

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-07-00278-CR

Gerald John Conger, Appellant

v.

The State of Texas, Appellee

**FROM THE DISTRICT COURT OF TRAVIS COUNTY, 299TH JUDICIAL DISTRICT
NO. D-1-DC-06-204445, HONORABLE CHARLES F. BAIRD, JUDGE PRESIDING**

MEMORANDUM OPINION

The State charged appellant, Gerald John Conger, with felony driving while intoxicated (DWI). *See* Tex. Penal Code Ann. § 49.04(a) (West 2003), § 49.09(b)(2) (West Supp. 2007). Conger pleaded not guilty to the offense, stipulated to the prior convictions, and waived a jury trial. After hearing the evidence and testimony, the trial judge found Conger guilty of second-degree felony DWI and sentenced him to three years' imprisonment. In his sole point of error, Conger argues that the evidence is factually insufficient to support his conviction.

A DVD recording of appellant performing the standard field sobriety tests was taken and introduced into evidence during trial. The DVD recording, State's exhibit number 1, was not included in the appellate record. We have been in contact with the district court clerk and the court reporter and neither one claims to have custody of the recording.

We must therefore abate these proceedings and remand this cause to the district court for a determination of the location of the DVD recording exhibit. In the event that the DVD recording cannot be located, the district court shall determine whether the exhibit can be replaced by agreement of the parties, or with a copy determined by the district court to accurately duplicate with reasonable certainty the original exhibit. *See* Tex. R. App. P. 34.6(f). The district court shall make findings of fact and submit its findings, the record of any hearing held, and the DVD recording or any agreed duplicate, to this court no later than 30 days from the date of this opinion.

Diane M. Henson, Justice

Before Justices Patterson, Puryear and Henson

Abated

Filed: June 11, 2008

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