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2014 IL App (3d) 130378-U

Order filed August 7, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

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. 3-13-0378
)	Circuit No. 11-DT-1735
ADAM J. MARCHEWKA,)	
Defendant-Appellant.)	Honorable Carmen Goodman, Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Presiding Justice Lytton and Justice O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The evidence was sufficient to prove defendant guilty beyond a reasonable doubt of DUI, and there was no error in admitting the video recording of the stop.
- ¶ 2 Following a stipulated bench trial, defendant, Adam Marchewka, was found guilty of driving under the influence (DUI) (625 ILCS 5/11-501(a)(2) (West 2010)) and speeding (625 ILCS 5/11-601(b) (West 2010)). On appeal, defendant argues: (1) he was not proven guilty beyond a reasonable doubt of DUI; and (2) the trial court erred when it allowed the use of a video recording of the DUI stop. We affirm.

FACTS

¶ 3

¶ 4 At approximately 4:10 a.m. on November 19, 2011, defendant was pulled over by Officer Daniel Murray for speeding 15 miles per hour over the speed limit. As a result of the stop, defendant was arrested and charged with DUI and speeding. 625 ILCS 5/11-501(a)(2), 11-601(b) (West 2010).

¶ 5 Defendant filed a petition to rescind statutory summary suspension, and a hearing was held on January 13, 2012. Defense counsel requested the admission of the video recording taken from Murray's dashboard camera, and the State stipulated to its foundation. Murray testified that on the day of the incident, all of his equipment, including his radar, was in operating order. Murray pulled defendant's vehicle over because his radar indicated defendant was traveling 70 miles per hour in a 55 mile per hour zone. Murray stated that other than his speed, defendant was not driving erratically and committed no other violations. Murray approached defendant on the driver's side of the vehicle. As Murray stood three to four feet from defendant, he immediately detected a strong odor of alcohol emanating from defendant's breath. Defendant also had a passenger, but Murray did not speak to her until after defendant's arrest.

¶ 6 Murray testified that defendant slurred his speech and occasionally stuttered, but he did not have glassy or bloodshot eyes or a flushed face. After speaking with defendant, Murray suspected he was impaired so he returned to his squad car and waited for backup. When Murray reapproached defendant, he asked him to get out of the vehicle. Defendant did not stumble or stagger as he walked to the back of his vehicle. As Murray spoke to defendant, he could smell alcohol coming from defendant's breath, despite the wind that was blowing. When Murray asked defendant if he had been drinking, defendant said he had his last drink around 3:30 a.m., after he finished playing hockey. Defendant said that he left the ice rink to go straight home. Murray

testified that the ice rink was approximately three to five miles from where he stopped defendant. Defendant initially told Murray he had one beer, but later he indicated he drank three beers between 2:30 and 3:30 a.m.

¶ 7 When Murray asked defendant to complete a field sobriety test, defendant refused. Murray placed defendant under arrest for DUI. Murray testified that the factors he used to determine defendant was intoxicated were defendant's speed, the strong odor of alcohol emanating from his breath, his admission to drinking alcohol, and his slurred speech. Additionally, Murray noted that the strong odor of alcohol he initially smelled on defendant did not dissipate during the 5 to 10 minute traffic stop.

¶ 8 Murray further testified that after defendant's arrest, he approached the passenger in defendant's vehicle. Initially, Murray did not smell anything, but after speaking with her, he detected an odor of alcohol. The passenger advised Murray that she was intoxicated. Defense counsel then played the video recording of the stop. Counsel asked Murray about the display on the video screen, which indicated a speed of zero miles per hour. Murray testified that the speed did not measure defendant's speed, but indicated the squad car's speed from the global position system, which was not working that night. Counsel also asked Murray about the lack of audio during his first encounter with defendant. Murray explained that he did not turn his microphone on until he approached defendant's vehicle the second time. Murray also admitted that the video recording played in court was not properly synced with the audio, explaining that there had been an intermittent problem with the system used to put the video recording onto a DVD. Murray testified that this had nothing to do with the video recording equipment in his vehicle, which was working properly that night.

¶ 9 Defendant testified that the night of the incident he had a hockey game that ended around

midnight. Defendant stayed at the ice rink until 3:30 or 4 a.m. because he was reviewing some tax returns for his teammates. Defendant testified he had one beer after the game. Defendant admitted telling Murray he had two to three beers during a four hour period that night.

Defendant also testified he had a stuttering problem since childhood and that he stutters when he gets nervous. Defendant testified he was not impaired on the night of the incident. He refused the field sobriety tests because he had just finished playing hockey and had bad ankles.

¶ 10 The trial court denied defendant's petition to rescind statutory summary suspension. The cause proceeded to a stipulated bench trial on December 12, 2012, where defendant agreed that the stipulated evidence would consist of the transcript from his summary suspension hearing, the video recording of the stop introduced at that hearing, and a stipulation that defendant refused a breathalyzer test at the police department. The trial court found defendant guilty of both offenses, specifically noting that it found Murray's testimony credible. The trial court denied defendant's motion to reconsider and sentenced him to 18 months of conditional discharge. Defendant appeals.

¶ 11 ANALYSIS

¶ 12 Defendant first argues he was not proven guilty beyond a reasonable doubt of DUI because the evidence was insufficient to prove he was under the influence. When a defendant challenges the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056; *People v. Collins*, 106 Ill. 2d 237 (1985). Under this standard, the reviewing court must construe all reasonable inferences in favor of the State. *People v. Givens*, 237 Ill. 2d 311 (2010). A conviction will only be overturned where the evidence is so improbable or unsatisfactory that it

creates a reasonable doubt of defendant's guilt. *Id.*

¶ 13 To prove defendant guilty of DUI in this case, the State was required to prove beyond a reasonable doubt that defendant drove or was in actual physical control of a vehicle while under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2010). DUI convictions may be based solely on circumstantial evidence or the credible testimony of the arresting officer. *People v. Love*, 2013 IL App (3d) 120113. Additionally, a defendant's refusal to submit to chemical testing is circumstantial evidence of his consciousness of guilt. *Id.*

¶ 14 Viewing the evidence in the light most favorable to the State, we conclude a rational trier of fact could have found beyond a reasonable doubt that defendant was intoxicated. Murray testified that defendant had a strong odor of alcohol on his breath when he first talked to him in his vehicle and as he stood next to defendant outside, despite the fact that the wind was blowing. Murray also testified that defendant slurred his speech, admitted to drinking alcohol that night, and refused to submit to any field sobriety tests. Although defendant testified that he only had one beer that night, had a speech impediment, and refused the field sobriety tests due to bad ankles, the trial court specifically found Murray's testimony credible.

¶ 15 Defendant highlights the fact that Murray did not testify to several factors that if present would typically indicate impairment. However, it is not the function of this court to retry defendant. *People v. Ross*, 229 Ill. 2d 255 (2008). Based on our review of the evidence presented at trial, we find that it was not so improbable or unsatisfactory that it leaves any doubt of defendant's guilt. See *Givens*, 237 Ill. 2d 311.

¶ 16 Defendant next argues that the trial court erred when it allowed the use of the video recording of the stop. Specifically, defendant argues the video was defective because the audio and video were not properly synced, and that *People v. Kladis*, 2011 IL 110920, required the

State to produce a proper video recording.

¶ 17 Generally, a defendant is precluded from attacking or otherwise contradicting any facts to which he stipulated. *People v. Woods*, 214 Ill. 2d 455 (2005). Additionally, defendant forfeits any issue as to the impropriety of the evidence if he procures, invites, or acquiesces in the admission of that evidence. *Id.* As such, defendant has waived any issue regarding the video recording because defendant introduced the recording during the summary suspension hearing and stipulated to it as evidence for trial. Moreover, *Kladis*, 2011 IL 110920, does not require the State to produce a proper video as defendant suggests. Instead, *Kladis* stands for the proposition that the State can be barred from introducing testimony of the arresting officer regarding an incident that had been recorded and later destroyed. *Id.* Therefore, we find its holding inapplicable to the instant case, and conclude that the trial court did not err in admitting the video recording into evidence.

¶ 18 CONCLUSION

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

¶ 20 Affirmed.