2014 IL App (2d) 140253-U
No. 2-14-0253
Order filed November 5, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FRANCIS R. TRANKINA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 12-DT-3993 Honorable Anthony V. Coco, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The State proved defendant guilty beyond a reasonable doubt of DUI: defendant's weaving, his bloodshot glassy eyes, his slurred speech, his odor of alcohol, his admission of drinking, his performance on field sobriety tests, and his refusal to submit to a breath test supported the trial court's finding, per the proper legal standard, that defendant was impaired, even if slightly, in a manner that prevented him from driving safely.

¶ 2 Defendant, Francis R. Trankina, appeals his conviction of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2012)). He contends that the trial court applied the wrong legal standard to determine that he was "under the influence" of alcohol and that the evidence was insufficient to convict him. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested on November 2, 2012. He refused a Breathalyzer test. He later filed a petition to rescind his statutory summary suspension, which was granted because defendant had not been given a warning regarding what would happen if he refused. On October 24, 2013, a bench trial was held.

¶ 5 Officer Kurt Messer testified that he stopped defendant's vehicle on I-88 at about 2:48 a.m. for improper lane usage (625 ILCS 5/11-709 (West 2012)) after observing the vehicle weave out of it lane multiple times, with its passenger's and driver's side tires going over the line by more than a tire's width. He did not observe any other traffic violations. A video filmed from the squad car shows that defendant's vehicle weaved within the lane for 24 seconds before Messer activated his lights. Because of the angle of the camera and what appears to be a slight curve in the road, it is not clear that the vehicle ever crossed out of the lane by more than a tire's width. However, at one point its passenger's side tires did touch the lane markings. The driver's side tires did not appear to do so.

¶ 6 Defendant promptly pulled over when Messer activated the lights on the squad car, and he had no trouble locating and producing his driver's license and insurance card. Defendant said that he was coming from a reception at Northern Illinois University where he consumed four beers between 11 p.m. and 2 a.m. There was evidence that the reception began at 7 p.m. Defendant exited his vehicle at Messer's request, did not have difficulty getting out of it, and did not lean on it for support. After stopping the vehicle, Messer observed that defendant had bloodshot glassy eyes and slurred speech and that a strong odor of alcohol was emanating from the vehicle. Messer continued to observe slurred speech and the odor of alcohol throughout the encounter.

¶ 7 Messer administered the horizontal gaze nystagmus (HGN) test. Defendant kept his balance during the test. However, he initially failed to follow Messer's instructions and improperly moved his head. He did not move his head after Messer again instructed him not to do so. Messer next administered the walk-and-turn test, a divided-attention test that requires the person to follow directions and demonstrate coordination. The test requires the person to walk a specific number of steps heel-to-toe in a straight line, and Messer demonstrated how to perform it. Defendant told Messer that he had severe arthritis in his right hip and would have difficulty performing tests. During the test, defendant took the correct number of steps, but his steps were seven inches apart instead of heel-to-toe. Defendant also stepped off the line twice and turned improperly. Ultimately, Messer observed five out of eight clues that would indicate that a person was under the influence of alcohol. Messer did not remember if defendant said that his hip actually caused problems with the test. In the video it does not appear that defendant made any attempt at all to walk heel-to-toe. He also does not limp or show signs of pain in the video.

¶ 8 Defendant also did not perform the one-leg-stand test correctly. Messer told defendant that he could do the test on either leg, but defendant did the test on his right leg. Defendant put his foot down four times and raised his right arm for balance. Messer could not recall if defendant told him that his hip caused problems with the test. Other than during the tests, defendant did not have any problems with balance.

¶ 9 Defendant was arrested and charged with driving under the influence of alcohol and improper lane usage. He was cooperative, although he refused the Breathalyzer test. Messer testified that, in his opinion, defendant was driving under the influence of alcohol and was unable to safely operate a motor vehicle on the highway.

¶ 10 After Messer testified, the State rested, and defendant moved for a directed finding. That motion was denied, and the defense rested without presenting evidence. The court found defendant guilty. In reaching its determination, the court stated:

> "The state has to prove beyond a reasonable doubt that the gentleman was driving or in actual physical control of a car and that he was intoxicated. In order to do that, the state has to show me beyond a reasonable doubt that the defendant was less able, either mentally or physically or both, to exercise clear judgment as the case law says with steady hands and nerves and operate an automobile safely to himself and to the public. Even a slight impairment that leads to a slight reduction in the motorist's ability to drive is sufficient to support a conviction."

¶ 11 The court noted factors in defendant's favor such as that he cooperated, pulled over promptly, produced his papers properly, did not have trouble getting out of the vehicle, and answered questions appropriately. However, the court said that it saw traffic violations on the video and that Messer testified credibly that the vehicle's tires went over the line on both the driver's side and the passenger's side. The court also credited Messer's testimony that defendant had bloodshot glassy eyes, a strong odor of alcohol, and slurred speech. Defendant also admitted that he had consumed alcohol and he refused a Breathalyzer. The court noted that defendant did not follow directions the field tests. The court said that perhaps some of the failures could be attributed to a sore hip but that some could not. The court also noted issues defendant had with balance, missing the heel-to-toe portion of the walk-and-turn test by seven inches, completely disregarding directions on how to properly turn, and being unable to even make it to 10 on the one-leg-stand test, during which he put his arm out for balance, put his foot down four times, and swayed. As a result, the court found defendant guilty.

¶ 12 Defendant moved for reconsideration, arguing in part that the court applied the wrong standard when it said that even a slight impairment in the ability to drive was sufficient to support a conviction. The court noted Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000), which states that a person is under the influence of alcohol when his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care. The court then observed that, in *Mills v. Edgar*, 178 Ill. App. 3d 1054, 1057 (1989), the Fourth District applied that to find that any reduction in the ability of a motorist to drive was sufficient. Thus, the court denied the motion. Defendant was sentenced to conditional discharge, public service, completion of a monitoring program, counseling, and attendance at a victim impact panel. He appeals.

¶ 13 II. ANALYSIS

¶ 14 Defendant argues that the evidence was insufficient to show that he was driving under the influence of alcohol. He first contends that the trial court applied the wrong standard to determine that he was under the influence of alcohol, arguing that it misapplied *Mills* when it stated that even a slight impairment that leads to a slight reduction in the motorist's ability to drive is sufficient to support a conviction. In the alternative, he contends that *Mills* was wrongly decided. He then argues that there was no evidence that he exhibited anything greater than a slight impairment.

¶ 15 A reviewing court will not set aside a criminal conviction unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). In reviewing a challenge to the sufficiency of the evidence, " 'the relevant question is whether, after 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.' " (Emphasis in original.) *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "The State may prove a defendant guilty of DUI based upon circumstantial evidence." *People v. Weathersby*, 383 Ill. App. 3d 226, 229 (2008). Moreover, "[t]he trier of fact must assess the credibility of the witnesses and the weight of their testimony, resolve conflicts in the evidence, and draw reasonable inferences from that evidence, and this court will not substitute its judgment for that of the trier of fact on these matters." *People v. Slinkard*, 362 Ill. App. 3d 855, 857 (2005).

¶ 16 Section 11-501(a)(2) of the Illinois Vehicle Code provides that an individual "shall not drive or be in actual physical control of any vehicle within this State" while such individual is "under the influence of alcohol." 625 ILCS 5/11-501(a)(2) (West 2012). It is commonly stated that a person is under the influence of alcohol when, due to the consumption of alcohol, he or she is "less able, either mentally or physically, or both, to exercise clear judgment, and with steady hands and nerves, operate an automobile with safety to himself and to the public." *People v. Sullivan*, 132 Ill. App. 2d 674, 677 (1971). In *Mills*, the Fourth District held that even a slight impairment that leads to a slight reduction in the motorist's ability to drive is sufficient to support a conviction. *Mills*, 178 Ill. App. 3d at 1057.

¶ 17 Defendant contends either that the trial court misapplied *Mills* or that *Mills* provides an incorrect standard. Defendant relies on Illinois Pattern Jury Instructions, Criminal, No. 23.29 (4th ed. 2000), stating that a person is under the influence "when, as a result of drinking any amount of alcohol, his mental or physical faculties are so impaired as to reduce his ability to think and act with ordinary care." Defendant argues that this standard was not applied when the trial court found that a slight impairment was sufficient.

¶ 18 In *Mills*, the court considered the administrative revocation of a driver's license due to a Colorado conviction of driving "while ability impaired." *Mills*, 178 Ill. App. 3d at 1056. The Fourth District noted that Colorado's standard of proof required impairment only to the slightest degree. *Id*. at 1057. The court found Illinois law to be substantially similar. *Id*. at 1056. It interpreted the pattern instruction to mean that any reduction in the ability of a motorist to drive would be sufficient to support a conviction because even a slight impairment could reduce the person's ability to think and act with ordinary care. See *Mills*, 178 Ill. App. 3d at 1057. That determination is logical and is in line with other commonly stated propositions of law such as the proposition that "[a] defendant is guilty of DUI if the State proves that he was under the influence of alcohol to a degree that rendered him incapable of driving safely." *Weathersby*, 383 Ill. App. 3d at 229. Even a slight impairment could do just that. Thus, to the extent defendant argues that *Mills* was wrongly decided, we disagree.

¶ 19 Defendant also argues, however, that the trial court misapplied *Mills* by focusing on a slight impairment or slight reduction in his ability to drive instead of addressing whether there was any reduction in his ability to exercise ordinary care. But that is not the case. The trial court specifically and correctly noted that the State had to show "beyond a reasonable doubt that the defendant was less able, either mentally or physically or both, to exercise clear judgment as the case law says with steady hands and nerves and operate an automobile safely to himself and to the public." Thus, the court applied the law as commonly cited (see *Sullivan*, 132 Ill. App. 2d at 677), which in turn is an expression of the ability of the driver to exercise ordinary care. To reverse because the court did not use the specific words "ordinary care" or specifically quote the pattern instruction would put form above substance. Further, the court specifically mentioned the pattern instruction when it denied the motion to reconsider. Looking to the entire context of

the court's comments, it is clear that the court found that, although the impairment was slight, defendant was impaired in a manner that prevented him from driving safely—a finding that necessarily encompassed the inability to exercise ordinary care. Thus, the trial court did not misapply *Mills* or err in the standard it applied. Because there was no error, we need not discuss whether any error was harmless.

¶ 20 Defendant next argues that the evidence was insufficient to prove beyond a reasonable doubt that he was driving under the influence. Defendant points to the lack of evidence in the video that his vehicle crossed the lane markers, his general cooperativeness and ability to move and communicate, and his hip arthritis. But other evidence showed that defendant exhibited a number of signs of impairment. Messer testified that he observed defendant's vehicle cross the lane markers, and the video, while not clearly showing the car moving outside of the lane, shows the vehicle weaving significantly within the lane markers. Messer noticed the odor of alcohol coming from defendant and observed that he had bloodshot glassy eyes and slurred speech. Defendant admitted to drinking four beers and had significant difficulty in following the instructions for the field sobriety tests and in performing the tests. Even if defendant's hip arthritis were considered a factor, defendant still entirely failed to follow instructions on the walk-and-turn test, and he ignored that he was told that he could perform the one-leg-stand test on either leg. In addition, his refusal to submit to a Breathalyzer test was circumstantial evidence of consciousness of guilt. *Weathersby*, 383 Ill. App. 3d at 230. Upon this evidence, a rational trier of fact could have found defendant guilty.

¶ 21 III. CONCLUSION

¶ 22 The trial court applied the correct legal standard, and the evidence was sufficient to prove defendant guilty. Accordingly, the judgment of the circuit court of Du Page County is affirmed.

¶ 23 Affirmed