STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

Village of Pleasant Prairie

Plaintiff-Respondent

v

Brian Lucas

Defendant-Appellant

Appeal No. 2017AP2131
District 2

BRIEF OF RESPONDENT

Appeal from Decision of the Kenosha County Circuit Court, Branch 8, Honorable Chad G. Kerkman presiding
Trial Court File No. 2017 CV 865

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not necessary since the facts and legal arguments can be fully developed within the briefs along with the theories and legal authorities on each side.

Publication is not appropriate since it will not contribute to the legal literature or clarify the law as to what evidence is necessary to sustain a verdict of operating under the influence.

STATEMENT OF ISSUES

1. DID THE TRIAL COURT COMMIT ERROR WHEN IT DENIED THE APPELLANT'S ORAL MOTION, MADE ON THE DAY OF TRIAL, FOR AN ADJOURNMENT?

2. WAS THE FINDING OF GUILTY MADE BY THE TRIAL COURT SUPPORTED BY SUBSTANIAL EVIDENCE? DID THE TRIAL COURT ERRONEOUSLY CONSIDER THAT IT WOULD HAVE BEEN IMPOSSIBLE FOR THE DEFENDANT TO HAVE A .05 BAC 2 1/2 HOURS AFTER ONLY CONSUMING ONE (1) DRINK WHEN CONSIDERING THE CREDIBILITY OF THE DEFENDANT'S TESTIMONY?

STATEMENT OF CASE

On July 19, 2017, the Appellant was found guilty of operating a motor vehicle while under the influence of an intoxicant in violation of Village Of *Pleasant Prairie Ordinance 348-1* adopting *Section 346.63 (1) (A)* of the Wisconsin Statutes in the Municipal Court of Pleasant Prairie, Judge Richard Ginkowski presiding.

The defendant immediately filed an appeal seeking a trial in the Circuit Court. The case was assigned to the Honorable Chad Kerkman, Kenosha County Circuit Court Branch 8. On August 22, 2017, the Circuit Court scheduled a 6-person jury trial for October 2, 2017. On September 28, 2017, the defendant, ex parte, phoned the Court and requested an adjournment of the Trial. This request was denied by the Circuit Court.

On October 2, 2017, Mr. Lucas orally moved the Court to appoint counsel for him. The Court advised the Appellant that this was a civil matter and he couldn't appoint counsel. The Court denied the Motion to Appoint Counsel at public expense.

Mr. Lucas then requested time to speak with the prosecutor. The court allowed this and briefly recessed the proceedings. Following this conference, the Appellant advised the Trial Court that he wished to waive a Jury Trial. The Court granted this request.

Prior to the first witness being sworn, Mr. Lucas orally moved the Court to dismiss the case because he was without counsel and to proceed would "put his life and liberty in jeopardy." The Trial Court denied this motion and the trial proceeded. At the conclusion of the trial testimony, the Trial Court found the defendant guilty of operating an automobile under the influence.

ARGUMENT

1. THE APPELLANT HAD AMPLE TIME TO SECURE A LAWYER BETWEEN THE MUNICIPAL COURT TRIAL AND THE SCHEDULED CIRCUIT COURT JURY TRIAL.

The Appellant was convicted on July 19, 2017 in the Municipal Court of Pleasant Prairie, Wisconsin. He promptly appealed the conviction to the Circuit Court. His Circuit Court trial was scheduled for October 2, 2017. Mr. Lucas first raised the issue of an adjournment four (4) days before the trial in an ex parte telephone call to the Court. No written motion for an adjournment or supporting affidavit setting forth the need for an adjournment was ever filed with the Court. Therefore, there was no abuse of discretion when the Trial Court denied his telephonic request.

On the trial date, the Appellant requested the Court to appoint a lawyer to represent him. The Judge explained that since this was a civil case there was no requirement or statutory mandate that he appoint counsel. It should be noted that in making his request for the appointment of an attorney, Mr. Lucas never made a claim of indigency. When the Court refused to appoint counsel, the Appellant then moved to dismiss the case because he was without an attorney and to proceed would "put my life and liberty in jeopardy." (R 22,. p 6;App App p. 6) This motion was denied by the Trial Court. Since there was no statutory requirement or authority for the appointment of counsel in a civil case, the Trial Court properly denied Appellant's request for a dismissal.

The Court acted appropriately under the circumstances and facts. Although the Court has the inherent authority to appoint counsel in a civil case, there is a presumption against the appointment for an indigent party when it is not likely that a litigant will be deprived of personal liberty if unsuccessful. *Piper v. Popp, 167 Wis. 2d 633; 482 N.W. 2d 353 (1992)*. In this case, the Appellant didn't even meet the threshold of establishing that he was indigent so as to possibly cause the Court to exercise its inherent power. Further, the loss of a driving privilege and a monetary fine is not a deprivation of one's personal liberty.

2. THE EVIDENCE AMPLY SUPPORTS THE COURT'S FINDING OF GUILT IRRESPECIVE OF ITS OBSERVATION THAT ONE DRINK CONSUMED 2 1/2 HOURS PREVIOUS TO THE ARREST WOULDN'T CAUSE A .05 BAC. THE COURT IN JUDGING THE CREDIBILITY OF APPELLANT'S TESTIMONY MAY CONSIDER FACTS COMMONLY KNOWN.

The fact that the BAC was only .05 doesn't in and of itself mandate an acquittal. If this were a case where the defendant was found asleep in a properly parked vehicle and with good Field Sobriety Tests and no other signs of impairment or indications of abhorrent driving, it is likely that this verdict would have been other than guilty.

Here the facts aren't that different than those in the case of *County of Milwaukee v. Proegler, 95 Wis. 2d 604; 291 N.W. 608 (1980)* where the defendant was convicted with a .02 BAC taken three (3) hours after the defendant was found

sleeping behind the wheel of a parked car on the emergency ramp of I-43 with the motor running.

Here there were numerous facts which support the conviction in addition to the .05 BAC. Mr. Lucas was found parked facing the wrong way on a highway at 5:30 a.m. after the police received a call from a citizen who reported the situation. (R. 22 , p.8; App App p.8) The officer, in response to that call, found the defendant's vehicle illegally parked facing eastbound in the westbound lane of the highway. The defendant was the only occupant of the vehicle and he was seated in the driver's seat and slumped over and asleep while leaning against the driver side window. The motor was running and the transmission was in neutral. The officer had to bang on the window to arouse the defendant, and he reacted by placing the car in drive and drove the car forward about 100 feet before he stopped. The officer had to run after the car while yelling at the driver to stop the car. The defendant admitted to drinking earlier in the evening. His eyes were red and glassy, and his speech was slow (R. 22, p. 7-10; App App p. 7-10). As a result, the officer requested that he perform Field Sobriety Tests as a part of her investigation. He performed poorly on the FST's. He exhibited five (5) clues out of six (6) on the HGN test and six (6) clues on the walk and turn test followed by four (4) clues on the one leg stand test.

As can be seen from the foregoing sequence of events, the building blocks of evidence fell into place for the Officer which led to the arrest of the defendant

for operating under the influence. The .05 BAC is not dispositive of whether the defendant was operating under the influence. Although Mr. Lucas's BAC was under .08, the .05 BAC when considered in the light of the other evidence clearly supports the verdict. This other evidence consists of driving on the wrong side of the highway and parking illegally while the motor was running and falling asleep and then causing the car to lurch forward about 100 feet when awakened by the Officer. The defendant's admission that he didn't know he was on the wrong side of the highway is but another building block leading to the inevitable conclusion that the defendant was under the influence (R.22,p. 66). These facts when considered in light of the FST's support the conclusion of two experienced police officers that Appellant was under the influence of an intoxicant. One doesn't need to be drunk to be guilty of the offense of Operating Under the Influence. Clearly, the evidence amply supports the Trial Court's conclusion that Mr. Lucas was less able to exercise the clear judgment and steady hand necessary to safely handle and safely control a motor vehicle. All of these facts (considered totally apart from the Trial Court's observation in judging the credibility of Appellant's testimony that it would be impossible for one standard 1-ounce drink to cause a .05 BAC 2 1/2 hours later) support the finding of guilt in of itself.

The defendant's claim that the Court committed error when it observed that a .05 BAC would be impossible 2 1/2 hours after but one drink is unfounded. This is not an observation which requires expert testimony. *Section 902.01 (2) (b)* of

the Wisconsin Statutes permits the Court to take judicial notice of facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. The blood-alcohol chart published by the Wisconsin Department of Transportation is one source of facts capable of accurate and ready determination which cannot be reasonably questioned. See *State v. Hinz, 121 Wis 2d 282; 360 N.W. 2d 56* (CA. App). A review of that chart supports the Trial Court's observation. Although the Trial Court didn't refer to this chart in making its observation, it must be assumed that a Wisconsin trial judge would be fully aware of this chart and its contents. Expert testimony wasn't required for the Trial Court to observe as it did. Expert testimony wasn't required to support the Trial Court's reliance on common knowledge that one drink consumed 2 1/2 hours previously would never result in a .05 BAC in light of commonly known standard elimination rate of 0.015 per hour. See: *State ex rel Cholka v. Johnson, 96 Wis. 2d 704; 292 N.W. 2d 835 (1980)* and *DeKeuster v Green Bay & W. R., 262 Wis. 476; 59 N.W. 2d 452 (1953)*. In short, a Trial Court may apply common knowledge and individual observations and experiences to the evidence presented for purpose of drawing factual inferences therefrom.

Respectfully Submitted

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by_____
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CONCLUSION

The following facts were testified by the arresting Officer:

1. At about 5:24 a.m. the department received a citizen call about a driver passed out behind the wheel of a car.

2. The Officer found the car to be illegally parked facing eastbound in the westbound lane with its motor running with the defendant slumped over and asleep while leaning against the driver side window.

3. The Officer had to knock on the window to arouse the defendant and when she did so he put the car into drive and lurched forward about 100 feet.

4. The defendant admitted to drinking earlier. His eyes were red and glassy. His speech was slow.

5. He failed each of the three FST's administered.

These facts alone amply support the Trial Court's finding of guilt apart from any consideration of whether one (1) drink consumed 2 1/2 hours previously could result in a BAC of .05. The Trial Court was justified in drawing on a commonly known fact in the context of judging the defendant's credibility.

CERTIFICATION

I certify that this brief meets the form and length requirements of Rule 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of the brief is 14 pages.

Dated: June _____, 2018

Signed,

_____
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