

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

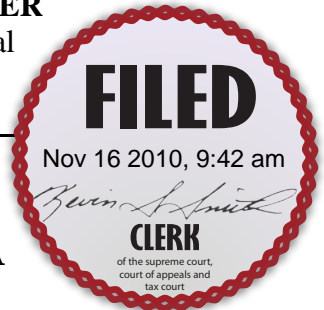
ATTORNEY FOR APPELLANT:

DONALD E. BAIER
Baier & Baier
Mount Vernon, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL J. KEMPF,
Appellant- Defendant,

vs.

STATE OF INDIANA,
Appellee- Plaintiff,

)
)
)
)
)
)
)
)
)
)
)

No. 65A01-1003-CR-134

APPEAL FROM THE POSEY CIRCUIT COURT
The Honorable James M. Redwine, Judge
Cause No. 65C01-0809-FD-75

November 16, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Michael Kempf was convicted following a jury trial of operating a vehicle while an habitual traffic violator, a Class D felony. He raises four issues that we consolidate and restate as whether the evidence is sufficient to support his conviction. Concluding the evidence is sufficient to support the conviction, we affirm.

Facts and Procedural History

On August 29, 2008, Kempf was stopped by Indiana State Trooper Timothy Wood for not wearing a seatbelt. Kempf told Trooper Wood he did not have his driver's license but identified himself sufficiently for Trooper Wood to have a dispatcher look Kempf up in the Bureau of Motor Vehicles ("BMV") database. Trooper Wood was advised Kempf's driver's license was suspended because Kempf was an habitual traffic violator ("HTV"). Trooper Wood placed Kempf under arrest and had him transported to jail.

The State charged Kempf with operating a motor vehicle as an HTV.¹ Following a jury trial at which Trooper Wood testified and the State introduced into evidence certified copies of Kempf's driving record, Kempf was found guilty as charged. The trial court sentenced him to eighteen months, with twelve months suspended to probation. In addition, Kempf's driving privileges were suspended for life. Kempf now appeals his conviction.

¹ Kempf was originally charged pursuant to Indiana Code section 9-30-10-16(a)(2), but the charge was amended, over Kempf's objection, to charge him pursuant to section 9-30-10-16(a)(1).

Discussion and Decision

I. Standard of Review

When reviewing the sufficiency of the evidence supporting a conviction, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role to assess the credibility of witnesses and weigh the evidence. Id. Thus, when we are confronted with conflicting evidence, we must consider it most favorably to the fact-finder's determination. Id. We will affirm a conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." Id. (citation omitted). "The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." Id. (citation omitted).

II. Knowledge of Suspension

A. Proof of Mailing

Kempf first contends the evidence was insufficient to show he had actual knowledge that his driving privileges were suspended. "A person who operates a motor vehicle . . . while the person's driving privileges are validly suspended under this [HTV] chapter . . . and the person knows that the person's driving privileges are suspended . . . commits a Class D felony." Ind. Code § 9-30-10-16(a)(1). A conviction does not require proof that the person operated a vehicle with knowledge that the person's driving privileges were suspended because of an HTV determination; a conviction requires only proof that the person operated a vehicle with knowledge that the person's driving privileges were suspended for any reason. State v. Jackson, 889 N.E.2d 819, 823 (Ind.

2008). “Service by the bureau [of motor vehicles] of notice of the suspension . . . by first class mail to the person at the last address shown for the person in the bureau’s records . . . establishes a rebuttable presumption that the person knows that the person’s driving privileges are suspended or restricted.” Ind. Code § 9-30-10-16(b). Thus, in the absence of direct proof of the person’s actual knowledge, the State may presumptively satisfy the knowledge element by establishing proper notice to a person’s last address in the BMV’s records, subject to rebuttal by the accused. Jackson, 889 N.E.2d at 822.

In Jackson, there was direct evidence of the defendant’s knowledge as he told the police officer who stopped him that his license was suspended. See id. There is no similar direct proof here. Although Kempf told Trooper Wood he did not have his driver’s license, he did not also indicate that was because his license was suspended. Therefore, the State was required to provide additional evidence to establish Kempf’s knowledge of his suspension. The State introduced into evidence a certified copy of Kempf’s driver’s record that shows a lengthy list of traffic convictions and license suspensions, including a suspension as an HTV effective from July 22, 2008 to July 20, 2018, with a “mail date” of June 17, 2008, to an address on Orchard Road, Evansville, Indiana. Exhibit Volume at 3, 23. The Orchard Road address was provided to the BMV on November 13, 2003, and not changed until August 30, 2008. Id. at 23. The stop at issue took place on August 29, 2008. In addition, a copy of a notice of suspension purportedly mailed on June 17, 2008, and a copy of an envelope addressed to Michael Kempf at the Orchard Road, Evansville, Indiana, address were admitted into evidence. Id. at 19.

Kempf contends the notice and envelope are insufficient to establish service of the notice by first class mail to his last known address and are therefore, insufficient to establish the rebuttable presumption of his knowledge of suspension. Specifically, he points to the absence of a notation on the notice showing that it was mailed, absence of first class postage or postmark on the envelope, and lack of verification by a BMV representative in court that the notice was mailed. In Spivey v. State, 922 N.E.2d 91 (Ind. Ct. App. 2010), this court held that the evidence need not specifically indicate a notice of suspension was sent by first class mail. Id. at 93. A driving record that indicates the mail date of a notice of suspension is sufficient to establish the rebuttable presumption the defendant knew of his license suspension, as “the trier of fact may reasonably infer that the notice was sent via first-class mail” because “it is common knowledge that the general method of mailing a letter is through the United States Postal Service via first-class mail.” Id.; see also Quarles v. State, 763 N.E.2d 1020, 1023 (Ind. Ct. App. 2002) (“Quarles’s knowledge of his suspension may be inferred from the printout of his driving record introduced into evidence which shows that these suspension notices were mailed to his last known address.”).

In addition, drivers have the obligation to keep the BMV apprised of their current address. See Ind. Code § 9-24-13-4. The BMV may rely on the address which was last provided by a driver when mailing a notice of suspension. Fields v. State, 679 N.E.2d 898, 900 (Ind. 1997); see also Brown v. State, 677 N.E.2d 517, 519 (Ind. 2007) (“The [BMV] may rely on the address which was last provided by the driver. . . . [T]he driver is required to provide it with an updated address. If the driver has not, the [BMV] may

assume the address last given is the correct address to which to send a notice.”). The last address Kempf provided to the BMV prior to his suspension was the Orchard Road, Evansville address.² This is sufficient evidence upon which the jury could find the BMV met the requirement of mailing notice of suspension to Kempf’s last known address in order to establish the rebuttable presumption that Kempf had knowledge of his suspension.

B. Content of Notice

Indiana Code section 9-30-10-16(b) also requires the notice of suspension be in compliance with Indiana Code section 9-30-10-5 in order for the rebuttable presumption of the defendant’s knowledge of his suspension to be established. Kempf contends the suspension notice was insufficient as a matter of law. Indiana Code section 9-30-10-5 provides the notice must inform the person that “the person may be entitled to relief under section 6 of this chapter or may seek judicial review of the person’s suspension” Indiana Code section 9-30-10-6 provides for relief in the event of a material error in the person’s driving record. The notice of suspension mailed to Kempf in this case informs him of the judgments leading to his habitual traffic violator status and resulting ten-year license suspension and then states:

You may request an administrative review if you believe the BMV’s records contain a material error with respect to your driving record. Explain the relevant facts in the space provided below and mail this form to the [BMV]. Within 30 days of receiving your request for review, the BMV

² Kempf argues it is “fundamentally unfair, unfounded, and inequitable” for the BMV to rely on an address provided four and one-half years prior to mailing a notice of suspension and the presumption that he received a notice mailed to that address should not be applied in this case because “the BMV should have recognized the possibility that [he] may have changed addresses in that period of time” Appellant’s Brief at 12. Given that it is the driver’s obligation to apprise the BMV of any change of address rather than the BMV’s obligation to search through its files and surmise the driver might have a new address, *see Brown*, 677 N.E.2d at 519, we reject Kempf’s argument.

will determine whether or not a material error exists that caused the suspension. Then, the BMV will notify you of that determination. This request for review does not postpone your suspension. Indiana law also allows you to petition for judicial review of this suspension in a circuit, superior, county, or municipal court in the county where you live.

Exhibit Vol. at 19. The jury was instructed as to the statutory requirements of the notice of suspension and determined this notice was sufficient to inform Kempf he might be entitled to administrative relief from the suspension if there was a material error in his driving record and to further inform him he might be entitled to judicial relief in the event he had grounds for such relief. Although the notice could have more closely tracked the language of the statute, the jury appropriately could have determined it provides the requisite advisements. Cf. State v. Hammond, 761 N.E.2d 812, 815 (Ind. 2002) (“The validity of a license suspension depends on the merits of the adjudication, so an untimely or incomplete suspension notice does not justify automatic reversal of the suspension.”); Stewart v. State, 721 N.E.2d 876, 880 (Ind. 1999) (“While defects in the administrative process may warrant relief under administrative law, it is not the province of criminal proceedings to correct such errors. . . . [T]he essence of the HTV offense was the act of driving after being so determined.”). Because the record shows the BMV mailed a proper notice of suspension to Kempf’s last known address, the State established the rebuttable presumption Kempf knew his license was suspended when he drove a vehicle on August 29, 2008, which Kempf failed to rebut. The evidence therefore supports his conviction.

Conclusion

Sufficient evidence supports Kempf’s conviction for operating a vehicle while an

HTV. His conviction is affirmed.

Affirmed.

MAY, J., and VAIDIK, J., concur.