2018 IL App (1st) 160065-U

No. 1-16-0065

Order filed October 11, 2018

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. YB 102 211
	)	
REMIGIJUS NIUKLYS,	)	Honorable
	)	Steven J. Rosenblum,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for driving under the influence of alcohol affirmed over his contention that the trial court should have found him impaired by prescription medication rather than alcohol and that the State should have charged him with driving under the influence of prescription medication.

¶ 2 Following a bench trial, defendant Remigijus Niuklys was found guilty of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2014)), and sentenced to 5 days

in jail and 18 months of supervision.[1] On appeal, defendant contends that he was not proven guilty of DUI beyond a reasonable doubt when the evidence at trial demonstrated that he was impaired by prescription medication rather than alcohol. He further contends that the State erred when it charged him with driving under the influence of alcohol because it should have charged him with driving under the influence of prescription medication. We affirm.

¶ 3 Prior to the start of trial, the parties stipulated to a videotape that truly and accurately reflected the events of May 18, 2014. The trial court then recessed in order to watch the video.

¶ 4 The video shows a vehicle changing lanes, weaving within lanes, and driving onto a curb before pulling into a parking lot and stopping. Music could be heard coming from the vehicle. Palos Heights police officer John Parnitzke then approaches the vehicle and asks, in pertinent part, if defendant is diabetic. No answer can be heard. The second time the question is asked, a negative answer is heard. When Parnitzke asks if defendant knows why he was pulled over, he answers no. Parnitzke states that the vehicle was going 50 miles per hour, could not stay in one lane, and hit a light pole. When Parnitzke asks if the vehicle is in park, defendant replies that he does not understand.

¶ 5 When defendant exits the vehicle, he sways, his speech is slurred, and he repeatedly puts his hands in his pockets despite Parnitzke's instructions not to do so. When Parnitzke tells defendant to follow a light with his eyes without moving his head, defendant initially moves his head. Defendant continues to place his hands in his pockets and sways when walking. Parnitzke states that he smells alcohol and defendant denies that he has been drinking. Defendant refuses to perform the walk and turn test. Parnitzke then states that defendant's eyes are bloodshot and

[1] Defendant was also found guilty of improper lane usage and speeding. He makes no argument regarding those convictions on appeal.

glassy, he is swaying and smells of alcohol, and if he has not been drinking what is the explanation. Defendant says that he is sober, and asks Parnitzke to walk him home. When Parnitzke asks defendant to recite the alphabet, defendant recites to the letter E, then stops. He explains that he is Jewish and is not "English." Defendant refuses to perform any more tests and is arrested for DUI.

¶ 6 When court reconvened, Officer Parnitzke testified that he was trained in observing and detecting drivers impaired by alcohol. He was on patrol just after midnight on May 18, 2014, when he observed a vehicle make numerous lane violations, including changing lanes without activating a turn signal. Parnitzke used his dash-mounted radar to determine that the vehicle was traveling 50 miles per hour in a 35-mile-per-hour zone. When he activated his lights, the vehicle accelerated, left the street, and went onto the parkway, where it hit the support base of a light pole. The vehicle then returned to the road and entered a parking lot. Parnitzke exited his squad car and approached the vehicle. He observed defendant texting and heard very loud music. When defendant opened the door, Parnitzke detected a strong odor of alcoholic beverage from inside. He also observed that defendant's eyes were bloodshot and glassy. Parnitzke asked if defendant was diabetic and defendant answered no. During their subsequent conversation, defendant's speech was slurred and Parnitzke had difficulty understanding his words. Parnitzke observed defendant "swaying heavily" as he exited the vehicle. He also smelled the odor of alcohol coming from defendant.

¶ 7 Parnitzke administered the horizontal gaze nystagmus test (HGN test), and instructed defendant to follow the stimulus with his eye. However, Parnitzke had to repeat the directions "numerous" times and defendant had trouble not moving his head. At the completion of the test

and based upon all the other factors up to that point, Parnitzke believed that defendant had consumed alcohol. When Parnitzke asked defendant to complete other field sobriety tests, defendant refused. During their conversation, Parnitzke asked defendant to complete the "alphabet test." Defendant initially declined because he was Jewish, then attempted the test but only reached the letter E. Parnitzke did not remember if he asked defendant whether defendant had been drinking alcohol, but asserted that the question would have been recorded on the video. Defendant refused to perform the sobriety tests and was ultimately arrested for DUI. A search of defendant's vehicle recovered two bottles of alcohol with open seals from the passenger seat.

¶ 8 Defendant was then taken to a police station, where he refused to provide a breath sample and was given the *Miranda* warnings. During a subsequent conversation, defendant stated that he had not been ill and had not taken any medication in the previous six hours. Parnitzke had made hundreds of DUI arrests in his career and had observed people under the influence of alcohol in both a professional and personal capacity. The totality of the circumstances in this case led Parnitzke to opine that defendant was under the influence of alcohol. The parties stipulated that Parnitzke was properly trained and certified in the administration of field sobriety tests. During cross-examination, Parnitzke acknowledged that the medications Xanax, Clonazepam, and Buspirone were recovered from defendant's vehicle, and returned to him when he was released from custody.

¶ 9 Defendant testified that he drove Petris Ruben and "Tomas" to watch hockey at a friend's house. Tomas brought a bag of alcohol. Defendant did not drink any because he was using Xanax, Clonazepam, and Buspirone as prescribed by a physician. He took Clonazepam at 7 p.m. Although he had been told that a potential side effect of the Clonazepam was drowsiness, he did

not feel drowsy when he left his friend's home. Defendant did not observe Tomas or Ruben bring anything into the vehicle. After dropping the men off, defendant began to drive to his girlfriend's house. He felt dizzy and sleepy, so he stopped at a gas station for juice. He also removed his medication from his jacket pocket and placed the bottles in the vehicle. He continued to drive and turned on loud music to combat his drowsiness.

¶ 10 At one point, the lights of a police vehicle startled him and he tried to pull over. He hit a curb, and then pulled into a parking lot. When the officer approached the vehicle, the officer stated that defendant was driving 50 miles per hour in a 35-mile-per-hour zone and asked "[m]ore than a few times" whether defendant was diabetic. The officer did not ask whether defendant was using drugs. Defendant felt dizzy and drowsy when he exited the vehicle and had weak balance. Defendant performed the eye test, but did not agree to perform the field sobriety tests because he was feeling weak around the legs. When he was asked at the police station whether he used any medication in the last six hours, he answered in the negative because he had taken medication more than six hours prior. He did not tell the officer that he was using prescription medication.

¶ 11 During cross-examination, defendant testified that he did not provide a breath sample because he had already been arrested and charged with DUI and it would not change anything. He also testified that he did not perform the alphabet test because he did not know how the letters "go from A to Z in what order."

¶ 12 Defendant's friend Petris Ruben testified, through a translator, that defendant drove him to a friend's house to watch hockey. Once there, Ruben drank alcohol, but defendant did not. When Ruben asked why defendant was not drinking, defendant indicated that he was on

prescription medication. Ruben observed defendant consume medication around 7 p.m. When they left, a friend sat in the front passenger seat with a bag containing bottles of alcohol.

¶ 13 In finding defendant guilty, the trial court stated that "all were in agreement" that defendant's driving on the video was "horrendous," that is, the vehicle went from one lane to another and no "blinker" was used. The court then stated that the video and Parnitzke's testimony contradicted defendant's testimony that he immediately curbed the vehicle. Moreover, defendant drove five to seven feet onto the curb and parkway, striking a light post. When defendant's vehicle stopped, there was loud music and Parnitzke smelled a strong odor of alcohol coming from the vehicle and from defendant. The court concluded that both sides agreed that defendant was out of sorts, but disagreed as to the cause. The court then noted that defendant failed the HGN test, could only reach the letter E in the alphabet test, refused to perform additional field sobriety tests, and that alcohol was recovered from the vehicle. The court stated that medication was recovered from the vehicle and defendant testified that medication made him dizzy and drowsy. However, defendant also admitted that when he was asked if he took medication, he answered no. The court noted that, although defendant could have explained that he was on medication and taken a breathalyzer test, he did not; that is, he declined to "show the officer that he had no alcohol whatsoever in his system."

¶ 14 The court further noted that, on the video, defendant stumbled when he exited the vehicle, refused to perform field sobriety tests, did not follow directions, and asked the officer to walk him home. The court concluded that defendant was "clearly impaired" and that the question was whether defendant was impaired because of alcohol or drugs. The court noted that defendant never stated that he took any drugs and that defendant testifying that he took medication did not

explain the alcohol on his breath, the slurred speech, or the bloodshot glassy eyes. The court also stated that it had to consider that there were open bottles of alcohol in the vehicle and that defendant did not take a breathalyzer test. The court therefore found defendant guilty of DUI, and sentenced him to 5 days in jail and 18 months of conditional discharge.

¶ 15 On appeal, defendant contends that he was not proven guilty of DUI beyond a reasonable doubt because the evidence at trial demonstrated that he was impaired by prescription medication rather than alcohol. He further contends that his conviction must be vacated because he was not charged with the correct offense.

¶ 16 As a threshold matter, we address defendant's argument that this court should review the evidence with no deference to the trial court's ruling. He asserts a *de novo* standard should be applied because "the trial court incorrectly applied the law to find defendant guilty of the wrong subsection" of the DUI statute. This argument is premised on defendant's assertion that he was driving under the influence of prescription medication, and, therefore, should have been charged with that offense. However, defendant was not charged with DUI based upon driving under the influence of prescription medication; rather, he was charged and found guilty of DUI based upon driving under the influence of alcohol. Although defendant contends that he was charged and convicted of the wrong offense, on appeal, he is challenging the sufficiency of the evidence with regard to the elements of the offense of which he was actually convicted, that is, DUI based upon driving under the influence of alcohol. Moreover, a *de novo* standard of review applies only when the facts are not in dispute and the defendant's guilt is a matter of law. See *People v. Smith*, 191 Ill. 2d 408, 411 (2000).

¶ 17 When 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 State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48. It is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts. *People v. Bradford*, 2016 IL 118674, ¶ 12. We will not reverse a criminal conviction based upon insufficient evidence unless the evidence is so improbable or unsatisfactory that there is reasonable doubt as to defendant's guilt (*Bradford*, 2016 IL 118674, ¶ 12), nor simply because a defendant claims that a witness was not credible or that the evidence was contradictory (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009)).

¶ 18 Here, defendant was found guilty of DUI. To sustain a conviction of DUI, the State must prove that defendant was in actual physical control of a vehicle when he was under the influence of alcohol. *People v. Philips*, 2015 IL App (1st) 131147, ¶ 17. To be under the influence of alcohol, a defendant must be under the influence to a degree that renders him incapable of driving safely. *Philips*, 2015 IL App (1st) 131147, ¶ 18. Circumstantial evidence may be used to prove this; further, the testimony of a single, credible police officer may alone sustain a conviction of DUI. *Philips*, 2015 IL App (1st) 131147, ¶ 18. In this case, defendant does not contest that he was in physical control of his vehicle and that his driving was impaired; rather, he contends that he was not under the influence of alcohol.

¶ 19 In the case at bar, taking the evidence in the light most favorable to the State as we must, the evidence sufficiently established that defendant was under the influence of alcohol when Officer Parnitzke testified that he smelled an odor of alcohol coming from defendant's vehicle

and from defendant's mouth, that defendant's eyes were bloodshot and glassy, and that defendant's speech was slurred and difficult to understand. Parnitzke also testified that defendant swayed as he exited the vehicle and that defendant had difficulty following instructions. Moreover, the video shows that defendant swayed when he exited the vehicle, did not follow the officer's instructions, and was slurring his words. Although defendant testified that he had not consumed alcohol and that his impairment was due to the side effects of prescription medication, it was for the trial court, as the trier of fact, to resolve any conflicts in the evidence and to assess the credibility of the witnesses. *Bradford*, 2016 IL 118674, ¶ 12. The trial court found the testimony of defendant and Ruben not credible and Parnitzke credible as evidenced by its finding of guilt. This court will not substitute its judgment for that of the trial court on this issue. See *Siguenza-Brito*, 235 Ill. 2d at 228 (it is not the function of the reviewing court to retry the defendant).

¶ 20 Defendant, however, contends that the trial court erred when it did not credit his testimony that he had not consumed alcohol because he was taking prescription medication. He notes that this testimony was corroborated by Ruben, and argues that the trial court "cherry picked the facts that it liked," ignored other explanations for defendant's impairment, and improperly shifted the burden of proof to defendant.

¶ 21 When assessing a sufficiency of the evidence claim on appeal, however, this court does not retry the defendant or substitute its judgment for that of the trier of fact as to the issues of witness credibility and the weight to be given to each witness's testimony (see *Siguenza-Brito*, 235 Ill. 2d at 228), yet this is exactly what defendant seeks. He essentially asks this court to reweigh the evidence against him, as his contentions on appeal focus on reasons why the trial

court was wrong to believe Parnitzke rather than defendant and Ruben. We decline defendant's request as that is not the proper role of a court of review.

¶ 22 Moreover, a trier of fact is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. See *In re Jonathon C.B.*, 2011 IL 107750, ¶ 60. Although defendant argues that his testimony and explanation for his impairment was "ignored" and should have been credited, contrary to defendant's argument, there was evidence from which a rational trier of fact could conclude that defendant was under the influence of alcohol.

¶ 23 Defendant further argues that the trial court erred when it disregarded his unrebutted testimony. However, the trial court did not disregard defendant's testimony. Rather, it came to the conclusion that defendant's testimony was not credible in light of the entirety of the testimony and evidence presented at trial. See *Bradford*, 2016 IL 118674, ¶ 12 (it is the responsibility of the trier of fact to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from the facts).

¶ 24 We are similarly unpersuaded by defendant's argument that the trial court improperly shifted the burden of proof to defendant when it noted that defendant declined to take a breathalyzer test and that defendant did not tell the officer that he had taken prescription medication. Here, rather than shifting the burden of proof to defendant, the trial court was questioning the credibility of defendant's testimony at trial. Ultimately, this court reverses a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to his guilt (*Bradford*, 2016 IL 118674, ¶ 12); this is not one of those cases. Accordingly, we affirm defendant's conviction for DUI.

¶ 25 Defendant next argues that his DUI conviction must be vacated because the evidence at trial established that he was under the influence of prescription medication, and, therefore, he could not have been convicted of driving under the influence of alcohol. In essence, defendant argues that the State charged him with the wrong offense. We disagree. Although defendant may believe that the State charged him incorrectly, as discussed above, there was sufficient evidence at trial from which a rational trier of fact could have found the essential elements of the crime with which defendant was charged beyond a reasonable doubt. See *Brown*, 2013 IL 114196, ¶ 48. Therefore, his argument is not persuasive.

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 27 Affirmed.