NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2002-KA-0388**
VERSUS	*	**COURT OF APPEAL**
ANDRE CHACHERE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
	*	
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APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 416-114, SECTION "J"
Honorable Leon Cannizzaro, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Miriam G. Waltzer, Judge James F. McKay III, and Judge Dennis R. Bagneris, Sr.)

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CONVICTION AND SENTENCE AFFIRMED, REMANDED WITH INSTRUCTIONS

On August 14, 2000, Andre J. Chachere was charged by bill of information with operating a vehicle while intoxicated, third offense, in violation of La. R.S. 14:98(D). He was arraigned on September 14th and pleaded not guilty. At a hearing on November 8th the court denied the motion to suppress the statement and the motion to quash. On January 9, 2001, after being advised of his right to a jury, the defendant elected a bench trial which occurred that day. The court took the case under advisement and on January 18th found the defendant guilty as charged. A pre-sentencing investigatory report was ordered, and the defendant was sentenced on April 18th to five years imprisonment; all but six months of his sentence was suspended, and he was placed on five years active probation with special conditions. One of the conditions was that he participate in an in-patient substance abuse program. He was granted an out-of-time appeal on May 31, 2001.

At trial Officer Sun-Day Richardson testified that she was dispatched to an automobile accident at 755 Tchoupitoulas Street about 5:30 p.m. on

July 22, 2000, and there she found two vehicles in the middle of the street. The drivers were outside their cars. Chachere's car was directly behind the other car, and he admitted to the officer that he hit the other vehicle which was stopped for a traffic light. When Officer Richardson got within a few feet of Chachere, she could smell alcohol, and she noticed that his eyes were glassy and he was unsteady on his feet. She described him as "off balance" and noted that he was leaning on his car. He gave her his driver's license but he appeared confused and disoriented when she asked for other documentation. He was "hesitant" when he spoke, and his speech was slurred. The officer told the defendant that he was under investigation for driving while intoxicated, but because she was not qualified to give him any of the tests for intoxication, she transported him to the Crescent City Connection Police Station. There he was offered a breathalyzer and a blood alcohol test, but he refused to take the tests. He received two citations; one for reckless operation of a vehicle and the other for driving while intoxicated. Under cross-examination the officer admitted that the defendant had a valid driver's license, car registration, and proof of auto insurance, and that she had not seen him driving.

Officer Anthony Monaco, a fingerprint examiner and custodian of records, testified as to his experience and training in analyzing fingerprints

and was found to be an expert. The officer took the defendant's fingerprints in court on the day of trial and compared them to those on the arrest registers of January 18, 1994 and April 1, 1995, the prior occasions when the defendant was charged with driving while intoxicated. He found the fingerprints matched.

The parties stipulated that if Officer David Kramer of the Crescent City Connection Police were to testify, he would say that in April of 1997, Andre Chachere was involved in an automobile accident in which a person was killed. When Officer Kramer observed Chachere on the night of the accident, he saw that the defendant had glassy eyes, difficulty with balance, and slurred speech. Furthermore, Chachere reeked of alcohol and, when tested, showed a blood alcohol concentration of .214%. Chachere was convicted of vehicular homicide.

Before addressing the assignment of error, we note a potential sentencing error patent in that the trial court did not prohibit the benefits of parole, probation, or suspension of sentence for at least six months as mandated by La. R.S. 14:98(D)(1). (Since probation has been revoked, the issue is the prohibition on parole). This court has the authority to address this issue. In State v. Williams, 2000-1725 (La. 11/29/2001), 800 So.2d 790, the Louisiana Supreme Court affirmed the appellate court's decision to

vacate an illegally lenient sentence imposed by the trial court and remanded the case for resentencing in accordance with the statutory provisions although the State had not objected to the illegally lenient sentence:

> [T]he authority of the appellate court to recognize sentencing error arises in part from the self-activating provisions of La. Rev. Stat. Ann. § 15:301.1(A) (i.e., the failure to impose sentence without benefit of parole, probation, or suspension of sentence) and under La. Code Crim. Proc. Ann. art. 882 (the sentencing errors other than those which fall under La. Rev. Stat. Ann. §15:301.1(A). Under the provisions of article 882, "a[n] illegal sentence may be corrected *at any time* by . . . an appellate court on review."

State v. Williams, 2000-1725, p.16, 800 So.2d at 802.

Although La. R.S. 15:301.1 provides that penalties under the criminal statutes are self-activating (i.e., "each sentence which is imposed under the provisions of that statute shall be deemed to contain the provisions relating to the service of that sentence without benefit of probation, parole, or suspension of sentence"), when the trial court fails to state that the sentence is to be served without benefits, the Supreme Court acknowledged that an appellate court may, on occasion, remand for resentencing. The Supreme Court recognized that the appellate court in Williams was justified in remanding the matter for resentencing as "an element of sentencing discretion existed as regards the length of sentence served without benefit of

parole, probation or suspension of sentence." State v. Williams, 2000-1725, p.15, 800 So.2d 801. The statute states that at least six months must be without benefits but three years without the benefit of parole has been affirmed under La. R.S. 14:98(D). State v. Goodby, 487 So. 2d 1280 (La. App. 3 Cir. 1986). Accordingly, we order the trial court to issue a per curiam stating whether and in what term the defendant's benefit of parole was prohibited when his sentence was made executory. If the benefit was not limited, the case must be remanded for resentencing on the prohibition of parole.

The defendant argues that the evidence is insufficient to support the conviction in that the evidence failed to prove that he was intoxicated.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict should be upheld. State v. Mussall, 523 So. 2d 1305 (La. 1988).

Intoxication with its attendant behavioral manifestations is an observable condition about which a witness may testify. What behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. Some behavioral manifestations, independent of any scientific test, are sufficient to support a charge of driving while intoxicated. State v. Bourgeois, 00-1585 (La. App. 5 Cir. 3/14/01), 785 So. 2d 848, 853, citing State v. Hendon, 94-0516 (La. App. 1 Cir.4/7/95), 654 So. 2d 447, 449.

Under La. R.S. 14:98, the state must prove that the defendant was operating a motor vehicle while under the influence of alcohol. Additionally, to convict the defendant of a third offense, the state must prove that he has two prior convictions for driving while intoxicated.

Officer Robertson testified that she saw the defendant's vehicle after it was involved in a traffic accident in which he slammed into a car stopped for a traffic light. He admitted to driving the vehicle. She noticed that he reeked of alcohol, his eyes were bloodshot, his speech slurred, and his balance unsteady. Furthermore, he refused to take any of the tests designed to determine intoxication.

The defendant maintains that his case is similar to State v. Loisel, 2001-4612 (La. App. 4 Cir. 3/6/02), 812 So. 2d 822, and State v. Kent, 610

So. 2d 265 (La. App. 5 Cir. 1992), where DWI convictions were reversed for insufficient evidence. In Loisel, this court overturned a DWI conviction that was based on the arresting police officer's report and videotape of the defendant at the time he was arrested. This court found the videotape contradicted the arresting officer's description of the defendant as unsteady in gait and unclear in speech. The defendant agreed to take a test in which he was asked to recite part of the alphabet; he had no trouble the first time he did it, but he mixed up some letters on his second try. In State v. Kent, (*Supra)* the defendant was stopped for speeding and had difficulty getting out of his truck; the arresting officer noticed a moderate odor of alcohol and his eyes seemed red. The defendant took a field sobriety test and did not clearly fail it. These cases can be distinguished from the instant case in that the defendants in Loisel and Kent were not stopped as a result of traffic accidents, and both those defendants took field tests and performed adequately.

The case at bar is very similar to State v. Johnson, 580 So. 2d 998 (La. App. 3 Cir. 1991), where the arresting officer approached the defendant who had just been involved in a traffic accident. The officer noticed the smell of alcohol, bloodshot eyes, slurred speech and an unsteady gait. The defendant was taken to the police station, and a second officer interviewed him. That

officer also testified as to his behavior. The defendant refused to take any of the tests for intoxication. The evidence was found sufficient to support a conviction for third offense DWI.

Chachere argues that Officer Richardson's testimony is insufficient to support his conviction. She testified that she had been working as an officer for two years, but, other than her training at the police academy, she had no special training in DWI testing. However, Officer Richardson only testified as to symptoms that she observed; she did not attempt to test the defendant. Furthermore, she was called to the site because the defendant had run into a car stopped for a traffic light, and she issued a reckless driving citation to him. She believed him to be intoxicated and transported him to an office where he could be tested. The defendant complains that the conviction is unsupported by any objective evidence and that there are other explanations such nervousness for defendant's behavior. However, he refused to take any of the tests for DWI. His refusal is admissible under La. R.S. 32:666 as evidence of intoxication. State v. Washington, 498 So. 2d 136 (La. App. 5 Cir. 1986). Certainly nervousness can induce some hesitancy, but the symptoms observed by Officer Richardson are the classic indicators of intoxication. The obvious conclusion to be reached from the facts of this case is that the defendant was driving while intoxicated.

In addition to establishing the elements of intoxication, the state must also prove that the defendant has two prior valid convictions as defined in La. R.S. 14:98(F)(1), and these convictions are not more than ten years old. La. R.S. 14:98(F)(2).

The defendant next argues that because his fingerprints are not on the backs of his two prior convictions, the state did not adequately link him to the predicate guilty pleas. At trial the fingerprint expert testified that the defendant's fingerprints taken in court that day matched those on the prior arrest registers. Furthermore, two waiver of constitutional rights/plea of guilty forms are part of the record. In each the defendant, his attorney, and the judge signed the form which indicated that after being advised of his rights. Andre Chachere pleaded guilty to driving while intoxicated on August 16, 1994 and again on September 12, 1996. The defendant's name, address, birth date, and social security number are the same on all the documents. Such evidence has been found sufficient to link a defendant to prior offenses. State v. Payton, 2000-2899 , p. 9 (La. 3/15/2002), 810 So. 2d 1127; State v. Henry, 96-1280 (La. App. 4 Cir. 3/11/98), 709 So. 2d 322.

The defendant's arguments are without merit.

Accordingly, for reasons given above, the defendant's conviction is affirmed. His sentence of five years is also affirmed, and the trial court is

ordered to issue a per curiam stating whether and in what particular terms the defendant's benefit of parole was prohibited when his sentence was made executory, and if the benefit was not limited, the case will be remanded for a specific time limit on the prohibition of parole.

CONVICTION AND SENTENCE AFFIRMED, REMANDED WITH INSTRUCTIONS