ORIGINAL

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060027
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 19 2006
STATE OF NORTH DAKOTA

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

APPEAL OF JUDGMENT OF CONVICTION OF JANUARY 5, 2006,
FROM CASS COUNTY DISTRICT COURT

EAST CENTRAL JUDICIAL DISTRICT
HONORABLE WADE L. WEBB, PRESIDING

BRIEF OF APPELLEE, CITY OF FARGO, NORTH DAKOTA

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   c. The defendant admitted to drinking alcohol; and

   d. The defendant exhibited the physical signs of being under the influence of alcohol.

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STATEMENT OF THE ISSUES

1. Whether a rational fact finder could have found the defendant guilty beyond a reasonable doubt of driving under the influence based upon evidence that:

    a. The defendant refused to submit to a chemical test;

    b. The defendant failed field sobriety tests;

    c. The defendant admitted to drinking alcohol; and

    d. The defendant exhibited the physical signs of being under the influence of alcohol.

2. Whether a rational fact finder could have found the defendant guilty beyond a reasonable doubt of operating a motor vehicle without liability insurance based upon evidence that he did not provide proof of insurance at the time of the motor vehicle stop and did not subsequently provide proof of insurance.

STATEMENT OF THE FACTS

The City of Fargo (Fargo) charged Danial Curtis (Curtis) with driving under the influence, driving under suspension, and operating a motor vehicle without liability insurance on August 19, 2005. The sufficiency of the evidence on the driving under suspension charge is not before the court.

Curtis represented himself at his jury trial on December 29, 2005. With respect to the DUI allegation, Fargo provided evidence that Curtis smelled of alcohol (T. at 29-30) and that he admitted to drinking alcohol (T. at 34). Fargo also provided evidence that Curtis staggered when he walked (T. at 34), that he failed field sobriety tests (T. at 35-43), and that he refused to submit to a chemical test (T. at 45-46).

With respect to the allegation that Curtis was operating a motor vehicle without liability insurance Fargo offered evidence that Curtis did not provide the officer with proof of insurance at the time of the stop (T. at 32) and that, to the best of the officer's knowledge, Curtis did not subsequently provide proof of insurance to anyone (T. at 33).

Curtis did not offer any evidence at trial (T. at 60).

The jury found Curtis guilty of all three charges and the court entered judgment on January 5, 2006 (App. at 12-15).

LAW AND ARGUMENT

I. STANDARD OF REVIEW

Curtis' recitation of the standard of review based upon a challenge to the sufficiency of the evidence is accurate. 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.

II. THE JURY HEARD AMPLE EVIDENCE FROM WHICH IT COULD HAVE FOUND CURTIS GUILTY BEYOND A REASONABLE DOUBT OF DRIVING UNDER THE INFLUENCE

The quantum of evidence before the jury in this case is greater than the evidence that the jurors considered in State v. Knowels, 2003 ND 180, 671 N.W.2d 816. In Knowels, this Court considered whether a reasonable fact finder could have found Knowels guilty beyond a reasonable doubt based on some physical signs of alcohol consumption and the fact that he refused a chemical test. Id. at ¶ 2-4.

The Court stated that:

> North Dakota law does not require a chemical test to convict under N.D.C.C. § 39-08-01(1)(b). State v. Whitney, 377 N.W.2d 132, 133 (N.D. 1985) (citing State v. Kimball, 361 N.W.2d 601 (N.D. 1985); State v. Gawryluk, 351 N.W.2d 94 (N.D. 1984); State v. Kisse, 351 N.W.2d 97 (1984)). "[T]he crime created by subsection (1)(b) is driving while under the influence of intoxicating liquor, regardless of the driver's blood alcohol concentration." State v. Schwab, 2003 ND 119, ¶ 8, 665 N.W.2d 52 (citing City of Minot v. Bjelland, 452 N.W.2d 348, 350 (N.D. 1990)). Rather, the State must prove "the defendant, while driving a motor vehicle on a public way lacked 'the clearness of intellect and control of himself that he would otherwise have.'" Whitney, 377 N.W.2d at 133 (quoting State v. Halvorson, 340 N.W.2d 176, 178 (N.D. 1983)).

In the instant case, along with much of the same evidence presented to the Knowels jury, the Curtis jury could consider Fargo's evidence that Curtis performed and failed field sobriety tests (T. at 35-43).

There was an abundance of evidence presented to the jury from which a reasonable fact finder could conclude beyond a reasonable doubt that Curtis was guilty of driving under the influence and the jury's decision on that issue should be upheld.

III. THE EVIDENCE THAT CURTIS WAS OPERATING A MOTOR VEHICLE WITHOUT LIABILITY INSURANCE WAS SUFFICIENT FOR A RATIONAL FACT FINDER TO CONCLUDE THAT HE WAS GUILTY BEYOND A REASONABLE DOUBT.

The same standard of review articulated above applies to this issue, that is, that the court must consider all evidence in the light most favorable to Fargo and determine whether a reasonable fact finder could have concluded beyond a reasonable doubt that Curtis was guilty. Knowels at ¶ 6.

The evidence before the jury was that Curtis did not provide the arresting officer with proof of insurance at the time of the stop and that, to the best of the officer's knowledge, Curtis did not provide proof of insurance to anyone else (T. at 32-33).

Curtis does not challenge the constitutionality of the ordinance or the instructions to the jury. See Brief of Appellant at ¶ 15. Fargo's prohibition on operating a motor vehicle without liability insurance reads:

> F.M.C. 8-0320. Driving without liability insurance prohibited.--No person shall drive, or the owner may not cause or knowingly permit to be driven, a motor vehicle in this city without a valid policy of liability insurance in effect in order to respond in damages for liability arising out of the ownership, maintenance, or use of such motor vehicle in the amount required by chapter 39-16.1, N.D.C.C. Upon being stopped by a law enforcement officer for the purpose of enforcing or investigating the possible violation of an ordinance or state law or during the investigation of an accident, the person driving the motor vehicle shall provide to the officer upon request satisfactory evidence of the policy required under this section. If unable to comply with the request, that person may be charged with a violation of this section. If that person produces a valid policy of liability insurance in effect at the time of violation of this section to the officer, officer's agency, or a court, that person may not be convicted or assessed any court costs for violation of this section. Violation of this section is a Class B misdemeanor and the sentence imposed must include a fine of at least $150 which may not be suspended. A person convicted for a second or subsequent violation of driving without liability insurance within an 18-month period must be fined at least $300 which may not be suspended.

The evidence before the jury was that Curtis did not supply the officer with proof of insurance at the time of the stop nor did he subsequently provide any proof. A fact finder, considering this evidence in the light most favorable to it, could rationally conclude that Curtis was not insured on August 19, 2005, when he was observed driving.

Curtis' argument is that, in order to sustain a conviction for this offense, Fargo must prove a negative, which is very near impossible. Consider, for example, how Fargo would go about proving that dragons and unicorns do not exist.

Perhaps Fargo could take the deposition of every person in the world, all of whom would presumably testify that they have never seen either (although it would not be surprising if some testified to the contrary). But even assuming universal testimony to the effect that no living human has ever seen either creature, how can we be sure that there is not at least one unicorn in some remote spot of the earth not frequented by humans?

More down to earth, how would Fargo go about proving to Curtis' satisfaction that he had no liability insurance on August 19, 2005? Would it have to contact every liability insurance company qualified to do business in this state and subpoena its records to determine if it insured Curtis at the time and place where the offense was claimed to have occurred? Although theoretically this would be possible, as a practical matter, it would impose an intolerable burden on Fargo.

Consequently, Fargo (and the state of North Dakota) very sensibly and fairly provides that the driver must have proof of insurance with him or her while operating the vehicle. Whatever burden or inconvenience this may impose on the motor vehicle operator (and such burden is surely very slight) is more than outweighed with the burden Fargo would be saddled with if it were required to investigate every encounter between its officers and its

citizens in the context of a motor vehicle infraction or offense to determine whether an uninsured vehicle was involved in such occurrence, particularly if it had to prove a negative in the manner commented upon above.

So, the offense can very fairly be viewed more in the nature of failing to provide proof of insurance, rather than failing to carry insurance (although, to be sure, in many instances, the failure to provide proof of insurance will be attributable to the failure to carry insurance).

In this fashion, the offense can be equated to the failure to provide a driver's license. Surely Fargo is justified in punishing the failure to produce a driver's license even though the person convicted of the offense held a valid driver's license at the time of the commission of the offense (which license just happened to be elsewhere than in the vehicle). Such punishment is justified on the theory that the driver has placed Fargo at a serious inconvenience in accomplishing its entirely legitimate goal of assuring that only licensed persons operate motor vehicles on its highways and streets.

If the particular offense being appealed is viewed in this fashion, it is apparent that ample evidence supports — and indeed the defendant does not contest — the conclusion that the defendant failed to provide proof of insurance when requested.

The correctness of this analysis should not be confused or clouded by the ability of the defendant to obtain a dismissal of the charges at any time up to conviction by providing proof that the vehicle was insured at the time that the request for proof of insurance was not complied with. This "escape hatch" is provided by the lawmakers merely as a matter of grace, and forms no part of the underlying offense itself. It could be stripped from the ordinance and that which remains would be perfectly valid.

Alternatively, one could view the "failure to produce" element of the ordinance as an evidentiary device, giving rise to a presumption that the vehicle was not insured at the time the demand for production was made. However, the presumption created is not an irrebuttable one, but rather it can be rebutted in the fashion provided by the ordinance. That is, by providing proof of valid insurance coverage in effect at the time of the driving.

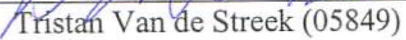
Thus, we have no more than a familiar exercise in "burden-shifting" which is entirely permissible when the facts which give rise to the burden-shifting (*.i.e.*, the failure to provide proof of insurance when requested) are by themselves alone probative of the occurrence of the conduct which Fargo wishes to forbid and to punish, and the facts which will negate the need for such punishment are much more conveniently within the grasp of the defendant than within the knowledge of Fargo. And, moreover, when, by the mechanism of such burden-shifting, Fargo is spared the nearly impossible task of proving a negative.

CONCLUSION

For the foregoing reasons, Fargo asks that the district court judgment be affirmed.

Respectfully submitted this 19th day of May, 2006.

OFFICE OF THE FARGO
CITY PROSECUTOR



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