2012 IL App (1st) 102976-U

FIRST DIVISION
DATE 3-26-12

No. 1-10-2976

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).

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. YP 349636
	)	
RICHARD SHIKE,	)	Honorable
	)	Pamela G. Karahalios,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

O R D E R

¶ 1 *Held*: Evidence supported trial court's finding that defendant was guilty beyond a reasonable doubt of driving while under the influence of alcohol. Mittimus is amended to vacate or reduce certain fees and fines which the State concedes were erroneously assessed against defendant.

¶ 2 In a bench trial, defendant Richard Shike was convicted of driving while under the influence of alcohol (DUI) and sentenced to two years' conditional discharge and 15 days in jail, in addition to certain fees and fines which were assessed against him. Defendant contends on

appeal that his guilt was not established beyond a reasonable doubt. He also challenges some of the fees and fines which were assessed against him.

¶ 3 At trial Susan Ross testified that she was divorced from defendant and that they shared a daughter who was 14 years old at the time of trial. She was at home with her daughter on March 9, 2010, at about 4:30 p.m. when defendant came to her house. According to Ross, defendant was "very intoxicated" as he was very unstable on his feet, he was slurring his words, and she could smell the very strong odor of alcohol on his breath. She did not ask defendant if he had been drinking because she could smell it and could tell by the way he was behaving. Also his eyes were glassy and he was "wobbly" on his feet. Defendant asked if he could stay at the house but Ross told him that he could not do so because he was drunk, and she asked him to leave. After 10 or 15 minutes he did leave the house, got into his pickup truck and drove away. Ross also left in her car with her daughter, whom she had to take to dance class. Ross had to drive in the same direction as defendant and she saw him pull into the parking lot of Somebody's Bar as she drove by.

¶ 4 At about 6:30 p.m. Ross drove by Somebody's Bar again and saw defendant coming out of the bar and getting into his truck. As she drove by she saw that he was "pretty shaky" getting into his truck. Defendant immediately began calling Ross' cell phone and did not stop until her daughter, who was with Ross, answered it. At about 8 p.m. he began calling again and this time Ross spoke to him. She testified that he was "slurring" and she could tell he had been drinking. Ross and her daughter left her home to get some hot chocolate at around 8:30 or 8:40 p.m. When they returned, she saw defendant's truck parked across the street from her house, with defendant sitting inside the truck. Ross called 911 because she wanted defendant to leave, as her daughter had to go to school the next morning and it was difficult to deal with defendant when he was under the influence of alcohol. After calling 911, Ross drove a mile or two away because she did

not want her daughter to observe the encounter. When she returned, the police were checking objects in defendant's truck and she spoke to them at that time.

¶ 5 On cross-examination, Ross admitted that she did not call the police when she saw Ross leave her home and get into his truck and drive off while he was intoxicated, nor did she call them when she saw him leave the bar and get back into his truck. Ross explained that it was very hard to do so because defendant was her daughter's father, and her daughter was in the car with her. When she called 911 after seeing defendant's truck parked across from her house, she told the operator that she was not sure if it was defendant's truck. Ross testified that she actually was sure it was defendant's truck but she did not want her daughter to think she was "calling" on her father. When she subsequently spoke to the police she told them that defendant was "intoxicated for the day."

¶ 6 Rolling Meadows police officer Mark Stone testified that about 9 p.m. on the day in question he was called to an investigation of a suspicious vehicle, described as a silver pickup truck. When he approached the truck he saw defendant sleeping in the driver's seat, with the key in the ignition. He woke defendant up by knocking on the truck's window and asked him why he was sleeping in his truck at that location. Defendant mumbled an unintelligible answer and when Stone again asked what he was doing there, defendant mumbled another answer which Stone could not understand. Stone also observed that defendant's eyes were very glassy and he had an extreme odor of "an alcoholic beverage" on his breath. At Stone's request, defendant gave him his driver's license. Stone then returned to his squad car, activated his video surveillance system, and called for backup. When other police officers arrived, Stone returned to defendant in the pickup and asked him to get out of the truck. According to Stone, defendant did so with "a little bit of difficulty" and put on his shoes, which he had off in the truck. Defendant refused to take a field sobriety test, so Stone had defendant walk back to his squad car and then arrested defendant.

Stone could not recall whether he made any observations of defendant's balance while defendant walked back to the squad car. Stone testified that he had made over 100 DUI arrests in the past and it was his opinion, based upon his observations of defendant, that defendant was under the influence of alcohol. He also did not believe that defendant was able to safely operate a vehicle. On cross-examination Stone testified that from smelling the odor of alcohol on defendant's breath he could not tell how much defendant had to drink or what he had been drinking. As his conversation with defendant continued, after waking him up, defendant was coherent, responsive, and cooperative the entire time, although he did refuse to take a field sobriety test and also refused to take a breathalyzer examination.

¶ 7 Stone's DVD of this incident is included in the record on appeal and was shown to the trial court. It did not record defendant's initial responses to Stone's questions and directions to him. It does record defendant's subsequent conversations with Stone, in which defendant is coherent and responds to all of Stone's commands. No other evidence was heard, and after final arguments the trial court found defendant guilty of DUI. Defendant was sentenced to two years' conditional discharge and 15 days in the Cook County jail. This appeal ensued.

¶ 8 We first consider defendant's assertion that his guilt was not proven beyond a reasonable doubt. As a reviewing court we will not reverse a conviction unless the evidence is so improbable or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *People v. Cooper*, 194 Ill. 2d 419, 431 (2000). We give great deference to the trial court's determinations of the credibility of witnesses, what weight is to be given to their testimony, and what inferences should be drawn. *Cooper*, 194 Ill. 2d at 431. The question before us is whether, when the evidence is viewed in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Cooper*, 194 Ill. 2d at 430-31. Here, the State was required to prove that

defendant was in actual physical control of his vehicle while he was under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008).

¶ 9 Defendant does not contest that he was in actual physical control of his vehicle when he was arrested. He contests the court's finding that he was then under the influence of alcohol. Defendant's refusal to take a field sobriety test in itself is circumstantial evidence of intoxication. *People v. Roberts*, 115 Ill. App. 3d 384, 387 (1983). Furthermore, when Officer Stone first encountered defendant, asleep behind the steering wheel of his truck with the keys in the ignition, he observed upon awakening defendant that defendant's words were mumbled and could not be understood, defendant's eyes were glassy, and he had an extreme odor of alcohol on his breath. It was Stone's opinion, based upon over 100 DUI arrests he had made in the past, that defendant was under the influence of alcohol at that time. The trial court clearly placed great credence in this testimony. It also placed great credence in the corroborating testimony of Ross that as early as 4:30 that afternoon, defendant was very intoxicated, slurring his words, unstable on his feet, and with a very strong odor of alcohol on his breath. She observed him drive away from her house and then saw him park at a bar. Two hours later she saw him leaving that bar and appear to have difficulty getting into his truck. At 8 p.m. when he telephoned her she could tell he had been drinking by the manner in which he was slurring his words. This was just one hour before Stone encountered defendant sleeping in his truck.

¶ 10 Defendant makes much of the fact that Ross did not telephone the police earlier when she presumably saw defendant driving away while intoxicated. But Ross gave the plausible explanation that she found it difficult to inform on defendant in the presence of her daughter, as defendant was her daughter's father. It was only when she saw that defendant was parked across from her house at 9 p.m. at night that she called the police, fearing that another encounter with him would interfere with her daughter's sleep on a school night. Defendant also cites *People v.*

Thomas, 34 Ill. App. 3d 578, 580 (1975) for the proposition that testimony that a defendant's breath smelled of alcohol does not suffice to prove that he was intoxicated. But in *Thomas* the defendant had also sustained a head injury which ultimately required an operation and which put him in a coma for over one month. *Thomas*, 34 Ill. App. 3d at 580. The reviewing court found that this injury could have accounted for symptoms which a police officer interpreted as indicating the defendant's intoxication, including slurred speech, unsteady balance, red eyes, and a red face. *Thomas*, 34 Ill. App. 3d at 580. We therefore find *Thomas* to be readily distinguishable from the case before us where defendant was merely awakened from his sleep behind the steering wheel of his truck.

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

¶ 12 Defendant contends, and the State concedes, that he should not have been liable for a $5 court system fee, as that fee cannot be assessed for a violation of section 11-501 of the Vehicle Code. 55 ILCS 5/5-1101(a) (West 2008). Accordingly we vacate that fee.

¶ 13 Defendant also contends and the State concedes that a $15 miscellaneous assessment imposed by the trial court was improper where the trial court did not cite to any statutory authority for its imposition. *People v. Hunter*, 358 Ill. App. 3d 1085, 1094 (2005). We also vacate that assessment.

¶ 14 Finally, defendant contends and the State concedes that he was eligible for a reduction of $5 per day of pre-sentencing custody for $50 in fines he received. 725 ILCS 5/110-14 (West 2008). These fines included a $5 drug court fee (55 ILCS 5/5-1101(f) (West 2008); found to be a fine in *People v. Sulton*, 395 Ill. App. 3d 186, 192 (2009)); a $5 youth diversion/peer court assessment (55 ILCS 5/5-1101(e) (West 2008); found to be a fine in *People v. Graves*, 235 Ill. 2d 244, 255 (2007)); a $10 mental health court fee (55 ILCS 5/5-1101(d-5) (West 2008); found to be a fine in *Graves*, 235 Ill. 2d at 255 (2009)); and a $30 children's advocacy center fee (55 ILCS

5/5-1101(f-5) (West 2008); found to be a fine in *People v. Jones*, 397 Ill. App. 3d 651, 664 (2009)). Defendant spent six days in pre-sentencing custody and therefore was entitled to have these fines reduced by $30.

¶ 15 For the reasons set forth in this order, we affirm defendant's conviction and sentence; we vacate his $5 court system fee and his $15 miscellaneous assessment; and we reduce the $50 in fines imposed on him by $30.

¶ 16 Conviction affirmed; fees and fines modified as directed.