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COURT OF APPEALS
DISTRICT II

04-06-2016

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

APPEAL NO. 2015AP002504

COUNTY OF WALWORTH,
Plaintiff-Respondent,

v.

JAMES E. ROBINSON, JR.,
Defendant-Appellant.

BRIEF OF PLAINTIFF-RESPONDENT

ON APPEAL FROM THE JUDGMENT OF CONVICTION
THE HONORABLE JAMES L. CARLSON, CIRCUIT COURT JUDGE
CIRCUIT COURT FOR WALWORTH COUNTY

STATEMENT OF THE FACTS

The defendant-appellant, James E. Robinson, Jr., hereinafter Robinson, was arrested for operating a motor vehicle while intoxicated (OWI) 1st offense, which occurred on December 7, 2014 (R1). A court trial was scheduled and heard on November 9, 2015 (R19). The following evidence was introduced at Robinson's court trial:

Mr. Craig Tripp's Testimony:

On December 7, 2014 at approximately 10:45 a.m., Mr. Craig Tripp was traveling southbound on Highway 43 when he called police to report erratic driving from a vehicle

traveling southbound in front of his vehicle (R19:4-5). Mr. Tripp followed the vehicle for approximately twenty to twenty-five miles and observed the vehicle driving from lane to lane, taking up more than both lanes of traffic and driving at erratic speeds (R19:5, 6-7). The vehicle was traveling at speeds over 70 miles per hour and then slowed down to 40 miles per hour (R:19:5, 7). After reporting his observations of the vehicle to police, Mr. Tripp continued to follow the vehicle until Walworth County deputies pulled the suspect vehicle over (R19:5-6, 7-8). Mr. Tripp further observed the driver of the suspect vehicle slumping over the steering wheel while driving (R19:7-8).

Walworth County Sheriff Sergeants Mark Roum and Timothy Otterbacher's Testimony:

On December 7, 2014 at approximately 10:48 a.m., veteran Walworth County Sheriff Sergeants Mark Roum and Timothy Otterbacher were in separate squad cars parked in the median of I-43 in the area of Bowers Road in the Town of Lafayette, Walworth County, Wisconsin when an attempt to locate a vehicle was reported by two different people on the phone (R19:9-10, 22, 35). The callers reported that the vehicle, described as a green Dodge pickup truck with driver's side damage, was weaving, taking up several lanes of traffic, and was speeding up and slowing down (R19:10).

After receiving the dispatch, Sergeants Roum and Otterbacher observed the suspect vehicle pass their location and observed that the driver of the vehicle was hunched over and appeared to be falling asleep (R19:10, 23, 37). Sergeant Roum also noticed that another vehicle was following the suspect vehicle and had its emergency flashers on. Sergeant Roum later learned that the driver of the vehicle following the suspect vehicle was Craig Tripp (R19:11).

Sergeant Roum and Sergeant Otterbacher activated their squad car's emergency lights and approximately $\frac{3}{4}$ of a mile later, which Sergeant Roum felt was an excessive distance, the vehicle came to a stop in the Town of Lafayette, Walworth County, Wisconsin (R19:11, 18-19, 23). During that $\frac{3}{4}$ of a mile, Robinson was traveling much slower than the posted speed limit and Robinson only pulled over after deputies active their sirens (R19:18-19). The driver of the vehicle was identified by his Wisconsin photo driver's license as Robinson (R.19:11-12, 16, 23-24).

Walworth County Sheriff Deputy Sergeant Mark Roum, who has been in law enforcement for twenty-one years, approached the passenger's side of Robinson's vehicle, and observed that Robinson's movements were slow and deliberate (R19:9, 12). After Robinson stepped out of the vehicle

Sergeant Roum noticed the same slow, deliberate, unsteady demeanor from Robinson (R19:12).

Sergeant Roum stood by as Sergeant Otterbacher administered field sobriety tests to Robinson (R19:13). As Robinson was doing the walk-and-turn and one-leg stand tests Sergeant Roum stood on the freeway's white line because Robinson was so unsteady Sergeant Roum was concerned Robinson would fall into traffic (R19:13). Based on his observations of Robinson's performance on the field sobriety tests, Sergeant Roum, who is trained in administering field sobriety tests, believed that Robinson presented a safety concern (R19:13-14).

When Sergeant Otterbacher, who has been in law enforcement for over thirty years, first approached Robinson he observed that Robinson appeared to be "out of it." (R19:22, 24). Sergeant Otterbacher explained that Robinson did not answer questions appropriately, his answers were vague, he spoke slower than normal, and did not walk right when he got out of his vehicle (R19:24). Robinson initially denied consuming alcohol, but then admitted that he had consumed one beer last night (R19:24). Sergeant Otterbacher did not smell any odor of intoxicants on Robinson (R19:25). Robinson also admitted that he was taking several prescription medications including Doxepin,

Klonopin, Trazodone, and the generic version of Seroquel (R19:25-26, 41).

Sergeant Otterbacher, who is trained and certified to administer field sobriety tests and has made hundreds of arrests for OWI, administered field sobriety tests to Robinson (R19:22,27). The first test Sergeant Otterbacher conducted on Robinson was the Horizontal Gaze Nystagmus (HGN) test, which Otterbacher explained can detect alcohol and certain drugs (R19:27,29). Sergeant Otterbacher stated that he observed six out of six clues on this test (R19:28). He further stated that:

When [Robinson] came up to touch the pen, he totally missed the top of the pen and he was an inch or two closer to my face than to the tip of the pen and what struck me as odd is he kind of maintained that position for five seconds or so. It was an unusually longer length of time. It's like he was almost thinking that he was touching the pen. But then he moved his finger back and did touch the tip of the pen.

R19:28. Next, Sergeant Otterbacher had Robinson perform the walk-and-turn test (R19:29). After explaining and demonstrating this test, Sergeant Otterbacher observed that Robinson was unable to maintain his balance, on the first nine steps Robinson only walked in a heel to toe fashion on two steps, and his turns were off (R19:29-30). On his way back, Robinson walked a normal gait (R19:30). Finally, Sergeant Otterbacher explained and demonstrated to Robinson

the one-leg stand test (R19:30). While performing the test, Robinson lifted his leg for a brief period of time, put it back down and continued to count. Robinson again lifted his leg at number 10 and then placed his foot back down on the ground (R19:31-32). Robinson also continually raised his arms at the start of the test (R19:31-32).

Based on the callers' observations, as well as his own observations of Robinson, Sergeant Otterbacher formed the opinion that Robinson was under the influence and impaired to drive (R19:32-33). Although Robinson told Sergeant Otterbacher he was simply tired, Sergeant Otterbacher believed Robinson's condition was "a lot more than being tired." (R19:45). Sergeant Otterbacher placed Robinson under arrest (R19:33-34). Robinson was transported to Lakeland Medical Center, where he was read the "Informing the Accused" form before refusing an evidentiary chemical test of his blood (R19:33-34, 44). Sergeant Otterbacher requested that Deputy Frami, a Drug Recognition Expert, come to Lakeland Medical Center to evaluate Robinson (R19:44).

Walworth County Sheriff Deputy Garth Frami's Testimony:

Deputy Frami arrived at Lakeland Medical Center at approximately noon to evaluate Robinson (R19:55). Deputy Frami has been trained, certified and is an instructor in

administering field sobriety tests (R19:53). Deputy Frami has also completed the Drug Recognition Expert program, is certified, and in his capacity as a drug recognition expert has administered the drug evaluation approximately forty-eight times (R19:54). Deputy Frami met with Sergeant Otterbacher and was given a summary of Otterbacher's observations of Robinson (R19:55). Deputy Frami then met with Robinson and immediately noticed that Robinson appeared to be on the "nod", which is usually associated with narcotic analgesic use (R19:56). Deputy Frami explained that being on the nod appears very much the same as an individual who is falling asleep, however, it is slightly different (R19:56). Deputy Frami also noticed that Robinson was disoriented, seemed confused, was slow to react, and had slow raspy speech (R19:57, 69). Robinson admitted to Deputy Frami that the night before he had taken Seroquel, Doxepin and Trazodone, which are central nervous system depressants (R19:57). Robinson further told Deputy Frami that he had approximately five to six hours of sleep the previous night (R19:67).

Deputy Frami began his evaluation by administering a preliminary breath test to Robinson, which had a reading of zero (R19:57). After excluding medical factors, Deputy Frami had Robinson submit to several field sobriety tests,

including the modified Romberg balance test, the walk-and-turn test, the one-leg stand test, and the finger-to-nose test (R19:58-61). Deputy Frami also attempted to conduct the HGN test on Robinson, however, Robinson was unable to keep his eyes open to complete the test (R19:61-62). Deputy Frami explained that in addition to alcohol use, the HGN test can get positive test results for the use of central nervous system depressants, inhalants, and associate anesthetics (R19:61-62). At the conclusion of his evaluation, Deputy Frami opined that Robinson was under the influence of a narcotic analgesic and that Robinson was unable to safely operate a motor vehicle (R19:62). In explaining his inconsistent finding with the medications Robinson stated he was taking Deputy Frami explained:

[Robinson] stated he was on central nervous system depressants, but evaluation again without the horizontal gaze nystagmus test, that could change the opinion or add to it - um - but appeared that he was under the influence of narcotic analgesic.

R19:62. Deputy Frami explained that there was no way for him to know the exact drug Robinson was on without a blood test, but he could evaluate for a category of drug (R19:64). Deputy Frami further explained that central nervous system depressant and narcotic analgesics are very close in comparison to the signs and symptoms they exhibit

(R19:65). Deputy Frami acknowledged that some of the test results he obtained in Robinson's evaluation could have occurred as a result of the ingestion of central nervous system depressants (R19:65). Deputy Frami explained:

Again, on the nod would not be associated with that category and that's different than someone falling asleep. So, based on that, the other evidence, there could also be poly drug use in this case which would mean he was under the influence of multiple drug categories which would equate for some of the other signs and symptoms I saw as well. Drugs don't always affect everybody the same. You got your happy drunks and your angry drunks. Drugs work the same way. So there could be something else that was adding to this as well.

R19:65-66.

James E. Robinson, Jr.'s Testimony:

Finally, Robinson testified that at the time of his stop on December 7, 2014 he was not under the influence of any prescription drugs, controlled substances, or alcohol (R19:71-72, 79). Robinson acknowledged that at the time of his stop he told Sergeant Otterbacher the prescription medications he was taking, which were accurately stated by Sergeant Otterbacher, but that he takes them in the evening because they can make him tired (R19:76, 77, 78-79). Robinson claimed that although he had five to six hours of sleep the night before, he was simply tired at the time of his traffic stop (R19:72, 74, 79).

ARGUMENT

I. SUFFICIENT EVIDENCE WAS PRESENTED AT TRIAL FOR THE COURT TO FIND ROBINSON GUILTY OF OPERATING A MOTOR VEHICLE WHILE INTOXICATED CONTRARY TO WIS. STAT. §346.63(1)(A).

A. Standard Of Review And Legal Principles.

The Appellate Court in reviewing a finding of guilt by a trial court without a jury, will not reverse unless the finding is clearly erroneous. See Wis. Stat. §805.17(2); *Noll v. Dimiceli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575 (Ct. App. 1983).

Findings of fact by the trial court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence.

Cogswell v. Robertshaw Controls Co., 87 Wis.2d 243, 249-50, 274 N.W.2d 647 (1979). "[W]here there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Id.* (citations omitted).

This court must examine the record to find facts that support upholding the fact finder's decision to convict. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis.2d 1, 681 N.W.2d 203.

Following a court trial, the court found Robinson guilty of operating a motor vehicle while under the influence of a drug (R19:87-91). Operating a motor vehicle while under the influence of a drug has two elements: 1) the defendant drove a motor vehicle on a highway; and 2) the defendant was under the influence of a drug to a degree which renders him incapable of safely driving at the time the defendant drove a motor vehicle. Wis. JI-Criminal 2666. See also Wis. Stat. § 346.63(1)(a). In the present case, the trial court's finding of guilt is not clearly erroneous.

B. The County Presented Sufficient Evidence To Prove Robinson Operated A Motor Vehicle While Under The Influence of A Drug.

Robinson alleges that the County failed to present sufficient evidence that he was under the influence. Robinson, however, fails to clear the hurdle to prove that the court heard insufficient evidence to convict him. The County proved both elements of operating a motor vehicle while under the influence of a drug to a reasonable

certainty by evidence that is clear, satisfactory and convincing. WIS JI-Criminal 2663A, 2663B, 2664A, 2664B.

Based on the testimony introduced in this case there is more than sufficient evidence to find to a reasonable certainty that Robinson was under the influence of a drug. Mr. Tripp, a citizen witness, followed Robinson's vehicle for at least twenty miles and observed Robinson's erratic driving. Sergeants Roun and Otterbacher, who are both veteran deputies, also observed Robinson's erratic driving and Robinson failed to immediately pull over for the deputies. Upon contact with Robinson all three deputies: Sergeant Roun, Sergeant Otterbacher, and Deputy Frami, all observed that Robinson had poor balance, appeared disoriented, confused, and had slow deliberate movements and speech. Robinson admitted that he was on the prescription medications Doxepin, Klonopin, Trazodone and the generic version of Seroquel; however, he claimed to have taken the medication the night before. Robinson claimed to have slept five to six hours the night before, and acknowledged that his medications can make him drowsy. After Robinson failed to satisfactorily complete field sobriety tests, Sergeant Otterbacher and Deputy Frami concluded that Robinson was under the influence and Sergeant Otterbacher believed Robinson's condition was "a

lot more than being tired." Importantly, Deputy Otterbacher observed six of six clues on the HGN test, which both Deputy Otterbacher and Deputy Frami stated can detect the presence of certain drugs. Deputy Frami elaborated that the HGN can test positive for central nervous system depressants, which are the category of drugs Robinson admitted to taking the night before. Moreover, although Deputy Frami, a Drug Recognition Expert, opined that Robinson was under the influence of narcotic analgesics, Frami explained his conclusion was without considering the HGN as he was unable to complete the test. Frami stated results from an HGN test could change Frami's opinion. Frami also acknowledged that some of the test results he obtained in Robinson's evaluation could have occurred as a result of the ingestion of central nervous system depressants. Finally, Robinson refused to submit to an evidentiary sample of his blood, which is evidence of consciousness of guilt. *See State v. Zielke*, 137 Wis. 2d 39, 51, 403 N.W.2d 427, 432 (1987). These facts provide more than sufficient evidence to find that Robinson was under the influence of a drug and guilty of violating Wis. Stat. §346.63(1)(a).

Although Robinson argues that his physical condition was caused by lack of sleep, the trial court disagreed.

The trial court has the exclusive right to "decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence." *State v. Below*, 2011 WI App 64, ¶4, 333 Wis.2d 690, 799 N.W.2d 95. "When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact." *Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d at 249-50. Based on the evidence introduced, the trial court was free to conclude that Robinson's condition was caused by much more than a lack of sleep, but rather Robinson's use of his prescription drugs.

Robinson also argues that alleged inconsistencies in Deputy Frami's testimony warrant reversal of this action. However, credible witnesses often make inconsistent statements in court. The trier of fact has the discretion to examine the alleged inconsistency and weigh it against the totality of the evidence presented and render a verdict. Under the facts presented it was not an abuse of discretion for the trier of fact to find Robinson guilty of operating a motor vehicle while intoxicated contrary to Wis. Stat. 346.63(1)(a).

CONCLUSION

For the reasons set forth above, the State respectfully requests that the trial court be affirmed.

Dated this ____ day of April, 2016.

Respectfully submitted,

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CERTIFICATION

I certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order.

_____ Monospaced font: 10 characters per inch; double spaces; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides.

The length of the brief is _____ pages.

I also certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: _____

Signed,

Attorney