

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota
Plaintiff & Appellee

v.

Daryl Hennings
Respondent & Appellant

)
) **Supreme Court No.**
) **20150096**
)
) **Stutsman County No.**
) **47-2014-CR-00534**
)
)

APPELLEE'S BRIEF

Appeal from the Judgment
of the District Court
Entered March 9, 2015,
Issued in Stutsman County District Court
by the Honorable Thomas E. Merrick
Judge of the Southeast District Court

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[¶3] STATEMENT OF ISSUES

[¶4] There was sufficient evidence was presented at trial to support the judge's verdict of guilty of driving under the influence.

[¶5] JURISDICTIONAL STATEMENT

[¶6] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

[¶7] STANDARD OF REVIEW

[¶8] The standard of review for this type of case was set out in 2005 in State v. Krull:

In an appeal challenging the sufficiency of the evidence, this Court “look[s] only to the evidence most favorable to the verdict and the reasonable inferences therefrom to see if there is substantial evidence to warrant a conviction.” State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816 (quoting State v. Kunkel, 548 N.W.2d 773, 773 (N.D.1996)). “A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor.” Id. This Court “will not weigh conflicting evidence, nor judge the credibility of witnesses.” State v. Klose, 2003 ND 39, ¶ 19, 657 N.W.2d 276. The existence of conflicting testimony or other explanations of the evidence does not prevent the jury from reaching a conclusion the evidence is clear beyond a reasonable doubt. State v. Charette, 2004 ND 187, ¶ 7, 687 N.W.2d 484. “A jury may find a defendant guilty even though evidence exists which, if believed, could lead to a verdict of not guilty.” State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98 (quoting State v. Hatch, 346 N.W.2d 268, 277 (N.D.1984)).

State v. Krull, 2005 ND 63, ¶ 13-14 693 N.W.2d 631

[¶9] STATEMENT OF THE CASE

[¶10] On September 13, 2014, the Defendant, Daryl Hennings, (hereinafter referred to as “Hennings”) was charged by citation with Driving or in Actual Physical Control of a Motor Vehicle While Under the Influence of Alcohol or Drugs and/or with an AC of .08 or greater. It was alleged to be a second offense, and a class B misdemeanor. Upon checking Hennings’ priors, the State discovered that Hennings had three prior convictions for DUI/APC (JA-05-K-12847, JA-06-K-19945, 47-09-K-00533). Based on that information, the State

filed a motion to amend the offense from a second offense to a fourth offense, a class C felony. The district court granted the motion to amend.

[¶11] At the arraignment on December 12, 2014, the State filed a criminal information alleging that Hennings committed the offense of person under the influence of intoxicating liquor or any other drugs or substance not to operate vehicle. A bench trial was held on March 9, 2015, before the Honorable Thomas E. Merrick. Judge Merrick found Hennings guilty of the offense alleged in the criminal information. A Notice of Appeal was filed on March 24th, 2015.

[¶12] STATEMENT OF THE FACTS

[¶13] On September 13th, 2014, Deputy Matt Thom of the Stutsman County Sheriff's Office received a report of a violation of a local ordinance at approximately 7:45 p.m. Trial Transcript Page 6, Lines 10-23. Deputy Thom was informed that there people on bikes riding around on the south side of the Pipestem Dam. TT pp. 6-7, ll 25, 1-11. It was a violation because unauthorized motor vehicles were not allowed on the south side of the dam. TT p. 7, ll 14-19. Deputy Thom testified that he responded to the scene by coming in on a prairie trail off of a gravel road that runs east and west by the dam. TT. p. 8, ll 2-4. He rolled down the window of his patrol car and listened; at that point, he could hear the sound of bikes down below from his location. TT p.8, ll 10-11.

[¶14] From his vantage point, Deputy Thom couldn't see anything, so he drove onto the dam and stopped midway down the dam. TT pp. 8-9, ll-22-25, 1-5. It was at that location that Deputy Thom looked down and could see a headlight moving in the trees. Id. Deputy Thom headed back to his original location, surmising that the bike would come back out on top of the dam and he would meet it there. TT p. 9, ll 10-20. It was at that point that Deputy Thom came upon two bikes sitting in the road and two males standing on the road. TT p.9, ll 21-24. The bikes were not running and there weren't any lights on either bike. TT p.10, ll-19-20.

[¶15] The two males were identified as Hennings and Wayne Deery. TT p.11, ll 9-11. Deputy Thom asked Hennings and Deery how much they'd had to drink that day, noting he could smell alcohol when he was talking to both of them. TT p.12, ll-1-6. Hennings told Deputy Thom he had a couple of beers. TT p. 12, ll 7-9. As Deputy Thom was taking the two males information, a third person pulled up to the scene on a dirt bike, later identified as Gary Ronholm. TT p. 12-13, ll 11-25, 1-13. As Deputy Thom was running everyone's information, Deery suddenly left the scene on foot. TT p. 13-14, ll 17-25, 1-4.

[¶16] Deputy Thom then called his sergeant and Trooper Paul Sova for assistance. TT p. 14, ll 5-25. Trooper Sova assisted in giving Hennings sobriety tests and ultimately arrested Hennings for Actual Physical Control. TT p. 18, ll 1-

5. When Hennings took the stand at the bench trial, he testified that he was one of the three men on bikes who were out on the dam that day. TT p. 82-83, ll 25, 1-3. He concurred that he had consumed a couple of beers before he rode his bike down to the dam. TT p. 83, ll 6-13. Hennings also said that, at some point during the ride and before he came into contact with law enforcement, his bike broke down. TT p. 84, ll 5-11.

[¶17] According to Hennings, when his bike broke down, Deery stopped with him. TT p. 84, 12-14. They then proceed to work on Hennings' bike together. TT p. 84, ll 17-19. Hennings also says that he and Deery started to drink whiskey while they were working on the bike. TT p. 84, ll 20-24. Hennings' attorney asked him if he (Hennings) was drinking to impairment at this juncture, to which Hennings says yes. TT p. 87, ll 18-21. Hennings then testifies that he got the bike up to where he came into contact with law enforcement by pushing it up the hill. TT p. 84-85, ll 25, 1-17. Upon cross examination, Mr Hennings clarified that he had pushed the bike about 300 yards. TT p. 92-93, ll 25, 1-2.

[¶18] LAW AND ARGUMENT

[¶19] 1. There was sufficient evidence was presented at trial to support the judge's verdict of guilty for driving under the influence

[¶20] Hennings was found guilty of Person Under the Influence of

Intoxicating Liquor or Any Other Drugs or Substance Not to Operate Vehicle

under N.D.C.C. § 39-08-01(1)(a) and/or 39-08-01(1)(b):

A person may not drive a vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular

use in this state if any of the following apply:

- a. That person has an alcohol concentration of at least eight one-hundredths of one percent by weight at the time of the performance of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
- b. That person is under the influence of intoxicating liquor.

This offense is a class C felony under N.D.C.C. §§ 39-08-01(5)(d), and 12.1-32-01(4). Hennings argues that the evidence was insufficient to warrant a conviction of Person Under the Influence of Intoxicating Liquor or Any Other Drugs or Substance Not to Operate Vehicle or DUI . As noted earlier, “a conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Knowels at ¶ 6.

[¶21] On March 9th, 2015, the district court found Mr. Hennings guilty of driving under the influence. TT pp 100-101, ll 18-25, 1-17. The court found that the act of Mr. Hennings pushing his motor bike was considered to be driving. Id. The court also found that Mr. Hennings was under the influence at the time based on testimony that Hennings had been drinking both before and after the bike had

broken down. Id. In concluding that Mr. Hennings was driving by way of pushing his bike, the court had mentioned “an old case.” Id. The case that the district court was referring to is State v. Larson, 479 N.W.2d 472 (N.D. 1992).

[¶22] In Larson, the defendant was traveling with two other people in a bus towing a pickup and another vehicle. Id. The bus, which was driven by Dan Quigley, broke down. Id. The group continued their travels with Larson steering the bus and Quigley pushing the bus with the pickup. Id. The pick-up over heated and the group stopped. Id. While the pickup cooled, Larson and the others drank alcohol. Larson at 472. Later, they resumed their journey. Id.

[¶23] The caravan was stopped by an officer of the North Dakota Highway Patrol. Id. At that time, it was noted that Larson was again steering the bus, and Quigley was pushing the bus. Id. It was also stipulated that Larson controlled the steering and brakes of the bus, and that the motor of the bus was inoperable. Id. Based on the results of field sobriety tests and a blood-alcohol test, Larson was arrested for driving under the influence. Id. Mr. Larson was convicted of DUI and appealed the conviction. Id.

[¶24] The issue addressed in Larson was whether Larson’s control of the bus constituted “driving” under 39-08-01 N.D.C.C. Larson at 472. The North Dakota Supreme Court recognized that Larson was neither charged or convicted of being in actual physical control. Id. The Court also noted that DUI and APC are

separate crimes and that “driving” is an essential element of DUI. Id. (citing State v. Jacobson, 338 N.W. 2d 648 (N.D. 1983)). Larson’s argument was that he was not “driving” the bus because the motor was disabled. Id. In coming to its conclusion, the Court considered the ordinary meaning of the verb “drive” as it is used in section 39-08-01 N.D.C.C. which is “to control the movement or direct the course of ... an automobile.” Id. (citing Webster’s New World Dictionary of the American Language 427 (2nd College Ed. 1980)). The Court found that Larson was “driving” in that he steered the bus and controlled the brakes, and that he controlled and directed the movement of the bus. Id.

[¶25] In the instant case, the district court considered that Hennings admitted to drinking a couple of beers before getting on his motorcycle and heading to the Pipestem dam. The district court also took into account Hennings’ testimony of drinking after the bike broke down, sharing whiskey with Wayne Deery and drinking to the point of being impaired. It was after he had been drinking whiskey that Hennings decided to push the bike up the hill to the prairie trail where law enforcement made contact with him. Based on that information and the precedent set by State v. Larson, the district court found Hennings guilty of driving under the influence.

[¶26] In reviewing all of the above evidence presented at trial and viewing it in a light most favorable to the prosecution, a rational fact finder could find

Hennings guilty of driving under the influence. Knowels, at ¶ 6.

[¶27] CONCLUSION

[¶28] For the foregoing reasons, plaintiff and appellee the State of North Dakota respectfully requests that the district court's verdict of guilty to be affirmed.

RESPECTFULLY SUBMITTED this 30th day of July, 2015.

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STATE OF NORTH DAKOTA
COUNTY OF STUTSMAN

IN DISTRICT COURT
SOUTHEAST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
Plaintiff/Appellee

) **Supreme Court No. 20150096**
) **Stutsman Cty No. 47-2014-CR-00534**

v.

)
)
) **CERTIFICATE OF SERVICE**

DARYL HENNINGS,

)
)
)

Defendant/Appellant)

1. On July 30th, 2015, a copy of the document “Appellee’s Brief: Appeal from the Judgment of the District Court Entered March 9th, 2015, Issued in Stutsman County” was e-served on the following individuals:

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