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COURT OF APPEALS
STATE OF WISCONSIN
DISTRICT III

09-02-2015

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

CASE NO. 2015AP000612 & 2015AP000613

COUNTY OF EAU CLAIRE,

Plaintiff-Respondent

v.

SUSAN M. SANDAS,

Defendant-Appellant.

APPEAL FROM JUDGMENT OF CONVICTION AND DENIAL OF
POSTCONVICTION AND PRETRIAL MOTIONS IN
EAU CLAIRE COUNTY CIRCUIT COURT
THE HONORABLE KRISTINA M. BOURGET, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

- I. WAS THE EVIDENCE RECEIVED AT TRIAL SUFFICIENT FOR A JURY TO CONCLUDE THAT SANDAS WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A DRUG TO A DEGREE WHICH RENDERED HER INCAPABLE OF SAFELY DRIVING?

THE TRIAL COURT DECIDED: Yes

- II. WAS THE EVIDENCE RECEIVED AT TRIAL SUFFICIENT FOR A JURY TO CONCLUDE THAT SANDAS WAS OPERATING A MOTOR VEHICLE LEFT OF THE CENTER LINE?

THE TRIAL COURT DECIDED: Yes

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

Oral argument should not be necessary for the prosecution of this appeal. It is expected that the parties' legal briefs will fully present and address the issues presented for appeal. Additionally, the court's decision need not be published since it is anticipated that it will be controlled by existing case law.

STATEMENT OF THE CASE

On May 23, 2014, Susan Sandas filed a Motion to Dismiss and Suppress (6). She filed a Motion to Dismiss – Supplement on July 21, 2014 (9). The same Motion to Dismiss – Supplement was filed again on July 30, 2014 with an attachment of a letter from Richard Alfuth, M.D. (10). The Motions to Dismiss and Motion to Suppress were denied after an evidentiary hearing on July 14, 2015 (26) in a written decision dated August 26, 2014 (11).

On January 5, 2015, a six-person jury found Sandas guilty of Operating a Motor Vehicle Left of the Center Line (19) and Operating a Motor Vehicle While Under the Influence of a Drug (18).¹ Sandas filed a Motion for Judgment of Acquittal Notwithstanding the Jury Verdict and for New Trial on January 12, 2015 (20). In a written decision dated February 9, 2015, the Court denied Sandas' motion (22).

Sandas filed a Notice of Appeal on March 25, 2015 (25).

¹ Sandas' Statement of the Case erroneously alleges she was convicted of Operating Under the Influence of a Controlled Substance.

STATEMENT OF FACTS

Because Sandas' Statement of Facts does not include all of the "facts relevant to the issues presented for review," Wis. Stats. § (Rule) 809.19(1)(d), as it fails to recite most of the trial evidence relevant to her appellate claims, a summary of the relevant facts is included here.²

On June 5, 2013, shortly before 5:00 p.m., Morgan Gerk was driving his vehicle home to Eau Claire after finishing his work as an environmental compliance specialist in Augusta, Wisconsin (28:70-71). Gerk first noticed a vehicle ahead of his between Augusta and Fall Creek (28:72). Gerk became concerned about the erratic driving he witnessed from this vehicle after having passed through Fall Creek (28:72). Gerk said that he noticed the vehicle swerving hard to the right and then overcompensating by swerving left (28:72). He then took a few minutes to make additional observations to satisfy himself that the driver wasn't texting, looking at a map or fidgeting (28:72). Once he saw that the driver had two hands on the steering wheel and was facing forward the whole time, he was convinced the driver was compromised in some way and he then called -911 (28:72-73).

Gerk reported to the dispatcher his observations of the driving behavior until the vehicle was stopped by law enforcement officers at the Kwik Trip on

² Sandas' Statement of Facts also fails to cite to the record, includes argument, and references a letter which was never received as an exhibit at trial (28:157-158) or any other court proceeding (26: 37-39). The letter from Dr. Richard Alfuth was submitted as an attachment to the second filing of the Motion to Dismiss – Supplement (10) sixteen days after the evidentiary hearing took place.

Brackett Avenue in the City of Eau Claire (28:73-76). Gerk provided the license plate number and vehicle description to the dispatcher (28:73). He described how there is a series of blind hills between Fall Creek and Eau Claire where you can't see the vehicles beyond the crest of the hill (28:73). He said that the driver was swerving right into the gravel shoulder of the road and then swerving back left and overcompensating beyond the fog line and the centerline a couple of times on those blind hills, which could have easily resulted in a high speed collision and that worried him a lot (28:73-74). Gerk said that when they approached the transition of Altoona and Eau Claire, where the roadside becomes a concrete curb, he saw the driver swerve right and come within inches of the curb (28:74). He was afraid because of the 45 mile an hour speed of travel, that the driver would hit the curb, lose control of the vehicle and spin out, or possibly collide with another vehicle (28:74).

Gerk parked in the Papa Murphy's parking lot while officers addressed the driver in the Kwik Trip parking lot (28:76). Gerk provided a written statement of his observations to law enforcement officers while he was still parked in the Papa Murphy's parking lot (28:76).

A recording of Morgan Gerk's -911 call was marked as Exhibit #2 and played for the jury (28:77). Gerk testified that everything he reported to the dispatcher was accurate with the exception of his direction of travel, which he reported as eastbound when it was actually westbound (28:78).

Timothy Porn, an officer with the Eau Claire Police Department, testified that he heard the police radio broadcast about a possibly impaired driver which he soon observed in the Kwik Trip parking lot (28:83). He followed the vehicle which came from the east entrance, and as it made its way out of the west entrance, (which was directly across from Papa Murphy's), he initiated contact with the vehicle before it could enter Brackett Avenue (28:83-84). Officer Porn identified the driver of the vehicle as Susan Sandas (28:86). Officer Porn observed that Sandas had a glazed look over her eyes as if she were impaired (28:86). Based on his training and experience, Officer Porn did not think the glazed look was a result of fatigue (28:87). Officer Porn asked Sandas to step out of the vehicle and he observed that she was unstable on her feet (28:88). He asked her if she took any type of medication (28:88). Sandas told Officer Porn that she had medication at home but did not have any medication with her and didn't take any (28:88). Officer Porn asked Sandas whether she was taking any sort of narcotic medication (28:89). She denied that she had taken any (28:89).

An Eau Claire County Deputy Sheriff arrived to take over the investigation from Officer Porn because the initial observations of the driving occurred outside the limits of the City of Eau Claire (28:87-88). Officer Porn stood by while the field sobriety tests were conducted by the Deputy (28:88). Based on Officer Porn's observations of the standard field sobriety tests, he felt that Sandas was impaired by something other than fatigue (28:89).

Dustin Walters, a Deputy Sheriff for Eau Claire County, testified that when he first contacted Sandas, he noticed that her pupils were very constricted and that the sky was cloudy (28:120). Based on his training, Deputy Walters believed that Sandas might have been impaired by narcotics (28:120-121). He also observed that Sandas' eyes appeared glazed over, her speech was "kinda slow and slurred", she swayed back and forth, and seemed generally unsteady on her feet (28:121). He asked Sandas if she'd taken any prescription medications (28:121). Sandas reported that she had medications prescribed for her but said she hadn't taken any that day (28:121). A few minutes later, Sandas said that she had taken medication for depression (28:121-122). Deputy Walters asked Sandas whether she was on any narcotic medications (28:122). Sandas said she was prescribed a narcotic for pain but that she hadn't taken it and that she didn't have it with her (28:122). Sandas wouldn't identify the narcotic medication that she was prescribed (28:122).

Deputy Walters then testified about the three standard field sobriety tests he administered to Sandas and what he had observed (28:122-128). Deputy Walters explained what he looks for when conducting the Horizontal Gaze Nystagmus test (28:123-125). He then testified that he saw lack of smooth pursuit in both of Sandas' eyes and nystagmus at maximum deviation in both eyes (28:123-124).

Deputy Walters explained what he looks for during the performance of the walk and turn test (28:125-126). He told the jury he saw Sandas lose her balance and come out of the starting position during instructions, step off the line during

the performance of the first nine steps of the test, and fail to touch heel-to-toe on a couple of the steps (28:126). He saw Sandas take 14 steps instead of 9, and saw her raise her arms for balance more than 6 inches away for her body while taking the steps (28:126). On the second set of nine steps, Deputy Walters observed Sandas miss heel-to-toe on several steps, use her arms for balance, and take 16 steps instead of 9 (28:126-127).

Deputy Walters explained to the jury what he looks for in the performance of the one-leg stand test (28:128). He then described his observations of Sandas' performance of the test (28:128). Deputy Walters saw Sandas begin to sway as soon as she raised her left foot, use her arms for balance, and start hopping to keep her balance at 19 or 20 seconds before she put her foot down on Count 23 (28:128). A recording of the video from Deputy Walters' squad camera (marked as Exhibit #4) was played for the jury (28:129).

William Johnson, chemist supervisor within the Toxicology Section of the Wisconsin State Laboratory of Hygiene, testified that Fluoxetine, Norfluoxetine (a metabolite of Fluoxetine), and Oxycodone were identified as drugs found in Sandas' blood sample (28:174). He testified that the quantities of those drugs in Sandas' blood sample were within the therapeutic range (28:175). Johnson testified that a person can be impaired for driving even while the drug is within the therapeutic range (28:175), but that he could not definitively say that any individual person would be impaired for driving simply by looking at the test

results (28:175-176). Johnson explained to the jury that how a person reacts to a particular medication depends upon the individual and a number of factors, including the presence of other drugs in the person's system (28:175-179). Johnson also explained that the narcotic analgesic property of Oxycodone could cause constricted pupils (28:179) as well as sleepiness (28:178).

ARGUMENT

Sandas' argument consists of nothing more than her disagreement with the findings of the jury and her disagreement with the court's rulings on the motion for judgment notwithstanding the jury's verdict and the motion to dismiss. No case law is cited in the entire brief. No standard of review is provided for any issue raised.

Standard of Review

Jury verdicts are upheld if there is "any credible evidence in the record on which the jury could have based its decision." *Morden v. Continental AG*, 2000 WI 51, ¶ 39, 235 Wis.2d 325, 611 N.W.2d 659 (quoting *Lundin v. Shimanski*, 124 Wis.2d 175, 184, 368 N.W.2d 676 (1985)). A motion for judgment notwithstanding the verdict should only be granted when the evidence gives rise to no dispute regarding material issues or when evidence is so clear and convincing that unbiased minds can reach only one conclusion. *Wozniak v. Local No. 1111*, 57 Wis.2d 725, 733, 205 N.W.2d 369 (1973).

I. THE TRIAL COURT PROPERLY DENIED THE MOTION TO DISMISS AND THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Sandas alleged that the court erred in failing to grant her pre-trial motion to dismiss (Brief at p. 5), but she neglected to develop an argument in support of that statement. In a written decision dated August 26, 2014 (11), the Court noted that Sandas produced a letter from her treating physician dated March 27, 2014 (10) regarding current use of oxycodone (10mg) and acetaminophen (325 mg) (as a supplement to the motion to dismiss the traffic citations). The Court found that Sandas was “implicitly asking the Court to grant summary judgment dismissing the traffic citations” (11:2). The Court held that summary judgment is not available in civil forfeiture actions. Sandas provided no legal authority to the contrary.

Sandas also alleged that the court erred when it denied the Motion for Judgment Notwithstanding the Jury Verdict (Brief at p.5). Once again, Sandas failed to develop an argument in support of that statement. In a written decision dated February 6, 2015, the Court stated that “[a] jury’s verdict should be sustained if there is *any* credible evidence to support the verdict” (22). Sandas fails to provide an alternate legal standard, simply alleging that her view of the evidence should prevail.

II. THE EVIDENCE RECEIVED AT TRIAL WAS SUFFICIENT FOR A JURY TO CONCLUDE THAT SANDAS WAS OPERATING A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF A DRUG TO A DEGREE WHICH RENDERED HER INCAPABLE OF SAFELY DRIVING.

The jury was instructed that evidence is the sworn testimony of witnesses (28:212; 17:5). The jury was also instructed how they should evaluate the credibility of each witness (28:215-216; 17:8-9). Among those considerations are whether the witness has an interest or lack of interest in the result of the trial, the clearness or lack of clearness of the witness' recollections, the opportunity the witness had for observing and for knowing the matters the witness testified about, and the reasonableness of the witness' testimony (28:215-216; 17:8). The jury was also instructed to consider bias or prejudice, if any has been shown, possible motives for falsifying testimony, and all other facts and circumstances during the trial which tend either to support or to discredit the testimony (28:216).

Sandas claims that the standard field sobriety tests administered by Deputy Walters were improperly performed and of no use whatsoever (Brief at p. 9). The jury had the benefit of viewing Sandas' performance of those tests (28:129) from which they were permitted to make their own judgment. The jury was also permitted to accept as true the testimony of the law enforcement officers that the standard field sobriety tests were conducted according to protocol, despite the testimony of Sandas' witness Thomas Burr.

The jury was permitted to discount Sandas' testimony, particularly after they heard her conversations with law enforcement officers in which she claimed she had not taken any medications that day or the night before, and that she refused to identify the narcotic drug she was prescribed (28:88-89,121-122, Exhibit 4).

Sandas misstates the evidence when she claims that either William Johnson from the Wisconsin State Laboratory of Hygiene or Dr. Richard Alfuth were able to know that Sandas took her medications as prescribed on June 5, 2013 (Brief at pp. 10-11, 6). William Johnson was able to conclude that the amount of oxycodone that was found in Sandas' blood sample, at the time it was drawn, was within the therapeutic range for that medication (28:174). Johnson testified that a person may be impaired for driving when the drug level is within the therapeutic range, but he could not infer from the test alone that a particular person was impaired by a particular level of medication in the same way that he could infer impairment by a certain level of alcohol in the blood (28:175-176). Dr. Alfuth conceded that he did not know whether Sandas took her medication as prescribed on May 5, 2013 (28:151) and he never witnessed her driving (28:150). Dr. Alfuth did not have independent knowledge from which he could conclude that Sandas' use of oxycodone caused no significant impairment for her job, driving, or in her personal life (28:150-155).

The jury was instructed how to evaluate expert opinion testimony. “[A] witness with expertise in a particular field may give an opinion in that field. In determining the weight to give to this opinion, you should consider the qualifications and credibility of the witness, the facts upon which the opinion is based, and the reasons given for the opinion. Opinion evidence was received to help you reach a conclusion. However, you are not bound by an expert’s opinion. In resolving conflicts in expert testimony, weigh the different opinions against each other. Also, consider the qualifications and credibility of the experts and the facts supporting their opinions” (28:215). The jury was permitted to disregard the opinion of Thomas Burr.

The jury was instructed that “[i]t is not necessary that every fact be proved directly by a witness or an exhibit. A fact may be proved indirectly by circumstantial evidence. Circumstantial evidence is evidence from which a jury may logically find other facts according to common knowledge and experience. Circumstantial evidence is not necessarily better or worse than direct evidence. Either type of evidence can prove a fact. Whether evidence is direct or circumstantial, it must satisfy you by evidence which is clear, satisfactory and convincing that the Defendant committed the offense” (28:214).

The jury was permitted to conclude that the evidence of the drugs identified in Sandas’ blood sample, along with her observed driving behavior and her behavior before and during the standard field sobriety tests, amounted to sufficient

evidence to prove she was operating a motor vehicle while under the influence of a drug to a degree which rendered her incapable of safely driving.

III. THE EVIDENCE RECEIVED AT TRIAL WAS SUFFICIENT FOR A JURY TO CONCLUDE THAT SANDAS WAS OPERATING A MOTOR VEHICLE LEFT OF CENTER.

Sandas claims, without citing any authority, that the sworn testimony of an eyewitness is insufficient to support a conviction for Operating a Motor Vehicle Left of Center (Brief at p. 8). Sandas suggests, again without citing any authority, that in order for the conviction to be upheld, a law enforcement officer must have personally viewed the violation and/or some sort of corroborating evidence must have been presented at trial.

Since Sandas fails to develop her argument, this Court need not address it. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W. 2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments).

The jury saw and heard the testimony of Morgan Gerk, who did not know Susan Sandas (28:70). The jury also heard the contemporaneous observations Gerk made of Sandas' driving when the recording of the -911 call was played during the trial (28:77). The jury could reasonably conclude that a stranger isn't likely to involve himself in reporting his observations to law enforcement and testifying in court under oath unless his observations were true and that his concern for others' safety was genuine.

CONCLUSION

The evidence presented to the jury was legally sufficient to support their finding that Susan Sandas operated a motor vehicle while under the influence of a drug to a degree which rendered her incapable of safely driving and that Sandas operated a motor vehicle on a roadway to the left of the centerline.

Sandas' alternative view of the evidence does not lead to a conclusion that the jury's verdicts must be replaced with a judgment of acquittal. The jury was instructed to come to their own conclusion when evaluating the evidence presented to them (28:209-216). They were not required to agree with Sandas.

For all the reasons stated, the court should affirm the decisions of the circuit court denying the Motion to Dismiss and Suppress and denying the Motion for Judgment of Acquittal Notwithstanding the Jury Verdict and For New Trial and affirm the jury's verdicts.

Dated this 28th day of August, 2015.

Meri C. Larson
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cc: Attorney Michael Rajek

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 14 pages and 3,138 words.

Dated this 28th day of August, 2015.

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