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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

April 18, 2006

City of Fargo, Plaintiff and Appellee, v. Danial Ray Curtis, Defendant and Appellant.	Supreme Court No. 20060027 Cass County No. 05-K-3523

APPEAL FROM THE DISTRICT COURT
CASS COUNTY, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WADE L. WEBB, PRESIDING

BRIEF OF APPELLANT

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[¶ 3] STATEMENT OF THE ISSUES

1. Whether the evidence was insufficient to support Curtis' conviction of driving under the influence.

2. Whether the evidence was insufficient to support Curtis' conviction of driving without liability insurance.

STATEMENT OF THE CASE

[¶ 4] This is an appeal by Danial Curtis from the Criminal Judgments entered by the Honorable Wade L. Webb, East Central Judicial District Court on January 5, 2006. (App. at 12-14). Curtis was arrested and charged with Driving Under the Influence, Driving Under Suspension or Revocation, and Driving Without Liability Insurance on August 19, 2005. (App. at 3-4). The case was tried to a jury on December 29, 2005. (Transcript of proceedings). Curtis represented himself at trial. (T. at 4). The jury returned verdicts of guilty for all three charges. (App. at 9-11). The Court sentenced Curtis to 30 days in jail with 29 suspended and credit for 1 day served on each charge. (App. at 12-14). A $425 fine was imposed on the DUI charge, $400 on the DUS charge, and $150 on the Driving Without Liability Insurance charge. (App. at 12-14). Curtis filed a notice of appeal on January 19, 2006. (App. at 2, 16). The court appointed counsel to represent Curtis on appeal. (App. at 2).

STATEMENT OF THE FACTS

[¶ 5] On August 19, 2005, Fargo Police Officer Nick Kjonaas arrested and charged the Appellant, Danial Curtis, with Driving Under the Influence, Driving Under Suspension or Revocation, and Driving Without Liability Insurance. (App. at 3-4). Curtis represented himself at a jury trial on December 29, 2005. (App. at 1, 6-7).

[¶ 6] The evidence at trial was that Officer Kjonaas stopped Curtis' vehicle because one of his headlights was out. (T. at 27). He approached the vehicle and asked Curtis for his driver's license, proof of insurance, and registration card. (T. at 27). Kjonaas testified that Curtis did not provide him with proof of insurance. (T. at 27-28, 32-33).

[¶ 7] Kjonaas testified that during his initial contact with Curtis, Curtis was reluctant to speak with him and would not open his mouth electing to communicate with head gestures instead. (T. at 29). Kjonaas testified that Curtis' breath smelled of alcohol. (T. at 29-30), and that Curtis admitted to drinking a couple of beers. (T. at 34). When he eventually had Curtis get out of his car, Kjonaas noticed that he was walking in a "somewhat uncoordinated manner" consistent with swaying or staggering. (T. at 34). At that point, Kjonaas instructed Curtis on how to perform the one leg stand test. (T. at 35). Kjonaas noticed four of four clues of intoxication during the test, which is a failure. (T. at 38). Kjonaas then instructed Curtis on the walk and turn test. (T. at 38-40). When Curtis performed the test, Kjonaas notice 7 out of 8 clues, which is a failure. (T. at 40). Kjonaas attempted to administer the horizontal gaze nystagmus test, but Curtis would not follow the instructions Kjonaas gave. (T. at 41-43). Kjonaas testified that Curtis' failure to follow instructions as a sign of impairment. (T. at 43). Kjonaas requested a chemical test, but Curtis refused to take one. (T. at 45-46). Kjonaas felt that Curtis was very intoxicated. (T. at 44).

[¶ 8] Kjonaas issued Curtis traffic tickets for all three charges after transporting Curtis to the jail. (T. at 49). Curtis told Kjonaas that he had had surgery on one of legs, (T. at 51), and that he had knee problems. (T. at 57). Kjonaas felt the injury did not affect Curtis' performance on the field sobriety tests because during the one leg stand test Curtis stood on his good leg. (T. at 57).

[¶ 9] During closing arguments the prosecutor shifted the burden of proof to Curtis by suggesting that Curtis was guilty of Driving Without Liability Insurance because he had failed to provide proof of insurance. (T. at 67-68, 75). At trial's

conclusion, the jury entered a verdict of guilty for each of the charges. (App. at 9-11). The court entered judgments on January 5, 2006, (App. at 12-15), and Curtis appealed (App. at 16).

JURISDICTIONAL STATEMENT

[¶ 10] The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06, 40-18-15.1. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 4(b)(1)(A).

LAW & ARGUMENT

[¶ 11] When reviewing challenges to the sufficiency of the evidence, this court considers the evidence most favorable to the verdict and all reasonable inferences from such evidence. State v. Wilson, 2004 ND 51, ¶ 6, 676 N.W.2d 98 (citing State v. Knowels, 2003 ND 180, ¶ 6, 671 N.W.2d 816). The defendant "must show the evidence, when viewed in the light most favorable to the verdict, reveals no reasonable inference of guilt." Wilson, 2005 ND at ¶ 6 (quoting State v. Strutz, 2000 ND 22, ¶ 7, 606 N.W.2d 886). The Court does not weigh conflicting evidence or judge the credibility of witnesses. Wilson, 2005 ND at ¶ 6 (citing State v. Johnson, 425 N.W.2d 903, 906 (N.D. 1988)). Rather the reviewing court will "merely review the record to determine if there is competent evidence that allowed the jury to draw an inference reasonably tending to prove guilty and fairly warranting a conviction." Wilson, 2005 ND at ¶ 6 (quoting State v. Jacobson, 419 N.W.2d 899. 901 (N.D. 1988)). This Court reverses a conviction only if no rational fact-finder could have found the defendant guilty beyond a reasonable doubt, after applying the standard above. State v. Burke, 2000 ND 25, ¶ 12, 606 N.W.2d 108.

The defendant bears the burden of convincing this Court that there is no reasonable inference of guilt, based on the evidence. See State v. Ebach, 1999 ND 5, ¶ 24, 589 N.W.2d 566.

I. The evidence was insufficient to support Curtis' conviction of DUI.

[¶ 12] Curtis does not feel that the evidence at trial was sufficient to prove that he was under the influence of alcohol. More specifically, the City failed to prove that any abnormal physical or mental condition was the result of alcohol consumption. The jury was properly instructed on what it means for a person to be "under the influence of intoxicating liquor." The trial court explained that:

> The phrase "under the influence of intoxicating liquor" is a flexible term. The mere fact that the driver of a motor vehicle may have consumed intoxicating liquor does not necessarily render the driver "under the influence of intoxicating liquor." The circumstances and effect must be considered.
>
> On the other hand, the driver need not be intoxicated or in a state of drunkenness to be "under the influence of intoxicating liquor." This expression covers not only all the well-known and easily recognized conditions and degrees of intoxication, but also any abnormal mental or physical condition which is the result of drinking intoxicating liquor and which tends to deprive a driver of that clearness of intellect or control which the driver would otherwise possess. Whether the Defendant was "under the influence of intoxicating liquor" is a question of fact for you to determine.

(App. at 7).

[¶ 13] Curtis did not take a chemical test, so there was no evidence of the amount of alcohol in his blood. (T. at 46). The evidence most favorable to the verdict came in through Kjonaas' testimony. Kjonaas testified that he detected an odor alcohol on Curtis' breath and that Curtis admitted to consuming a couple of beers. (T. at 34). Curtis was reluctant to speak with him and would not open his mouth electing to communicate with head gestures instead. (T. at 29). When he got out of the car, Curtis walked in a

"somewhat uncoordinated manner" consistent with swaying or staggering. (T. at 34). Curtis then failed the walk and turn test and the one leg stand test. Though Kjonaas admitted Curtis had explained that he had a knee injury. (T. at 51, 57). He also failed to perform the horizontal gaze nystagmus test properly. (T. at 41-43).

[¶ 14] Under the circumstances, Curtis believes the evidence was insufficient to support the verdict, especially considering that his knee problem could explain the failure on the field sobriety tests.

II. The evidence was insufficient to support Curtis' conviction of driving without liability insurance.

[¶ 15] The court properly instructed the jury on the elements of driving without liability insurance. (App. at 8). The trial court instructed the jury as follows:

> The City's burden of proof is satisfied if the evidence shows, beyond a reasonable doubt, the following essential elements:
> 1) On of about August 19, 2005, in the City of Fargo, Cass County, the Defendant, Danial Ray Curtis, drove a motor vehicle: and
> 2) At the time of the driving, a valid policy of liability insurance was not in effect.

(App. at 8). While the jury was properly instructed on the elements of the offense, the City did not carry its burden beyond a reasonable doubt. Officer Kjonaas merely testified that he requested proof of insurance and that no proof was provided. (T. at 27-28, 32-33). In other words, the City's case showed that Curtis' did not prove that he in fact had insurance. The City did not present any other evidence pertaining to that offense. (Transcript of proceedings). This is not a case where the defendant admitted to not having insurance. Nor is this a case where upon providing insurance information, further investigation revealed the policy to be lapsed or otherwise invalid. In fact, the City did not present any evidence to show that Curtis did not have insurance.

[¶ 16] Instead of providing evidence that Curtis did not have insurance, the City simply acted as though the failure to produce proof of insurance was a crime in and of itself. During closing arguments the prosecutor argued:

> [E]verybody's required to carry an insurance card with them in their vehicle to prove they have insurance on their car. The legislature has mandated that they have to carry insurance if they are going to operate a motor vehicle on city streets. The defendant didn't have an insurance card. The defendant has provided no evidence that the vehicle he was driving on the 19th of August of this year was insured, which is a violation.

(T. at 67-68). The prosecutor went on to say:

> [T]he defendant can always provide proof of insurance prior to today, and that's good enough. The City -- that's going to satisfy the City if the defendant up until today had provided us with something to show he had insurance on the car. We haven't been able to see nothing.

(T. at 75). The prosecutor's statements disclaimed the City's responsibility to furnish proof for its allegations. The comments shifted the burden to Curtis to disprove his guilt. The City's case rested entirely on the fact that Curtis had never disproved the City's allegation of guilt. Curtis had not proved his innocence so he was guilty in the eyes of the City. This is a viewpoint that the jury evidently adopted.

CONCLUSION

[¶ 17] For all of the foregoing reasons, Curtis asks this Court to reverse his convictions.

Dated this the 18th day of April, 2006.

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[¶ 18] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Tristan Van de Streek, pursuant to Administrative Order 14 on the 18th day of April, 2006. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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