. § 39-11-201(e) (1997). Only slight evidence will suffice if it is uncontradicted. State v. Bloodsaw, 746 S.W.2d 722, 724 (Tenn. Crim. App. 1987). A jury may infer venue from proven facts. State v. Reed, 845 S.W.2d 234, 238 (Tenn. Crim. App. 1992).

In the present case, Officer Davis testified that he was employed by the Chattanooga Police Department and was on routine patrol duty in the Brainerd Road and Lee Highway area when he encountered the defendant at Ankar's on the night in question. It is beyond dispute that the city of Chattanooga is within Hamilton County. See Tennessee Blue Book 588 (1998). Moreover, the jury could draw reasonable inferences from Officer Davis' testimony about Ankar's, Brainerd Road and Lee Highway. Cf. State v. Alonzo Tony Watson, No. 01C01-9606-CC-00260, slip op. at 9 (Tenn. Crim. App., Nashville, Jan. 14, 1998) (jury could infer venue from state's witnesses' testimony about business establishments and street names). This evidence was not challenged at trial. Thus, we readily conclude that the state carried its burden of proving venue by a preponderance of the evidence.

III

Finally, we consider whether the trial court erred in its instruction on the definition of "physical control." As discussed in section I above, the issue of whether a defendant was in "physical control" of a vehicle is determined under the totality-of- the-circumstances test announced in State v. Lawrence, 849 S.W.2d 761, 765 (Tenn. 1993). The charge the trial court gave was from the pattern jury instruction, which did not include any language addressing the Lawrence totality-of-the-circumstances test. See T.P.I. - Crim. 38.06 (4th ed. 1995).

The pattern instruction given by the trial court is as follows:

> Physical control: for a person to be in physical control of a motor vehicle, the person must be present at or near a motor vehicle and must have the ability to determine whether or not such motor vehicle is moved and, if so, to where it is moved. It is not necessary that the motor of a motor vehicle be running or capable of starting for a person to be in physical control of such vehicle. A person may be in physical control of a motor vehicle without driving, starting or moving the motor vehicle.

A totality-of-the-circumstances instruction, as prompted by Lawrence, has recently been approved by this court. See State v. Charles R. Brown, No. 03C01-9806-CC-00213, slip op. at 7 (Tenn. Crim. App., Knoxville, Jun. 2, 1999), perm. app. denied (Tenn. 1999); see also James Issac Mabe, No. 03C01-9402-CR-00051, slip op. at 5 (Tenn. Crim. App., Knoxville, Oct. 25, 1994). In Charles R. Brown, the pattern instruction was supplemented by the following language:

> When the issue is the extent of the defendant's activity necessary to constitute physical control you should take into account all the circumstances. That is the location of the defendant in relation to the vehicle, the whereabouts of the ignition key, whether the motor was running, the defendant's ability but for his intoxication to direct the use or non-use of the vehicle, and the extent to which the vehicle itself is capable of being operated or moved under its own power.

Charles R. Brown, slip op. at 7. On the strength of Lawrence and Charles R. Brown, the pattern instruction supplemented by a totality-of-the-circumstances charge, such as that given in Charles R. Brown, is undoubtedly a correct exposition of the law in a case such as the one now before us. The question we must determine, however, is whether the defendant has properly raised and preserved the claimed right to a totality-of-the-circumstances instruction, as he now asserts on appeal.

The record reflects that an off-the-record, in-chambers conference was held during the trial at which the defense objected to the definition of physical control with which the trial court planned to charge the jury. The trial court made an on-the-record reference after the return of the verdict to this off-the-record proceeding, stating, "[Defense counsel] had some suggestions [about the proper charge on physical control] and we ended up going with the pattern instruction because those instructions have been approved, basically, or in other words, they have been found to be legally valid." In his amended motion for new trial, the defendant alleged that the trial court's instruction on physical control was "too broad and encompasse[d] non-criminal conduct." At the hearing on the motion for new trial, defense counsel merely objected to the instruction the court had given as too broad. Counsel also raised his concern about the fact that the objection had not been made on the record. The court observed, "I think we will stipulate for the record that there was a huge objection by [defense counsel] to this [instruction on physical control] and a long discussion and lots of examining of what it ought to be." Following the hearing, the trial court entered an order supplementing the record, which provided

> That the record is amended to reflect that counsel for Defendant objected to the Court's detailed instruction to the jury regarding physical control as given on page 125 of the trial transcript. Said objection, although not made on the record, was made in the Judge's chambers, prior to the instruction being given, and the Court overruled

said objection.

First, we review the nature of the defendant's complaint about the trial court's instruction to determine whether it was an objection to an erroneous charge, an objection to an omission of a specific charge, or a request for a special

instruction. See Tenn. R. Crim. P. 30(b). The analysis is important, because if the instruction is erroneous or a special instruction request is not granted, the defendant may raise the issue in his motion for new trial without making an immediate objection; however, "alleged omissions in the charge must be called to the trial judge's attention at the trial or be regarded as waived." State v. Haynes, 720 S.W.2d 76, 84-85 (Tenn. Crim. App. 1986).

We do not regard the trial court's instruction to be an erroneous statement of the law, so far as it went. Thus, we conclude that the defendant's complaint, to be tenable, must amount to an objection about an omitted instruction or a request for a special instruction that was denied. The record does not clearly reflect the nature of the complaint made to the trial court, but the form of the complaint made on appeal is capable of fitting within either rubric.

As an objection to an omitted instruction, the defendant's claim is defeated because the record fails to reflect that a proper, timely objection was made. See Haynes, 720 S.W.2d at 84-85; State v. James R. Hawkins, No. 02C01-9603-CR-00098, slip op. at 27 (Tenn. Crim. App., Jackson, May 23, 1997). Although the record reflects that objections to the court's proposed and actual charges were made, it does not clearly reflect the nature of those objections nor that they were related to the issues as framed on appeal. As best we can tell, the nature of the objection made at the trial level was that the charge was unduly broad and could in some cases perhaps result in a conviction despite lack of proof of actual criminal conduct. The record is devoid of any information about what the defense proposed to remedy the alleged vagueness of the instruction. Specifically, there is no evidence the defense asserted that the trial court was erroneously omitting a totality-of-the-circumstances test for "physical control."[2]

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[2]Furthermore, this court has observed on many occasions that an appellant may not present one theory at trial and another on appeal. See, e.g., State v. Banes, 874 S.W.2d 73, 82 (Tenn. Crim. App. 1993); State v. Matthews, 805 S.W.2d 776, 781 (Tenn. Crim. App. 1990). To do so results in waiver. See, e.g., Tenn. R. App. P. 3(e) (issue presented for review is waived if predicated upon jury instructions granted or refused and the issue was not "specifically stated in a motion for new trial"); Banes, 874 S.W.2d at 82.

As a specific instruction request, the defendant's claim also fails. Special requests for jury instructions are governed by Tennessee Rule of Criminal Procedure 30, which provides in pertinent part

> (a) Special Requests. – At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adversary counsel. The court shall inform counsel of its proposed action upon the requests, and any other portion of the instructions concerning which inquiries are made, prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court may, in its discretion, entertain requests for instructions at any time before the jury retires to consider its verdict.
> (b) Objections. – After the judge has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to the failure to give a requested instruction, but failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for new trial.

Tenn. R. Crim. P. 30(a), (b).

In the case at bar, the record fails to reflect that the defense complied with the requirement that special requests be filed in writing. A trial court will not be placed in error where a requested special instruction was not presented in writing. State v. Mackey, 638 S.W.2d 830, 836 (Tenn. Crim. App. 1982).

Even if one assumes that the totality-of-the-circumstances instruction the defendant advocates on appeal would cure the alleged ambiguity problem to which he generally objected at trial, there is no evidence of record that the defendant tendered a written special request or even made an oral request for the court to supplement its proposed instruction with additional language per Lawrence. See Tenn. R. App. P. 30(a), (b); State v. Brewer, 932 S.W.2d 1, 15 (Tenn. Crim. App. 1996); State v. Steven Dwight Womac, no number (Tenn. Crim. App., Knoxville, Aug. 29, 1989); Mackey, 638 S.W.2d at 836. Furthermore, there is no evidence of record from which we may conclude that this specific issue was ever presented orally to the trial court. We are loath to place the trial court in error where it has not had the opportunity to pass upon the specific contention raised. See Tenn. R. App. P. 3(e), 36(a).

For these reasons, appellate consideration of the propriety of the

totality-of-the-circumstances instruction is waived.

Finding no error requiring reversal, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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GARY R. WADE, PRESIDING JUDGE

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JERRY L. SMITH, JUDGE