2016 IL App (3d) 150258-U

Order filed June 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Whiteside County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0258
v.	)	Circuit No. 14-DT-3
	)	
JENNIFER L. MORGAN,	)	Honorable Michael R. Albert,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade dissented.

ORDER

¶ 1 *Held*: The evidence, as recited in the bystander's report, was sufficient to sustain defendant's conviction for driving under the influence of alcohol and drugs.

¶ 2 Defendant, Jennifer L. Morgan, appeals from her driving under the combined influence of alcohol and drugs conviction. Defendant argues that the State failed to prove her guilt beyond a reasonable doubt because the evidence failed to establish that she was impaired by any drug. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by a three-count information. Counts I and II charged defendant with two counts of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2), (a)(1) (West 2012)). Count III charged defendant with driving under the combined influence of alcohol and drugs (625 ILCS 5/11-501(a)(5) (West 2012)). Count II of the information was dismissed prior to trial, and a bench trial was held on counts I and III. No verbatim transcript of the trial is available, but a certified bystander's report is part of the record on appeal.

¶ 5 The bystander's report states that Sergeant Mark Davis of the Rock Falls police department testified that, on November 14, 2013, around 1:15 a.m., he was dispatched to a motor vehicle accident. The vehicle had run into a traffic pole, and defendant was its sole occupant. Davis said that defendant had a strong odor of alcohol on her breath, her speech was slurred and confused, and her eyes were extremely bloodshot and glassy. Davis had to assist defendant from the vehicle. Davis said that defendant almost fell when she stepped out of her vehicle. Davis did not notice that defendant had suffered any physical injuries and defendant did not say that she was injured. Defendant later refused an ambulance transport, but she was unable to sign the refusal. Defendant told Davis that she had been drinking. Davis did not conduct a field sobriety test because defendant was unable to stand without assistance. During his interaction, defendant asked Davis to retrieve her medication from the car. Davis found a prescription for hydrocodone, which was prescribed to defendant. The prescription had been filled days before the accident in the amount of 60 pills. Only 10 pills remained in the bottle. Defendant told Davis that she had taken pills that day, but defendant was unsure how many she took or the time they were consumed. Davis read defendant her *Miranda* warning, and defendant said that she

had been operating a vehicle and was "under the influence of alcohol and/or drugs." No chemical tests for the presence of drugs were performed.

¶ 6 Officer Dave Pilgrim testified, consistent with Davis's testimony, that defendant appeared to be under the influence of alcohol. Pilgrim also said that after defendant was Mirandized, she said that she had taken hydrocodone that was prescribed to her.

¶ 7 According to the bystander's report, defendant testified that she had not taken hydrocodone on the day of the accident and she did not have any recollection of the accident. Defendant said that the hydrocodone was hers, and she used it to treat her atypical migraines. The bystander's report also stated that "defendant did not provide any testimony or evidence that atypical migraines would lead a person to act or appear intoxicated," and "defendant did not supply any accident reports, medical diagnoses, or expert witnesses to corroborate [her] testimony."

¶ 8 The court found defendant guilty of count III, driving under the combined influence of alcohol and drugs, and not guilty of count I, driving under the influence of alcohol.[1] The court sentenced defendant to 24 months of court supervision. Defendant appeals.

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[1]We note that the court's finding of guilt on count III, driving under the combined influence of alcohol and drugs, is not inconsistent with its not guilty finding on count I, driving under the influence of alcohol. Clearly the trial court found that defendant was impaired by the combination of the alcohol and drugs and not impaired from her consumption of alcohol alone. In addition, even if there had been a claim of inconsistent findings it would not have been legally viable. See *People v. McCoy*, 207 Ill. 2d 352, 357-58 (2003) (holding a defendant cannot challenge her conviction, following a bench trial, on the sole basis that the conviction is legally inconsistent with an acquittal on another charge).

¶ 9 ANALYSIS

¶ 10 Defendant argues that the evidence was insufficient to sustain her conviction because the State failed to prove beyond a reasonable doubt that a drug was present in her system at the time of her arrest. Notably, defendant does not argue that any drug in her system was present as a result of a valid prescription. Instead, her argument is that she had not taken any drugs. Defendant concedes that she had alcohol in her system.[2]

¶ 11 Upon review, we find that the evidence, when viewed in the light most favorable to the State, was sufficient for the fact finder to reasonably infer the presence of a drug in defendant's body at the time of her arrest.

¶ 12 In a challenge to the sufficiency of the evidence, we must determine, viewing the evidence in the light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime to have been proved beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). On review, it is not the function of this court to retry the defendant. *Id*. Determinations of the weight to be given to the witnesses' testimonies, their credibility, and the reasonable inferences to be drawn from the evidence are the responsibility of the fact finder. *Id*. at 261-62.

¶ 13 Here, defendant challenges her driving under the combined influence of alcohol and drugs conviction. To sustain this conviction, the State must prove beyond a reasonable doubt that defendant drove or was in physical control of a vehicle while "under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that render[ed] the person incapable of safely driving." 625 ILCS 5/11-501(a)(5) (West 2012).

[2]On page five of her brief, defendant states "[n]either does the evidence in this case establish the defendant had any drugs or substances, other than alcohol in her system."

¶ 14 The undisputed evidence at trial established that defendant was prescribed hydrocodone to treat her migraines. Sergeant Davis testified that defendant told him that she had taken hydrocodone on the day of the accident, but she did not indicate the amount or time of consumption. Officer Pilgrim also said that defendant told the officers that she had taken hydrocodone that was prescribed to her. According to Davis, a prescription bottle for hydrocodone was found in defendant's car that was nearly empty despite being filled only days before the accident. After receiving her *Miranda* warning, defendant said that she had been operating the vehicle and was "under the influence of alcohol and/or drugs." These facts, although partially refuted by defendant's testimony, gave rise to the reasonable inference that defendant had taken hydrocodone before the accident and was under the influence of hydrocodone at the time of her arrest. No physical or medical evidence was required to establish the presence of drugs in defendant's system as this circumstantial evidence readily established that defendant had consumed hydrocodone prior to the accident. See *People v. Hall*, 194 Ill. 2d 305, 330 (2000) ("Circumstantial evidence is sufficient to sustain a criminal conviction, provided that such evidence satisfies proof beyond a reasonable doubt of the elements of the crime charged."). Further, the evidence established that defendant was impaired and unable to safely operate her motor vehicle as she was unable to stand or walk on her own, spoke incoherently, was unable to sign her name to the ambulance release, and was involved in a motor vehicle accident. Defendant's refutation of this evidence created a credibility determination, and because we were not present for the trial, we defer to the court's acceptance of the veracity of the officers' testimonies. See *Collins*, 106 Ill. 2d at 261-62. The evidence, viewed in the light most favorable to the State, was sufficient to sustain defendant's conviction.

¶ 15 CONCLUSION

¶ 16 The judgment of the circuit court of Whiteside County is affirmed.

¶ 17 Affirmed.

¶ 18 JUSTICE McDADE, dissenting.

¶ 19 The majority affirms the decision of the circuit court of Whiteside County finding defendant, Jennifer L. Morgan, guilty of driving under the combined influence of alcohol and drugs. For the reasons that follow, I respectfully dissent from that decision.

¶ 20 The State charged Morgan, in a three-count information, with three criminal violations—two of driving under the influence of alcohol and a third of driving under the combined influence of alcohol and drugs. Count II asserting the influence of alcohol was dismissed by the State prior to trial.

¶ 21 A bench trial was held on the remaining two counts. All the record shows about the evidence presented during that proceeding is set out in an agreed bystanders' report signed by the presiding judge and both counsel.

¶ 22 At the close of trial, the court acquitted Morgan of driving under the influence of alcohol. The record is devoid of any basis for that ruling. Its significance for us is that the only way we can affirm the conviction is if we find proof beyond a reasonable doubt that Morgan actually had drugs in her system in an amount sufficient to combine with whatever alcohol was there to result in impairment.

¶ 23 There is ample evidence that there was alcohol in her system: Sergeant Davis testified that when he approached the car, he smelled a strong odor of alcohol on Morgan's breath; her speech was slurred; she was confused; her eyes were bloodshot and glassy; she was "unable to focus long enough to sign the refusal" for medical treatment and she could neither stand nor walk without assistance. An open can of Mike's Hard Lemonade was found in the car and Morgan

told him and Officer Pilgrim that she had been drinking at K's Korner in Rock Falls prior to the accident, implicitly acknowledging she had some alcohol in her system. Moreover, while Pilgrim "testified in a manner that corroborated Sergeant Davis's testimony," he also testified that, to him, "the defendant appeared to be under the influence of alcohol."

¶ 24 By contrast, the evidence that Morgan actually had a drug in her system was virtually non-existent. No testing of any kind was done so there is no forensic evidence that she had *any* drug in her system. Nor does the bystanders' report indicate that the State presented any medical evidence about the characteristics of hydrocodone, including its effects, its duration in the system and any negative interaction with alcohol.

¶ 25 At the scene, Morgan asked Davis for her medicine and he retrieved it. He found the bottle, not open in the car like the Hard Lemonade but inside her purse. All we know about the medicine is that it was "a prescription for hydrocodone prescribed to the defendant. The prescription had been filled only days before for sixty pills and the bottle was nearly empty, with only ten pills remaining." Morgan testified at trial that the hydrocodone was hers and that it had been prescribed to treat atypical migraines.

¶ 26 We do *not* know, because no witness for the State said, how many days earlier the prescription had been filled—three? six? ten? twenty? Knowing when the prescription had been filled would give us at least some *fact* from which to infer a reasonable number of pills to be left in the bottle. Nor do we know the prescribed dosage or schedule, if any, for taking the medicine. Knowing the dosing schedule would give some *fact* suggesting when one might anticipate the effects of the drug would wear off and/or perhaps when it would no longer be present in Morgan's system. Instead, we are left by the State with only unsupported speculation.

¶ 27 We are also expected to *assume*, in the absence of any facts cutting either way, that the entire prescribed amount (60 pills) remained in that single bottle. Yet we know Morgan was employed as a registered nurse and, again depending of the dosing schedule, may have left some pills at home and only had a fraction of them in the bottle in her purse. We have no idea how many of the 60 pills she had actually taken or when she had taken them. Still the State asks us to speculate that she took enough pills within an unknown relevant time frame to have combined with alcohol to render her impaired at the time of the accident.

¶ 28 Faced with this lack of evidence, the majority falls back on our standard of review as stated in *People v. Collins*, 106 Ill. 2d 237, 261 (1985), and finds that "the evidence, when viewed in the light most favorable to the State, was sufficient for the fact finder to reasonably infer the presence of a drug in defendant's body at the time of her arrest."

¶ 29 For several reasons, I do not think even *Collins* is enough to support this decision. First, reasonable inferences must be based on facts, not supposition[3] The only facts presented about the hydrocodone are that: (1) Morgan had filled a prescription at some indefinite time in the recent past; (2) the medicine had been prescribed for treatment of her atypical migraines—it was not contraband; (3) the bottle was inside her purse in the car; (4) when initially filled the bottle held 60 pills and at the time of the accident it held 10 pills; (5) Davis testified he asked Morgan if

[3] "An inference or presumption is a legal device that either permits or requires the fact finder to assume the existence of a presumed or ultimate fact based on certain predicate or basic facts. *People v. Watts*, 181 Ill.2d 133, (1998). While inferences and presumptions play 'a vital role in the expeditious resolution of factual questions' (*People v. Hester*, 131 Ill.2d 91, 98 (1989)), their use to prove an element of a crime may raise due process concerns. *Watts*, 181 Ill.2d at 143. The due process clause ' "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." ' *People v. Jeffries*, 164 Ill.2d 104, 114 (1995) (citations omitted.)." *People v. Greco*, 204 Ill.2d 400, 407 (2003).

she had taken any pills that day and she responded affirmatively but did not say how many she had taken or when; (6) Davis testified that Morgan "*stated* that she had been operating a motor vehicle and was under the influence of alcohol and/or drugs;" and (7) Morgan testified at trial that she had not taken any of the pills that day and denied any recollection of the accident.

¶ 30 The evidence, also presented by the State, about Morgan's condition that night is set out in ¶ 23 above. This evidence does not reasonably imply or permit a reasonable inference that, at the time of the accident, Morgan was able to understand and waive her *Miranda* rights, could "testif[y] that she had taken some hydrocodone which was prescribed to her;" or that this woman who was unable to focus enough to sign a refusal of medical treatment could remotely, conceivably "*state[ ]* that she had been operating a motor vehicle and was *under the influence of alcohol and/or drugs.*"

¶ 31 Nor do we have any indication in the bystanders' report that the trial court made any factual findings or credibility determinations. Ordinarily such findings could be implied by the ultimate decision to convict, but we have those two curious paragraphs in the bystanders' report

> "28. The defendant did not provide any testimony or evidence that atypical migraines would lead a person to act or appear to be intoxicated.
>
> "29. The defendant did not supply any accident reports, medical diagnoses, or expert witnesses to corroborate the defendant's testimony."

These paragraphs suggest (1) that the burden of proof had been shifted so the State's obligation to prove Morgan guilty became her obligation to prove her innocence and (2) that she had failed to carry that burden.

¶ 32 In *Collins*, the supreme court also set out another facet of the standard of review, saying, "a criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the defendant's guilt." While the evidence that Morgan was driving impaired is unquestionable, I would find that the *evidence* that she actually had hydrocodone in her system is so improbable and unsatisfactory that it simply cannot support a finding that she is guilty beyond a reasonable doubt of driving under the combined influence of alcohol and drugs.