

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
May 17, 2005 Session

**STATE OF TENNESSEE v. RAYMOND G. MCCARTER**

**Appeal from the Criminal Court for Hamilton County  
No. 243822 Rebecca J. Stern, Judge**

**No. E2004-01639-CCA-R3-CD - Filed August 18, 2005**

The appellant, Raymond G. McCarter, pled guilty to a violation of the light law and a violation of the registration law prior to being found guilty by a jury of driving under the influence (“DUI”). After trial, the appellant conceded that he had two (2) prior DUI offenses, and this made a bifurcated hearing to determine whether the appellant was guilty of DUI third offense unnecessary. The trial court sentenced the appellant to eleven (11) months and twenty-nine (29) days on the third offense DUI conviction, but suspended all of the sentence except for 120 days. The trial court sentenced the appellant to thirty (30) days for the violation of the light law and thirty (30) days for violation of the registration law, to be served concurrently to the sentence for DUI. After the denial of a motion for new trial, the appellant filed a timely notice of appeal. On appeal, the appellant challenges the sufficiency of the evidence and the trial court’s decision to allow a hearing-impaired person to sit on the jury. Because the evidence is sufficient to support the conviction and because the appellant failed to properly preserve the juror issue for appeal, the judgment of the trial court is affirmed.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Lloyd A. Levitt, Chattanooga, Tennessee, for the appellant, Raymond G. McCarter

Paul G. Summers, Attorney General & Reporter; John H. Bledsoe, Assistant Attorney General; Bill Cox, District Attorney General; Parke Masterson, Assistant District Attorneys General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

At approximately 10:00 p.m. on October 20, 2002, Deputy Greg Carson of the Hamilton County Sheriff's Department was working patrol in an unincorporated area of Hamilton County on Suck Creek Road near the Marion County Line. Deputy Carson pulled his police cruiser into a church parking lot to talk to Deputy Glenn Rollins. Both officers exited their vehicles and stood in the parking lot talking. As they stood there, Deputy Carson noticed the appellant's vehicle as it drove by, because it had no working taillights on either side. Deputy Carson pointed the vehicle out to Deputy Rollins, and the two (2) officers got into their respective vehicles to execute a traffic stop.

Deputy Rollins pulled out of the church parking lot first, and pulled out onto Suck Creek Road to follow the appellant. The two (2) officers communicated via radio. Deputy Rollins noticed that the appellant's rear brake lights were working because the appellant was tapping his brakes. It took Deputy Rollins between 200 and 300 yards to catch up with the appellant. As the officers caught up with the appellant, the appellant started pressing his brakes. At one point, Deputy Rollins lost sight of the appellant in a curve in the road. Deputy Rollins did not see the appellant speeding or weaving outside of his lane. Deputy Rollins activated his blue lights, but the appellant did not pull over. The appellant passed a restaurant traveling at around forty (40) miles per hour, and still did not pull over.

The officers decided at that point that Deputy Carson should pass the appellant to try to get the appellant to pull over. Deputy Carson maneuvered his vehicle into the other lane of traffic and safely nudged the appellant's car in an attempt to get the appellant to pull over. The appellant finally pulled over as Deputy Carson "guided [him] off the roadway" about one-half (1/2) of a mile away from where the blue lights had been originally activated.

Deputy Rollins made contact with the appellant. Deputy Rollins immediately noticed a strong odor of an intoxicant on the appellant and saw a "tall boy Budweiser" that was "open" and "sitting in the console." Deputy Carson noticed that the appellant's "hair was all out of whack" and that the appellant had a "moderate odor of an intoxicant about his breath." As Deputy Carson approached the vehicle, he noticed that there were two (2) juveniles in the vehicle with the appellant. Deputy Carson stayed by the vehicle with the juveniles while Deputy Rollins requested that the appellant perform several field sobriety tasks. When the appellant produced his license and registration, Deputy Rollins discovered that the registration did not match the vehicle.

As the appellant exited the vehicle, Deputy Rollins noticed that the appellant was "a little bit unsteady on his feet," had "bloodshot eyes," and that his hair was sticking "out and up," but that his speech was "pretty fair." The appellant admitted that he had at least two (2) beers. Deputy Rollins asked the appellant to perform the walk-and-turn. The appellant completed nine (9) steps forward and counted each step. However, the appellant did not touch his heels to his toes. According to Deputy Rollins, "he just did like a normal person would walk." The

appellant turned around and came back three (3) steps, and then stopped without completing the task. The appellant failed to touch his heels to his toes at any point during the performance of the task. The appellant asked Deputy Rollins to take him home.

Deputy Rollins then asked the appellant to perform a second field sobriety task, the one-leg stand. The appellant completed approximately ten (10) to twenty (20) seconds of the thirty (30) second test. At that point, Deputy Rollins placed the appellant under arrest for DUI.

The appellant claimed that he consumed at least one (1) beer earlier in the day at his brother's house while they were working on the vehicle, attempting to repair the taillights. When he left his brother's house, the appellant had an opened beer and an unopened beer in the vehicle with him.

The appellant was indicted in April of 2003 for violation of the light law, violation of the registration law, DUI, and DUI per se. The indictment indicated that the appellant had two (2) prior DUI convictions, one on April 22, 1996 in Hamilton County, and one on September 22, 1987, in Red Bank City Court.

Prior to trial, the appellant filed a motion to suppress the results of the breathalyzer test on the basis that the police did not fully comply with the observation period required in order to substantiate the validity of the test. The trial court granted the motion to suppress.<sup>1</sup>

The trial court held a jury trial beginning on January 22, 2004. At the beginning of the proof, the appellant pled guilty to violation of the light law and violation of the registration law. The appellant also waived the jury's setting of the fine. At the conclusion of the trial, the jury found the appellant guilty of DUI. After being found guilty, the appellant conceded that he had two (2) prior DUI convictions, thus a bifurcated hearing was not conducted to determine the existence of the appellant's prior DUI crimes. The trial court sentenced the appellant to eleven (11) months and twenty-nine (29) days on the DUI third offense with all but 120 days suspended. The trial court imposed a fine of \$1,010. The trial court also sentenced the appellant to serve thirty (30) days on each of the two (2) remaining charges, to run concurrently to the DUI conviction.

The appellant filed a timely motion for new trial, arguing that the evidence was insufficient to support the jury's verdict and that the trial court erred by allowing a hearing-impaired person who required an interpreter to sit on the jury at the appellant's trial. The trial court denied the motion for new trial and the appellant now appeals.

### Sufficiency

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<sup>1</sup> It is not clear from the record exactly what effect the grant of the motion to suppress had on the appellant's indictment, but it appears that the trial court dismissed the DUI per se count in light of the grant of the motion to suppress.

On appeal, the appellant challenges the sufficiency of the evidence to support the conviction for DUI. Specifically, he argues that “the proof in his case was clearly insufficient to establish his guilt beyond a reasonable doubt and the jury’s verdict was clearly against the weight of the evidence.” The appellant does not indicate which portions of the proof were insufficient to sustain the guilty verdict. The State argues that there was sufficient evidence to support the conviction for DUI.

When a defendant challenges the sufficiency of the evidence, this Court is obliged to review that claim according to certain well-settled principles. A verdict of guilty, rendered by a jury and “approved by the trial judge, accredits the testimony of the” State’s witnesses and resolves all conflicts in the testimony in favor of the State. State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992). Thus, although the accused is originally cloaked with a presumption of innocence, the jury verdict of guilty removes this presumption “and replaces it with one of guilt.” State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Hence, on appeal, the burden of proof rests with the defendant to demonstrate the insufficiency of the convicting evidence. Id. The relevant question the reviewing court must answer is whether any rational trier of fact could have found the accused guilty of every element of the offense beyond a reasonable doubt. See Tenn. R. App. P. 13(e); Harris, 839 S.W.2d at 75. In making this decision, we are to accord the State “the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences that may be drawn therefrom.” See Tuggle, 639 S.W.2d at 914. As such, this Court is precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. State v. Morgan, 929 S.W.2d 380, 383 (Tenn. Crim. App. 1996); State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Moreover, we may not substitute our own “inferences for those drawn by the trier of fact from circumstantial evidence.” Matthews, 805 S.W.2d at 779. Further, questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trier of fact. State v. Odom, 928 S.W.2d 18, 23 (Tenn.1996).

Tennessee Code Annotated section 55-10-401 provides:

(a) 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 on 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; or (2) The alcohol concentration in such person’s blood or breath is eight-hundredths of one percent (.08%) or more.

In the case herein, the proof showed that both Deputy Carson and Deputy Rollins noticed an odor of alcohol about the appellant’s person as they executed the traffic stop. Both Deputy Carson and Deputy Rollins also commented that the appellant was not steady on his feet, that his hair was unkempt and that the appellant had bloodshot eyes. There was an open beer in the vehicle at the time of the stop and the appellant admitted to having had at least two (2) beers. Deputy Rollins testified at trial that the appellant was unable to successfully complete the one-leg stand and the walk-and-turn field sobriety tasks. The appellant claimed that he had poor

balance that impeded his ability to complete the field sobriety tasks. We determine that there was sufficient evidence presented to allow the jury to reject the appellant's testimony and conclude that the appellant was guilty of DUI. See State v. Hiner, 988 S.W.2d 697 (Tenn. Crim. App. 1999) (determining that there was sufficient evidence to sustain a DUI conviction where the defendant's appearance, her unsteadiness on her feet, her slurred speech, her failure to adequately perform field sobriety tasks and her own statements made shortly after the arrest demonstrated that the defendant was under the influence of an intoxicant). This issue is without merit.

### Hearing-Impaired Juror

Next, the appellant argues that the trial court erred in allowing a hearing-impaired juror to serve on the jury. Specifically, the appellant argues that he was "deprived of a fair trial due to the inability of the deaf juror to both watch her interpreter convey the testimony of the witnesses by hand signals and at the same time personally observe the demeanor and manner of the witnesses testifying on the stand including the inflection of their voices." The State disagrees, contending that the appellant has waived the issue for failure to preserve an adequate record on appeal. In the alternative, the State argues that the trial court committed no error by allowing the juror to serve on the jury.

According to Tennessee Code Annotated section 22-1-102(b), "persons not in the full possession of the senses of hearing or seeing shall be excluded from service on any jury if the court determines, of its own volition or on motion of either party, that such person cannot provide adequate service as a juror on such jury." The qualifications of a juror are not subject to review on appeal unless there has been a clear abuse of the trial court's discretion in determining the juror's qualifications. State v. Mickens, 123 S.W.3d 355, 375 (Tenn. Crim. App. 2003).

The trial transcript in the case herein states that "a jury of twelve was duly impaneled, selected and accepted by both sides" followed by this note: "See colloquy regarding Juror No. 51, attached after exhibits. Per agreement of counsel, only comments made concerning her were to be included." The attachment following the exhibits reads as follows:

(Whereupon, the following questions were asked of Juror 51. It is agreed by the State and the defense this part of jury selection only would be included in the record.)

THE COURT: 51, Crystal Dawson.

JUROR 51: She is my interpreter.

THE COURT: Okay. Would it be more convenient for you as the interpreter if she sat on the end and you could sit next to her?

INTERPRETER: That's fine.

THE COURT: Sit on the end chair and then - let's move a chair up for her interpreter, the back.

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MR. MASTERSON: Ms. Dawson, clubs or organizations you are active in?

JUROR 51: No, sir.

MR. MASTERSON: How about the criminal justice system?

INTERPRETER: Accountable.

MR. LEVITT: I'm sorry?

MR. MASTERSON: Accountable.

From the record presented to this Court on appeal it does not appear that the attorney for the appellant objected to the seating of Juror 51 as a juror. The extent of Juror 51's hearing impairment is also not clear from the record. From the record, we are only able to discern that Juror 51 went on to become the jury foreperson and was able to verbally announce the jury's verdict in open court after being questioned through her interpreter by the trial court. In the absence of an objection or challenge to Juror 51 on the basis that her hearing impairment compromised her ability to serve, we consider this issue waived. See Tenn. R. App. 36(a). Moreover, we note that other jurisdictions have rejected similar challenges to a juror on the basis of hearing impairment where there is no showing in the record that such impairment made the juror incapable of performing his or her duties. There is no such showing in this record. See e.g., United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987) (rejecting argument that a hearing impaired juror who participated at trial with the assistance of an interpreter was unqualified to serve as a matter of federal law); Woodard v. Commonwealth, 147 S.W.3d 63 (Ky. 2004) (reversing prior decision which held that a hearing impaired juror could not serve on a jury and determining that juror's service did not deny the defendant a fair trial); Skinner v. State, 33 P.3d 758 (Wy. 2001) (determining that defendant was not prejudiced by hearing impaired juror where there was no showing that the juror was so impaired as to make him incapable of performing his duties); People v. Guzman, 555 N.E.2d 259 (N.Y. 1990) (determining that trial court did not abuse its discretion in allowing a deaf juror, with the aid of an interpreter, to consider the evidence presented at trial, where juror was both literate and articulate, her ability to speak and read lips mitigated effects of her hearing loss, and she was an active and willing participant in the trial process).

#### Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE