2018 IL App (1st) 171661-U

No. 1-17-1661

Order filed August 10, 2018

Fifth Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. TH 270031
	)	
VASYL NYZHNYK,	)	Honorable
	)	Patrick Stanton,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for driving under the influence of alcohol is affirmed over his contention that the State failed to prove him guilty beyond a reasonable doubt.

¶ 2 Following a bench trial, defendant Vasyl Nyzhnyk was convicted of driving under the influence of alcohol (625 ILCS 5/11-501(a)(2) (West 2014)), and one count of operating an uninsured vehicle (625 ILCS 5/3-707 West 2014)). He was sentenced to 24 months' conditional

discharge. Defendant appeals, arguing that the State failed to prove him guilty of driving under the influence of alcohol beyond a reasonable doubt. We affirm.[1]

¶ 3 Defendant was charged with one count of operating an uninsured vehicle, one count of driving under the influence of alcohol, and failure to notify of an address change within 10 days.[2] Defendant waived his right to a jury trial and, with the aid of a Russian interpreter, the case proceeded to a bench trial.

¶ 4 Chicago police officer Rhonda Pressley testified that, about 4:00 a.m., on August 2, 2015, she responded to a noise disturbance call on North Oak Park Avenue. There, Pressley noticed a parked van that had its motor running, headlights on, and loud music playing inside. She approached the vehicle and saw defendant slumped over the van's steering wheel, asleep. After unsuccessfully attempting to wake defendant by knocking on the driver side window, Pressley opened the driver side door, removed the keys from the ignition, and roused defendant. She then asked him for his driver's license and proof of insurance. He responded by searching through the pockets of a black backpack located on the passenger seat. After a few moments of searching, he stopped. Pressley again asked to see his driver's license and insurance card. Defendant retrieved a black purse from the floor in front of the passenger seat and searched through it to no avail. He ultimately found his wallet in his rear pant pocket and produced a valid Florida driver's license and an expired insurance card. Pressley noticed a strong odor of alcohol emanating from defendant and inside the van.

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

[2] During trial, the State moved to *nolle prosequi* the charge alleging that defendant failed to notify of an address change within 10 days.

¶ 5 Pressley asked defendant to exit the vehicle. Prior to complying with Pressley's request, defendant changed into a different pair of flip-flop sandals. Pressley described that defendant had to "sit down for a minute" and she observed that he had "bloodshot, glassy, watery eyes." She also explained that he had used the driver's side door to help him keep his balance as he stood. Pressley ordered defendant to walk to the sidewalk, and, as he did so, his pants fell down. Defendant, with Pressley's aid, put them back on and walked to the sidewalk. Once there, Pressley asked defendant to perform the horizontal gaze nystagmus field sobriety test. As she began explaining the test to defendant, he interrupted her and said, in English, "no, I'm not doing that." She then asked defendant to perform two other field sobriety tests, the one-leg stand and the walk-and-turn tests, but defendant again refused. Pressley concluded that defendant was under the influence of alcohol and placed him under arrest. After defendant was transported to the police station, Pressley read him the Warning to Motorists. At the station, defendant followed Pressley to a room where the breathalyzer was located. She instructed defendant to sit on the bench in front of the breathalyzer, which he did. As she instructed him to take a deep breath, he shook his head from side to side to indicate that he would not comply. Pressley testified that, in her experience as a police officer, she has dealt with over 100 people who have been under the influence of alcohol.

¶ 6 On cross-examination, Pressley testified that she did not know how long the van had been at Oak Park Avenue prior to her arrival there. She admitted that several of the details included in her direct examination were not present in the reports that she prepared shortly after defendant's arrest. These included: her initial attempt to wake defendant by knocking on the window, that defendant's pants fell down as he walked to the sidewalk, and that she smelled a strong odor of

alcohol emanating from the van. Pressley acknowledged that in her alcohol influence report, she only checked the box for "sleepy." She also acknowledged that she indicated on the report that defendant's pupil size was normal and there was no lack of convergence that she could detect from looking at his eyes. She further testified that "No, I won't do that" and "no" were the only words defendant spoke to her in English. She conceded that neither she, nor any other officer, read the Warning to Motorists to defendant in Russian or Ukrainian. She acknowledged that it was dark outside and that, when defendant was searching for his driver's license, it was dark in the van.

¶ 7 On redirect-examination, Pressley testified that her report did include the fact that a strong odor of an alcoholic beverage was emanating from defendant's mouth.

¶ 8 The court found defendant guilty of operating an uninsured vehicle and driving under the influence of alcohol. In announcing its decision, the court noted that certain information had been left out of the police report, but concluded that Pressley's testimony was credible. The court highlighted the evidence presented, including the delay in rousing defendant, his confusion while searching for his driver's license, and his reliance on the door for support. The court also stated that "defendant understood what he was doing" when he refused the field sobriety tests and breathalyzer.

¶ 9 On appeal, defendant argues that the State failed to prove beyond a reasonable doubt that he was under the influence of alcohol at the time of his arrest.

¶ 10 When a defendant challenges his conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the

crime beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences from the record must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. It is the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh evidence, and to draw reasonable inferences from the facts. *Brown*, 2013 IL 114196, ¶ 48. We will not substitute our judgment for that of the trier of fact on issues involving the weight of the evidence or the credibility of the witnesses. *Brown*, 2013 IL 114196, ¶ 48. A defendant's conviction will not be overturned unless the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of the defendant's guilt. *Id.*

¶ 11 Here, defendant was convicted of driving under the influence of alcohol. In order to sustain defendant's conviction for this offense the State was required to prove that defendant was in physical control of his van while he was under the influence of alcohol. See 625 ILCS 5/11-501(a)(2) (West 2014). Defendant does not challenge that he was in physical control of the van, but rather whether the State adequately proved that he was under the influence of alcohol.

¶ 12 To prove a defendant was under the influence of alcohol, the State must show that defendant's ability to operate a motor vehicle was impaired by the consumption of alcohol. *People v. Eagletail*, 2014 IL App (1st) 130252, ¶ 36. Circumstantial evidence may be used to satisfy the State's burden. *Id.* The testimony of a single, credible police officer alone may sustain a conviction for driving under the influence. *People v. Phillips*, 2015 IL App (1st) 131147, ¶ 15. Courts have found that testimony establishing a defendant's breath smelled of alcohol and his or her eyes were bloodshot is relevant in demonstrating the influence of alcohol. *People v. Love*, 2013 IL App (3d) 120113, ¶ 35. Additionally, a defendant's refusal to submit to chemical testing

(*id.*) or to perform sobriety tests (*People v. Roberts*, 115 Ill. App. 3d 384, 387-88 (1983)) may be used as evidence of consciousness of guilt.

¶ 13 After viewing the evidence in the light most favorable to the State, we conclude that a rational trier of fact could find that defendant was under the influence of alcohol. Pressley testified that she discovered defendant asleep in his van, slumped over the steering wheel as the motor was running, the headlights were on, and the music was playing loudly. When she finally succeeded at waking defendant, she smelled a strong scent of alcohol on his breath and noticed that his eyes were "bloodshot" and "glassy." Pressley also observed defendant struggling to follow her instructions to produce a driver's license. As defendant was exiting the van, he needed to use the driver's side door for balance. Pressley asked him to walk to the sidewalk, and, as he did, his pants fell down. He then refused to take three different sobriety tests or a breathalyzer. See *People v. Morris*, 2014 IL App (1st) 130512, ¶ 21-22 (finding that defendant's refusal to submit to a breathalyzer test, along with testimony from police officers that defendant's eyes were bloodshot and his breath smelled of alcohol, was sufficient to sustain his conviction for driving under the influence of alcohol). Given this evidence, a rational trier of fact could have found defendant was driving under the influence of alcohol.

¶ 14 Defendant nevertheless argues that Pressley's testimony was severely undermined because certain details that she testified to were not included in her reports of the incident.

¶ 15 We initially note that the discrepancies between Pressley's testimony and her reports were fully explored at trial during cross-examination. It was the responsibility of the trier of fact to determine her credibility, the weight to be given to her testimony, and to resolve any inconsistencies and conflicts in the evidence. *People v. Starks*, 2014 IL App (1st) 121169, ¶ 51;

People v. Sutherland, 223 Ill. 2d 187, 242 (2006). In announcing its ruling, the court noted that certain information was not included in the reports, but concluded that Pressley's testimony was credible.

¶ 16 Given this record, defendant's arguments are, essentially, asking us to reweigh the evidence in his favor and substitute our judgment for that of the trier of fact. This we cannot do. See *People v. Collins*, 214 Ill. 2d 206, 217 (2005) ("In reviewing the evidence, it is not the function of th[is] court to retry the defendant, nor will we substitute our judgment for that of the trier of fact."). A reviewing court will not reverse a conviction simply because defendant claims that a witness was not credible. See *People v. Evans*, 209 Ill. 2d 194, 211-12 (2004). Discrepancies in testimony, such as what Pressley might have omitted from her report, affect only its weight and the trier of fact is charged with deciding how such flaws impact the credibility of the whole. *People v. Gray*, 2017 IL 120958, ¶ 47. While a trial court's findings of fact are not conclusively binding on us, we may only intercede when we conclude that the evidence was "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48. This is not one of those cases.

¶ 17 For these reasons, we affirm the judgment of the circuit court of Cook County.

¶ 18 Affirmed.