

NOTICE  
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2012 IL App (4th) 110408-U

Filed 10/01/12

NO. 4-11-0408

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
GERALD D. REED,	)	No. 09CF141
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

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PRESIDING JUSTICE TURNER delivered the judgment of the court.  
Justices Pope and McCullough concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the evidence failed to indicate defendant drove a vehicle while he was under the influence of drugs to a degree that rendered him incapable of driving safely, the State's evidence was insufficient to prove him guilty of aggravated driving under the influence and child endangerment beyond a reasonable doubt.

¶ 2 In October 2010, the trial court found defendant, Gerald D. Reed, guilty of one count of aggravated driving under the influence (DUI) and three counts of endangering the life and health of a child. In March 2011, the court sentenced him to probation and a jail term.

¶ 3 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt and (2) his trial counsel was ineffective. We reverse.

¶ 4 I. BACKGROUND

¶ 5 In May 2009, the State charged defendant by information with one count of

aggravated DUI (625 ILCS 5/11-501(d)(1)(H) (West 2008)), alleging he drove a vehicle while he was under the influence of a drug or combination of drugs to a degree that rendered him incapable of driving safely (625 ILCS 5/11-501(a)(4) (West 2008)) and at a time he did not possess a valid driver's license. The State also charged defendant with three counts of endangering the life or health of a child (720 ILCS 5/12-21.6(a) (West 2008)), alleging he knowingly permitted three children to ride unrestrained in his vehicle while his own physical and mental faculties were so impaired as to reduce below the standard of ordinary care his ability to operate the vehicle. Defendant pleaded not guilty.

¶ 6 In February 2010, Dr. Richard Dirkes sent a letter to the trial court, indicating he had treated defendant for attention deficit hyperactivity disorder (ADHD) since February 2007. He prescribed Adderall at 40 milligrams per day.

¶ 7 In September 2010, defendant's bench trial commenced. Defendant pleaded guilty to the charges that the children were not wearing seat belts, he was not wearing a seat belt, and he was driving on a suspended license. The case then proceeded on the remaining charges.

¶ 8 Illinois State Police Trooper Chad Dumonceaux testified he received a week's worth of training on alcohol- and/or drug-impaired motorists and was certified as a teacher in field-sobriety testing. On May 23, 2009, at 9:20 a.m., Dumonceaux observed a driver who was not wearing his seat belt. After executing a traffic stop, Dumonceaux walked up to the vehicle and noticed the driver and three children were not wearing seat belts. Dumonceaux stated the driver, identified as defendant, appeared "nervous" and "had a little fidgety action going on." Defendant stated his license had been suspended and he had outstanding warrants for his arrest. Dumonceaux noticed defendant's speech pattern was "rapid." While they sat in the front seat of

the patrol car, Dumonceaux noticed defendant's "knees were almost constantly knocking back and forth." Thinking defendant might be impaired, Dumonceaux noticed defendant's eyes were "constricted." Dumonceaux shined his flashlight in defendant's eyes but saw no adjustment in his pupils. Based on his training and experience, Dumonceaux stated this could indicate defendant had narcotics in his system. As their conversation proceeded, defendant kept asking for water and "licking his lips."

¶ 9           Once the arrest warrants were confirmed, Dumonceaux placed defendant under arrest. A search of his person revealed a prescription pill bottle of Adderall. Defendant stated he had ADHD and the Adderall helps him focus. Dumonceaux stated Adderall is an amphetamine, a stimulant that constricts the pupil. He did not know the symptoms of ADHD. Defendant stated he stuffed a tissue inside the bottle so people would not know he was carrying the pills; his wife would take them from him if she heard them rattle. The bottle's label indicated the prescription was for 60 pills with a dosage of 2 pills per day. Dumonceaux stated the prescription was filled on May 21, 2009, which was two days prior to the arrest, but he only counted 42.5 pills in the bottle. In explaining the discrepancy, defendant stated the pills might have been at home or his wife might have taken them.

¶ 10           Based on defendant's rapid speech, his "fidgetiness," his "constricted eyes without the proper response to light," and his inability to explain the differentiation in the pill count, Dumonceaux believed he was impaired. Dumonceaux asked defendant to consent to a blood and urine test but he refused. Upon receiving defendant's consent to search the vehicle, Dumonceaux located a bottle of lidocaine and eight alcohol swabs. Defendant stated a doctor gave them to him for his back pain.

¶ 11 On cross-examination, defense counsel asked Dumonceaux about the odor of marijuana in the vehicle. Defendant told Dumonceaux that he did not smoke in the van but his wife did. Dumonceaux testified he did not receive training on the symptoms or side effects of Adderall or other medications taken for ADHD. Dumonceaux testified he noticed one of defendant's pupils was different in size than the other. He stated that could be caused by a head injury or different drugs in the body reacting a certain way.

¶ 12 Illinois State Police Trooper Tracy Atteberry testified she was called to the scene to take care of defendant's children. Upon arrival, Atteberry noticed defendant was "extremely fidgety," his "pupils were extremely small," and he "kept licking his lips." As to the vehicle, Atteberry noticed it was messy, the dashboard where the air bag was located was duct-taped, one of the doors did not open correctly, and she could smell a faint odor of marijuana.

¶ 13 Atteberry had a conversation with Melissa Everroad, who stated she and defendant smoked marijuana in the vehicle on a trip to Indiana. Everroad also stated defendant was in a lot of pain and believed he was abusing drugs to alleviate the pain.

¶ 14 After the State rested, the trial court continued the case until October 2010. For the defense, Everroad testified defendant is her boyfriend and they have children together. On the day of defendant's arrest, they were preparing to go on a bike racing trip. In preparation for the trip, Everroad packed clothes, racing equipment, and food. She also took out some of defendant's prescription medication and put it into a different container. Everroad stated she did not tell a trooper that defendant had a problem with his medication.

¶ 15 Defendant testified he is a chiropractor and has been licensed since 2007. In 2004, defendant was diagnosed with ADHD. He initially took Ritalin but switched to Adderall,

which he stated is a central nervous system stimulant. Defendant stated Adderall helped to relieve his ADHD symptoms, which included an inability to focus, concentrate, or finish a task, as well as being hyper and "fidgety." Defendant testified he had been in a car accident in 1986 and suffered head injuries. As a result, defendant stated the pupil on his left side is larger than the one on the right. Defendant testified Dumonceaux checked his pupils while seated in the front seat of the patrol car facing north and east. Defendant stated it was a bright sunny day.

¶ 16 Following closing arguments, the trial court found the evidence indicated defendant took more Adderall than he was prescribed and it affected him to a degree that rendered him incapable of safely driving a vehicle. The court found defendant guilty on all four counts.

¶ 17 On March 4, 2011, the trial court sentenced defendant to 30 months' probation and 180 days in jail. The court also imposed various fines, fees, and assessments. On March 11, 2011, defendant filed a *pro se* motion to reconsider his sentence, asking for periodic imprisonment so he could keep his employment. On March 29, 2011, defendant filed a notice of appeal.

¶ 18 In May 2011, the trial court withdrew defendant's notice of appeal. The court then denied his motion to reconsider his sentence and directed the clerk to file a new notice of appeal. This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 Defendant argues the State failed to prove him guilty beyond a reasonable doubt of aggravated DUI where Trooper Dumonceaux's observations were explained by defendant's ADHD and his use of Adderall to control it. We agree.

¶ 21 "When reviewing a challenge to the sufficiency of the evidence in a criminal

case, the relevant inquiry is whether, when viewing 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.' " *People v. Ngo*, 388 Ill. App. 3d 1048, 1052, 904 N.E.2d 98, 102 (2008) (quoting *People v. Singleton*, 367 Ill. App. 3d 182, 187, 854 N.E.2d 326, 331 (2006)).

The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony, to resolve conflicts in the evidence, and to draw reasonable inferences from that evidence. *People v. Jackson*, 232 Ill. 2d 246, 280-81, 903 N.E.2d 388, 406 (2009).

"[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable[,] or unsatisfactory as to create a reasonable doubt of the defendant's guilt."

*People v. Rowell*, 229 Ill. 2d 82, 98, 890 N.E.2d 487, 496-97 (2008). "This same standard of review applies regardless of whether the defendant received a bench or jury trial." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 225, 920 N.E.2d 233, 241 (2009).

¶ 22 Section 11-501(a)(4) of the Illinois Vehicle Code provides that "[a] person shall not drive or be in actual physical control of any vehicle within this State while \*\*\* under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving." 625 ILCS 5/11-501(a)(4) (West 2008). A defendant will be found guilty of aggravated DUI when the violation was committed when he "did not possess a driver's license or permit or a restricted driving permit or a judicial driving permit or a monitoring device driving permit." 625 ILCS 5/11-501(d)(1)(H) (West 2008).

¶ 23 To prove a defendant guilty of DUI, the State must prove "that a driver was under the influence of a drug or alcohol to a degree that rendered him incapable of driving safely."

*People v. Gordon*, 378 Ill. App. 3d 626, 631-32, 881 N.E.2d 563, 567 (2007). Circumstantial

evidence can prove a defendant guilty of DUI. *People v. Hostetter*, 384 Ill. App. 3d 700, 712, 893 N.E.2d 313, 323 (2008). "Further, the credible testimony of the arresting officer by itself is sufficient to sustain a conviction of driving under the influence." *Hostetter*, 384 Ill. App. 3d at 712, 893 N.E.2d at 323.

¶ 24 In the case *sub judice*, Trooper Dumonceaux testified he received training regarding alcohol- and drug-impaired motorists. After stopping the vehicle, Dumonceaux noticed defendant appeared nervous and was "fidgety." When he spoke, defendant's speech was "rapid." His knees "were almost constantly knocking back and forth." Thinking defendant was impaired, Dumonceaux noticed his eyes were "constricted," and when he shined a light on defendant's eyes, he saw no adjustment in the pupils. As they continued to talk, defendant kept asking for water and licked his lips frequently. A count of defendant's pill bottle indicated he had been prescribed 60 Adderall pills two days earlier, but only 42.5 remained. Defendant also refused a chemical test. Trooper Atteberry noticed defendant was "extremely fidgety," his "pupils were extremely small," and he "kept licking his lips." Atteberry also testified that Everroad stated defendant abused drugs to alleviate his pain.

¶ 25 In *People v. Workman*, 312 Ill. App. 3d 305, 306, 726 N.E.2d 759, 760 (2000), the Second District reviewed the defendant's conviction for driving under the influence of a drug or combination of drugs to a degree that rendered the defendant incapable of driving safely. In that case, the arresting officer stated the defendant swayed and stumbled as he walked and failed several field-sobriety tests. *Workman*, 312 Ill. App. 3d at 307, 726 N.E.2d at 760-61. A prescription bottle of lorazepam was found on the defendant's person, and a count revealed 8 pills out of a prescription for 30 pills. *Workman*, 312 Ill. App. 3d at 308, 726 N.E.2d at 761. The

defendant allegedly told the officer the pills were muscle relaxants that belonged to his wife. *Workman*, 312 Ill. App. 3d at 308, 726 N.E.2d at 761. A breath test revealed a blood-alcohol content of 0.01. *Workman*, 312 Ill. App. 3d at 308, 726 N.E.2d at 761.

¶ 26 In analyzing the sufficiency of the State's evidence, the Second District noted as follows:

"The opinion of an officer regarding whether a person is under the influence of drugs is circumstantial evidence that may be considered sufficient provided that the officer has the relevant skills, experience, or training to render such an opinion; in other words, the officer would have to be qualified by the court as an expert in order to reach such a conclusion." *Workman*, 312 Ill. App. 3d at 310, 726 N.E.2d at 763.

In reviewing other cases involving the qualifications of officers to render such an expert opinion, the court stated as follows:

"[I]n a case involving a charge of driving under the influence of a drug or combination of drugs, when there is no competent evidence by a qualified witness regarding the nature and effect of the drug alleged to have been ingested and the defendant has not admitted to taking the drug and being under the influence, this lack of competent testimony may create a reasonable doubt of the defendant's guilt, absent other sufficiently incriminating evidence." *Workman*, 312 Ill. App. 3d at 311, 726 N.E.2d at 763-64.

¶ 27 The Second District found the officer did not testify he had significant experience or expertise in detecting whether a person was driving under the influence of drugs or was influenced by a drug such that it prevented the person from safely driving. *Workman*, 312 Ill. App. 3d at 311, 726 N.E.2d at 764. The court also found the officer was not knowledgeable about lorazepam, its nature, or any side effects it might have on the driver. *Workman*, 312 Ill. App. 3d at 311, 726 N.E.2d at 764.

"There is no competent testimony whatsoever regarding the drug's physiological effects, the amount required to produce any significant effect, or how the drug would affect a person's ability to drive safely. There was conflicting evidence regarding whether defendant had actually taken any amount of the drug. It is unclear when he would have taken the drug that day. Defendant denied taking the drug and never admitted to being under the influence of any chemical substance. Although there were medical tests that could have been performed to determine whether defendant had in fact ingested a drug or was under the influence of a drug, none were produced at trial." *Workman*, 312 Ill. App. 3d at 312, 726 N.E.2d at 764.

The Second District concluded the evidence regarding whether the defendant was under the influence of a drug and whether it affected his ability to drive safely was so unsatisfactory that it raised a reasonable doubt of his guilt. *Workman*, 312 Ill. App. 3d at 312, 726 N.E.2d at 764.

¶ 28 We find the same result applies in this case. Unlike *Workman*, defendant here has

ADHD and possessed Adderall for which he had a prescription. The State's evidence failed to show when or if the missing pills were consumed by defendant. Trooper Dumonceaux did not observe defendant engage in any driving that was unsafe other than the failure to wear a seat belt, the reason for the stop. The State's evidence consisted of defendant fidgeting, licking his lips, and his constricted pupils. However, defendant's mannerisms are explained by his ADHD condition and the side effects that are caused by Adderall. Moreover, defendant's licking of his lips and dry mouth can be explained by not having any water during the two-hour stop.

¶ 29 We note Dumonceaux testified he spent a week learning about drug- and alcohol-impaired motorists and was a certified teacher for field-sobriety testing. He agreed he learned in his training that a central nervous stimulant constricts the pupils of the eye. Adderall is an amphetamine, a stimulant which constricts the pupil. However, Dumonceaux was not given any information in his training as to the symptoms or side effects displayed by a person taking Adderall to treat ADHD. The State failed to show Dumonceaux was qualified to give an opinion that defendant was under the influence of Adderall to the extent it impaired his ability to drive safely. We find the evidence as to whether defendant was under the influence of a drug and whether it affected his ability to drive safely is so unsatisfactory that it raises a reasonable doubt of his guilt. Accordingly, defendant's convictions for aggravated DUI and child endangerment must be reversed. In light of our decision, we need not address defendant's remaining arguments.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we reverse the trial court's judgment.

¶ 32 Reversed.