

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs November 29, 2005

**STATE OF TENNESSEE v. MELISSA ROBERTS**

**Direct Appeal from the Criminal Court for Meigs County  
No. 3062 E. Eugene Eblen, Judge**

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**No. E2005-00760-CCA-R3-CD - Filed December 28, 2005**

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The defendant, Melissa Roberts, was convicted of driving under the influence and was also found to have violated the implied consent law. See Tenn. Code Ann. §§ 55-10-401, -406 (2003). For the driving under the influence offense, the trial court imposed a sentence of eleven months and twenty-nine days to be suspended after the service of four days of confinement, with supervision until payment of fine and costs. Her driver's license was suspended for one year. The trial court imposed a concurrent one-year suspension of her driver's license for her violation of the implied consent law. In this appeal as of right, the defendant argues that the evidence was insufficient to support her convictions. The judgment of the trial court is affirmed but modified to the extent that violation of the implied consent law is not a criminal conviction or a Class A misdemeanor.

**Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed**

GARY R. WADE, P.J., delivered the opinion of the court, in which JOSEPH M. TIPTON and THOMAS T. WOODALL, JJ., joined.

Robert N. Meeks, Collegedale, Tennessee, for the appellant, Melissa Roberts.

Paul G. Summers, District Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Scott McCluen, District Attorney General; and Frank Harvey, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

On March 30, 2003, Officer Keith Kyle of the Meigs County Sheriff's Department responded to a report of a car obstructing a road. When the officer located the car, he found the defendant asleep in the driver's seat. Another female was asleep in the front passenger's seat. The doors were locked. After the officer knocked on the window for several minutes and yelled at the defendant, she awoke and opened the door. The officer immediately smelled alcohol. When the defendant stepped out of the car, he noticed that she was having trouble balancing herself. She agreed to take field sobriety tests and failed both the "one-legged stance" test and the "walk and turn" test. At that

point, the officer placed her under arrest and transported her to the county jail, where he read her the Tennessee Department of Safety Implied Consent Report. She refused to submit to a test for a blood alcohol determination.

In a bench trial, Officer Kyle, the state's only witness, testified that after receiving the call about a car obstructing a road, he found the car "backed up to an embankment, setting in the middle of the road." He stated that the car was blocking about half of one lane, its engine was not running, and its headlights were "very dim." According to the officer, when he was able to awaken the defendant to open the door, he smelled "a strong odor of alcoholic beverage upon her." He recalled the defendant saying that she "thought that she had backed [the car] into a driveway." Officer Kyle testified that after he conducted the field sobriety tests, he placed the defendant under arrest for driving under the influence and called a wrecker service to tow the vehicle. He then recounted taking her to jail where he read the implied consent form and confirmed her refusal to undergo a blood alcohol test.

On cross-examination, the officer conceded that he had not seen the defendant drive that night. He also acknowledged that he had unsuccessfully attempted to start the car. Officer Kyle remembered that the defendant had claimed that her female passenger had been driving, but he also recalled that the defendant admitted having backed the car into what she thought was a driveway.

The defendant, testifying in her own behalf, denied that she operated the vehicle after drinking alcohol, denied having told the officer that she had operated the vehicle, and denied that the officer attempted to start the car. Although she did acknowledge having drunk about three margaritas prior to her arrest, she denied that she was "drunk" and described her condition as merely "impaired." The defendant claimed that her sister-in-law, the female passenger, had been the designated driver that night and that another passenger, who she identified only as "Dawn," had left the scene in order to get gas. Although conceding that she was found asleep in the driver's seat of the car by the police officer, she claimed her sister-in-law had accidentally driven into a ditch and that, afterwards, her sister-in-law "helped [her] into the driver's seat to try to get [the car] started." During further cross-examination, however, the defendant stated that she was asleep when the purported accident occurred and that the last thing she remembered before being awakened by the officer was riding in the car. She stated her sister-in-law informed her about the other passenger going for gas and about how she was helped into the driver's seat. She contended that she did remember waking up in the driver's seat and recalled trying to start the car before going back to sleep. She claimed no recollection of telling the officer that she thought she was in a driveway. The defendant contended that her refusal to take the blood alcohol test was because she had already been charged with driving under the influence. She further explained that she was upset and did not understand why her sister-in-law had been allowed to return home.

The trial court found the defendant guilty of driving under the influence and violating the implied consent law. Although not making a determination as to whether the defendant actually operated the vehicle, the trial court concluded that the defendant "was in physical control of the

automobile. . . . [b]y being behind the wheel, and the keys in the car, and the officer's testimony that when he got there the lights were dim, and that the car was backed into the [embankment]."

In this appeal, the defendant first asserts that the evidence was insufficient to support her conviction for driving under the influence. She contends that there was insufficient proof that she either drove or was in physical control of the car. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to bench trial as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992). In a bench trial, the verdict of the trial judge is entitled to the same weight on appeal as a jury verdict. State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999).

## I.

The statute prohibiting driving under the influence provides in pertinent part as follows:

It is unlawful for any person to drive or to be in physical control of any automobile . . . on any of the public roads and highways of the state, or on any streets . . . while:

(1) Under the influence of any intoxicant . . . or drug producing stimulating effects on the central nervous system . . . .

Tenn. Code Ann. § 55-10-401(a)(1) (2003). Thus, the plain language of the statute provides that a person can be found guilty one of two ways: (1) by driving while intoxicated or (2) by being in physical control of an automobile while intoxicated.

In this instance, the evidence established that the defendant, while under the influence of an intoxicant, was sleeping in the driver's seat of a car that was partially obstructing a public road. Although the defendant admitted being "impaired," the officer described her as intoxicated. She acknowledged having consumed about three margaritas that night, and she failed two field sobriety tests. She admitted to the officer that she had backed the car into what she thought was a driveway. The car, found with the headlights beginning to dim, would not start. Under our law, the trier of fact was free to reject the theory offered by the defendant and fully accredit the evidence offered by the state. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). Here, the trial judge based his verdict on his finding that the defendant was "in physical control" while intoxicated. See Tenn. Code Ann. § 55-10-401(a) (2003).

In State v. Lawrence, 849 S.W.2d 761, 763 (Tenn. 1995), our supreme court adopted a totality of the circumstances test in determining that the defendant was, in fact, in physical control of an automobile within the meaning of Tennessee Code Annotated section 55-10-401. Our high court provided a nonexhaustive list of factors relevant to that determination, including the following: 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. Id. The supreme court has observed that this totality of the circumstances approach is "highly factual and . . . all circumstances should be taken into consideration by the trier of fact." State v. Butler, 108 S.W.3d 845, 850 (Tenn. 2003). The court ruled that the purpose of the statute was "'to enable the drunken driver to be apprehended before he strikes.'" Lawrence, 849 S.W.2d at 765 (quoting Hughes v. State, 535 P.2d 1023, 1024 (Okla. Crim. App. 1975)). In Butler, our supreme court upheld a conviction where the defendant, while intoxicated, was found within 100 yards of his motorcycle. Even though the motorcycle was inoperable at the time because a spark plug had been removed and a cylinder needed to be drained, our high court ruled that the defendant was properly convicted of driving under the influence. Butler, 108 S.W.3d at 852. While Justice Adolpho A. Birch, Jr., dissented, concluding that the evidence was insufficient to establish that the defendant was in physical control of his motorcycle at the time of his arrest, he agreed with the decision of the majority to confirm the test established in Lawrence. See id. at 854.

In our view, the first factor in Lawrence, the location of the defendant in relation to the vehicle, weighs in favor of the state. When the officer arrived on the scene, the defendant was asleep in the driver's seat. Further, although there was no direct testimony regarding the whereabouts of the ignition key, the second factor, the defendant admitted at trial that she attempted to start the car, and the officer attempted to do so just before it was towed away. From this circumstantial evidence, a rational trier of fact could have properly inferred that the key was inside the vehicle. This factor also weighs in favor of finding that the defendant was in physical control of the car. Although the third factor, whether or not the motor was running or the car was moving, appears to favor the defense, "it has long been the law in this state that a driving under the influence conviction based upon physical control does not hinge on whether the vehicle's engine is running or whether the vehicle is in motion." Butler, 108 S.W.3d at 851 (citing Hester v. State, 270 S.W.2d 321, 322 (Tenn. 1954); State v. Ford, 725 S.W.2d 689, 690-91 (Tenn. Crim. App. 1986)). In Butler, our supreme court adopted the "reasonably capable of being rendered operable" standard when determining whether a person is in physical control of a vehicle. This rule was established in State v. Smelter, 674 P.2d 690 (Wash. Ct. App. 1984):

[T]he proper focus was not narrowly on the "mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move." Thus, . . . where "circumstantial evidence permits a legitimate inference that the car was where it was *and was performing as*

*it was* because of the defendant's choice, it follows that the defendant was in" physical control of the vehicle.

Butler, 108 S.W.3d at 852 (citation omitted) (quoting Smelter, 674 P.2d at 693). Skipping momentarily factor four, which addresses the defendant's ability to direct the use of the vehicle, the standard was adopted to aid the trier of fact in evaluating the fifth Lawrence factor, whether the vehicle was capable of operation. Butler, 108 S.W.3d at 852. Although defense counsel, while cross-examining Officer Kyle, claimed the car required a new battery and other repairs in order to start, there was no evidence introduced at trial as to what, if any, repairs were needed to operate the vehicle. Inferentially, it was driven by someone to the point where it was discovered. In our assessment, the fifth factor enunciated in Lawrence, concerning "the extent to which the vehicle itself is capable of being operated or moved under its own power or otherwise," weighs more favorably for the state than for the defense. The fourth Lawrence factor, concerning "the defendant's ability, but for his intoxication, to direct the use or non-use of the vehicle," is not helpful under the circumstances of this case.

The defendant points to State v. Carter, 889 S.W.2d 232 (Tenn. 1994), in support of her claim that she was not in physical control of the car. In Carter, the defendant was arrested in the parking lot of her children's dentist for driving under the influence. The defendant attempted to start her vehicle just prior to police officers' arrival but was unsuccessful because the vehicle's battery was dead and because her carburetor needed repair. Finding "no support in the record to indicate that the vehicle could be driven under its own power," the court held that under the Lawrence totality of the circumstances test, the evidence was insufficient to convict the defendant of driving under the influence. Id. at 234.

In State v. Roger Dale Bryan, No. M2003-01366-CCA-R3-CD (Tenn. Crim. App., at Nashville, July 7, 2004), perm. app. denied (Tenn. 2004), an officer responded to a call about a vehicle blocking a public intersection. Upon arrival, the officer observed the defendant "'bent over under the hood'" of a truck. Id. at 1. Based on the defendant's demeanor and on his poor performance on three field sobriety tests, he was arrested for driving under the influence. In that case, this court upheld the conviction, placing particular emphasis on the location of the vehicle, which gave "rise to an inference that it had been driven immediately prior to the arrival of officers on the scene." Id. at 4. Because in Carter the vehicle was in a private lot, the circumstances were different. Bryan, where the vehicle was on a public street, is in closer alignment to this case.

Applying the totality of the circumstances approach, the evidence was sufficient to establish that the defendant was in physical control of the car within the meaning of Tennessee Code Annotated section 55-10-401(a). She was asleep in the driver's seat of a car that was blocking part of a public road. She was admittedly impaired and, by inference, she had access to the ignition key.

## II.

The defendant next asserts that the evidence was insufficient to support the finding that she violated the implied consent law. She claims that she was not made aware of the consequences of her refusal to submit to a blood alcohol test. She urges this court to follow the plain language of the statute, which would have required a finding by the trial court that she had driven the car in order for the statute to be applicable.

Tennessee's implied consent law provides in pertinent part as follows:

(a)(1) Any person who drives any motor vehicle in the state is deemed to have given consent to a test for the purpose of determining the alcoholic or drug content of that person's blood; provided, that such test is administered at the direction of a law enforcement officer having reasonable grounds to believe such person was driving while under the influence of an intoxicant . . . .

(2) Any law enforcement officer who requests that the driver of a motor vehicle submit to a test pursuant to this section for the purpose of determining the alcoholic or drug content of the driver's blood shall, prior to conducting such test, advise the driver that refusal to submit to such test will result in the suspension of the driver's operator's license . . . .

(3) If such person having been placed under arrest and thereafter having been requested by a law enforcement officer to submit to such test and advised of the consequences for refusing to do so, refuses to submit, the test shall not be given, and such person shall be charged with violating this [statute].

Tenn. Code Ann. § 55-10-406(a)(1)-(a)(3) (2003).

A first violation of the Implied Consent Law is not a criminal offense, misdemeanor or otherwise. The proceeding is civil in nature. State v. Jones, No. W2004-00476-CCA-R3-CD (Tenn. Crim. App., at Jackson, Mar. 28, 2005).

Here, the officer testified that the defendant admitted that she had backed the car into what she thought was a driveway. The officer also stated that he read to the defendant the Tennessee Department of Safety Implied Consent Report, which explains the implied consent law and the penalty for refusing a blood alcohol test. He claimed that the defendant indicated that she understood the implied consent law, including the consequences of refusing to submit to a blood alcohol test. A copy of the Implied Consent Report was introduced into evidence. The defendant's signature and initials appear on the form as an acknowledgment of her refusal to submit to the test. The defendant contested neither her refusal to submit to the test nor the validity of the signature on the form. Although she denied that she told the officer that she had driven the car and denied that the officer explained to her the consequences for a refusal to submit to the blood alcohol test, the trier of fact was free to reject the theory offered by the defendant and fully accredit the evidence offered by the state. See Summerall, 926 S.W.2d at 275.

Upon review of the implied consent statute, it appears that its applicability hinges on whether the "test is administered at the direction of a law enforcement officer having reasonable grounds to believe such person was driving while under the influence." Tenn. Code Ann. § 55-10-406(a)(1) (2003); see State v. Turner, 913 S.W.2d 158, 160 (Tenn. 1995). It does not hinge on a finding by the trial court that the defendant had actually driven the vehicle. From all of the circumstances, it is our view that the officer had reasonable grounds to believe that the defendant had been driving while under the influence of alcohol. Her refusal, therefore, to submit to a blood alcohol test after having been informed of the consequences is sufficient evidence to support the finding of the trial court. Because, however, violation of the Implied Consent Law is not a criminal conviction, the judgment is modified to delete any reference to the defendant having committed a Class A misdemeanor.

Otherwise, the judgment of the trial court is affirmed.

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GARY R. WADE, PRESIDING JUDGE