

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 990273
District Court No. CR-99-623

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JAN 27 2000

STATE OF NORTH DAKOTA

State of North Dakota,

Appellee,

vs.

Joseph Stephen Dobson,

Appellant.

APPEAL FROM THE DISTRICT COURT
The Honorable Michael O. McGuire, Presiding

APPELLANT'S BRIEF

STEVEN D. MOTTINGER
921 Second Avenue South
Fargo, North Dakota 58103
(701) 237-0687

ATTORNEY FOR APPELLANT

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JURISDICTION STATEMENT

This court has jurisdiction to hear this appeal according to article VI, section 2 of the N.D. Constitution which provides:

The supreme court shall be the highest court of the state. It shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction. The supreme court shall consist of five justices, one of whom shall be designated chief justice in the manner provided by law.

N.D. Const., art. VI, s 2.

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STATEMENT OF ISSUES

1. Did the trial court err in denying Defendant's Rule 29 (a) Motion for Judgment of Acquittal?
2. Was the evidence sufficient to sustain the jury's conviction of Driving Under the Influence and Driving While License Suspended or Revoked?

STATEMENT OF THE CASE

Joseph Stephen Dobson was charged with Count 1, Driving a Motor Vehicle While Under the Influence of Intoxicating Liquor in violation of N.D. Cent. Code § 39-08-01 and Driving While License Suspended or Revoked in violation of N.D. Cent. Code § 39-06-42 in a Second Amended Information dated August 25, 1999. Count 3, No Liability Insurance was dismissed. [Appendix pages 8-9].

This matter was tried before a jury in Cass County District Court on August 26, 1999. The jury found the Defendant guilty of the charges of Driving Under the Influence and While License Suspended as set forth in the Criminal Information.

On Count One, Driving Under the Influence, the Defendant was sentenced to serve twelve (12) months at the North Dakota Department of Corrections and Rehabilitation, with credit for 33 days previously served and pay a one thousand dollar fine. On Count two, the Defendant was sentenced to twelve (12) months at the North Dakota Department of Corrections and Rehabilitation, all but four days suspended for 24 months, on condition the Defendant commits no further violations of the law for the next 24

months and pay a one thousand dollar fine, to run concurrent with Count 1. The Court also ordered Supervised Probation with State Parole and Probation for 24 months to abide by the Standard conditions of probation as stated in the Criminal Judgment and Commitment [Appendix pages 10-12].

Monty Mertz, acting for the Defendant, filed the Notice of Appeal herein dated September 3, 1999. [Appendix page 13].

Steven D. Mottinger was assigned to this case on December 21, 1999, by the Cass County District Court, and filed a Motion For Extension For Good Cause with Affidavit in Support herein dated December 23, 1999. [Appendix pages 14-15].

STATEMENT OF FACTS

Defendant, Joseph Stephen Dobson is a 29 year old male who works for a small sign company and whose principal place of residence is the rural area of Harwood, North Dakota.

On the late afternoon of February 13, 1999, at approximately 4:30, the Defendant and a friend, Ron Albaugh, journeyed to Sanborn, North Dakota, where Defendant Dobson was to work the next morning.

The two men arrived at a bar in Sanborn at approximately 7:30 p.m. They remained at the bar, drinking alcoholic beverages, until around midnight. Defendant Dobson and Mr. Albaugh were both intoxicated. Defendant Dobson was assisted to his vehicle by Mr. Potratz, an acquaintance who had also been at the bar that evening. Mr. Potratz testified that he placed the intoxicated defendant into the passenger side of his vehicle and that, he fell to sleep immediately. Although Mr. Potratz did not see Mr. Albaugh drive the vehicle away, he did see the vehicle leaving the Sanborn bar.

The vehicle was later spotted by Patrol Officer, Joel Stading, who testified that the vehicle was swerving from the middle of the road to the shoulder. The officer asked

Dispatch to run the license and Dispatch returned with information that the car was registered to Judy Dobson. The officer then requested Dispatch to run a license check on both Judy and Joe Dobson, and found that the licenses on both were suspended. Deputy Renshaw then called Deputy Joel Stading to assist in executing a traffic stop. Deputy Stading shined a spot light as the vehicle passed his patrol car. Although he was not able to identify the driver, he did identify the driver as having dark hair and wearing a brown coat.

When Deputy Renshaw executed the traffic stop, both deputies walked up to the stopped vehicle. They found Defendant Dobson, still in the passenger seat, and he appeared to be sleeping. Mr. Albaugh was lying in the back seat. Both men appeared to be equally intoxicated.

LAW AND ARGUMENT

The Defendant, Joseph Stephen Dobson, has appealed this conviction by asserting that the trial court erred in not granting his Rule 29(a) Motion for Judgment of Acquittal in regard to Count I, Driving Under the Influence of Intoxicating Liquor, and Count II, Driving While License Suspended or Revoked, as the State failed to prove that the defendant was driving the vehicle on the night in question. In regard to both charges, the State has not offered sufficient evidence that Defendant Dobson was the driver of the vehicle, to justify a jury's conviction.

North Dakota Rules of Criminal Procedure, Rule 29(a) reads:

- (a) Motion before submission to jury. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, information, or complaint after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such

offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without having reserved the right.

N.D. R. Crim. P. 29(a).

The applicable statute reads:

1. A person may not drive or be in actual physical control of any 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 . . . that person is under the influence of intoxicating liquor.

N.D. Cent. Code § 39-08-01 (1997 & Supp. 1999)

"The purpose of [this section] is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers." State v. Ghylin, 250 N.W. 2d 252, 253 (N.D. 1977) (Intoxicated driver was found to be in actual physical control).

Although Ghylin discusses what constitutes actual physical control, that case is clearly distinguishable from

the present case. In Ghylin, the intoxicated driver was seen getting out of the driver's side of the vehicle and removing his keys from the ignition. Defendant Dobson was assisted into the passenger side of his vehicle where he fell into a deep sleep. He was still in the passenger side of the vehicle, asleep, when the vehicle was pulled over. The Defendant in Ghylin also admitted, on two separate occasions, that he was driving the evening he was arrested. Defendant Dobson has consistently maintained that he never drove the vehicle that evening.

In City of Valley City v. Berg, 394 N.W. 2d 690 (N.D. 1986), a passenger was found guilty of being in actual physical control of a vehicle while under the influence of intoxicating liquor even though she was sat in the passenger's seat. Berg is also clearly distinguishable from the present case. In Berg, the Defendant reached over from the passenger seat and started the vehicle so that the heater could be used and it lurched forward and crashed into a restaurant. Id. at 691. The Court ruled, "A driver has 'actual physical control' of his car when he has real (not hypothetical), bodily restraining or directing influence over, or domination and regulation of, it's movements of

machinery." *Id.* In the present case, the Defendant's actual physical control over the vehicle is strictly "hypothetical". It is purely speculative that someone sleeping in the passenger seat of the car is able to have influence over and regulation of that vehicle.

In State v. Schuler, 243 N.W. 2d 367 (N.D.1976), the Court cites several cases where "we pointed out that the rule as to circumstantial evidence, at the trial level, is that such evidence must be conclusive and must exclude every reasonable hypothesis of innocence . . ." *Id.* at 371.

Defendant Dobson argues that the State did not establish conclusive evidence and that there existed a reasonable supposition that should have been considered and weighed in favor of the Defendant's innocence.

Defendant Dobson maintains that there is insufficient evidence to sustain the jury's verdict of Guilty to both Counts as neither officer identified Defendant Dobson as the driver of the car on February 13, 1999.

Both Defendant Dobson and Ron Albaugh had dark hair and dark clothing on the evening the vehicle was stopped. There was no middle console in the vehicle nor any other deterrent to prevent Mr. Albaugh from lunging into the back seat when

the car was stopped by the deputies. Both deputies admitted that they saw no movement in the car after initiating the traffic stop. (Hearing Transcript of 8/26/99/page 29).

Both officers testified that there was mud splashed on the window and that neither could make a positive identification of the driver. The only thing they could see was that the driver had dark hair and brown clothing. (See Hearing Transcript of 8/26/99/pages 25, 27, and 29 (Officer Renshaw) and pages 41, 50, and 51 (Officer Stading). Both officers also testified that both Dobson and Albaugh had dark hair. (See Hearing Transcript of 8/26/99/page 34 (Officer Renshaw) and page 42 (Officer Stading). During cross examination, Deputy Renshaw admitted and Defendant Dobson later testified that what the Defendant had actually worn that evening was faded tan coveralls. (Hearing Transcript of 8/26/99/page 25 & page 66).

Defendant Dobson also testified regarding Defense Exhibits 1 & 2, which clearly identified the vehicle as having tinted windows the night of the arrest. (Hearing Transcript of 8/26/99/page 72).

Defendant Dobson maintains that there is clearly a lack of evidence to substantiate that he, and not Mr. Albaugh,

was the driver of the vehicle that evening.

To grant a judgment of acquittal, a trial court must find "the evidence is insufficient to sustain a conviction of the offenses charged." State v. Ohnstad, 359 N.W.2d 827, 834 (N.D. 1984). Defendant Dobson contends that there is insufficient evidence to prove, beyond a reasonable doubt, that the Defendant was the driver of the vehicle the evening it was stopped. Therefore, Defendant Dobson also maintains that there was insufficient evidence to sustain Count II of the Information, Driving While License Suspended or Revoked.

The trial court abused it's discretion in denying Defendant's Rule 29(a) Motion for Judgment of Acquittal, first on the Driving While Under the Influence charge, and subsequently, on the Driving While License is Suspended charge.

CONCLUSION

The conviction of Defendant Dobson for the charges of Driving Under the Influence and Driving While License Suspended should be reversed, based on the error of the District Court in not allowing his Rule 29(a) Motion for Judgment of Acquittal. The Trial Court should have found the evidence insufficient to sustain a conviction of the offenses charged.

Defendant Dobson maintains, on Appeal, that the Court, even after reviewing the evidence in a light most favorable to the verdict, will determine that there is not substantial evidence to support the charges of Driving Under the Influence and Driving While License Suspended.

Dated this 21 day of January, 2000.



Steven D. Mottinger
ND ID 03597
Attorney for Appellant
921 Second Avenue South
Fargo, ND 58103
(701) 237-0687

ADDENDUM

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