Affirmed and Opinion filed January 17, 2002.

In The

Fourteenth Court of Appeals

NO. 14-00-01386-CR

JORGE ALBERTO REYES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 351st District Court
Harris County, Texas
Trial Court Cause No. 840,732

O P I N I O N

Appellant, Jorge Alberto Reyes, was convicted of driving while intoxicated. *See* TEX. PEN. CODE ANN. § 49.01 (Vernon Supp. 2002). In three points of error, appellant claims (1) his counsel rendered ineffective assistance, (2) the evidence is legally and factually insufficient, and (3) the trial court erred by denying his motion to suppress. We affirm.

Background and Procedural History

Officer W. T. Johnson of the Houston Police Department was on patrol and stopped at a four way traffic stop on April 1, 2000. The Officer saw appellant's vehicle approach

from the opposite direction and stop at the sign. As Officer Johnson began to proceed through the intersection, appellant made an "abrupt" turn in front of the officer's car nearly causing a collision with his. Officer Johnson turned around to follow appellant. He turned on his red lights and appellant pulled into the parking lot of a strip center.

Officer Johnson approached appellant's vehicle to inform him he had made an illegal turn. Officer Johnson testified that when appellant rolled down the window he smelled alcohol coming from the vehicle, noticed appellant's bloodshot eyes and saw an open container of beer. He informed appellant why he had stopped him and then asked if appellant had been drinking. Appellant admitted he had been drinking beer. Officer Johnson then asked appellant to step out of the car and perform field sobriety tests. Officer Johnson testified that appellant had to lean against the car for support. Based on appellant's performance of the field sobriety tests, his bloodshot eyes, his admission of drinking, and the open container of beer in the vehicle, Officer Johnson formed the opinion that appellant was intoxicated and transported him to the police station.

At the police station, Officer Phillip Kung read appellant his statutory warnings. Appellant refused to submit a sample of his breath. Officer Kung requested appellant perform the field sobriety tests and videotaped his performance.

The jury found appellant guilty of driving while intoxicated, found two enhancement paragraphs to be true, and assessed punishment at fifty years' confinement. This appeal followed.

Ineffective Assistance of Counsel

In his first point of error, appellant claims his trial counsel was ineffective. The standard for determining claims of ineffective assistance under the Sixth Amendment is well established. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986). To prevail on a claim of ineffective assistance an appellant must prove by a preponderance of the evidence that (1) his trial counsel's representation fell below an objective standard of reasonableness, and (2) there is a

reasonable probability that, but for his trial counsel's errors, a different outcome would have resulted. *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996) (citing *Strickland*, 466 U.S. at 688). The review of counsel's representation is highly deferential and we must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable representation. *Id*. Appellant must also affirmatively prove prejudice. *Id*. Appellant must prove that the errors, judged by the totality of the representation, rather than by isolated instances of error, denied him a fair trial. *Id*. The appellant's failure to make the required showing of deficient representation or sufficient prejudice defeats an ineffective assistance claim. *Id*.

Appellant claims his trial counsel was ineffective because he failed to file a motion to suppress the arrest, the statements made by appellant to the officers, and the videotape. However, appellant's trial counsel did file a motion to suppress all evidence seized and "all statements, either written or oral, made after the said seizure of defendant" based on a lack of probable cause. That motion was denied.

In addition, appellant must present a record supporting the claim of ineffective assistance of counsel and "in the vast majority of cases, the undeveloped record on direct appeal will be insufficient for an appellant to satisfy *Strickland*." *Thompson v. State*, 9 S.W.3d 808, 814 n.6 (Tex. Crim. App. 1999). Appellant did not file a motion for new trial, or otherwise present a record establishing trial counsel's strategy or the lack thereof. Without such proof, we presume trial counsel's conduct and decisions were reasonable. *Id*. at 814. Here, trial counsel argued to the jury that the videotape was "a great video for the Defense" and that appellant did not appear to be intoxicated. Based on trial counsel's argument that the videotape was helpful to his case, his failure to attempt to suppress the videotape may have been sound trial strategy. *See Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994). Accordingly, appellant's first point of error is overruled.

Legal and Factual Sufficiency

In his second point of error, appellant claims the evidence is legally and factually

insufficient to support his conviction for driving while intoxicated. When reviewing legal sufficiency, we view the evidence in the light most favorable to the verdict and determine whether a rational trier of fact could have found the elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318–19, 99 S.Ct. 2781, 2788–89 (1979); *Cardenas v. State*, 30 S.W.3d 384, 389 (Tex. Crim. App. 2000). If a reviewing court determines the evidence is insufficient under the *Jackson* standard, it must render a judgment of acquittal because if the evidence is insufficient under *Jackson*, the case should never have been submitted to the jury. *See Jackson*, 443 U.S. at 318–19. In a legal sufficiency challenge, we do not re-weigh the evidence. *King v. State*, 29 S.W.3d 556, 562 (Tex. Crim. App. 2000).

In reviewing factual sufficiency, we do not view the evidence "in the light most favorable to the prosecution." *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App. 1997). Rather, we ask whether a neutral review of all the evidence, both for and against the finding, demonstrates the proof of guilt is either so obviously weak as to undermine confidence in the jury's determination, or, although adequate if taken alone, is greatly outweighed by contrary proof. *Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000). We will set aside a verdict for factual insufficiency only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. *Wesbrook v. State*, 29 S.W.3d 103, 112 (Tex. Crim. App. 2000).

A person commits the offense of driving while intoxicated if the person is intoxicated while operating a motor vehicle in a public place. *See* TEX. PEN. CODE ANN. § 49.04(a) (Vernon Supp. 2002). When an accused is charged with driving while intoxicated, the State must prove that (1) appellant did not have the normal use of mental or physical faculties by reason of the introduction of alcohol; or (2) appellant had a blood alcohol concentration of 0.08 or more. *See* TEX. PEN. CODE ANN. § 49.01 (Vernon Supp. 2002).

In this case, Officer Johnson testified that appellant "abruptly" pulled in front of his patrol car, nearly causing a collision. He further testified that once appellant's window was

rolled down, the officer could smell alcohol coming from the vehicle, saw an open container of beer and noticed that appellant's eyes were bloodshot. He testified appellant admitted he had been drinking. Both Officers Johnson and Kung testified that based on appellant's demeanor, his performance of the field sobriety tests, his bloodshot eyes, and strong odor of alcohol, each formed the opinion that appellant was intoxicated. The arresting officer's observations and subsequent opinion that appellant was intoxicated have been held legally sufficient evidence to support a conviction for driving while intoxicated. *Annis v. State*, 578 S.W.2d 406, 407 (Tex. Crim. App. 1979); *Watkins v. State*, 741 S.W.2d 546, 549 (Tex. App.—Dallas 1987, pet. ref'd.). Further, Officer Kung testified that appellant refused to submit a sample of his breath which would have determined the blood alcohol concentration. The jury may consider this refusal in determining guilt. *Finley v. State*, 809 S.W.2d 909, 913 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd).

After viewing the evidence in the light most favorable to the prosecution, we believe that a rational trier of fact could have found the essential elements of the offense of driving while intoxicated. Appellant's legal sufficiency challenge is overruled.

Appellant also claims the evidence is factually insufficient to support his conviction for driving while intoxicated. In conducting a factual sufficiency review, we only exercise our fact jurisdiction to prevent a manifestly unjust result. *See Clewis v. State*, 922 S.W.2d 126, 135 (Tex. Crim. App. 1996). We do not find evidence in the record that greatly outweighs the evidence supporting the trial court's judgment. For the reasons discussed above, the jury's decision was not so contrary to the weight of the evidence as to be clearly wrong and unjust.

We conclude that the evidence presented by the State is legally and factually sufficient to sustain appellant's conviction for driving while intoxicated. Appellant's second point of error is overruled.

Motion to Suppress

In his third and final point of error, appellant claims the trial court erred in denying

his motion to suppress because the State failed to show the officer had reasonable suspicion to stop appellant. In reviewing the trial court's ruling, this court gives almost total deference to the trial court's determination of historical facts. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). However, a trial court's determination of whether the officer had reasonable suspicion and probable cause, should be reviewed *de novo* on appeal if its resolution does not turn on an evaluation of credibility and demeanor. *See id*.

In this case, the trial court held a hearing on appellant's motion to suppress. At the hearing, Officer Johnson testified that as he began to drive through the intersection, appellant "abruptly turned" in front of him, nearly causing a collision and committing the offenses of failure to yield the right of way and an illegal turn. *See* TEX. TRANS. CODE ANN. §§ 545.151, 545.152 (Vernon 1999). It is well settled that a traffic violation committed in an officer's presence authorizes a stop. *Valencia v. State*, 820 S.W.2d 397, 399 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd). After an officer validly stops a vehicle for a traffic offense, the officer may conduct a brief investigative detention of the occupants of the vehicle. *Id*. at 400 (citing *Goodwin v. State*, 799 S.W.2d 719, 727 (Tex. Crim. App. 1990)). Accordingly, we conclude the trial court did not err in denying the motion to suppress. Appellant's third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed January 17, 2002.
Panel consists of Justices Yates, Edelman, and Wittig[1].
Do Not Publish — TEX. R. APP. P. 47.3(b).

[1] Senior Justice Don Wittig sitting by assignment.