

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 30, 2008

STATE OF TENNESSEE v. THOMAS W. SINKS

**Appeal from the Criminal Court for Washington County
No. 29601 Lynn W. Brown, Judge**

No. E2006-00626-CCA-R3-CD - Filed June 23, 2008

The defendant, Thomas W. Sinks, appeals as of right his Washington County jury conviction for driving under the influence (DUI). He contends that the trial court erred in overruling his motion to suppress the results of blood alcohol analysis, that the evidence is insufficient to support his conviction, and that the trial court erred in allowing certain witnesses to testify as experts regarding the effects of cocaine on the defendant's ability to drive. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and NORMA MCGEE OGLE, JJ., joined.

Roger A. Woolsey, Greeneville, Tennessee, attorney for appellant, Thomas W. Sinks.

Robert E. Cooper, Jr., Attorney General & Reporter; Jennifer L. Bledsoe, Assistant Attorney General; H. Greeley Wells, Jr., District Attorney General; and Robert Montgomery, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The defendant's conviction stems from his involvement in a motor vehicle accident occurring on June 19, 2003, at approximately 2:50 p.m. on Highway 107 in Washington County. Justin Fender testified that he and his girlfriend were traveling on Highway 107 when they saw the defendant behind them and noticed the defendant's truck veer off the road approximately three times. Fender became concerned and told his girlfriend to pull over to allow the defendant to pass them. As the couple continued down the highway behind the defendant, they witnessed the defendant crash into a Toyota Camry as it began to turn into the parking lot of Fender's Produce Market. Fender recalled that the Camry had its signal light on to indicate a right turn and that the defendant's brake lights never came on.

Stephanie Lockner, the driver of the Toyota Camry, testified that she and her mother were going to Fender's Produce Market to purchase tomatoes. Upon approaching the market, she and her mother realized that it was closed, so she told her mother that they would pull into the lot and turn around. She recalled that her turn signal was on. The next thing Stephanie testified to remembering was emergency personnel warning her to be careful of the downed power lines that had fallen when her car was pushed into a nearby utility pole. As a result of the accident, she suffered injuries to her head, back, and hand. She and her mother were transported to Johnson City Medical Center for treatment of their injuries. Stephanie reiterated that she had her turn signal on and was in the process of turning when the defendant struck them.

Stephanie's mother, Kathy Lockner, was a passenger in and the owner of the Toyota Camry. She testified that she has a "pet peeve" about turn signals and was positive that her daughter had turned on the signal as she approached the market parking lot. She recalled hearing the utility pole break. She further recalled that the windows were down and that she never heard any brakes squealing from the defendant's vehicle indicating that he tried to stop before hitting them. She stated that she suffered a back injury that required physical therapy but that neither she nor her daughter required overnight hospitalization from their injuries.

Tennessee Highway Patrol (THP) Sergeant Diane Mays testified that she had been employed with the THP since 1994. She stated that she arrived on the scene of the accident involving a Toyota Camry and a Tennessee Department of Transportation truck and found a downed utility pole and power lines. She recalled that the truck suffered damage to the front end. She also remarked that the defendant was "profusely sweating [and] that his eyes were glassy." Sergeant Mays asked the defendant if he was taking any medication, and the defendant told her that he was taking two prescription drugs, Paxil and Clonopin. The defendant agreed to submit to a blood test and left the scene with Trooper Brett Garland.

Trooper Brett Garland testified that he had been employed with the THP since 2002. He recalled administering several field sobriety tests to the defendant, namely the walk-turn, one leg stand and horizontal gaze nystagmus tests. He recalled that there was some debris on the road when he arrived at the scene and that there were no skid marks indicating that the defendant had tried to stop. He remarked that the defendant was sweating a lot and had "glassy," bloodshot eyes. Trooper Garland indicated that the defendant showed signs of impairment when performing the field sobriety tests. When questioned about the accident report, Trooper Garland stated that he accidentally marked that the defendant appeared normal and that he overlooked several field sobriety indicators on the form. He stated that he tried to give the defendant the "benefit of the doubt because [he] thought [the defendant] may have been overmedicated." He also testified that the defendant was slow to respond to questions and was quiet, showing some signs of impairment at the scene. Trooper Garland testified that he wanted a blood test to confirm whether the defendant was impaired.

The parties stipulated that the toxicology report of Stephanie Dodson of the Tennessee Bureau of Investigation (TBI) revealed no presence of alcohol in the defendant's blood. TBI Forensic Scientist Melanie Carlisle testified that the defendant's blood analysis showed the presence of marijuana and cocaine, although at very low levels. A toxicology screen of the defendant's urine showed the presence of cocaine and marijuana metabolites as well as the evidence of opiates. When

asked on cross-examination whether the levels detected would have affected the defendant's driving, Carlisle was unable to state whether the defendant's driving would have been hampered.

TBI Forensic Scientist Kelly Hopkins testified that the defendant's blood showed the presence of an inactive cocaine metabolite, benzoylecgonine. She stated that the inactive metabolite would have no effect on the defendant's driving, but she could not offer an opinion as to any effect the cocaine may have had at the time of the accident. Agent Hopkins explained that the acute effects of cocaine last from thirty to ninety minutes after ingestion but that chronic symptoms may last up to two weeks and include blurred vision, drowsiness, and cravings. She testified that although she could not be sure what effect the cocaine had on the defendant's driving at the time of the accident, the analysis results showed that the defendant had consumed cocaine sometime in the twenty-four hours preceding the accident.

Dr. Kenneth Ferslew testified as an expert in forensic toxicology. He testified regarding the effects of cocaine on an individual's ability to drive. He explained that the defendant's blood and urine analysis results showed that the defendant had consumed both marijuana and cocaine in the preceding twenty-four hours before the accident. He also stated that cocaine remains active in the bloodstream for approximately six hours and metabolizes rather quickly. He opined that for the cocaine to have shown up in the defendant's urine, his ingestion of cocaine must have occurred "relatively acutely" to the time of the accident. In determining whether the cocaine had an effect on the defendant's operation of the truck, Dr. Ferslew considered three factors determinative: (1) the misoperation of the vehicle as evidenced by the accident, (2) the altered psycho-motor performance as evidenced by the defendant's poor performance of field sobriety tests, and (3) the presence of drugs in the defendant's blood and urine. Relative to factor three, Dr. Ferslew testified that he was not completely satisfied that the analysis results levels were sufficient to show that the defendant was impaired at the time of the accident. He specifically stated that the proof was lacking "from the toxicology reports that there [are] drugs that would definitely indicate concentrations that would impair [the defendant]." In summary, he stated that the defendant may not have been acutely affected by the drugs at the time of the accident.

The defendant presented several witnesses who were his coworkers at the time of the accident. All of them testified consistently that the defendant never appeared impaired while at work. They all stated that the defendant acted normal on the day of the accident. Everyone also stated that their work day ended at 2:30 p.m. that day, only twenty minutes before the accident. Larry Arrowood, the defendant's supervisor at the time of the accident, testified that he arrived at the scene of the accident to find the defendant in Trooper Garland's patrol car on his way to the medical center for the blood test. Without objection, he testified that Sergeant Mays told him at the scene that the defendant appeared okay but had agreed to a blood test to determine whether any of his medications had affected his driving. Arrowood followed the defendant to the hospital and remained with him. He stated that other than seeming distressed over the accident, the defendant appeared normal at the hospital.

Based upon this evidence, the jury found the defendant guilty of driving under the influence of an intoxicant, first offense, a Class A misdemeanor. The defendant was later sentenced to eleven months and twenty-nine days suspended after the service of ten days in jail.

ANALYSIS

Initially, we note that the defendant alleges in his statement of issues that the trial court erred in allowing the state to proceed to trial on the DUI count after he and the state had entered into a pretrial diversion agreement on the felony reckless endangerment count wherein, he alleges, the state agreed to nolle prosequere the DUI count. However, the defendant fails to present any argument regarding this allegation in his brief, fails to cite to the record in any way, and the record is unclear regarding this claim. For these reasons, we conclude that this issue is waived. See generally Tennessee Rules of Appellate Procedure Rules 24(a) and 27(a)(7).

Suppression of Blood Analysis

The defendant contends that the trial court erred in overruling his motion to suppress the results of his blood analysis. He argues that Trooper Garland did not have reasonable grounds to believe that the defendant was impaired and thus had no basis to request that the defendant submit to blood analysis. The state argues that the defendant has waived this issue for failing to provide a transcript of the suppression hearing in the record on appeal. We agree that the defendant has waived this issue by failure to provide an adequate record on appeal and is not entitled to relief. Tennessee Rules of Appellate Procedure Rule 24(a).

Sufficiency of the Evidence

The defendant also claims that the evidence is insufficient to support his conviction for driving under the influence. The state argues that the evidence is sufficient beyond a reasonable doubt to support the conviction. Following our review, we agree with the state.

An appellate court's standard of review when the defendant questions the sufficiency of the evidence on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). The court does not reweigh the evidence; rather, it presumes that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). A guilty verdict removes the presumption of innocence and replaces it with a presumption of guilt, and on appeal the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict. Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

The defendant was convicted of driving under the influence in violation Tennessee Code Annotated Section 55-10-401. The statute states, in pertinent part:

(a) It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system;

....

Tenn. Code Ann. § 55-10-401(a)(1) (2004).

The defendant claims that the evidence produced at trial is insufficient to convict the defendant of DUI. He argues that inconsistencies in Trooper Garland's testimony regarding his impairment, the inconclusiveness of the blood analysis evidence and the testimony of his coworkers all preclude a rational trier of fact finding guilt beyond a reasonable doubt. We disagree. While we acknowledge certain inconsistencies in Trooper Garland's testimony regarding the defendant's suspected impairment at the scene, Trooper Garland explained these inconsistencies at trial as the result of his own inexperience at the time of the accident. The testimony of the expert witnesses established the presence of cocaine, marijuana, and opiates in the defendant's blood sometime within the twenty-four hours leading up to the accident, while remaining arguably inconclusive as to what "acute" effects the drugs may have had on the defendant's driving. Nevertheless, Trooper Garland testified that the defendant showed signs of impairment at the field sobriety tests. The jury chose to accredit this testimony, as was its province to do. We cannot conclude that the evidence was insufficient for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of driving under the influence.

Admission of Expert Testimony

The defendant contends that the trial court erred in allowing expert witnesses to testify regarding the defendant's drug use and its effects on his ability to drive. The state argues that the trial court did not abuse its discretion in admitting this testimony. Following our review, we agree with the state.

Questions regarding the admissibility, qualifications, relevancy and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-264 (Tenn. 1997). Pursuant to Rule 702 of the Tennessee Rules of Evidence, an expert may testify "in the form of an opinion or otherwise," when the "scientific, technical, or other specialized knowledge" offered by the witness will substantially assist the trier of fact. Rule 703 of the Tennessee Rules of Evidence requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78

S.W.3d 817, 834 (Tenn. 2002). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Id. at 832.

The defendant takes issue with all of the expert witnesses' testimony regarding the effects his drug use may have had on his ability to drive. He specifically argues that Dr. Ferslew's testimony regarding his impairment at the time of the accident was speculative and unreliable because it was based upon the conflicting report of Trooper Garland. Initially, we note that the defendant failed to object and, in some instances, stipulated the qualification of each expert witnesses who testified. Furthermore, the record reflects that much of the testimony that the defendant now finds objectionable was elicited by the defendant during the cross-examination of the TBI agents. Similarly, the defendant agreed that Dr. Ferslew was qualified to testify as a forensic toxicologist, an expertise which Dr. Ferslew testified includes the study of the "medical [and] legal aspects of drugs and alcohol and how they [a]ffect people." We also note that several times, Dr. Ferslew stated that the defendant may not have been acutely affected at the time of the accident by the drugs revealed in the toxicology report, a position that was arguably favorable to the defendant. Based upon all of these considerations, we conclude that the trial court did not abuse its discretion in admitting this testimony.

CONCLUSION

We conclude that the defendant has waived appellate review of the trial court's denial of his motion to suppress by failing to include the transcript of the suppression hearing in the record on appeal. We also conclude that the trial court properly admitted expert testimony regarding the effects the drugs found in the toxicology report may have had on the defendant and that the evidence is sufficient to support the defendant's conviction for driving under the influence. Therefore, the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE