In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-10-00509-CR

HAROLD RAY CLEMENTS, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 258th District Court
Polk County, Texas
Trial Cause No. 21103

MEMORANDUM OPINION

Harold Ray Clements appeals his conviction for habitually driving while intoxicated. *See* Tex. Penal Code Ann. § 49.04 (West 2011) (making driving while intoxicated, generally, a Class B misdemeanor), § 49.09(b)(2) (West 2011) (raising penalty to a third degree felony if the defendant has previously been convicted two times for driving while intoxicated). After pleading "true" to two enhancement paragraphs, the trial court determined that Clements was a habitual felony offender and sentenced him to fifty years in prison. *See* Tex. Penal Code Ann. § 12.42 (West 2011). On appeal,

Clements argues that the evidence is insufficient to support his conviction and that the trial court erred by ordering him to reimburse the county for the attorney's fees it incurred because he was indigent. We hold the trial court erred in awarding attorney's fees to reimburse the county for the expense of paying Clements's court-appointed attorney; we also hold that the evidence is sufficient to support Clements's conviction for felony driving while intoxicated. With the exception of the trial court's award of attorney's fees as costs, we affirm the judgment.

In his first issue, Clements argues the evidence is legally insufficient to support his conviction. In *Brooks v. State*, the Texas Court of Criminal Appeals held that the *Jackson v. Virginia* standard is the only standard a reviewing court should apply in determining whether the evidence sufficiency supports each element of a criminal offense the State is required to prove beyond a reasonable doubt. 323 S.W.3d 893, 895 (Tex. Crim. App. 2010); *see Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Brooks* states that "[i]t is fair to characterize the *Jackson v. Virginia* legal-sufficiency standard as: Considering all the evidence in the light most favorable to the verdict, was a jury rationally justified in finding guilt beyond a reasonable doubt." *Brooks*, 323 S.W.3d at 899 (citing *Jackson*, 443 U.S. at 319). "The *Jackson* standard of review gives full play to the jury's responsibility to fairly resolve conflicts in the evidence, to weigh the evidence, and to draw reasonable inferences from the evidence." *Williams v. State*, 301

S.W.3d 675, 684 (Tex. Crim. App. 2009), *cert. denied*, 130 S.Ct. 3411, 177 L.Ed.2d 326, 78 U.S.L.W. 3729 (2010).

A person commits the offense of driving while intoxicated "if the person is intoxicated while operating a motor vehicle in a public place." Tex. Penal Code Ann. § 49.04. To support a conviction for driving while intoxicated, "there must be a temporal link between [] a defendant's intoxication and his driving." *Kuciemba v. State*, 310 S.W.3d 460, 462 (Tex. Crim. App. 2010). To establish a temporal link, we examine the record for evidence showing how recently the vehicle had been driven, or for evidence showing the time that elapsed between an accident and the arrival of police, to determine whether the jury had an informed basis to determine the relationship, if any, between the defendant's driving and his intoxication. *Stoutner v. State*, 36 S.W.3d 716, 721 (Tex. App.—Houston [1st Dist.] 2001, pet. ref'd); *Weaver v. State*, 721 S.W.2d 495, 498 (Tex. App.—Houston [1st Dist.] 1986, pet. ref'd). The evidence establishing a temporal link can be solely circumstantial. *Kuciemba*, 310 S.W.3d at 462. For instance, breath tests taken from the defendant near the time the defendant was driving can serve as a circumstance that is probative in determining whether the defendant was driving while intoxicated. *See State v. Mechler*, 153 S.W.3d 435, 437, 440 (Tex. Crim. App. 2005) (holding that results of breath test obtained ninety minutes after arrest probative of both the impairment and per se definitions of intoxication); *Stewart v. State*, 129 S.W.3d 93,

97-98 (Tex. Crim. App. 2004) (holding that results of breath test obtained eighty minutes after arrest probative of both the impairment and per se definitions of intoxication).

The testimony in Clements's case, viewed in the light most favorable to the jury's verdict, shows that while parking his pickup at Walmart, Clements struck a parked car in the parking lot. After parking, Clements drank from a beer can and then got out of his pickup and went inside the store. When Clements returned to his pickup, he encountered the store's loss prevention officer, who testified that Clements smelled of alcohol and appeared to be intoxicated. After the police arrived, Clements failed two field-sobriety tests. Clements admitted to the investigating officer that he had consumed three beers that day. The investigating officer also testified that Clements smelled of alcohol and that Clements was intoxicated. Clements was arrested at 3:00 p.m., after which he refused to provide a breath sample as requested by the officer.

Clements contends that the evidence is insufficient to establish a temporal connection between the point he was determined to be intoxicated and the point that he was driving. However, we conclude that circumstantial evidence in this case allowed the jury to infer that Clements had been drinking before entering the store's parking lot, and to infer that Clements had recently driven his pickup while being intoxicated. *See Stoutner*, 36 S.W.3d at 721-22; *Weaver*, 721 S.W.2d at 498-500; *see also Kuciemba*, 310 S.W.3d at 462-63 (reasoning that the defendant's intoxication after traffic accident was circumstantial evidence that the intoxication was a cause of the accident). One of the

circumstances supporting a temporal link between Clements's intoxication and his driving is the evidence that he hit a parked car. *See Kuciemba*, 310 S.W.3d at 462 (noting that an inference of intoxication as having been the cause of an accident "is even stronger when the accident is a one-car collision with an inanimate object").

Considering all the evidence in the light most favorable to the judgment, we conclude a rational trier of fact could have found beyond a reasonable doubt that Clements was guilty of driving while intoxicated. *See Jackson*, 443 U.S. at 319; *Brooks*, 323 S.W.3d at 895. Having found the evidence sufficient to support the jury's verdict, we overrule Clements's first issue.

In his second issue, Clements argues that because he is indigent, the trial court abused its discretion by assessing him with $1,875 in attorney's fees. Under the Texas Code of Criminal Procedure, an indigent defendant may be taxed with attorney's fees if there is a material change in the indigent defendant's ability to pay attorney's fees between the date the trial court initially appointed trial counsel and the date the trial court rendered its final judgment. *See* Tex. Code Crim. Proc. Ann. arts. 26.04(p), 26.05(g) (West Supp. 2010); *see also Roberts v. State*, 327 S.W.3d 880, 883-84 (Tex. App.—Beaumont 2010, no pet.).

Here, when the trial court appointed trial counsel, the trial court determined that Clements was indigent. Additionally, the trial court determined that Clements was indigent when appointing counsel to represent Clements in this appeal. Moreover,

nothing in the record supports a finding that Clements's financial circumstances materially changed between the date the trial court initially appointed trial counsel and the date it rendered its judgment. We conclude there is no evidence to support the trial court's decision that Clements "has" the ability to pay his attorney's fees. *See* Tex. Code Crim. Proc. Ann. art. 26.05(g); *Roberts*, 327 S.W.3d at 884.

In its brief, the State agrees that the trial court abused its discretion in taxing Clements with attorney's fees, and agrees that the trial court's judgment should be modified to delete the trial court's award of attorney's fees from the judgment. Accordingly, we modify the judgment to delete the award of $1,875 in attorney's fees as costs. In all other respects, we affirm the trial court's judgment.

AFFIRMED AS MODIFIED.

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HOLLIS HORTON
Justice

Submitted on August 3, 2011
Opinion Delivered August 24, 2011
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Before Gaultney, Kreger, and Horton, JJ.