STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0636

State of Minnesota,
Respondent,

vs.

Michal James Berger,
Appellant.

Filed December 14, 2020
Reversed
Jesson, Judge

Cottonwood County District Court
File No. 17-CR-18-354

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Nicholas Anderson, Cottonwood County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

JESSON, Judge

Appellant Michal James Berger was convicted of fourth-degree driving while under the influence of a controlled substance. Although initially stopped for leaving a park after hours, Berger was released because law enforcement did not believe he was under the

influence. It was only after Berger went to the jail to pick up his passenger who had been arrested during the stop that he was suspected to be under the influence and placed under arrest as well. Because the evidence does not prove beyond a reasonable doubt that Berger was under the influence of a controlled substance while driving, we reverse.

FACTS

In September 2019, Officer Jonathon Beck saw a car leave a closed park at around 3:30 a.m. Officer Beck stopped the car, driven by appellant Michal James Berger, to investigate. During the stop, Officer Beck spoke with Berger and noticed that he had bloodshot eyes and smelled faintly of alcohol and marijuana. Officer Beck then administered a preliminary breath test and conducted a search of the vehicle. The preliminary breath test returned an alcohol concentration of 0.00 and a search of the vehicle did not return any illegal items. Because Officer Beck did not suspect that Berger was under the influence, he released Berger. Officer Beck did arrest one of Berger's passengers for a probation violation, however, and took the individual to jail.

When Officer Beck arrived at the jail, Berger was already there to pick up his passenger. At that point, Officer Beck was notified by dispatch that Berger had been previously arrested in Iowa for possession of LSD and pain pills. Based on this information and the observations made during the traffic stop, Officer Beck decided to investigate further and asked Berger to speak with him inside. Berger agreed.

During their conversation, Officer Beck noticed that Berger's skin was flush and his eyes appeared dilated and bloodshot. Officer Beck then administered three standard field

sobriety tests: the modified Romberg test,[1] the walk-and-turn, and the one-leg stand. Officer Beck also checked Berger's pulse and pupil dilation.[2] After observing Berger's performance on the field sobriety tests, Officer Beck concluded that Berger failed each one and placed Berger under arrest.[3] A blood sample was then taken from Berger. The results of the test indicated the presence of THC, a controlled substance in Minnesota.[4]

Berger was charged with fourth-degree driving while under the influence of a controlled substance. Minn. Stat. § 169A.20, subd. 1(2) (2018). Instead of proceeding to trial, Berger agreed to a stipulated-facts trial pursuant to Minnesota Rule of Criminal Procedure 26.01, subdivision 4, upon the advice of his attorney. The district court accepted the parties' stipulated facts, and upon review concluded that the facts proved beyond a reasonable doubt that Berger was driving under the influence of a controlled substance—marijuana—on the day of his arrest.

Berger appealed the district court's verdict to this court. He then moved to stay his appeal to pursue postconviction relief on the theory that he received ineffective assistance of counsel because his trial attorney submitted the case for a stipulated-facts trial under rule 26.01, subdivision 4, as opposed to rule 26.01, subdivision 3, thereby eliminating his

[1] The modified Romberg test asks individuals to estimate the span of 30 seconds.
[2] Berger's pupils were 6.5 mm dilated, which Officer Beck reported as being above the Drug Recognition Evaluator average of 2.5–5 mm in room light. Officer Beck also reported that Berger's pulse—122 BPM—was elevated above the average of 60–90 BPM.
[3] Berger claims that he passed some of the field sobriety tests, specifically the gaze nystagmus test.
[4] Minn. Stat. § 152.02, subd. 2(h) (2018).

ability to challenge, on appeal, the sufficiency of the evidence sustaining his conviction.[5] This court granted his stay of appeal.

In addition to seeking relief based on a claim of ineffective assistance of counsel, Berger asked the postconviction court to vacate his conviction, evaluate the sufficiency of the evidence and facts presented at the stipulated-facts trial, and decide whether he was guilty under Minnesota Rule of Criminal Procedure 26.01, subdivision 3. The postconviction court granted Berger's petition in part and found Berger guilty of fourth-degree misdemeanor driving while under the influence of a controlled substance.[6] Berger moved to dissolve the stay and now appeals.[7]

D E C I S I O N

Berger argues that the evidence produced by the state was not sufficient to prove beyond a reasonable doubt that he was driving while under the influence of marijuana. When, as in this case, a conviction is based on circumstantial evidence, this court conducts a two-step analysis to determine whether the evidence supports a guilty verdict. *State v. Silvernail*, 831 N.W.2d 594, 598 (Minn. 2013). First, this court identifies the circumstances proved by viewing any conflicting evidence in the light most favorable to

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[5] On appeal from a proceeding under rule 26.01, subdivision 4, a defendant may challenge only the dispositive pretrial ruling, and not other issues that could be raised on appeal. Minn. R. Crim. P. 26.01, subd. 4; *see also State v. Myhre*, 875 N.W.2d 799, 802 (Minn. 2016) ("[Rule 26.01, subdivision 4] allows a criminal defendant to plead not guilty; waive all trial-related rights, including his or her right to a jury trial; stipulate to the state's evidence in a trial to the court; and then appeal a dispositive, pretrial ruling.").

[6] The postconviction court "deem[ed] it unnecessary to address the ineffective assistance of counsel claim in [Berger's] first petition."

[7] The state did not file a brief in this matter, so this court proceeds pursuant to Minnesota Rule of Civil Procedure 142.03.

the verdict. *Id.* Then we determine whether the circumstances proved are consistent with the verdict of guilt and inconsistent with any other rational conclusion except that of guilt. *Id.* at 599. It is not enough that circumstances or inferences pointing to guilt are reasonable. *Id.* Guilt must be the only rational hypothesis this court can reach based on the proved circumstances. *Id.*

Minnesota Statute § 169A.20, subdivision 1(2) makes it a crime for any person to "drive, operate, or be in physical control of any motor vehicle" when that person is "under the influence of a controlled substance." Here, the issue is limited to whether Berger was under the influence of marijuana while he was driving his car. An individual is said to be under the influence when they "do not possess that clearness of intellect and control of himself that he otherwise would have." *State v. Ards*, 816 N.W.2d 679, 686 (Minn. App. 2012) (quotations omitted).

Viewed in the light most favorable to the verdict, and taking into account the stipulated facts agreed to by the parties, we conclude that the following circumstances were proved. Officer Beck conducted a stop when he saw Berger's car leaving a closed park. Officer Beck did not observe any traffic violations or poor driving prior to stopping Berger. During the stop, Officer Beck observed that Berger had bloodshot eyes and smelled faintly of alcohol and marijuana. Officer Beck also administered a preliminary breath test, which resulted in an alcohol concentration of 0.00. Because Officer Beck did not believe Berger was under the influence at that time, he released Berger. Later, while talking to Berger at the jail, Officer Beck observed that Berger had flushed skin, bloodshot eyes, and dilated pupils. After administering the field sobriety tests, Officer Beck determined that Berger

failed each one. Finally, Berger's blood test confirmed the presence of THC on the day of his arrest.[8]

Moving to the second step in our analysis, we must determine whether the circumstances proved above are consistent with guilt and inconsistent with any other rational hypothesis except guilt. *Silvernail*, 831 N.W.2d at 599. Again, the sole issue is whether Berger was under the influence when he drove his car; that is, he did not "possess that clearness of intellect and control of himself that he otherwise would have." *Ards*, 816 N.W.2d at 686 (quotations omitted). Because "under the influence" is not defined by statute, we turn to case law for guidance.

In instances where courts have found sufficient evidence of driving while under the influence, stops were typically triggered by a vehicle collision or traffic violation, which demonstrated that the driver lacked that "clearness of intellect and control." For example, in *State v. Waterston*, the defendant was charged with driving while under the influence of alcohol after police officers witnessed the defendant's one-car collision. 371 N.W.2d 650, 651 (Minn. App. 1985). There, this court determined that evidence of defendant's poor driving, poor balance, and "unusually talkative" state was sufficient to convict him of driving while under the influence. *Id.* Similarly, in *State v. Shepard*, police officers suspected the defendant may have been driving while under the influence after she called

[8] Unlike alcohol, there is no statutory threshold for the amount of THC at which a person is considered "under the influence." *Compare* Minn. Stat. § 169A.20, subd. 1(5) (2018) (setting the threshold alcohol concentration at .08), *with* Minn. Stat. § 169A.20, subd. 1(2) (no threshold amount). Thus, the mere presence of THC in Berger's blood does not necessarily prove that his driving was influenced by the substance.

to inform police that she had rolled her truck into a ditch. 481 N.W.2d 560, 561–62 (Minn. 1992). Again, the court found that there was sufficient evidence of defendant's intoxication to convict. *Id.* at 562–63; *see also State v. Richardson*, 372 N.W.2d 368, 369 (Minn. App. 1985) (officer stopped defendant after observing defendant speeding and passing other cars illegally).

Erratic or aggressive driving has also often led to individuals being stopped on suspicion of driving while under the influence. In *State v. Teske*, the defendant was observed cutting off another driver, driving aggressively on a busy street, failing to stop at a stop sign, weaving in and out of other cars, failing to yield the right of way to another driver, and speeding. 390 N.W.2d 388, 389 (Minn. App. 1986). After stopping the defendant, officers observed that he smelled of alcohol, had glassy, bloodshot eyes, and swayed while walking. *Id.* This court upheld the conviction, concluding that the evidence was sufficient for the jury to find the defendant guilty of driving while under the influence. *Id.* at 390-91.

In sum, in cases where convictions for driving under the influence have been upheld, observable traffic violations or aggressive, poor driving generally preceded the stop and provided evidence that the driver was, indeed, driving under the influence.

In contrast, in *State v. Elmourabit*, where the state relied primarily on outward manifestations of intoxication observed *after* the stop, the Minnesota Supreme Court concluded that the proof fell short of proof beyond a reasonable doubt. 373 N.W.2d 290, 291 (Minn. 1985). In *Elmourabit*, the respondent was convicted of driving while under the influence of alcohol. *Id.* The district court relied on evidence that the respondent had been

speeding, smelled of alcohol when stopped by police, had glassy and bloodshot eyes, was difficult to understand, and became aggressive multiple times during his interaction with police to support its guilty verdict. *Id.* at 291. But the supreme court concluded that "[t]he inferences to be draw from this evidence, however, are in somewhat uneasy equilibrium," and led the court to decide that this proof fell short of proof beyond a reasonable doubt. *Id.* at 293-94.

Guided by this case law, we conclude that the circumstances proved here are inconsistent with a reasonable hypothesis of guilt. *Silvernail*, 831 N.W.2d at 599. Nothing in Officer Beck's report suggests that Berger was driving poorly, violated any traffic laws, or acted out of the norm in any other substantive way.

In reaching this conclusion, the supreme court's decision in *State v. Elmourabit* is particularly instructive. 373 N.W.2d at 290. The circumstances in Berger's case are less compelling than in *Elmourabit*. He was not stopped by Officer Beck because of poor driving, but because he was leaving a park at a time that it would normally be closed. Berger did not exhibit any aggressive behavior. Officer Beck did not suspect that Berger was under the influence during the stop and released him. Nor was Berger's condition at the jail different from what Officer Beck had encountered shortly before when he decided to release Berger. Finally, although Berger was determined to have failed three of the field sobriety tests, we are mindful to avoid placing "too much significance" on field sobriety

tests.[9] *Cf. id.* at 292 (stating principle in context of successful passing of field sobriety tests).

When considered as a whole, the circumstances proved do not exclude a reasonable hypothesis of innocence. We therefore reverse.

Reversed.

[9] Even if a fact-finder believed that Berger's poor performance was due to the presence of THC in his system, the conclusion that it influenced his *driving* is not necessarily reached.