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2012 IL App (3d) 100701-U

Order filed January 18, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit Will County, Illinois
Plaintiff-Appellee,)	
v.)	Appeal No. 3-10-0701
)	Circuit No. 09-CF-2198
MICHAEL R. LAMBERT,)	Honorable
Defendant-Appellant.)	Edward Burmila, Jr. Judge Presiding

JUSTICE LYTTON delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Trial court did not improperly shift the burden to the defendant in drunk driving trial by asking both the prosecutor and defense counsel to comment on the defendant's refusal to submit to chemical tests; (2) Evidence was sufficient to support conviction for aggravated driving under the influence where an officer observed the defendant, with bloodshot and watery eyes, slurred speech and an odor of alcohol, cross the center line, fail a field sobriety test and refuse to submit to further testing.

¶ 2 The defendant, Michael Lambert, was found guilty of aggravated driving under the influence (625 ILCS 5/11-501(a)(2) and (d)(2)(E) (West 2008)) following a bench trial. On appeal, the

defendant argues that (1) the trial court improperly shifted the burden of proof to him, and (2) the evidence was insufficient to prove his guilt beyond a reasonable doubt.

¶ 3 The defendant was indicted for aggravated driving while under the influence of alcohol (625 ILCS 5/11-501(a)(2) and (d)(2)(E) (West 2008)). He waived trial by jury. The defendant's case proceeded to a bench trial on March 18, 2010.

¶ 4 Officer Mark Brunzie, a police officer for the City of Lockport, testified that on August 5, 2009, he approached the defendant in the parking lot of George's Restaurant. Officer Brunzie noticed that a strong odor of alcohol was emanating from the defendant. He also noticed that the defendant had bloodshot and watery eyes and slurred speech. After Officer Brunzie told the defendant to call a friend to drive him home, the defendant went back into the restaurant. The defendant came out of the restaurant approximately twenty minutes later. Officer Brunzie observed the defendant driving away from the restaurant.

¶ 5 Officer Brunzie followed the defendant and stopped him for speeding and improper lane usage. Upon stopping the defendant, Officer Brunzie noticed a strong odor of alcohol coming from the defendant. He also observed that the defendant had watery eyes and slurred speech. Officer Brunzie further observed an open beer bottle that contained some liquid and felt cold to the touch.

¶ 6 Outside the vehicle, the defendant walked with a limp but his balance was fine. The defendant claimed that he had problems with his leg and produced a handicapped parking placard. In the meantime, the defendant lit a cigarette and continued to smoke until Officer Brunzie told him to stop. Officer Brunzie then administered a field sobriety test, the Horizontal Gaze Nystagmus ("HGN") Test, to the defendant. The defendant failed the HGN test. Defendant refused to take the alphabet test or chemical tests. The defendant later refused to have his blood or urine tested.

¶ 7 Officer Brunzie was the only witness at the defendant's trial. The State also introduced as evidence a videotape from Officer Brunzie's squad car, showing the defendant's vehicle driving in front of Officer Brunzie and the events that transpired after Officer Brunzie pulled over the defendant's vehicle.

¶ 8 During the State's closing argument, the court interrupted the prosecutor with the following inquiry:

"THE COURT: Mr. Fleszewski, let me ask you a question, and I am going to put the same question but in reverse to Mr. Wallace.

I think it's critical in this case the manner in which the Court as a fact finder is going to have to look at the defendant's refusal for chemical testing.

Now it's one of two things. The defendant refused the chemical testing because he feared the result. If that is the case, he is guilty.

The other side of the coin, however, is, and there is no question that the defendant's interplay with these police officers could be interpreted for the defendant to – drawing a conclusion that he had been set up; that the officers had that prior conversation with him and said the whole time they don't think this is right. I didn't do anything wrong. I am not going to take your test because I don't think it's right.

The officer and I already testified – I already stated previously that I doubt that the officer was serendipitously in the parking lot, but he might have been lying in wait for this defendant.

Now what is there that indicates to the court that it's more likely from your perspective that he refused the test, refused to cooperate, smoked a cigarette to hide

his odor because he feared the result of the chemical test as opposed to the defendant's fear that he was being set up? Which of those? What is there that indicates one or the other in this case?"

¶ 9 The prosecutor responded that the defendant refused to take the chemical tests because he had told the officer that he was not drinking anything. According to the prosecutor: "[H]ad he taken those tests, it certainly we would argue show that he did have alcohol in his system, and it would be shown that he was lying again."

¶ 10 After the State concluded its argument, the court asked the following question to defense counsel:

"THE COURT: ***

In your argument please, the reverse of that, Mr. Wallace, why should I believe that your client refused all of that because he was being set up.

And I want to point to the video that not only did the defendant light a cigarette up, but he purposefully stood there and took several additional drags off the cigarette before he threw it away, although the officer kept telling him to stop smoking. And he did that purposefully and flicked the cigarette into the bushes.

So why should I think that he refused because he was being set up as opposed to fearing the results of the chemical test?"

Defense counsel responded that the defendant refused the chemical testing because "he was questioning everything that the officer was doing from the beginning, and this officer, as your Honor correctly pointed out and you can infer from the evidence, that he was just waiting for him."

¶ 11 The trial court issued its verdict on March 25, 2010. The court noted that it had no doubt that

the officer was “lying in wait” for the defendant, and found that the defendant’s attitude toward Officer Brunzie arose from his belief that he was targeted by the officer. However, the court rejected the defendant's argument that the defendant refused the testing because he felt he was being set up.

¶ 12 The court noted that the defendant lied about the length of time the open bottle of alcohol was present in his vehicle and lied about his consumption of alcohol. The court also noted that the defendant smoked a cigarette to mask the odor of alcohol, even after being told by the officer not to smoke. The court concluded that "the defendant's refusal to take the chemical test was because of his fear of the result."

¶ 13 The court found defendant guilty of aggravated driving under the influence of alcohol. The court later sentenced the defendant to six years in prison.

¶ 14 I

¶ 15 Defendant argues that the trial court improperly shifted the burden of proof to him when it asked defense counsel why the court should believe that the defendant refused testing because he felt he was being set up.

¶ 16 In a bench trial, a trial judge is presumed to know the law, and this presumption is rebutted only when the record affirmatively shows the contrary. *People v. Taylor*, 344 Ill. App. 3d 929, 937 (2003). It is also presumed that the trial judge has considered only competent evidence in reaching his verdict; this presumption may be rebutted only where the record affirmatively shows the contrary. *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977).

¶ 17 Evidence of a driver's refusal to take a test designed to determine blood-alcohol content is admissible and relevant as circumstantial evidence of his consciousness of guilt. *People v. Garriott*,

253 Ill. App. 3d 1048, 1052 (1993). The evidence of a driver's refusal exposes him to an inference regarding his state of mind about the likely results of that test. *Id.* The trier of fact could infer that the driver refused the test because he knew it would confirm he was driving under the influence. *Id.*

¶ 18 In the instant case, the court asked both the prosecutor and defense counsel to explain why the defendant refused chemical testing. The defendant analogizes the court's comments to a prosecutor's improper comments on a defendant's failure to testify, citing *People v. Smith*, 402 Ill. App. 3d 538, 541 (2010). This argument is not persuasive.

¶ 19 Unlike a jury, which must be instructed regarding the law, in a bench trial, a trial judge is presumed to know the law. *See Taylor*, 344 Ill. App. 3d at 937. This presumption is rebutted only when the record affirmatively shows the contrary. *Id.* The defendant has failed to rebut the presumption.

¶ 20 The court was allowed to infer that the defendant refused to undergo chemical testing because he knew the tests would confirm that he was intoxicated. *See Garriott*, 253 Ill. App. 3d at 1052. By asking both the defendant and the State to explain why the defendant refused to undergo testing, the court did not shift the burden to the defendant. Rather, the court gave the defendant an opportunity to provide an alternative explanation for his refusal. The court then considered and rejected the defendant's position that he refused the testing because he felt he was being set up. The court concluded that "the defendant's refusal to take the chemical test was because of his fear of the result."

¶ 21 The defendant failed to affirmatively show that the trial judge improperly applied the law by shifting the burden of proof to the defendant.

¶ 22

II

¶ 23 The defendant next argues that the evidence was insufficient to prove him guilty of driving under the influence beyond a reasonable doubt.

¶ 24 When a defendant challenges the sufficiency of the evidence, the same standard of review applies to both jury trials and bench trials. *People v. Mandic*, 325 Ill. App. 3d 544, 546 (2001). The applicable standard is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. *Id.*

¶ 25 A conviction for driving under the influence of alcohol may be sustained based solely on the testimony of the arresting officer. *People v. Wiebler*, 266 Ill. App. 3d 336, 339-40 (1994). Testimony by an arresting officer that the defendant had bloodshot eyes, slurred speech, an unbalanced walk, a flushed face and smelled of alcohol is sufficient to support a conviction for driving under the influence. See *People v. Miller*, 101 Ill. App. 2d 361, 365 (1968).

¶ 26 In the instant case, Officer Brunzie observed signs of the defendant's intoxication, including slurred speech, bloodshot and watery eyes and a strong odor of alcohol coming from the defendant. He also observed defendant cross the center line while driving, evidence that he was driving while impaired. See *People v. Kappas*, 120 Ill. App. 3d 123, 128 (1983). The defendant also failed the HGN test, providing additional evidence that the defendant was intoxicated. See *People v. McKown*, 236 Ill. 2d 278, 302-03 (2010). Finally, the open and partially consumed cold beer bottle in the defendant's car was more evidence of the defendant's alcohol consumption. See *id.*

¶ 27 Taking all of the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the defendant guilty of aggravated driving under the influence of alcohol

beyond a reasonable doubt.

¶ 28 The order of the circuit court of Will County is affirmed.

¶ 29 Affirmed.