

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2000 Session

STATE OF TENNESSEE v. CARL DAVID BURNETTE

**Direct Appeal from the Circuit Court for Grundy County
No. 3219 Buddy D. Perry, Judge**

No. M1999-2490-CCA-R3-CD - Filed November 9, 2000

Defendant Carl David Burnette was found guilty by a Grundy County jury of vehicular homicide as the proximate result of intoxication, Tenn. Code Ann. § 39-13-213(a)(2), a Class B felony, and of driving under the influence of an intoxicant, Tenn. Code Ann. § 55-10-401(a). Afterward, the same jury was requested to separately consider whether Defendant was guilty of aggravated vehicular homicide, Tenn. Code Ann. § 39-13-218(a)(3), a Class A felony. The jury decided that Defendant was guilty of the aggravated offense in lieu of vehicular homicide; the conviction for driving under the influence was subsequently merged into the count of aggravated vehicular homicide and Defendant received a sentence of twenty-two years. Defendant raises the following issues in this appeal: (1) whether the trial court erred when it overruled Defendant's motion to suppress the results of blood alcohol tests because the State failed to identify Defendant as the one from whom the blood samples were drawn, and (2) whether the trial court properly bifurcated the jury proceedings as required by Tenn. Code Ann. § 39-13-218(c) when charging aggravated vehicular homicide. We affirm the judgment of the trial court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which DAVID G. HAYES, J., and NORMA MCGEE OGLE, J., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Carl David Burnette.

Paul G. Summers, Attorney General and Reporter; Elizabeth T. Ryan, Assistant Attorney General; Steven H. Strain, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Defendant Carl David Burnette was driving his truck on the afternoon of March 8, 1998 when he crossed the center line and struck an oncoming vehicle. The driver of the other vehicle died shortly thereafter from injuries suffered during the collision. Officers investigating the accident detected the odor of alcohol on the Defendant who admitted that he had been drinking earlier that

day. Since Defendant was also injured, he was then airlifted to a hospital for medical treatment and for blood tests to determine alcohol content.

Criminal charges were subsequently filed against Defendant. He was initially found guilty by a Grundy County jury of one count of vehicular homicide as the proximate result of intoxication, Tenn. Code Ann. § 39-13-213(a)(2), a Class B felony, and one count of driving under the influence of an intoxicant, Tenn. Code Ann. § 55-10-401(a). After the jury returned guilty verdicts for both counts, the trial court held the second portion of the bifurcated trial and subsequently gave the jury additional instructions on the offense of aggravated vehicular homicide, Tenn. Code Ann. § 39-13-218(a)(3), a Class A felony. Thereafter, the jury determined that Defendant was guilty of the greater offense. After a sentencing hearing, the trial court sentenced Defendant as a Range I standard offender to twenty-two years for the Class A felony; the conviction for driving under the influence was merged into this count. Defendant raises the following issues in this appeal: (1) whether the trial court erred when it overruled Defendant's motion to suppress the results of blood alcohol tests because the State failed to identify Defendant as the one from whom the blood samples were drawn, and (2) whether the trial court properly bifurcated the jury proceedings as required by Tenn. Code Ann. § 39-13-218(c) when charging aggravated vehicular homicide.

I. FACTS

Stacy Williams, a trooper with the Tennessee Highway Patrol, testified that he was on duty the day of Defendant's accident. The weather was clear and road conditions were dry when Officer Williams arrived on the scene at approximately 2 p.m., shortly after the accident. Williams testified that he found Defendant sitting on the ground next to his vehicle and the victim, Pamela Partin, trapped in her car. Several people who had stopped to help were attempting to pry the car door open, but Ms. Partin appeared to be already dead. Williams asked Defendant whether he was the one driving the truck and whether he had been drinking. Defendant smelled of alcohol at the time and answered, "Yes." Williams asked, "How much?" Defendant replied, "Too much." Williams testified that he then ordered Defendant taken by ambulance and airlift from the accident scene directly to Erlanger Hospital to treat his leg injuries and also for blood alcohol tests. Williams wrote down Defendant's name and birth date before he was taken away. A search of Defendant's truck revealed a 1.75 liter bottle of vodka. Williams was not asked at trial whether the bottle was partially full, empty, or unopened when he discovered it, and the photograph admitted into evidence is inconclusive as to this matter. When Defendant was asked the question: "What had you been drinking?" he answered, "It was the vodka."

Williams testified that there were no skid marks present nor any signs that evasive maneuvers were taken by either car prior to the collision. Defendant's truck appeared to have veered off the road after it failed to negotiate a curve. Williams testified that the truck then traveled in the ditch alongside the road for 169 feet before it was maneuvered back onto the highway and into the opposite lane of traffic, striking the victim's car.

Larry Earl Fraley, a sergeant with the Tennessee Highway Patrol, testified that he also responded to the call regarding Defendant's accident. When Fraley arrived, Defendant initially told him that he fell asleep while driving. Fraley noticed a "strong odor of alcohol," however, and testified that he was present when Defendant later admitted to Williams that he drank "too much." Fraley further testified that it was obvious to him Defendant was intoxicated or "under the influence." Fraley instructed Williams to "read [Defendant] his rights."

At the suppression hearing, State Trooper Tim Aslinger testified that on March 8, 1998, he was dispatched to Erlanger Hospital to obtain a blood sample from a suspect named Carl David Burnette. Aslinger was at the hospital waiting for Burnette when he arrived. Aslinger testified that he personally filled out the toxicology request form which included Defendant's name, date of birth, and driver's license number but he did not remember whether he received this information from the transportation people or from Burnette himself. Aslinger testified that he was present while the hospital technician drew Burnette's blood. After the sample was labeled with Burnette's name and sealed by the technician at the hospital, Aslinger initialed it and stored it in his refrigerator for delivery to the crime lab the next day (because the lab was closed on Sunday). Aslinger testified that he recalled performing the above duties relating to Burnette, but he did not recognize Defendant when he saw him in court during the hearing.

Sharon Hodge testified at the pre-trial suppression hearing that she is qualified and licensed by the State of Tennessee to draw blood samples. Hodge stated that she drew the blood of a man identified as Carl David Burnette upon the request of Trooper Aslinger on March 8, 1998 at Erlanger Hospital. Hodge explained that chain-of-custody regulations do not permit her to draw blood without a toxicology request form and the presence of an officer. In addition, Hodge testified that she followed all proper procedures on March 8, 1998: she signed for the sample, noted the time, used the correct containers, sealed the sample, placed it in the special TBI container specifically designated for this purpose, and afterward handed the container to Trooper Aslinger. Although Hodge testified that she did not remember Defendant when she saw him in court, she was certain that the blood sample she drew that day belongs to the person identified on the label. Specifically, she explained that this is because the regulations require that all patients be given arm bands when they arrive and that all patients be identified personally or by armband before blood is taken.

Selena Darter testified that she is a special agent forensic scientist for the Tennessee Bureau of Investigation and that she received from Officer Aslinger the blood sample identified as belonging to Defendant. Darter testified that the sample she received was contained in a sealed blood alcohol kit initialed with the letters, "S.E.H." and dated March 8, 1998. Darter performed laboratory tests on Defendant's blood which revealed ethyl alcohol at 0.25 grams percent, commonly known as "point-two-five" blood alcohol. In response to questions regarding the reliability of testing procedures, Darter further testified that delays in actual testing and different methods of storage should not affect blood test results.

Jeffrey Bostic, a medical technologist who works in the chemistry and microbiology lab at Erlanger Medical Center, testified that he analyzed a blood sample identified as belonging to

Defendant. Bostic tested the sample for blood alcohol content; the results indicated an alcohol level of “270 milligrams per deciliter.”

Carl David Burnette, the defendant, testified that he had been drinking vodka earlier on the morning of March 8, 1998, but that he was not intoxicated at the time of the accident; he had consumed only ½ pint of vodka before the collision. Instead, Defendant claimed that a broken tie rod caused him to lose control of his vehicle as follows: Defendant reached down to adjust the radio; this caused him to drive off onto the shoulder of the highway, initially, and when he tried to correct his path, something popped; this “popping” caused him to veer back into the ditch then onto the road again where he drove across the center line and into the victim’s car. Defendant testified that the popping noise was a tie rod breaking and that broken tie rods can cause a driver to lose control of his car. Defendant admitted that he knew his tie rod was “worn a bit,” but he did not want to repair the truck right away for financial reasons.

Defendant testified that he drank a six-pack of beer while racoon hunting the previous night and that he lost his dog during this trip. In the morning, Defendant returned home only to eat breakfast, then left again to search for his dog. Defendant admitted that his wife was concerned about his driving ability. She wanted him to stay home, but he did not. Defendant denied telling Officers Williams and Fraley that he had “too much” to drink, and he did not remember telling Fraley that he fell asleep at the wheel. Finally, Defendant testified that even though he believed that the tie rod was responsible for the accident, he did not mention this fact to the officers at the scene of the accident because they did not ask him. Defendant testified that, contrary to the officers’ testimony, he was perfectly fine to drive the day of the accident.

Robert Lee Garrison testified that he has some experience as a mechanic and that he replaced the brakes on Defendant’s truck six months prior to the accident. At that time, Garrison noticed that Defendant’s tie rod was worn. He testified that when a tie rod breaks, the driver can lose control of his vehicle. Although Garrison did not remember whether or not he informed Defendant about the worn rod, he said he would have fixed the problem at that time if it presented any real danger.

Mike Scruggs, manager of a garage and wrecking yard, testified that he picked up Defendant’s car after the accident. Upon examining the wreckage, Scruggs discovered that the tie rod was broken. He testified that because the tie rod is necessary to steer the car, a broken rod could cause a driver to lose control of the automobile. Scruggs testified that it is also possible that the tie rod was broken during the accident; either scenario was conceivable.

During rebuttal proof, Robert Beard, an accident reconstructionist with the Tennessee Highway Patrol, testified that in his opinion the tie rod on Defendant’s car probably broke during the accident and, therefore, did not cause loss of control of the vehicle.

II. ADMISSIBILITY OF BLOOD ALCOHOL TEST

Defendant contends that the trial court erred when it overruled Defendant's motion to suppress the results of blood alcohol tests at trial. Defendant argues that the State failed to identify Defendant as the one from whom the blood samples were drawn and therefore, the blood test results were not properly admissible as evidence. We disagree.

Defendant does not contest the admissibility of blood alcohol tests in general. Furthermore, when a person is charged with vehicular homicide, Tenn. Code Ann. § 55-10-406(e) applies. It provides, in relevant part: “[n]othing in this section shall affect the admissibility in evidence, in criminal prosecutions for aggravated assault or homicide by the use of a motor vehicle only, of any chemical analysis of the alcoholic or drug content of the defendant’s blood which has been obtained by any means lawful” Tenn. Code Ann. § 55-10-406(e) (1997). Such tests are admissible provided that the sample was taken by a properly trained person and handled through a proper chain of custody between the time the blood was drawn and the time it was analyzed. See generally Tenn. Code Ann. §§ 55-10-401 to -412 (1997). There is no dispute that the procedural prerequisites to admitting the laboratory tests results were satisfied in the instant case.

Defendant states in his brief that he also does not challenge the chain of custody, authenticity or methodology concerning admissibility of his blood test. Defendant instead contends that the State “failed to identify the defendant as the one from whom the blood samples were drawn.” Defendant argues that the trial court should have therefore granted his pretrial motion to suppress the blood test results. However, the record shows that Defendant stipulated to the admissibility of his blood test at trial. The transcript contains the following regarding the testimony of Trooper Aslinger, the officer who met Defendant at the hospital, and Sharon Hodges, the person who drew the blood in question:

GENERAL: Your honor, our next witness would be by stipulation.
Sharon Hodge.

* * *

Ms. Hodge would testify that she drew blood from Mr. Burnette, that she drew blood in according with the TBI standards in terms of how to do that and she placed the tube of blood into a TBI Evidence Box, that she sealed it, initialed and delivered that box to Trooper Tim Aslinger, with the Tennessee Highway Patrol

* * *

Your honor, our next witness would also be by stipulation be [sic] Trooper Aslinger.

Trooper Aslinger would testify ... on March 8th of 1998, he was on duty, that he was dispatched to go to Erlanger Hospital in order to receive blood involving a vehicular homicide case arising out of Grundy County, that he went to the hospital, was directed to a subject identified as Mr. Burnette. He would testify that he received a TBI

Evidence Box from Sharon Hodge containing the blood drawn from Mr. Carl David Burnette....

* * *

Your honor, for the record, Mr. Peters is supposed to announce he agrees with the stipulations.

MR. PETERS: I so agree subject to the court's ruling and understanding that we discussed.

THE COURT: That's already in the record.

The trial court heard and denied Defendant's motion to suppress the test results prior to the trial; pertinent to this issue, objections were reserved for appeal based upon two grounds: improper chain of custody and insufficient identification of Defendant. Defendant subsequently abandoned the chain of custody issue in his brief, which brings us to the issue of identity.

Defendant's complaint regarding the evidence of identity of the person from whom the blood was withdrawn goes to the weight of the evidence and not its admissibility. The trial court did not err by denying the pre-trial motion to suppress. Indeed, the written motion to suppress the blood alcohol test results does not allege any issue regarding Defendant's identity. The issue was first raised by Defendant's counsel after all of the proof was heard at the pre-trial hearing. To the extent that Defendant also argues that the proof at trial was insufficient due to a lack of evidence regarding identity, this is also without merit, for the reasons stated below.

Before a defendant can be convicted, the State of Tennessee is required to prove that he was the person who committed the crime in question. State v. Andre Deshun Goss, No. 02C01-9809-CC-00294, 1999 WL 360162, at *2, Obion County (Tenn. Crim. App., Jackson, June 3, 1999) perm. to appeal denied (Tenn. 1999) (citing White v. State, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975)). The identity of defendants is a question of fact solely for the jury. State v. Phillips, 728 S.W.2d 21, 25 (Tenn. Crim. App. 1986) (citing State v. Crawford, 635 S.W.2d 704, 705 (Tenn. Crim. App. 1982)). Whether the State carried its burden of proof that the defendant committed the crime in question is a question of fact for the determination of the jury after consideration of the proof submitted at the trial. Goss, No. 02C01-9809-CC-00294, 1999 WL 360162, at *2 (citing White v. State, 533 S.W.2d 735, 744 (Tenn. Crim. App. 1975)). A courtroom identification is not a prerequisite to convict a defendant of a criminal offense. Id. (citing State v. Danny R. Morris, No. 01C01-9506-CC-00206, 1996 WL 233989 at *2, Humphreys County (Tenn. Crim. App., Nashville, May 9, 1996) perm. to appeal denied (Tenn. 1996)).

We conclude that the evidence was sufficient to establish beyond a reasonable doubt that it was Defendant who had his blood drawn at the hospital and, consequently, it was Defendant's blood which was the subject of the test results offered at trial. The record shows that Officer Williams documented Defendant's name and birth date at the scene of the accident. The record also proves that Williams then ordered Defendant taken by ambulance and airlift from the accident scene directly

to Erlanger Hospital for alcohol blood tests and medical treatment. The stipulations of testimony of both Officer Aslinger and Sharon Hodge establish that the blood was withdrawn from Defendant. The stipulations were obviously based upon their respective testimony at the pre-trial hearing and there was sufficient evidence at that hearing to prove that the blood sample was taken from Defendant. Defendant is not entitled to relief on this issue.

III. BIFURCATION OF TRIAL

Defendant contends that the court failed to properly bifurcate the jury proceedings as required by Tenn. Code Ann. § 39-13-218(c) when charging aggravated vehicular homicide. We disagree.

Defendant relies on Tenn. Code Ann. § 39-13-218(c) which requires the jury to consider whether Defendant had the requisite number of prior offenses and/or level of blood alcohol concentration necessary for aggravated vehicular homicide “separately” from their deliberation regarding Defendant’s guilt of vehicular homicide. Specifically, Defendant contends that the trial court erred when the jury was allowed to consider evidence of Defendant’s blood alcohol content during both phases of prosecution: the trial for vehicular homicide and the “separate” consideration of guilt for aggravated vehicular homicide after the guilty verdict of vehicular homicide was returned. Defendant’s reliance on § 39-13-218(c) is misplaced.

Tenn. Code Ann. § 39-13-213(a), in pertinent part, defines vehicular homicide as “the reckless killing of another by the operation of an automobile ... (1) [a]s the proximate result of conduct creating a substantial risk of death or serious bodily injury to a person; or (2) [a]s the proximate result of the driver’s intoxication as set forth in § 55-10-401. For purposes of this section, ‘intoxication’ includes alcohol intoxication as defined by § 55-10-408” Tenn. Code Ann. § 39-13-213(a) (1997). Section 55-10-401(a)(1) makes it unlawful to drive while “under the influence of any intoxicant” and section 55-10-401(a)(2) proscribes driving while “[t]he alcohol concentration in such [driver’s] blood or breath is ten-hundredths of one percent (10%) or more.” Tenn. Code Ann. § 55-10-401(a)(1) and (2) (1997). Section 55-10-408 allows an inference of intoxication for purposes of proving a violation of § 55-10-401(a)(1) where evidence shows there was .10% or more of alcohol in defendant’s blood. Tenn. Code Ann. § 55-10-408(a) (1997). Where applicable, as in this case, the jury must consider the driver’s blood alcohol concentration for the crime of vehicular homicide because it is necessary to prove as an element of the offense.

Aggravated vehicular homicide is a separate offense related to vehicular homicide. The Tennessee state legislature enhanced the penalty for vehicular homicide where the defendant has (1) two or more prior convictions for driving under the influence of an intoxicant, vehicular assault, or any combination of such offenses; (2) one or more prior convictions for vehicular homicide; or (3) at the time of the offense, twenty-hundredths of one percent (.20%) or more of alcohol in his or her blood and also a prior conviction for driving under the influence of an intoxicant or vehicular assault. See Tenn. Code Ann. § 39-13-218(a)(1) - (3) (1997). Aggravated vehicular homicide is a Class A felony. Tenn. Code Ann. § 39-13-218(d) (1997). In essence, the legislature added an element to the crime of vehicular homicide to make it “aggravated” which can be satisfied in one of the various

ways enumerated above. As in the case with vehicular homicide as a result of driver intoxication, it is clear that the jury must find intoxication beyond a reasonable doubt to convict for the aggravated offense under subsection (a)(3) (which requires proof that (1) there was at the time of the offense twenty-hundredths of one percent (.20%) or more of blood alcohol in the defendant's blood and (2) the defendant has one prior conviction for DUI or vehicular assault). Tenn. Code Ann. § 39-13-218(a)(3) (1997). Since intoxication is an element of both vehicular homicide and aggravated vehicular homicide and conviction for the former is a prerequisite to finding guilt for the latter, the jury must consider evidence of blood alcohol levels in both determinations.

Sub-section (c) of the statute for aggravated homicide requires that the jury's deliberations concerning this offense be bifurcated. It states:

If the defendant is charged with aggravated vehicular homicide, the indictment, in a separate count, shall specify, charge and give notice of the required prior conviction or convictions. If the defendant is convicted of vehicular homicide under § 39-13-213(a)(2), the jury shall then separately consider whether the defendant has the requisite number and types of prior offenses and/or level of blood alcohol concentration necessary to constitute the offense of aggravated vehicular homicide. If the jury convicts the defendant of aggravated vehicular homicide, the court shall pronounce judgment and sentence the defendant from within the felony classification set out in subsection (d) [for a Class A felony].

Tenn. Code Ann. § 39-13-218(c) (1997). Defendant contends that subsection (c) enjoins the jury from considering blood alcohol content in a charge for aggravated vehicular homicide where blood alcohol was previously considered in the underlying charge of vehicular homicide. However, nothing in the statutory language leads to this conclusion.

We must determine what is meant by the language in the statute requiring the jury to "separately consider whether a defendant has the requisite number and types of prior offenses and/or level of blood alcohol concentration necessary to constitute the offense of aggravated vehicular homicide." The Court's role in statutory interpretation is to determine and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope. State v. Butler, 980 S.W.2d 359, 362 (Tenn. 1998). The component parts of a statute should be construed, if possible, so that the parts are consistent and reasonable. State v. Alford, 970 S.W.2d 944, 946 (Tenn. 1998). The legislative intent should be derived from the plain and ordinary meaning of the statutory language when a statute's language is unambiguous. Carson Creek Vacation Resorts, Inc. v. Department of Revenue, 865 S.W.2d 1, 2 (Tenn. 1993). However, when a statute's language is ambiguous and the parties legitimately derive different interpretations, we must look to the entire statutory scheme to ascertain the legislative intent. Owens v. State, 908 S.W.2d 923, 926 (Tenn. 1995).

In the present case, the alleged ambiguity concerning the meaning of the term "separate" does not rise to the level necessary to warrant our examination of the legislature's statutory scheme. If

we accepted Defendant's argument, the State would not be allowed to prosecute offenders for vehicular homicide as a result of blood alcohol intoxication without forgoing prosecution for aggravated vehicular homicide under subsection (a)(3). We believe that the legislature enacted § 39-13-218 to enhance the penalty for certain vehicular homicides, not provide a waiver to offenders who commit vehicular homicide while significantly intoxicated and are subsequently convicted by a jury who heard blood alcohol evidence.

We therefore interpret § 39-13-218(c) to first require that the jury find a defendant guilty of vehicular homicide under § 39-13-213(a)(2). Subsection 39-13-213(a)(2) states that the level of driver intoxication required for this offense is "set forth in §§ 55-10-401" and includes alcohol "'intoxication' as defined by § 55-10-408..." "Intoxication" under § 55-10-401(a) is satisfied by proof that a defendant was driving while "(1) [u]nder the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or (2) [t]he alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more." Section 55-10-408(a) allows an inference of "intoxication" sufficient to violate § 55-10-401(a)(1) when evidence is presented that there was, at the time alleged, ten-hundredths of one percent (.10%) or more by weight of alcohol in the defendant's blood. See Tenn. Code Ann. §§ 55-10-401, -408 (1997). Clearly, the level of intoxication which satisfies the crime of vehicular homicide is substantially less than that level required for aggravated vehicular homicide. In circumstances where the jury finds a defendant guilty of vehicular homicide, the jury can then be required to separately determine whether the elements are present for the enhanced offense. This involves finding sufficient proof to show that the defendant's blood alcohol level was .20%, again, a significant increase over that level which satisfies vehicular homicide (.10%), *in addition to* proof of at least one prior conviction for either driving under the influence or vehicular assault. It is entirely plausible that a jury may find proof of blood alcohol sufficient to find guilt of vehicular homicide only. This form of deliberation, which we believe was contemplated by the legislature, requires a second and distinct determination only after the first is completed and the defendant is found guilty.

In this case, one count of the indictment charged Defendant with vehicular homicide, Tenn. Code Ann. § 39-13-213. At Defendant's trial for this offense, the State was allowed to prove that the reckless killing was the proximate result of Defendant's intoxication as set forth in Tenn. Code Ann. §§ 55-10-401, which includes an inference of intoxication from evidence that Defendant's blood alcohol content was .10% or more according to § 55-10-408(a). Furthermore, the State's evidence may include a blood alcohol test. Tenn. Code Ann. § 55-10-407(a) (1997).

The jury in this case was not given any instructions on aggravated vehicular homicide nor was it offered proof of prior convictions until after it rendered a guilty verdict for the crime of vehicular homicide. Thereafter, the jury considered (1) whether the State presented sufficient proof to show that the defendant's blood alcohol level was .20% or more and (2) the proof of his prior conviction for driving under the influence. Clearly, evidence showing Defendant's blood alcohol level was relevant and necessary for this determination as well. Moreover, this procedure satisfied

the statutory requirement that the proceedings be “separate” according to our understanding of Tenn. Code Ann. § 39-13-218(c). Defendant is not entitled to relief on this issue.

IV. CONCLUSION

We hold that the trial court properly refused to exclude the evidence of Defendant’s blood alcohol test. In addition, we hold that the trial court correctly bifurcated the trial in accordance with the requirements in Tenn. Code Ann. § 39-13-218(c).

Accordingly, the judgment of the trial court is AFFIRMED.

THOMAS T. WOODALL, JUDGE