

No. 1-09-2689

**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).

FOURTH DIVISION  
June 30, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. TP 276629
	)	
MARINO DIAZ,	)	Honorable
	)	Raymond W. Mitchell,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE SALONE delivered the judgment of the court.  
Justices Pucinski and Sterba concurred in the judgment.

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**O R D E R**

*HELD:* Where arresting officer smelled strong odor of cannabis on defendant's breath shortly after defendant's vehicle was stopped at a traffic safety check and defendant admitted to having smoked cannabis several hours earlier, there was sufficient evidence to find defendant guilty of driving a vehicle while there was any amount of cannabis in his breath.

Following a bench trial, defendant Marino Diaz was convicted of driving a vehicle while there was any amount of cannabis in

his breath. Defendant was sentenced to 12 months' supervision plus fees and fines. Defendant contends on appeal that there was insufficient evidence to prove him guilty beyond a reasonable doubt because the State failed to prove that he had been driving with any amount of cannabis in his breath.

The trial evidence shows that at about 11 p.m. on January 25, 2008, defendant was pulled over at a roadside safety check. Chicago police officer Elliott Musial stopped him and detected the strong odor of cannabis coming from inside the vehicle defendant was driving. Officer Musial then turned over defendant to Chicago police officer Phillip Travis, who took defendant aside to speak to him. Travis testified that he noticed that defendant had a strong smell of cannabis coming from his breath. When the defense objected to this testimony the court overruled the objection, finding a sufficient foundation to show that Travis was familiar with the smell of cannabis based on the following testimony from Travis. He had attended the Chicago Police Academy where he was trained in what cannabis smelled like. He had also taken refresher courses from the academy involving people under the influence of cannabis and had made other arrests of people with the smell of cannabis on their breath in his 16 years on the force.

When Travis asked defendant if he had been smoking anything illegal, defendant admitted smoking one cannabis joint

(cigarette) "several hours" earlier. Defendant agreed to take three field sobriety tests, all of which he flunked. Travis then arrested him and took him to the police station, where defendant refused to submit to blood and urine testing. However he did agree to waive his *Miranda* rights and again admitted that he had smoked one cannabis joint "earlier."

On cross-examination Travis admitted that he had seen defendant driving immediately before the stop and had not observed any bad driving by defendant.

The sole witness testifying on defendant's behalf was his mother, Yolanda Diaz, who stated that on the night in question she woke up the defendant in the room next to hers, where he was sleeping with his girlfriend. She asked him to drive her to the police pound to retrieve her stolen vehicle. Diaz testified that she did not recall defendant using any illegal substance that night, but admitted that she did not see him for two or three hours before she woke him up and so did not know what was occurring during that time.

Defendant was convicted of driving a vehicle while there was any amount of cannabis in his breath and sentenced to 12 months' supervision plus fees and fines. He now appeals, challenging the sufficiency of the evidence.

When presented with a challenge to the sufficiency of the evidence, this court must determine whether, after taking 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. Jackson*, 232 Ill. 2d 246, 280 (2009). It is not our function on review to retry the defendant. The trier of fact, in this case the circuit court, has the duty to make determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *Jackson*, 232 Ill. 2d at 280-81. We will reverse a conviction only where the evidence is so unreasonable, improbable, or unsatisfactory that a reasonable doubt of defendant's guilt remains. *Jackson*, 232 Ill. 2d at 281.

Defendant was convicted of violating section 11-501(a)(6) of the Illinois Vehicle Code, which provides in pertinent part that:

(a) A person shall not drive or be in actual physical control of any vehicle within this State while:

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(6) there is any amount of a drug, substance, or compound in the person's breath, blood or urine resulting from the unlawful use or consumption of cannabis \*\*\*. 625 ILCS 5/11-501(a)(6) (West 2006).

Defendant refers to section 11-501.2, which allows into evidence the concentration of alcohol, other drugs, or intoxicating compounds in a person's blood or breath at the pertinent time as determined by analysis of the person's blood, urine, breath, or other bodily substance. 625 ILCS 5/11-501.2 (West 2006). He contends that the State's proof failed because it did not introduce any evidence of chemical testing for the presence of cannabis. But the cases cited by defendant which mandate testing, as opposed to the opinion testimony of police officers, concern provisions expressly requiring proof of a specific blood-alcohol concentration of 0.10 or greater for one form of a conviction for driving under the influence of alcohol (now 0.08 or greater under 625 ILCS 11-501(a)(1) (West 2006)). *People v. Dakuras*, 172 Ill. App. 3d 865, 868-869 (1988); *People v. Boshears*, 228 Ill. App. 3d 667, 687 (1992). The *Dakuras* court expressly declined to decide whether opinion testimony of police officers could substitute for testing evidence to prove driving under the influence of alcohol where no minimal blood-alcohol concentration was specified in the statute. *Dakuras*, 172 Ill. App. 3d at 870.

We are concerned with a section which criminalizes any amount of cannabis in the breath, blood, or urine of the driver of a vehicle. No specific amount is required and therefore the precise accuracy of a chemical analysis is not needed. The trial

court, as the finder of fact, was justified in finding defendant guilty based upon defendant's confession to having smoked marijuana several hours before being stopped, and Officer Travis' testimony that when he spoke to defendant immediately after the stop he detected the strong odor of marijuana on defendant's breath. The court found that the State had established a sufficient foundation to show that Travis was familiar with the odor of cannabis based upon his Chicago Police Academy training, refresher courses he had taken, and other arrests he had made of people with cannabis on their breath.

The facts of this case are analogous in many respects to those of *People v. Briseno*, 343 Ill. App. 3d 953 (2003), which was also relied upon by the trial court. In *Briseno*, which involved the same statute at issue here, the arresting officer smelled cannabis on the defendant's breath and the defendant admitted that he had smoked cannabis just before he drove his car. *Briseno*, 343 Ill. App. 3d at 960. The defendant in *Briseno* challenged the use of his poor performance on field sobriety tests, but the *Briseno* court found that even without taking those tests into account, his guilt was proven beyond a reasonable doubt. *Briseno*, 343 Ill. App. 3d at 962. Defendant notes that the defendant in *Briseno* admitted to smoking cannabis immediately before driving, whereas defendant here admitted to smoking cannabis "several hours" earlier. In light of Officer Travis'

testimony that he smelled cannabis on defendant's breath at the time of his arrest, just after his car was stopped, we do not find this distinction in time to be relevant. Taking the evidence we have summarized in the light most favorable to the State, we conclude that the trial court did not err in finding defendant guilty.

Defendant's final contention is that the answer Officer Travis gave to one question on cross-examination was sufficient to negate the State's case. Travis was asked the following by defense counsel.

"Q. There was no device like a Breathalyzer that was put to [defendant's] mouth that would show that there was \*\*\* cannabis on his breath?

A. I'm not aware of any test that would show that.

Q. And you cannot testify today whether or not there was zero or 100 milligrams of cannabis on the defendant's breath?

A. No."

Defendant contends that this answer by Travis was an admission that he could not determine whether there were any milligrams of cannabis at all in defendant's breath. But we find this question to be ambiguous if not deliberately misleading. The officer clearly testified that he smelled cannabis on defendant's breath,

so that it was impossible for the amount of cannabis on defendant's breath to be zero. We find that any reasonable trier of fact could have found that Travis was referring to the impossibility of stating exactly how much cannabis was in someone's breath from smelling it. The statute only requires some amount of cannabis in the defendant's breath, and therefore that requirement was satisfied by Travis' testimony that he smelled the strong odor of cannabis coming from defendant's breath shortly after defendant was stopped.

Defendant relies upon *People v. Allen*, 375 Ill. App. 3d 810, 812-813 (2007) where a similar answer, elicited on cross-examination from the arresting officer, was held to negate the defendant's guilt. But in *Allen* the question was even more ambiguous and misleading, for the officer was asked "\*\*\* Aside from a person's breath, there's no way of indicating what amount of cannabis is in a person's blood? (Emphasis added.)" The officer was then asked "\*\*\* So you can't tell me if its zero or if its 100 milligrams?" The officer's agreement with both questions was then used to bolster an argument that the officer had admitted that there could have been zero milligrams of cannabis in the defendant's breath. This despite the officer having smelled cannabis on the defendant's breath and despite the reviewing court agreeing that burnt cannabis has a distinctive smell and that the trial court did not abuse its discretion in

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finding the officer qualified to detect the odor of burnt cannabis. *Allen*, 375 Ill. App. 3d at 813-815. We disagree with the holding of *Allen* in this respect.

Accordingly, the judgment of the circuit court is affirmed.  
Affirmed.