IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

KIMBERLY A. THOROUGHGOOD,	)	
	)	
Appellant/Defendant Below,	)	
	)	
v.	)	Cr. A. No. 0702010766
	)	
STATE OF DELAWARE,	)	
	)	
Appellee,	)	

Submitted: March 24, 2010
Decided: June 1, 2010

UPON APPEAL FROM THE COURT OF COMMON PLEAS
AFFIRMED

Raymond J. Otlowski, Esquire, Newark, Delaware, Attorney for Appellant-Defendant below.

Barzilai K. Axelrod, Esquire, Department of Justice, Wilmington, Delaware, Attorney for the State.

ABLEMAN, J.

This is an appeal from the October 14, 2009 conviction and sentencing of defendant Kimberly A. Thoroughgood ("Defendant") in the Court of Common Pleas. Following a jury trial, Thoroughgood was found guilty of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a). Thoroughgood was sentenced to sixty days at Level V confinement, which was the minimum mandatory term required by law, with her sentence to commence on January 7, 2010.

On appeal, Thoroughgood contends that the evidence was insufficient to satisfy the State's burden of proving beyond a reasonable doubt the essential elements of the offense of Driving While Under the Influence of Alcohol.

Facts

Sunday, January 21, 2007, was the night of the AFC Football Championship game between the New England Patriots and the Indianapolis Colts. Defendant Kimberly A. Thoroughgood was enjoying a few beers while watching the game at a local bar in the Trolley Square area of Wilmington. At approximately 10:00 P.M. that evening, Delaware State Police officers Steven Mayberry and Scott Mauchin were dispatched to a

single car accident on the ramp from northbound Route 52 to Route 141 southbound.

Upon arriving first at the scene, Master Corporal Mayberry observed a blue Lexus SUV with its right side sitting on top of the guardrail, approximately two to three feet off the ground, and tilted slightly towards the road with its left tires remaining on the concrete portion of the roadway. The car belonged to defendant Kimberly Thoroughgood, who was seated in the driver's seat. Shortly thereafter, Corporal Scott Mauchin arrived as back-up.

At trial, both troopers testified that the car was still running and that they observed the defendant in the driver's seat. The radio was on at high volume and there were no other passengers in the vehicle. Defendant, who was wearing a Patriots jersey, stated that she was returning from Catherine Rooney's, a bar located on Delaware Avenue in Wilmington, where she had consumed three beers before the game prior to driving home. She also admitted that she personally had driven the Lexus to its present location at the accident scene, but claimed that she had swerved to avoid a deer, which caused her car to land on the guardrail. Corporal Mayberry, an avid deer hunter, testified that there were no deer tracks in the area adjacent to the car.

According to Corporal Mayberry, Defendant was hysterical and crying and had difficulty focusing, as if she were staring right through him. Corporal Mauchin testified that the defendant advised him that she had stopped drinking about an hour before the police arrived at the scene and that the accident had occurred approximately thirty minutes earlier. He described her speech as understandable but slurred, and her eyes as glassy, bloodshot, and dilated. Corporal Mauchin detected a strong odor of alcohol from two feet away. Although Defendant did pass two of the field tests he administered, the alphabet and counting tests, she failed the National Highway Traffic Safety Administration (NHTSA) "walk and turn" test by exhibiting six out of eight clues. She was also unable to perform the NHTSA "one leg stand" test because she continued to talk over the officer's instructions and was pleading with him to let her go. Nor was she able to perform the "finger to nose" test as instructed. Defendant's demeanor and behavior were also suggestive of a lack of control. She repeatedly called Corporal Mauchin "cold-hearted" and "mean," requested that he call other officers whom she knew, and urged him to let her go and follow her home. Corporal Mauchin confirmed that, in his opinion, the defendant "was definitely over the legal limit" and had operated the motor vehicle while under the influence.

Defendant was eventually administered the intoxilyzer test by Corporal Mauchin at 11:33 P.M., following a 20-minute observation period conducted in accordance with required procedure. Thus, the test was administered approximately an hour and fifteen minutes after the officers first arrived at the accident scene. The defendant's blood alcohol concentration was 0.222, nearly three times the legal limit of 0.08.

Following a jury trial in the New Castle County Court of Common Pleas, Defendant was found guilty of Driving Under the Influence of Alcohol in violation of 21 *Del. C.* § 4177(a).

Defendant's Contentions

In her appeal of this conviction, Thoroughgood raises two arguments. First, she submits that the State failed to prove that she was driving her vehicle at the relevant time, as the vehicle was inoperable when the officers encountered her in the driver's seat at the scene and the car ultimately had to be towed away. Since there was no witness testimony to place the defendant "behind the wheel while driving," she argues that the State's evidence was insufficient to establish the first element of the offense of DUI.

The defendant's second ground in this appeal is that the State failed to prove that she was under the influence of alcohol at the time she drove the vehicle, or that she had a blood alcohol concentration of .08 or more within

four hours after driving the vehicle. This argument is also based upon the defendant's claim that the evidence was insufficient to establish when she was driving, and therefore there was no basis upon which the jury could conclude that the intoxilyzer test was administered within four hours of her driving the car.

Standard and Scope of Review

In reviewing appeals from the Court of Common Pleas, this Court sits as an intermediate appellate court, and its function mirrors that of the Supreme Court.[1] In addition to correcting errors of law, this Court's scope of review on appeal extends to whether the factual findings made by the jury viewed in a light most favorable to the State are supported by the evidence.[2] "[T]he findings of the jury, if supported by evidence, shall be conclusive."[3] The test to be applied in determining the sufficiency of circumstantial evidence to support a conviction is "whether the evidence, viewed in its entirety and including all reasonable inferences, is sufficient to enable a jury

[1] *See e.g.*, *Baker v. Connell*, 488 A.2d 1303, 1309 (Del. 1985); *State v. Richards*, 1998 WL 732960, at *1 (Del. Super. May 28, 1998).

[2] *Henry v. State*, 298 A.2d 327, 328 (Del. 1972); *Shipkowski v. State*, 1989 WL 89667, at *1 (Del. Super. July 28, 1989).

[3] Del. Const., art. IV, § 11(1)(a).

to find that the State's charges have been established beyond a reasonable doubt."[4]

Thus, if substantial evidence exists for a finding of fact, this Court must accept that finding. It is not permitted to make its own factual conclusions, weigh evidence, or make credibility determinations.[5]

Discussion

Thoroughgood first argues that "there were no witnesses presented to put the defendant behind the wheel while driving." While that may be true, the defendant overlooks the fact that she herself admitted that she drove the car from Catherine Rooney's to the Route 141 ramp, but claimed to have hit the guardrail while swerving to avoid a deer. Even without this admission on Defendant's part, the circumstantial evidence was more than sufficient to support the jury's conclusion that Defendant was driving her vehicle at the time of the accident. The jury here chose to believe the testimony of Corporal Mayberry, and did not credit Defendant's account of a deer as the cause of the accident. Moreover, Defendant was behind the wheel while the car was running and the radio was blaring. Defendant was hysterical, was unabashedly pleading with the police officers, and was dropping names to

[4] *Potts v. State*, 458 A.2d 1165, 1167 (Del. 1983) (citing *Holden v. State*, 305 A.2d 320, 322 (Del. 1973)).

[5] *State v. Goodwin*, 2007 WL 2122142, at *2 (Del. Super. July 24, 2007).

prevail upon them to let her go. Defendant also failed one of the field sobriety tests and was unable to complete two others. Based on his observations, Corporal Mauchin described Defendant as "definitely under the influence." Furthermore, there was no evidence that anyone other than the defendant had been in the vehicle at the time of the accident, nor was anyone else in the immediate area. Under these circumstances, the jury reasonably concluded that Defendant drove her vehicle at the time of the accident. The fact that the jury may have reached that conclusion by relying on circumstantial evidence or by rejecting direct evidence does not allow the Court to reject the jury's findings.

That the vehicle was lodged on the guardrail and thus unable to be driven at the time the police arrived at the scene does not preclude criminal liability, nor does it establish that the jury's verdict was not supported by the evidence. The jury could well have concluded that the defendant was driving the car *prior* to colliding with the guardrail. It was this pre-collision time period—not the state of the car after the collision—that was relevant in terms of whether Defendant was under the influence to establish that element of the criminal charge. The fact that Defendant's vehicle was disabled as a result of the accident has no bearing on the relevant factual

determination that the jury was required to make and the evidence supports the jury's conclusion.

In a related vein, Thoroughgood next argues that the State failed to show beyond a reasonable doubt that she took the intoxilzyer test within four hours of the alleged offense, as required by to 21 *Del. C.* § 4177(b). Defendant submits that since there was no eyewitness evidence to establish when the accident occurred, the jury could not reasonably have concluded that the test was administered within the four-hour time limitation. The Court disagrees.

The record clearly reflects that at the time the officers encountered the defendant, the car was running and the radio was playing at a high volume. Corporal Mauchin testified that he administered the test to Defendant at 11:33 P.M. which was approximately an hour and fifteen minutes or an hour and a half after the police arrived at the scene of the accident. While Corporal Mauchin could not establish precisely when the accident occurred, the circumstantial evidence of where the defendant had been and what she had been doing prior to the accident, together with the defendant's own admission to the police, constituted *prima facie* evidence that the defendant

took the test within four hours of the accident and the trial court properly admitted the test results into evidence.[6]

After the trial court made its preliminary ruling that the results of the test were admissible, the question of the test's timeliness became one of the ultimate issues for the trier of fact. There is no requirement in the law that the time of the accident be established to an absolute certainty. In this case, the jury could easily have inferred from the circumstances that the test was administered within four hours of Defendant's driving the car, and it is not proper for this Court to reach its own factual conclusions and substitute them for those of the jury.

Even if the defendant was able to establish that the four-hour requirement was not met in this case—which she has not done—there was sufficient evidence of Defendant's intoxication even had no intoxilyzer test ever been administered. The State is correct in its alternative reliance upon Corporal Mauchin's opinion that Defendant "was definitely over the legal limit" based upon his personal observations. Establishing that a defendant was "under the influence" does not always require a blood alcohol reading of 0.08 or more, but can be based upon other evidence "that the person [was], because of alcohol or drugs or a combination of both, less able than

[6] *Slaughter v. State*, 322 A.2d 15, 15 (Del. 1974); *Shipkowski*, 1989 WL 89667, at *2; *Dailey v. State*, 1986 WL 2280, at *2-3 (Del. Super. Feb. 10, 1986).

the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle."[7] Thus, a rational trier of fact could have found evidence sufficient to establish that the defendant was under the influence of alcohol even without evidence of the results of the intoxilyzer test.

Moreover, the four-hour rule is not intended to be a defense for the defendant to avoid the results when the intoxilzyer test is administered at a time later than four hours after driving:

> [T]he so-called "four-hour rule" . . . involves the mistaken notion that for a blood test's results to be admissible in a driving under the influence prosecution, the blood must be drawn within four hours of the alleged offense. In that sense at least . . . there is no "four hour rule." As long as the test, itself, is regular and the driver has not had anything else to drink, it does not matter how long after driving the blood is drawn.[8]

Indeed, the statute itself provides that evidence establishing the presence and concentration of alcohol "may include the results from tests of samples of the person's blood, breath, or urine taken within 4 hours after the time of driving *or at some later time*."[9]

In the final analysis, Defendant's appeal is nothing more than a futile effort to have the Court reevaluate the evidence and substitute its own

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[7] 21 *Del. C.* § 4177(c)(5).

[8] *State v. Baker*, 2009 WL 1639514, at *1 (Del. Super. Apr. 8, 2009).

[9] 21 *Del. C.* § 4177(g).

contrary factual findings for those that were made by the jury in arriving at its verdict. This jury's verdict was supported by ample evidence and should not be disturbed.

Conclusion

For the foregoing reasons, Appellant's conviction under 21 *Del. C.* § 4177 is hereby **AFFIRMED**.

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary
cc: Raymond J. Otlowski, Esq.
Barzilai Axelrod, Esq.