

No. 1-10-1831

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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. 09 CR 21427
)	
JOSE GARCIA,)	Honorable
)	Lawrence P. Fox,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

- ¶ 1 Held: State's evidence proved defendant guilty of felony driving while his license was revoked. Trial court's acquittal of defendant on charges of aggravated driving while under the influence of alcohol was based on the court's conclusion that the prosecution failed to prove that defendant was under the influence of alcohol, which was not an element of the offense of felony driving while defendant's license was revoked.
- ¶ 2 In a bench trial defendant Jose Garcia was convicted of felony driving while his license was revoked and sentenced to three years in prison. On appeal defendant contends that his guilt was not established beyond a reasonable doubt.

¶ 3 At the commencement of trial the defense gave an opening statement in which they asserted that defendant was not in actual physical control of the vehicle at issue because there was insufficient evidence that there were keys in the ignition. Testifying for the prosecution, Chicago police officer Antonio Perez testified that he and his partner, Officer Mario Sanchez, were patrolling in the vicinity of 2108 South Trumbull in Chicago shortly before 11 p.m. on November 14, 2009, when Perez saw an SUV parked at an angle at the corner of 28th and Trumbull. The engine was running and a man whom Sanchez identified in court as the defendant was slumped against the steering wheel. The officers woke defendant up by banging on the glass and had him get out of the vehicle. Perez saw that there were empty beer cans in the vehicle and defendant was stumbling as he got out of the vehicle. They turned off the vehicle and took the keys out of the ignition, called for an assist vehicle, and had defendant wait at the back of the vehicle. Perez testified that he did not smell the odor of alcohol on defendant.

¶ 4 The police officers who responded to the call for an assist vehicle were Officer Karwowski and his partner. Perez testified that he informed Karwowski that when they came upon defendant, he was asleep in the vehicle, his vehicle was running, he was behind the steering wheel of the vehicle, and there were beer cans in the vehicle. Perez also testified that they gave the car keys to Karwowski, although he did not state whether he or his partner did this.

¶ 5 Chicago police officer Richard Karwowski testified that he and his partner arrived at the scene at about 10:45 p.m. and saw defendant sitting slumped over on the rear bumper of a vehicle which was parked at a 45 degree angle to the curb. He spoke to Officer Perez and then looked in the cab of the vehicle, where he saw several open cans of beer. The keys "had been pulled from the ignition" and the engine was off. When he approached defendant he observed that defendant had blood shot eyes, the strong odor of alcohol on his breath, and slurred speech.

Based on these observations Karwowski "began to believe" that defendant was under the influence of alcohol. Karwowski then asked defendant to perform certain field sobriety tests. He testified that he spoke to defendant in English and defendant responded in English, although he gave defendant his Miranda warnings in Spanish and at trial a Spanish-speaking translator was used.

¶ 6 Karwowski first administered the horizontal gaze nystagmus test, which involved observing defendant's eyes as Karwowski had him follow the movement of a pen with his eyes without moving his head. According to Karwowski, defendant exhibited indicators of being under the influence of alcohol, including not tracking his gaze smoothly and having quivering eyes. Next Karwowski asked defendant to perform a walk and turn test and defendant was unable to keep his balance and raised his arms from their position against his body. Defendant was also unable to successfully perform a one legged stand test, as he put his foot down three times, hopped and raised his arms when he was supposed to stand on one foot with his hands at his side while counting until the officer told him to stop. Karwowski testified that for all three tests he instructed defendant in English and defendant responded in English. It was Karwowski's opinion, based upon these tests, that defendant was under the influence of alcohol while in control of a motor vehicle and he arrested him and transported him to the police station.

¶ 7 On cross-examination Karwowski testified that although Officers Perez and Sanchez told him that the engine of defendant's vehicle had been running and the keys were in the ignition, he did not mention these details in the arrest report that he prepared. Also, in a drug and alcohol influence report that he prepared he checked the boxes indicating that the engine was not running, defendant was not behind the wheel, and the keys were not in the ignition. He also testified that he did not inventory the keys to the vehicle although the car was impounded. On redirect examination the officer testified that he checked the answers that he did on the drug and

alcohol influence report because when he arrived at the scene defendant was sitting on the bumper of the vehicle, the engine was not running, and Officer Perez had told him that he removed the keys from the ignition. Based upon what Officers Perez and Sanchez told him he wrote in his arrest report that defendant had been passed out and his vehicle was obstructing traffic. However on recross examination he stated that he did not put in the arrest report that Officer Perez saw the engine running, took the keys out of the ignition, or gave him those keys. He testified that he did not inventory the keys because that was not required.

¶ 8 The parties stipulated that because of four prior convictions for driving under the influence of alcohol, defendant's driver's license was revoked and he did not have a valid driver's license when he was arrested for the current offenses.

¶ 9 Defendant was charged with four offenses. The first was aggravated driving while under the influence of alcohol in that he drove or was in actual physical control of a motor vehicle while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). For this offense the State intended to seek to have defendant sentenced as a Class 1 offender because he had committed four previous offenses of driving while under the influence of alcohol. The second offense charged was also aggravated driving while under the influence of alcohol in that he drove or was in actual physical control of a motor vehicle while under the influence of alcohol. For this offense the State intended to seek to have defendant sentenced as a Class 2 offender because he had committed two previous offenses of driving while under the influence of alcohol. The third charge was that defendant committed the offense of aggravated driving while under the influence of alcohol in that he drove or was in actual physical control of a motor vehicle while under the influence of alcohol at a time when he did not possess a driver's license. (625 ILCS 5/11-501(a)(2)/(d)(1)(H) (West 2008)). The fourth charge was that defendant committed the offense of felony driving while his driver's license was revoked in that he drove or was in actual physical

control of a motor vehicle when his driver's license was revoked. 625 ILCS 5/6-303(a) (West 2008). The trial court found defendant not guilty of the first three offenses and guilty of the fourth offense.

¶ 10 In arguing that he should have been found not guilty on all charges, defendant focuses on a statement by the court that there was no proof of driving, along with statements the court made that it was troubled by the evidence concerning the keys, which Officer Karwowski did not mention in his reports, although Officer Perez testified that Karwowski was given those keys. Defendant notes that the court found that a "really interesting and disturbing aspect of this case" was that Officer Perez testified that he gave the keys to Officer Karwowski but Karwowski was never asked by the State whether he got the keys from Perez and if he did get them from him, what he did with them. Defendant contends that because all four offenses required proof of some form of driving or being in control of the vehicle, his acquittal on the first three offenses should also require that he be acquitted of the fourth offense, driving while his license was revoked in that he drove or was in control of a motor vehicle while his license was revoked. But the first three offenses, unlike the fourth offense, also require that defendant be under the influence of alcohol when he commits the offenses. In acquitting defendant of the first three offenses the trial court made clear that it did not believe it had been established that defendant was under the influence of alcohol. The court stated that it did not place much credence in field sobriety tests. The court also stated that there was no "proof of driving" and no breathalyzer. It noted that Officer Perez did not "smell anything." The court also noted that Officer Karwowski, who administered the field sobriety tests, gave defendant his Miranda rights in Spanish but explained the field sobriety tests in English. In summary, the court stated:

"So when that's really all you have in the case, somebody who is using an interpreter at trial and there really isn't any evidence that

he speaks English, other than the testimony of these police officers that I don't find extremely credible with respect to that fact at least, there is certainly some question as to whether the evidence without any proof of driving or breathalyzer tests or anything like that is sufficient to find him guilty of driving under the influence of alcohol, and I find that it is not. So as to those three counts there is a finding of not guilty."

¶ 11 But in then convicting defendant of driving while his license was revoked in that he drove or was in control of a vehicle while his license was revoked, the court stated that in order to acquit defendant of this offense it would be necessary to find that Officer Perez was lying about the motor running and the keys being in the ignition when he and his partner came upon defendant in his vehicle. The court stated that it was bad police work not to have put these facts in any of the reports, but it did not believe that Officer Perez was lying. It also noted that there was no impeachment concerning the fact that defendant was behind the wheel of the vehicle. As to the keys, the court stated "who knows what happened to the keys" but concluded that it found the evidence sufficient to find defendant guilty of driving on a revoked license.

¶ 12 In reviewing a case for sufficiency of the evidence, we must bear in mind that it is the fact finder who has the responsibility of viewing and hearing the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). In a bench trial such as this one, the trial judge has the responsibility of determining the credibility of witnesses and resolving conflicts in that testimony. *People v. Spann*, 332 Ill. App. 3d 425, 445 (2002). It is not our function to retry the defendant or substitute our judgment for that of the trial judge (*People v. Ross*, 229 Ill. 2d 255, 272 (2008)) although we are charged with determining whether when the evidence is viewed in the light most favorable to

the prosecution, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)).

¶ 13 Defendant in his arguments is conflating two separate and independent elements of these offenses. As we have noted, the first three offenses, of which defendant was acquitted, required that for defendant to be convicted he must have been under the influence of alcohol. Those offenses also required either that defendant be driving at the time, or that he be in control of his vehicle. In acquitting defendant of the first three offenses, the trial court appeared to find that defendant was not driving, but the court's key finding was that defendant was not under the influence of alcohol. As defendant notes, the State did not attempt to prove that defendant was driving his vehicle. The court did not have to make a pronouncement on this element, but it chose to do so. But the court, as to those first three offenses, did not reach the element of whether defendant was in control of his vehicle, and such control would be evidenced by defendant being behind the wheel with the keys in the ignition. See *City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997). The trial court, in convicting defendant of the fourth offense, specifically indicated that it believed Officer Perez, who testified to precisely these facts as well as the additional incriminating fact that the engine was running. See *People v. Robinson*, 368 Ill. App. 3d 963, 983-84 (2006). This was the judge's ultimate conclusion, although it did express dissatisfaction with the manner in which these facts were recorded or not recorded in police reports concerning the incident. We find no basis for disturbing the trial court's resolution of any conflicts or inconsistencies in this testimony.

¶ 14 For all of these reasons we affirm defendant's conviction and sentence.

¶ 15 Affirmed.