Affirmed and Opinion filed October 19, 2000.

In The

Fourteenth Court of Appeals

NO. 14-99-00129-CR

JOSE HISQUIERDO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 23rd District Court
Brazoria County, Texas
Trial Court Cause No. 29,938

O P I N I O N

In this appeal, we examine the factual sufficiency of a conviction for DWI where no scientific evidence of appellant's intoxication was offered but where significant evidence of intoxication came from eyewitness testimony. Appellant, Jose Hisquierdo, was convicted by a jury of felony DWI as a habitual offender. He pled true to two enhancements and the jury assessed punishment of a sobering 75 years confinement. We affirm.

Background

Preceded by the odor of alcohol, appellant loudly stumbled through the door of "Buc-ees" convenience store. As he negotiated his way to the cold drink section, off-duty Freeport police officer, Mike Goodson, approached appellant and told him to stay where he was because he was too intoxicated to drive. He also had the store clerk phone the police. Goodson testified he never got closer than four feet from appellant. Also, Goodson admitted that he would have had no memory of the events surrounding the offense without having read the offense report. However, Goodson also stated that reading the report refreshed his memory.

As the police arrived, appellant pulled out of the parking lot in his pickup, making an illegal left turn in the officers' presence. Officer Standley eventually pulled over appellant. Standley observed appellant stumble as he exited his vehicle and then hold onto the side of the truck bed to steady himself. He asked appellant if he had anything to drink, to which appellant reckoned, "eight, nine or twelve, somewhere in there." Standley testified that appellant's breath strongly smelled of alcohol, his speech was slurred, and his eyes were red and glassy. Standley testified that he had never arrested someone for DWI without writing in his report the arrestee had slurred speech, glassy eyes, and was unsteady. Standley told appellant to let go of the truck. Appellant complied but began falling. Standley testified that appellant was "very intoxicated." Standley stated that the primary reason he believed appellant was intoxicated was his unsteadiness but conceded there are other things, such as sickness, disease, medication or diabetes, that could possibly cause unsteadiness (though no evidence of these maladies were introduced at trial, nor was the powerful odor of alcohol explained). Standley arrested appellant for DWI. He explained he did not perform field sobriety testing because appellant was "noticeably intoxicated."

Standley did request appellant to provide a breath specimen, though, to which appellant emphatically exhaled, "f--- you, you son-of-a-b----. You ain't getting s--- from me."[1] From there, Standley endured the slurred barbs of appellant's profanities all the way to the police station. At the station,

[1] By appellant's response, Standley no doubt received a sample of appellant's breath, but not likely the type he had in mind.

Standley again requested a breath specimen. Appellant again refused, spewing a similarly unequivocal barrage of obscenities as when the first request was made of him.

Factual Sufficiency

In reviewing a factual sufficiency claim, we assess the evidence in support of and contrary to the trier of fact's findings to determine whether the evidence is so weak that it renders the verdict clearly wrong and unjust or the verdict is contrary to the great weight and preponderance of the evidence. *See Johnson v. State*, 23 S.W.3d 1, 11 (Tex. Crim. App. 2000); *Cain v. State*, 958 S.W.2d 404, 407 (Tex. Crim. App.1997); *Clewis v. State*, 922 S.W.2d 126, 129 (Tex. Crim. App.1996). We must observe the principle of deference to jury findings. *Cain*, 958 S.W.2d at 407. The jury is the judge of the facts, and an appellate court should only exercise its fact jurisdiction to prevent a result that is manifestly unjust or clearly shocks the conscience. *Id.; Clewis*, 922 S.W.2d at 135.

Appellant argues the evidence is factually insufficient to support his conviction because:

1. The police performed no field sobriety tests on him;
2. No breath or blood samples were taken from him;
3. Officer Goodson admitted to having no memory of the events surrounding the arrest apart from Officer Standley's report; and
4. Officer Standley admitted that not all of appellant's behavior may have been caused by alcohol consumption.

We examine each contention in turn. First, though no field sobriety tests were performed on appellant, in light of the other evidence of appellant's severe intoxication, compromised motor skills, and belligerence, Officer Standley provided an acceptable reason for not doing any tests of this sort. Further, even though, from an evidentiary standpoint, it would have been the better practice to request a field sobriety test, the evidence here nonetheless indicates that appellant, in his hostile and uncooperative state, would have almost surely refused to take one.

Next, appellant raises the fact that no breath or blood samples were taken from him. This point perhaps "shocks the conscience" (*Clewis)*, but only because appellant has the hubris to complain about

the police not taking his breath test where the sole reason for it was appellant's own vulgar and unequivocal refusal to provide a sample.

Appellant complains of Officer Goodson's inability to recall the facts without first having refreshed his memory by reading the police report. However, Goodson stated that after he read the report, he was able to remember the material events. Further, reference to writings made in the past is a long-accepted and normally reliable method of refreshing one's memory, and is implicitly codified in the rules of evidence. *See* TEX. R. EVID. 803(5).

Finally, Officer Standley's admission that some of appellant's behavior possibly could have been caused by something other than alcohol is of little consequence. In light of the significant evidence as a whole of appellant's intoxication, and in the complete absence of any evidence of any other causes for appellant's readily observable unsteadiness, glassy bloodshot eyes, slurred speech, belligerence, and strong bouquet of liquor, Standley's testimony appears to have been no more than a simple, frank statement of the truism that "anything is possible."

In addition to the four discrete points raised by appellant, we have examined and considered the facts cited in his brief and independently reviewed the record. After viewing all the evidence in accord with our standard of review, we find the verdict is not contrary to the overwhelming weight of the evidence so as to be clearly wrong and unjust. Rather, the evidence, viewed in its entirety, strongly supports the jury's conclusion that appellant was legally intoxicated.[2]

Appellant's factual sufficiency issue is overruled. The judgment of the trial court is affirmed.

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[2] We note that appellant cited *Perkins v. State,* 2000 WL 298086 (Tex. App.—Waco 2000). In that opinion, the Waco court reversed a DWI conviction on the basis of factual insufficiency. However, since appellant filed his brief, the court withdrew its opinion and affirmed the conviction, substituting *Perkins v. State,* 19 S.W.3d 854 (Tex. App.—Waco 2000, pet. filed), in its place. As such, we do not consider *Perkins* as authority in appellant's favor.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed October 19, 2000.

Panel consists of Justices Yates, Wittig, and Frost.

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