2018 IL App (3d) 160065-U

Order filed April 10, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. KENYATTA L. MUHAMMAD, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois, Appeal No. 3-16-0065 Circuit Nos. 15-DT-211 and 15-TR-10354 Honorable Daniel L. Kennedy, Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to convict defendant of driving under the influence of alcohol.

¶ 2 Defendant, Kenyatta L. Muhammad, appeals her conviction for driving under the influence of alcohol (DUI), arguing that the evidence was insufficient to prove her guilty beyond a reasonable doubt. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged with DUI. 625 ILCS 5/11-501(a)(1), (2) (West 2014). The case proceeded to a jury trial. Eric Wetstein testified that he was a trooper for the Illinois State Police. He had been employed with the Illinois State Police for five years. He had been trained on how to: (1) detect if someone was under the influence of alcohol, (2) operate a Breathalyzer, and (3) administer standardized field sobriety tests.

¶ 5 On February 14, 2015, at 4 a.m., he was traveling down Interstate 80 and came upon a car pulled over on the side of the road with its hazard lights on. Defendant was sitting in the driver's seat in possession of the keys.[1] Wetstein asked defendant why she was pulled over, and she stated that she had run out of gas. Defendant's eyes were red. Wetstein "smelled a strong odor of an alcoholic beverage" emanating from defendant and the car. He also "noticed in the backseat there [were] open bottles of alcohol in plain view." There was a bottle of tequila and two bottles of vodka. Wetstein brought defendant over to his squad car, and she sat in the front seat. Wetstein stated he did this because,

> "There [were] two other occupants in the [car]. At my initial approach of the [car], I could smell a very overwhelming odor of an alcoholic beverage emitting from the [car]. I wanted to isolate the defendant who [was] in the driver's seat from the two other occupants in the [car]."

After he brought defendant to the squad car, he still smelled the strong odor of an alcoholic beverage. Defendant told Wetstein that she had only consumed about half a bottle of wine earlier in the evening because she knew she had to drive home.

¶ 6 Wetstein then administered field sobriety tests. He first administered the horizontal gaze nystagmus test and defendant exhibited all of the six clues. Based on this, Wetstein determined

[1]Though not in the record, defendant admits on appeal that she "probably had ready access to the ignition key."

that defendant had consumed alcohol. Second, he administered the walk and turn test. He gave defendant the instructions for performing the test and gave a demonstration. Wetstein stated,

> "During the instructional stage, [defendant] was unable to keep balance by keeping her right foot in front of her left. That would be considered a clue. And she instead of going heel to toe, she just took nine semi-normal walking steps down the line and back. So she would miss heel to toe. So I observed two clues."

He then administered the one-legged stand test. Out of the four possible clues on that test, Wetstein observed three: defendant swayed, used her arms for balance, and put her foot down once. Wetstein stated that exhibiting two clues was enough to indicate that defendant was under the influence of alcohol. He, therefore, determined that defendant was under the influence of alcohol and arrested her for DUI.

¶ 7 Wetstein escorted defendant to the Tinley Park Police Department. Wetstein read defendant the "Warning to Motorist," and defendant submitted to a Breathalyzer test. The result of the Breathalyzer was 0.08. Wetstein placed defendant in the booking room, and advised her of her *Miranda* rights. Defendant agreed to answer some questions. Wetstein asked if she had been drinking, and defendant stated that she had consumed half a bottle of wine. She told Wetstein she was coming from "a party bus" in Chicago. Wetstein asked defendant if she believed she was under the influence of alcohol, and defendant stated, "Yes."

¶ 8 No other witnesses testified. The jury found defendant guilty of DUI. Defendant filed a motion for a new trial or for judgment notwithstanding the verdict, which was denied. Defendant was sentenced to 12 months of court supervision.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that the evidence was insufficient to prove her guilty of DUI. Specifically, defendant contends that she was not in actual physical control over her car because she was not able to move her car. We find that, though the car was out of gas, defendant herself possessed the physical ability to start the engine or move the car. Based on this, taken in conjunction with the fact that she possessed the keys and was sitting in the driver's seat, defendant was in actual physical control of the car. As the other two elements of the offense were also met when taking the evidence in the light most favorable to the State, defendant was proven guilty of DUI.

¶ 11 In order for defendant to be found guilty of DUI, the State had to prove that defendant (1) was under the influence of alcohol or had a blood alcohol concentration of 0.08 or more and (2) was driving or in actual physical control of (3) a vehicle. 625 ILCS 5/11-501(a)(1), (2) (West 2014). Defendant does not contest on appeal that she was under the influence of alcohol. Therefore, we will consider the other two elements in turn.

¶ 12 As to the second element, a person need not actually drive in order to be in physical control of a vehicle. *City of Naperville v. Watson*, 175 Ill. 2d 399, 402 (1997). "Likewise, the person's intent to put the vehicle in motion is irrelevant to the determination of actual physical control." *People v. Eyen*, 291 Ill. App. 3d 38, 45 (1997). "The issue of actual physical control is determined on a case-by-case basis giving consideration to factors such as whether the motorist is positioned in the driver's seat of the vehicle, has possession of the ignition key and has the physical capability of starting the engine and moving the vehicle." *Watson*, 175 Ill. 2d at 402.

¶ 13 Defendant "admits that she was in the driver's seat of the car, and she probably had ready access to the ignition key." Defendant solely contends that she did not have the physical capability of starting the engine and moving the car as the car was out of gas. However, the

operable question when determining actual physical control is not whether the car was capable of being started and moved, but instead whether *defendant* herself possessed the physical ability to start and move the car. Stated another way, the immobilization of the car has no bearing on defendant's actual physical control of the car. Instead, we determine whether defendant herself would be physically able to operate the car. Here, defendant was seated in the driver's seat and "had ready access to the ignition key." Moreover, there is nothing in the record to show that defendant was physically incapable of starting the engine and moving the car. Therefore, taking the evidence in the light most favorable to the State, as we must (*People v. Collins*, 106 Ill. 2d 237, 261 (1985)), defendant was in actual physical control over the car. See *People v. Heimann*, 142 Ill. App. 3d 197, 198 (1986) (the defendant was in actual physical control of his car even though it would not start and he had to push it down the road); *People v. Cummings*, 176 Ill. App. 3d 293, 297 (1988) (the defendant was in actual physical control of the car where it was in the ditch with a broken tie rod and was not drivable); *Eyen*, 291 Ill. App. 3d at 46 (the defendant, who was pushing his car down the road because it would not start, was in actual physical control of his car).

¶ 14 We now turn to the third element: whether the car was actually a vehicle for purposes of the Illinois Vehicle Code (Code). 625 ILCS 5/1-100 *et seq.* (West 2014). The courts in *Heimann* and *Cummings* both considered whether a car that could not run was a vehicle under the Code. *Heimann*, 142 Ill. App. 3d at 198; *Cummings*, 176 Ill. App. 3d at 297. The court in *Heimann* noted that, under the then applicable version of the Code, "any device which may transport a person [was] a vehicle." *Heimann*, 142 Ill. App. 3d at 198. Though the defendant had to push his car, the court held that it was still a vehicle under that definition. *Id.* at 198-99. In *Cummings*, the definition of a vehicle under the Code had been amended and stated that a car was considered a

vehicle " 'until such time it either comes within the definition of a junk vehicle *** or a junking certificate is issued for it.' " *Cummings*, 176 Ill. App. 3d at 297 (quoting 625 ILCS 5/1-217 (West 2014)). Under the Code, " 'A junk vehicle is a vehicle which has been or is being disassembled, crushed, compressed, flattened, destroyed or otherwise reduced to a state in which it no longer can be returned to an operable state.' " *Id.* (quoting 625 ILCS 5/1-134.1 (West 2014)). The *Cummings* court found that there was no evidence that the defendant's car fit the description of a junk vehicle or that a junking certificate had been issued, and therefore, the car was a vehicle for purposes of the Code. *Id.*

¶ 15 While the car in the instant case had run out of gas, defendant does not contend, nor does the record show, that the car constituted a junk vehicle. Therefore, like the car in *Cummings*, the car in the instant case was a vehicle for purposes of section 11-501 of the Code. 625 ILCS 5/11-501(a)(1), (2); 1-217; 1-134.1 (West 2014).

¶ 16 CONCLUSION

¶ 17 The judgment of the circuit court of Will County is affirmed.

¶ 18 Affirmed.