2017 IL App (1st) 162627-U

No. 1-16-2627

Third Division
August 9, 2017

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.	)	Nos. TH 272220
	)	TH 272221
BRETT FORSGREN,	)	
	)	Honorable
Defendant-Appellant.	)	Diann K. Marsalek,
	)	Judge, presiding.

JUSTICE COBBS delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for driving under the influence of alcohol affirmed over his contention that the trial court applied the wrong standard in denying his motion for a directed finding.

¶ 2 Following a bench trial, defendant Brett Forsgren was convicted of driving on a prohibited sidewalk or parkway (Chicago Municipal Code § 9-40-070 (added July 12, 1990)) and driving under the influence of alcohol ("DUI") (625 ILCS 5/11-501(a)(2) (West 2014)) and

sentenced to 18 months of conditional discharge. On appeal, defendant contends the trial court erred by applying the wrong standard when it denied his motion for a directed finding.

¶ 3 The State called two witnesses at trial. Chicago police officer Tim Walter testified that he responded to a dispatch call around 1:30 a.m. on May 19, 2014, regarding a man slumped over in his vehicle at 3328 North Paulina. Walter observed a vehicle parked in the driveway at that address. The vehicle was running with its lights on, and defendant was in the driver's seat asleep behind the wheel. There was no one else in the vehicle, so Walter opened the driver's side door and removed the keys from the ignition. Defendant woke up, and Walter smelled a "very strong odor of alcoholic beverage coming from the interior of the vehicle and [defendant's] person." Defendant's eyes were bloodshot and glassy. He did not respond to Walter's questions. When defendant eventually spoke, his speech was slurred. His responses were slow and lethargic, but defendant eventually told Walter where he lived and that he had a few drinks and was going back out.

¶ 4 Walter asked defendant to exit his vehicle, and defendant's balance was "unsure;" he swayed side to side and fumbled with his wallet. Defendant gave Walter a medical insurance card rather than his driver's license. Walter administered several field sobriety tests, including a balance test, a horizontal gaze nystagmus test, and a walk-and-turn test. Defendant displayed various clues of impairment and alcohol consumption on all tests, indicating he was impaired. During the tests, defendant was unable to balance and follow directions.

¶ 5 Following the field sobriety tests, Walter transported defendant to the police station. Officer Richard Precht assisted Walter in processing defendant. In his career as a police officer, Walter participated in over 4,000 DUI arrests. In Walter's opinion, defendant was under the

influence of alcohol on May 19, 2014. Walter based his opinion on his observations of: defendant being slumped over in his vehicle; the strong alcoholic odor, defendant's bloodshot, glassy eyes; defendant's slurred speech; defendant's performance of the field sobriety tests, and the numerous clues of alcohol consumption and impairment that defendant displayed during the tests.

¶ 6 The State sought to introduce into evidence a video from Walter's vehicle of defendant's arrest. The video, which is not contained in the record on appeal, was played for the court.

¶ 7 On cross-examination, Walter testified that he observed the vehicle's wheels in the driveway, but its grill was blocking the sidewalk. Walter acknowledged that he never saw the car move, but he felt heat and heard music when he removed the keys from the ignition. Walter did not ask defendant how long he had been asleep, but he agreed that someone could be disoriented after waking up from a sound sleep. The field sobriety tests were conducted approximately two minutes after defendant woke up. It was 45 degrees out on May 19, 2014, and defendant was wearing a short sleeved shirt. Defendant had his arms crossed, and could have been warming himself up. Walter acknowledged that there was an indentation in the driveway, but stated that the field sobriety tests were not administered where the indentation was.

¶ 8 When Walter spoke to defendant at the scene, defendant informed him that he last consumed a drink at 8 p.m. He arrested defendant at approximately 1:48 a.m. Defendant also told Walter that he had been fighting with his girlfriend. However, Walter did not know if defendant went to his vehicle after the fight with his girlfriend.

¶ 9 Chicago police officer Richard Precht testified that he assisted in processing defendant on May 19, 2014, at the police station. Precht is a certified breath technician. He read defendant the

"Warning to Motorists" from a preprinted form. Precht informed defendant of the consequences of using a provided breathalyzer sample. After observing defendant for the requisite 20 minutes, Precht escorted defendant to the lockup area where the breathalyzer machine was located. Precht instructed defendant to blow into the machine until told to stop. Defendant attempted to blow into the machine but he "stuttered" and failed to provide enough breath for the machine to obtain a sample. Precht attempted to obtain a breath sample from defendant three times, but each sample was insufficient.

¶ 10 Precht then *Mirandized* defendant and asked him form questions from an "Alcohol Influence Report." During the course of the interview, defendant told Precht that he had been drinking at a bar, had one drink, and drank from 8 p.m. to 9 p.m. Defendant also told Precht that he was not using drugs, operating a vehicle, or under the influence of alcohol. Precht was aware that defendant lived at the location where he was arrested, but was not at the scene when defendant was arrested.

¶ 11 The State rested, and defense counsel moved for a directed finding. In support of its motion, defense counsel argued that the evidence was insufficient to show defendant was under the influence of alcohol because there was no evidence that he was impaired. Counsel argued that the evidence showed only that defendant was awakened from a sound sleep and, within two minutes, was asked to perform field sobriety tests. The State argued that it presented sufficient evidence to prove defendant was guilty beyond a reasonable doubt because the evidence established that defendant was in control of the vehicle and impaired. The State further argued the video and testimonial evidence regarding defendant's demeanor and performance on the field sobriety tests was sufficient to show impairment.

¶ 12 The court stated,

> "The defendant's Motion for Directed Finding at this point is going to be denied. I think the State has proven sufficient evidence to show that, a, the defendant was in the car, had actual physical control of the vehicle.
>
> And I also think the State has shown some indication of the defendant being under the influence, some of the factors that have been elicited so far in the testimony were that there was an odor of alcohol, the eyes were bloodshot, glassy, that the defendant's speech was slurred.
>
> He had an inability to retrieve the license and actually provided a medical card. Field sobriety tests were on the tape, which [the court] ha[s] seen, which do show that there was some issues with the field sobriety tests.
>
> There was an admission of consuming alcohol. There is the refus[al] of the Breathalyzer. So [the court] think[s] there is enough for the State to have shown their burden. So [the court is] going to deny the Motion at this point."

¶ 13 Following the court's ruling, the defense rested without presenting any evidence. The parties adopted their arguments from the motion for a directed finding. After a short recess, the court found defendant guilty of both driving on a sidewalk or parkway and DUI. In finding defendant guilty beyond a reasonable doubt, the court extensively recited the evidence presented. The court based its finding on defendant's performance on the field sobriety tests, the video, and the observations made by the officers. In response to the court's finding, defense counsel stated, "Judge, I disagree, respectfully, with the Court's ruling. And in light of the Court's ruling on the

Motion for Directed Finding, I thought that it was an indication by the finder of fact that this was a reasonable doubt case. I'd like the matter set down for Motion for a New Trial."

¶ 14 At a later date, defendant filed a posttrial motion and an amended posttrial motion for a judgment of acquittal and motion for a new trial, arguing he was entitled to a new trial because he presented no evidence based on the court's ruling on his motion for a directed finding. Defendant additionally alleged that the court erred in denying his motion for a directed finding and erred in finding him guilty. The court denied his motions. On July 20, 2016, defendant was sentenced to 18 months of conditional discharge. The sentencing hearing and the hearing on defendant's posttrial motions are not contained in the record. This appeal followed.

¶ 15 On appeal, defendant contends the trial court used the wrong standard when it denied his motion for a directed finding. Specifically, defendant argues that the court's comment that the evidence showed "*some indication* of defendant being under the influence," demonstrates that the court applied a lesser, incorrect standard for considering a motion for a directed verdict, rather than the correct reasonable doubt standard outlined in *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (In determining the constitutional sufficiency of the evidence, "the relevant question 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 the crime beyond a reasonable doubt." (Emphasis in original)). He claims he did not present any evidence at trial because he relied on the court's use of the phrase "some indication" as an indication that the State's evidence was insufficient.

¶ 16 In a criminal case, section 115-4(k) of the Illinois Code of Criminal Procedure provides the proper standard for granting a motion for a directed finding:

> "When, at the close of the State's evidence or at the close of all of the evidence, the evidence is insufficient to support a finding or verdict of guilty the court may and on motion of the defendant shall make a finding or direct the jury to return a verdict of not guilty, enter a judgment of acquittal and discharge the defendant." 725 ILCS 5/115-4(k) (West 2014).

¶ 17 A motion for a directed finding " 'asserts only that as a matter of law the evidence is insufficient to support a finding or verdict of guilty. The [motion] requires the trial court to consider only whether a reasonable mind could fairly conclude the guilt of the accused beyond a reasonable doubt, considering the evidence most strongly in the People's favor.' " *People v. Kelley*, 338 Ill. App. 3d 273, 277 (2003) (quoting *People v. Withers*, 87 Ill. 2d 224, 230 (1981)). For purposes of a motion for a directed finding, the defendant admits the truth of the facts stated in the State's evidence. *People v. Cazacu*, 373 Ill. App. 3d 465, 473 (2007) (quoting *Kelley*, 338 Ill. App. 3d at 277).

¶ 18 The question of the constitutional sufficiency of the evidence is entirely different from the ultimate question of guilty or not guilty, which involves the weighing of evidence and determining the credibility of witnesses. *People v. Connolly*, 322 Ill. App. 3d 905, 915 (2001). By contrast, in testing the sufficiency of the evidence to withstand a motion for a directed finding, the trial judge does not pass upon the weight of the evidence or the credibility of the witnesses. *Id.* at 915. A ruling on a motion for directed finding presents a question of law which we review *de novo. Id.* at 917-18.

¶ 19 Here, we are unpersuaded by defendant's claim that the trial court applied the wrong standard in denying his motion for a directed finding. When read as a whole, the record

demonstrates that the court found that the State presented sufficient evidence that defendant had control over the vehicle and was impaired. Although the trial court stated that there was "some indication" of impairment, the court went on to elaborate on the evidence that suggested defendant was impaired, *i.e.*, the officers' testimony that defendant admitted to consuming alcohol and had bloodshot eyes, defendant's issues with the field sobriety tests, his inability to retrieve his driver's license, and what amounted to his refusal to take the breathalyzer test. The court then concluded, "So [the court] think[s] there is enough for the State to have shown their burden." Thus, the court's plain language, not to mention its denial of the motion, revealed it found, "at that point," taking all the evidence as true and in the light most favorable to the State, that the evidence was sufficient to support a guilty finding, which was the proper standard at the directed finding stage.

¶ 20 Contrary to defendant's argument, the trial court was not required at that stage to find that the evidence *did in fact support* a guilty finding beyond a reasonable doubt, only that the evidence, when viewed in the light most favorable to the State, *could have* supported a guilty finding. See *Connolly*, 322 Ill. App. 3d at 915 (noting that a motion for a directed finding asks "whether the State's evidence *could support* a [finding] of guilty beyond a reasonable doubt, not whether the evidence *does in fact support* that [finding]." (Emphasis in original)). Based on the record and the evidence presented, we find no error with the trial court's decision to deny defendant's motion at the close of the State's evidence.

¶ 21 Additionally, we note that the record on appeal did not include the transcript of the hearing on defendant's posttrial motion, wherein he raised this precise issue. Thus, in determining the outcome of this case, we were without the benefit of the trial court's response to

defendant's allegation. Although the record before us was sufficient to review this case, we note that any doubts arising from a record's incompleteness are construed against the defendant and every reasonable presumption will be taken in favor of the judgment below. See *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 45.

¶ 22 Based on the foregoing, we affirm the judgment of circuit court of Cook County.

¶ 23 Affirmed.