Affirmed and Opinion filed December 2, 1999.

In The

Fourteenth Court of Appeals

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NO. 14-98-00210-CR

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STEPHEN STROMATT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 15
Harris County, Texas
Trial Court Cause No. 97-44308

O P I N I O N

Stephen Stromatt appeals a conviction for driving while intoxicated on the grounds that there is: (1) no evidence to show that he waived his right to a jury trial; and (2) factually insufficient evidence to show that he was intoxicated. We affirm.

Jury Waiver

Appellant's first point of error contends that there is no evidence in the record to reflect that he waived his right to a jury in writing in accordance with article 1.13(a). *See* TEX. CODE CRIM. PRO. ANN.

art. 1.13(a) (Vernon Supp. 1999).[1] However, after appellant filed his brief, a supplemental record was filed which contains appellant's written jury waiver. The waiver was executed by appellant on February 16, 1998, prior to trial, and was signed by his counsel, the attorney representing the State, and the trial judge. Therefore, appellant's first point of error is without merit and is overruled.

Factual Sufficiency

Appellant's second point of error challenges the factual sufficiency of the evidence to show that he was intoxicated.[2]

Standard of Review

A factual sufficiency review takes into consideration all of the evidence and weighs the evidence which tends to prove the existence of the fact in dispute against the contradictory evidence. *See Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). That a different verdict would be more reasonable is insufficient to justify reversal; the verdict will be upheld unless it is so against the great weight of the evidence that it is clearly wrong and unjust. *See id.* at 272.

A person commits the offense of driving while intoxicated if he has an alcohol concentration of 0.10 or more, or he does not have the normal use of mental or physical faculties by reason of the introduction of alcohol, a controlled substance, a drug, or any combination of those substances into the body, while operating a motor vehicle in a public place. *See* TEX. PEN. CODE ANN. §§ 49.01(2), 49.04(a) (Vernon 1994 & Supp. 1999).[3]

Sufficiency Review

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[1] Article 1.13(a) applies to both misdemeanor and felony cases. *See Huynh v. State*, 901 S.W.2d 480, 483 (Tex. Crim. App. 1995).

[2] Appellant relies on *Perkins* to support his factual sufficiency challenge; however, the judgment in *Perkins* has since been vacated by the Court of Criminal Appeals. *See Perkins v. State*, 940 S.W.2d 365 (Tex. App.–Waco 1997), *pet. granted, judgm't vacated*, 993 S.W.2d 116 (Tex. Crim. App. 1999) (per curiam) (remanding the case to the appellate court for reconsideration in light of the factual sufficiency review standard set forth in *Cain v. State*, 958 S.W.2d 404 (Tex. Crim. App. 1999)).

[3] Because the appellant refused to take an intoxilyzer test, the State's theory of prosecution was that he had lost the normal use of his mental or physical faculties.

The evidence presented against appellant essentially consisted of the testimony of the arresting officer, William Lindsey. Lindsey testified that he'd been specially trained to recognize intoxicated persons and had worked exclusively with DWI's for eleven years. Lindsey had witnessed appellant's vehicle cross over onto the emergency shoulder and then veer back, crossing over two lanes of traffic. Appellant's vehicle then crossed over another lane and rapidly accelerated. Lindsey's radar indicated appellant was driving 81 miles per hour. After pulling appellant's van over, Lindsey noticed that appellant had glassy, watery eyes. When Lindsey asked him if he had been drinking, appellant admitted to having had a "couple of beers" while at a local club. Initially, Lindsey did not detect any alcohol odor on appellant's breath, but after having appellant remove a dip of snuff from his mouth, Lindsey detected a moderate odor of alcohol. He stated that the odor he detected was inconsistent with appellant's claim that he had consumed only a couple of beers.

Lindsey administered a horizontal gaze nystagmus ("HGN") test and testified that all six clues were present. He also administered two additional field sobriety tests, a head tilt and one-leg stand. Lindsey testified that the results of these tests also indicated that appellant did not have normal use of his mental and physical faculties.

During cross-examination, Lindsey admitted that appellant had had no problems maneuvering his van off the road, that appellant had been cooperative and had responded appropriately to Lindsey's questions. Lindsey further admitted that appellant had exited his vehicle without any trouble and had not used the vehicle for support when walking to the rear of it. He also admitted that although appellant had a sway of 2 to 4 inches during the head tilt test, even someone who had not been drinking would have a sway of about 1 to 2 inches.

After being transported downtown, appellant refused to take an intoxilyzer test because he did not want his "fate determined by a machine." Although appellant admitted the conditions in the videotape room were good, he also refused to be videotaped while doing field sobriety tests at the police station,[4] because he wanted to speak with his attorney before doing anything further.

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[4] However, appellant was videotaped in the room while not taking field sobriety tests, and the tape was shown to the judge.

Appellant testified that he was at the club for two hours and ten minutes and had consumed three beers there. He stated that he did not feel impaired. He described his van as a "box on wheels" that was not capable of going 81 mph in the short period of time described by Lindsey. He testified further that he had not gone over into the emergency lane or crossed any lanes of traffic. Appellant indicated that there was questionable lighting during the HGN test, he was nervous, and he was wearing cowboy boots that made the testing difficult for him.

After his arrest, appellant telephoned his father from the holding cell. His father testified that when he spoke to appellant, appellant's speech was normal, logical, and coherent and he did not believe appellant was impaired. Appellant also presented the testimony of two friends who were with him at the club that evening. The first witness testified that she had been with appellant for approximately 45 minutes on the night of his arrest and, in her opinion, he did not appear intoxicated. She also stated that she was shocked to discover appellant had been arrested because he had appeared capable of driving. However, on cross-examination, she admitted that she had no knowledge of how many beers appellant had drank.

The second witness testified that it did not appear to him that appellant was impaired; however, he was with appellant for only 20 or 30 minutes that evening. He also testified that he was "shocked" to discover appellant had been arrested because he had not appeared intoxicated.

Although appellant presented some evidence suggesting that he had not lost the normal use of his mental and physical faculties, the majority of his evidence was elicited from individuals who did not observe his driving and did not know with certainty how much appellant had been drinking. Moreover, appellant admitted to having drank three beers that evening. Appellant's actions while driving were more probative of his condition and ability to operate a vehicle at that time than were his speech or demeanor after his arrest. We also cannot overlook the possibility that alcohol affected appellant's judgment and attitude toward driving even if it did not noticeably affect his speech or demeanor. Moreover, despite his explanations for doing so, appellant's refusal to take an intoxilyzer and allow his sobriety tests to be videotaped also support an inference of guilt.

Further, in light of Lindsey's experience investigating DWI's and his testimony concerning appellant's manner of driving, glassy and watery eyes, smell of alcohol, and failure of the field sobriety tests,

we cannot say that the verdict is so contrary to the weight of the evidence as to be clearly wrong or unjust.[5] Therefore, we overrule appellant's second point of error and affirm the judgment of the trial court.

/s/ Richard H. Edelman
Justice

Judgment rendered and Opinion filed December 2, 1999.

Panel consists of Justices Amidei, Edelman, and Wittig.

Do not publish — TEX. R. APP. P. 47.3(b).

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[5] *See e.g., Reagan v. State*, 968 S.W.2d 571 (Tex. App.--Texarkana 1998, pet. ref'd) (finding evidence of intoxication sufficient where officer observed defendant drift into a lane and change lanes without signaling, coupled with fact defendant failed two field sobriety tests, smelled of alcohol, admitted to consuming "a couple of drinks," had bloodshot, watery eyes, and had slurred speech); *Kennedy v. State*, 797 S.W.2d 695 (Tex. App.–Houston [1st Dist.] 1990, no pet.) (finding evidence of intoxication sufficient where officer observed defendant had red glassy eyes, slurred speech, and a strong odor of alcohol on his breath).