DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

CYD TYRELL FENDER,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-927

[June 20, 2007]

POLEN, J.

Appellant, Cyd Tyrell Fender, appeals a final judgment and conviction for driving under the influence. Following a jury trial, Fender was found guilty of one count of driving under the influence, one count of resisting an officer without violence and one count of failing to submit to a breath test. In a subsequent bench trial, the trial court found Fender had been convicted of DUIs on three prior occasions and converted her DUI conviction from a misdemeanor to a felony. The trial court also found that Fender previously refused to submit to a breath test, raising this conviction to misdemeanor status. Fender presents four arguments in this appeal and we find merit in one and write to clarify our position in another.[1] Fender argues the State failed to prove the requisite three prior DUI convictions and failed to prove she had previously refused to take a breath test. We agree that the State failed to prove the three prior DUI convictions and reverse this charge elevation and remand to the trial court for resentencing. However, we disagree with Fender's argument that the State failed to prove the prior refusal to take a chemical or physical test and affirm the trial court's charge elevation on this count.

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[1] Fender also raises a jury instruction issue, arguing the trial court erred instructing the jury on impairment by medication. We find there was sufficient evidence at trial on Fender's use of medication allowing the trial court to include this jury instruction. Although Fender introduced the evidence of medication use for another purpose, the evidence was sufficient to give rise to the inference that its use, coupled with alcohol consumption, had impaired her driving.

Fender moved for judgment of acquittal on both of these sentence elevations.

> A motion for judgment of acquittal challenges the legal sufficiency of the evidence. Denial of a motion for judgment of acquittal is reviewed by the de novo standard. If there is competent substantial evidence to support the jury's verdict, the trial court's denial of the motion will not be disturbed on appeal. In reviewing the trial court's denial of the motion for judgment of acquittal, the appellate court must follow the well settled principle that a defendant, in moving for a judgment of acquittal, admits all facts adduced in evidence, and the court draws every conclusion favorable to the state which is fairly and reasonably inferable from that evidence.

Sapp v. State, 913 So. 2d 1220, 1223 (Fla. 4th DCA 2005)(internal citations omitted). With regard to the felony DUI classification, "once a defendant charged with felony DUI is convicted of driving under the influence, the State must prove two elements beyond a reasonable doubt: (1) the historical fact of at least three prior DUI convictions and, (2) that the defendant is the person convicted on those prior occasions." *State v. Pelicane*, 729 So. 2d 534, 535 (Fla. 3d DCA 1999). "The trial court must be satisfied that the existence of three or more prior DUI convictions has been proved beyond a reasonable doubt before entering a conviction for felony DUI." *State v. Rodriguez*, 575 So. 2d 1262, 1266 (Fla. 1991).

In this case, to prove Fender's prior DUI convictions, the State produced a certified copy of Fender's criminal history report from the clerk of court's office, her fingerprints and a report from the fingerprint analyst matching Fender to two of her prior bookings, and a certified copy of her driving record. We hold this is not enough to prove the existence of Fender's prior DUI convictions.

In *Pelicane*, the Third District determined the submission of a computerized driving record along with an electronic docketing statement did not satisfy the burden of proof necessary for proving prior DUI convictions. 729 So. 2d at 535. Further, in *Jackson v. State*, this court determined: "[D]riving records, as distinguished from proper proof such as admissions, stipulations, or certified copies of convictions, are not sufficiently reliable to prove a defendant's prior record." 788 So. 2d 373, 374. Although this court upheld Jackson's conviction based on his failure to object or move for a judgment of acquittal at the time the trial court determined he had the requisite convictions, this court agreed that certified copies of prior convictions are necessary in proving prior

convictions. *Id.* at 375. We find the evidence submitted by the State does not constitute competent and substantial evidence supporting the trial court's denial of Fender's motion and does not prove Fender's prior DUI convictions beyond a reasonable doubt. We reverse the trial court's decision converting Fender's DUI from a misdemeanor to a felony.

Fender also argues the trial court erred in denying her motion for judgment of acquittal for prior refusal to take a physical or chemical test as the State failed to prove the prior refusal beyond a reasonable doubt, presenting the same argument detailed above. The State argues there is no case law supporting the assertion that the same type of evidence required to prove prior DUIs is necessary when proving a misdemeanor refusal. As proof of this charge, the State introduced a certified copy of Fender's driving records and a non-certified copy of Fender's booking records, both of which detailed a prior arrest in 1996 for DUI and a refusal to take a physical or chemical test.

While we have found no case law indicating what constitutes sufficient proof of a prior refusal to take a physical or chemical test, we hold the proof requirements are not necessarily as stringent as those needed to prove three prior convictions. In *Rodgers v. State*, this court determined that a certified copy of the defendant's driving record showing his license was currently suspended was sufficient to prove a charge of driving while license suspended. 804 So. 2d 480 (Fla. 4th DCA 2001). This indicates a certified copy of Fender's driving record showing a prior refusal to submit to a chemical or physical test would be sufficient to prove the charge.

We find the certified copy of Fender's driving record showing a prior DUI arrest and indicating her refusal to take a physical or chemical test, along with the non-certified copy of Fender's booking record, is sufficient to prove the prior refusal and affirm the trial court's holding upgrading the offense to a misdemeanor.

We find the trial court's findings upgrading Fender's misdemeanor DUI conviction to a felony are unsupported by the evidence. We reverse the trial court's determinations and remand this case for reduction of the DUI conviction from a felony to a misdemeanor. We affirm the trial court's finding that Fender previously refused to take a chemical or physical test and the upgrade of this offense to a misdemeanor.

STEVENSON, C.J., and TAYLOR, J., concur.

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Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Charles E. Burton, Judge; L.T. Case No. 05-3196 CFA02.

Richard G. Lubin and Tama Beth Kudman of Richard G. Lubin, P.A., West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Thomas A. Palmer, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.