

No. 1-09-2782

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION
FEBRUARY 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. TM 574 539
)	
SHANE FISHER,)	Honorable
)	Patrice Ball-Reed,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.

PRESIDING JUSTICE GARCIA and JUSTICE McBRIDE concurred in the judgment.

O R D E R

HELD: Judgment affirmed on evidence found sufficient to prove defendant guilty of alcohol DUI and related vehicular offenses beyond a reasonable doubt; and determined that the court did not err in denying his posttrial motion rendering his jury trial waiver issue moot.

Following a bench trial, defendant Shane Fisher was found guilty of State and municipal violations including failing to stop at a stop sign (Municipal Code of Chicago §9-24-010(b)),

failing to wear a seat belt (625 ILCS 5/12-603.1 (West 2006)), and driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2006)). Defendant was sentenced to 24 months' conditional discharge. On appeal, defendant claims that the evidence on all of the charges was insufficient to prove him guilty beyond a reasonable doubt¹ and that the court erred in denying his posttrial motion because his jury waiver was involuntary.

BACKGROUND

The record on appeal shows that defendant was charged with a number of vehicular offenses, to wit, following too close, failure to stay within his own lane, failure to stop at a stop sign, failure to wear a seatbelt, and driving under the influence of drugs and alcohol, after he was observed driving a motor vehicle by Chicago police officers Richard Fiorito and Joanne Hazzard at 4 a.m. on October 11, 2007, in the 3400 block of North Halsted Street in Chicago. At trial, the State called only one witness, Officer Fiorito, who testified that he observed defendant driving a motor vehicle northbound on Halsted Street "driving left of center repeatedly" with "over half the vehicle was left of center." Defendant's vehicle was tailgating a taxi

¹ The quantum of proof on the municipal stop-sign violation is by a preponderance of the evidence.

in front of it and failed to stop at a stop sign while turning left from Halsted to Cornelia.

Officer Fiorito further testified that when defendant stopped in an alley, he also stopped his vehicle and approached defendant, and observed that he was not wearing a seatbelt, smelled a strong odor of alcohol, observed "very red bloodshot or watery" eyes, and noticed that defendant "had a slurred thick tongue speech, seemed confused, and was very talkative." The officer also observed a passenger in the front seat. The officer asked defendant to exit his vehicle to take field sobriety tests, and as he exited, observed defendant staggering from side to side demonstrated trouble with balance.

Officer Fiorito then proceeded with the field sobriety tests by explaining and demonstrating the tests. Defendant was able to attempt the walk-and-turn, straight-line, and one-leg-stand tests. Defendant did not walk a straight line, turned the wrong way, and repeatedly started to walk before being told to do so. Specifically, when defendant began walking, the officer testified defendant staggered and demonstrated further trouble with his balance. Defendant demonstrated trouble with the straight-line test with his first, second, third, and fourth steps. On the fifth step, he staggered and stepped off the line. Defendant did not follow the directions by touching his heel to his toe when walking, and his gait increased with each step. Officer Fiorito

testified that defendant exhibited eight out of eight possible clues of impairment in the walk-and-turn test. When the officer administered the one-leg-stand test, defendant was explained the test and asked if he was able to perform the test, and if he had any questions. Defendant did not ask any questions, and then attempted the test by swaying and hopping, and put one foot down more than three times when the foot should have been up. Officer Fiorito opined that defendant could not perform the test appropriately, and that defendant exhibited four clues of impairment when the presence of two clues indicates impairment.

Defendant then refused the finger-to-nose test. The officer testified that based on his experience as a 9-year veteran police officer in observing thousands of people under the influence of liquor, he opined that defendant was under the influence of alcohol at the time he was driving his motor vehicle. Officer Fiorito further testified that defendant was taken to a police station where he refused to take a breathalyzer test. Defendant admitted, "I've had a few drinks," but when asked whether he had anything to drink he shook his head, indicating "no." Defendant later told the officer different amounts of liquor consumed. After Officer Fiorito testified the State rested as did the defense.

On January 13, 2009, the trial court found defendant guilty

of disregarding a stop sign, failing to wear a seatbelt, and driving under the influence of liquor, and not guilty of "following too close," failing to stay within his traffic lane, and driving under the influence of drugs. The defendant had a small glass vial containing an inhalant. Defendant told Officer Fiorito that the inhalant was "poppers." However, defendant never admitted to ingesting the poppers or any other drugs.

Defendant filed a posttrial motion on April 28, 2009, claiming that he was not proven guilty of the DUI and other traffic charges beyond a reasonable doubt, and apprised the trial court that several federal civil rights lawsuits had been filed against Officer Fiorito relating to his conduct in DUI arrests since the matter was tried on January 13, 2009. Defendant maintained that the officer lied in his case, and in many other cases, and that defendant was not aware of the officer's inappropriate conduct at the time of this trial.

Defendant attached to his motion three of the federal civil complaints, one of which was filed on January 12, 2009, and the other two on February 24, 2009. In these complaints, plaintiffs alleged that Officer Fiorito was prejudiced against homosexuals, created false reports against them, motivated by his extreme prejudice toward their sexual orientation and/or in part by his motivation for pecuniary gain, that he has lied under oath to perfect his fabrications, either used excessive force during the

arrests or called plaintiff a "faggot," and has performed unlawful DUI arrests to obtain more court time for his own pecuniary gain. In one complaint, there was a further allegation that the officer's misconduct was also motivated in part by his prejudice against plaintiff's race, and in another, that his conduct was motivated in part by his prejudice against plaintiff's hearing disability.

The State filed a response claiming that defendant's allegations are unfounded and cannot overturn the court's ruling because the trial court decided the case based on the evidence presented. The State further claims that the cases defendant referred to are unrelated to his case as they involved individuals who were arrested under different circumstances.

On June 9, 2009, a hearing was held on defendant's posttrial motion where the State informed the court that it was unaware of any pending criminal charges or disciplinary actions against Officer Fiorito, and that the court's credibility determination was correct. Defense counsel responded that Officer Fiorito had notice of the allegations against him which are imputed to the State, and go directly to his credibility. Counsel then argued that the State committed a discovery violation in failing to provide defendant with this information prior to trial, which, in turn, prevented the court from hearing about the bias, prejudice, and financial motivation evidence which would have changed the

result of the trial. Counsel further claimed that the State's failure to tender the exculpatory evidence likely affected defendant's jury waiver, and that this was a close case where the officer's credibility was in question.

The court denied defendant's motion. In its written order, the trial court found that the State did not commit a Supreme Court Rule 412 discovery violation as the allegations in the civil lawsuit do not pertain to the matter at hand, the undisclosed evidence would not have changed the result of the trial, and that defendant did not show any willfulness on the State's part in failing to disclose matters in which it did not represent the officer.

The trial court further found that the lack of information concerning the pending complaints did not prevent defendant from cross-examining the officer about any bias or prejudice, and noted that no issue regarding defendant's sexual orientation was raised, which was something that could have been pursued regardless of the federal complaints. The court also found it unreasonable to impute the officer's knowledge of the pending lawsuits to the State where the information was not in its control and the State was not representing him in those matters. The court then concluded that defendant chose to have a bench trial, and that the newly discovered evidence did not refute his guilt, especially where the federal complaints do not relate to

the facts of defendant's case as no issue regarding his sexual orientation was raised.

ANALYSIS

In this appeal, defendant first claims that the evidence was insufficient to prove him guilty beyond a reasonable doubt of DUI, and insufficient to prove him guilty of failure to stop at a stop sign and wear a seatbelt. Defendant maintains that since the State was aware of the allegations of misconduct against Officer Fiorito in DUI cases, they should have called Officer Hazzard who was also present during the arrest. As a result, defendant claims the trial court may infer that Officer Hazzard's testimony would have negatively impacted the State's case.

As a preliminary matter, defendant's claim that the State was aware of the allegations of misconduct against Officer Fiorito raised in defendant's posttrial motion.

In reviewing a sufficiency of the evidence issue on appeal, evidence that was not before the court during the trial cannot be considered. *People v. Kluppelberg*, 257 Ill. App. 3d 516, 536 (1993). When defendant challenges the sufficiency of the evidence to sustain his conviction for DUI, the proper standard of review 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. Cunningham*, 212 Ill. 2d 274, 279-80 (2004).

This standard recognizes the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences therefrom. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). A criminal conviction will be reversed only if the evidence is so unsatisfactory as to raise a reasonable doubt of defendant's guilt. *Campbell*, 146 Ill. 2d at 375.

The record shows that Officer Fiorito observed defendant drive through a stop sign, and commit other erratic driving behavior. The officer also testified that when he approached defendant in the alley he was not wearing a seatbelt, smelled a strong odor of alcohol, and failed certain field sobriety tests. Based on that information and the officers experience in observing more than one thousand people under the influence of alcohol, the officer opined that he believed defendant was driving under the influence of liquor. The officer's observations of defendant drive through a stop sign and not have his seat belt on was also sufficient to prove him guilty of those offenses. *People v. Hires*, 396 Ill. App. 3d 315, 318 (2009); *People v. Loferski*, 235 Ill. App. 3d 675, 682 (1992).

Defendant claims that the trial court erred in finding him guilty of these offenses because it found that the officer was incredible and impeached. He maintains that the fact that the court found him not guilty on several charges even though the

officer testified that the violations had occurred shows that the court found the officer incredible. However, the record does not disclose that the trial court ever indicated that the officer testimony was incredible. A trial court may accept parts of a witness' testimony and reject other parts (*People v. Rodriguez*, 187 Ill. App. 3d 484, 491 (1989)), which the court obviously did here in rendering its decision on various traffic offenses.

Based on its consideration of the evidence presented, the trial court found that the evidence was insufficient to convict defendant of following too close, and failing to stay in his own lane. The record thus shows that the court was aware of certain discrepancies in the officer's testimony, considered the evidence in light of them (*People v. Scott*, 152 Ill. App. 3d 868, 872 (1987)), and concluded that they did not call into question the totality of the officer's testimony regarding the offenses which proved defendant guilty.

Defendant next claims that the State violated Supreme Court discovery Rule 412 when it failed to disclose its own investigation of Officer Fiorito prior to trial. Defendant also points out that the State has since refrained from calling the officer as a witness and that the Chicago Police Department has taken him off the street.

In support of these allegations, defendant cites the appendix in his appellate brief where he has included documents

which are not part of the record on appeal, namely his post-conviction petition and a transcript of a proceeding on that petition. Since we may only consider those documents that have been made a part of the record on appeal, we will not consider these documents, nor the allegations pertaining to them as defendant did not raise them in his posttrial motion for a new trial. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988).

Defendant further claims that the trial court erred in denying his posttrial motion because the State failed to disclose the pending lawsuits against Officer Fiorito in violation of discovery Rule 412 and *Brady v. Maryland*, 373 U.S. 83 (1963). He maintains that the State is imputed with Officer Fiorito's knowledge of the lawsuits.

To establish a *Brady* violation, the undisclosed evidence must be favorable and material to the accused to show that there is a reasonable probability that had the evidence been disclosed, the result of the proceeding would have been different. *Brady*, 373 U.S. at 87-88. The question, however, is not whether the verdict would have been different, but, rather, in the absence of the evidence, did defendant receive a fair trial which produced a determination worthy of confidence. *People v. Collins*, 333 Ill. App. 3d 20, 21 (2002).

The *Brady* rule has since been codified in Supreme Court Rule 412(c) which provides that the State must disclose any material

information within its possession or control which would tend to negate the guilt of the accused as to the offense charged.

People v. Rincon, 387 Ill. App. 3d 708, 726-27 (2008).

Defendant, however, must establish that he requested the evidence in question, that the State possessed it and failed to disclose it. *People v. House*, 141 Ill. 2d 323, 387 (1990).

There is no evidence in the record that defendant made such a request or that the State was aware of the lawsuits pending against Officer Fiorito until defendant filed his posttrial motion. In fact, defendant presents no evidence as to when the officer became aware of the lawsuits, or if and when the officer was internally investigated by the Chicago Police Department. Furthermore, Officer Fiorito's knowledge of the lawsuits pending against him cannot be imputed to the State where the matter at bar is criminal, the lawsuits are civil, and the State is not representing the officer in them. *House*, 141 Ill. 2d at 387. In addition, under Rule 412 the burden rests with defendant, within limits, to pursue and ascertain relevant information in the preparation of his defense, and if any pending civil lawsuits existed against Officer Fiorito prior to trial, defendant could have easily obtained them as they would have been a matter of public record. *People v. Borawski*, 61 Ill. App. 3d 774, 777 (1978).

We also observe that the lawsuits pending against Officer Fiorito primarily focused on his improper conduct during DUI arrests based on his alleged prejudice against homosexuals. Defendant never claimed that the officer used excessive force against him, nor did he allege that he was homosexual and that the officer was prejudiced against him on that or any other basis, which, as the trial court noted, he could have pursued at trial regardless of the federal lawsuits. Accordingly, we cannot say that the trial court abused its discretion in denying defendant's posttrial motion. Defendant's remaining contention, that his jury waiver was involuntary due to the alleged discovery violation, is rendered moot. *People v. Boyd*, 363 Ill. App. 3d 1027, 1030 (2006).

In addition, even if the State should have tendered the information to defendant, and did not, defendant would still have to show that he was prejudiced to cause his jury waiver involuntary. *People v. Chambers*, 258 Ill. App. 3d 73, 87 (1994); *People v. Durklin*, 104 Ill. App. 3d 685 (1982). In order to prove prejudice, defendant would have had to show that he would have done something different had he know of the information. *People v. Cisewski*, 118 Ill.2d 163, 173 (1987). Defendant claims he would have requested a jury. However, that is not enough because a jury would have heard only from the police officer and the civil case would not have been allowed into evidence, so the results would have still been the same.

1-09-2782

In light of the foregoing, we affirm the judgment of the circuit court of Cook County.

Affirmed.