IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

STATE OF TENNESSEE,	)	
	)	
Plaintiff/Appellee,	)	
	)	**Case No.: E2010-02238-CCA-R3-CD**
v.	)	
	)	
DAVID H. SMITH,	)	
	)	
Defendant/Appellant.	)	

Appeal from a Jury Verdict of the
Criminal Court of Hamilton County, Case No. 266057

BRIEF OF APPELLANT
DAVID H. SMITH

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[ORAL ARGUMENT REQUESTED]

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JURISDICTIONAL STATEMENT

This matter is appealed from the Hamilton County Criminal Court, Division II, from a verdict entered on September 29, 2010. Defendant filed a timely Notice of Appeal to the Tennessee Court of Criminal Appeals with the trial court, pursuant to *Tennessee Rules of Criminal Procedure* 37(b)(1) and *Tennessee Rules of Appellate Procedure* 4(a). Appeal is proper with this Court, and this Court has jurisdiction to hear the issues joined.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether there existed sufficient evidence to convict the defendant of driving under the influence in violation of T.C.A. §55-10-401?

STATEMENT OF THE CASE

This matter arises from Division II, Stern, J. of the Hamilton County Criminal Court in which the defendant was acquitted by a jury of *per se* DUI but convicted of a separate count of DUI from a single incident indictment alleging a violation of T.C.A. §55-10-401.

On October 17, 2007, the Hamilton County Grand Jury returned Indictment No. 266057 against the defendant, charging him with Speeding (Count 1), Light Law Violation (Count 2), Driving Under the Influence (Count 3), and Driving Under the Influence with a Blood-Alcohol Content of .08 or Higher (Count 4). [R. 2-5, Indictment 266057].

On or about January 6, 2010, the Hamilton County District Attorney's office filed a Notice of Intent to Enhance or Impeach by Use of Prior Convictions, citing a conviction for Driving under the Influence in the State Court of Cobb County, Georgia on November 18, 2008. [R. 8, Notice of Intent to Enhance or Impeach By Use of Prior Convictions]. The Indictment was amended to reflect the prior convictions on or about July 6, 2010. [R. 9-10, Indictment – Amended].

The case was tried to a jury from September 28 - 29, 2010. On September 29, the jury acquitted the defendant on counts two, light law violation, and four, DUI *per se*. However, the jury returned guilty verdicts as to count one, speeding, and count three, DUI. [R. 11, Minutes – Jury Verdict].

On October 11, 2010, the defendant filed a Motion for Judgment of Acquittal and Memorandum in Support. [R. 15-16, Motion for Judgment of Acquittal and Memorandum in Support].

The motion was denied by the court at the sentencing hearing on October 25, 2011. The defendant was sentenced to eleven (11) months, twenty-nine (29) days suspended after serving forty-five (45) days, an alcohol and drug assessment class, two (2) year loss of driver's license, and fines. [R. 18-19, Judgments (Counts One and Three)]. The defendant filed a timely Notice of Appeal pursuant to the *Tennessee Rules of Appellate Procedure* Rule 4(a) on the same day. [R. 24, Notice of Appeal].

STATEMENT OF THE FACTS

On April 12, 2007, David Smith, the defendant, a resident of Atlanta, GA was in Chattanooga on business. That evening he visited the Palms Restaurant on Shallowford Road. The Palms is located on a section of Shallowford Road in Chattanooga where several restaurants serve area hotels, the Hamilton Place Mall, and travelers on the nearby state highways. The defendant left the restaurant in his vehicle around midnight. He drove a short distance down Shallowford Road toward his hotel. Shallowford Road is a major straight four lane road, well lit, and services area business, hotels, and access to state highways 75 and 24. At the intersection of Shallowford Road and Lee Highway, the defendant was stopped for speeding by Chattanooga Police Officer David Huggins. Officer Huggins advised the defendant that he was speeding and had clocked him driving at a rate of fifty-eight (58) miles per hour in a forty (40) mile per hour zone. [T. pp. 6-7]. Officer Huggins also advised the defendant that he had a damaged brake light on his left side in violation of Tennessee law. While speaking with the defendant, Officer Huggins stated that he smelled alcohol on the defendant's breath. The defendant acknowledged that he had something to drink while at the Palms but stated that he was not impaired. Officer

Huggins asked him to perform several standard field sobriety tests and the defendant agreed, cooperated and by any objective standard passed the offered field sobriety tests. [T. p. 14]. The defendant complied with all the officer's requests and performed each test as he was asked. These FST were recorded by the in car video of Officer Huggins and show that the defendant passed all FSTs. [R. Exhibit 1 – DVD of Arrest]. Officer Huggins told the defendant he had repeated two numbers while counting. [T. p. 15]. Based upon this minimal deviation, Officer Huggins placed him under arrest for driving under the influence. Notwithstanding the proof on the video of the FST, Officer Huggins told the defendant he had not passed certain tests that he had been given. [1]

The defendant signed the Implied Consent form and submitted to a blood test which was taken at the Chattanooga Police Department's blood room at 1:50 a.m., one hour and fifteen minutes after his arrest. The test returned a blood-alcohol content of 0.10. [T. p. 17].

The case proceeded to a jury trial on September 28, 2010 in Hamilton County Criminal Court. The state called two witnesses, Officer David Huggins, the arresting officer, and Special Agent John Harrison, who tested the sample of the defendant's blood.

During direct examination, Officer Huggins testified in accordance with his affidavit of complaint that his sole reason for stopping the defendant was for speeding and later he noticed a broken brake light. Officer Huggins stated that he arrested the defendant because based on his experience and observations during the field sobriety tests; he believed the defendant was driving while impaired. Officer Huggins later admitted that the defendant had passed the FSTs. He further testified that the defendant committed no other traffic infractions other than the speeding. [T. p. 22].

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[1] "He did not pass certain tests that I gave at that time... I smelled alcoholic substance coming from his breath… I felt that he was under the influence." [T. p. 14, line 25; p. 15, lines 1-2, 7].

Officer Huggins testified that the defendant possibly swayed on the line on the walk and turn test. [T. p. 33]. However, the officer admitted that his single observed sway does not mean that the defendant failed that particular test. [T. pp. 33-34].

The officer was asked whether the defendant had any physical problems that may have prevented him from effectively performing any of the field sobriety tests, particularly the walk and turn test. [T. p. 32]. Offer Huggins stated that he heard the defendant say he had problems with his back. [T. p. 32].

To document the test results tests, Officer Huggins was asked if kept a score sheet or record to determine whether defendant passed or failed the test [T. p. 31]. Officer Huggins said he did not document most of the FST and that on the walk-the-line test that he did not have it with him "at this time." [T. p. 31, line 22]. No explanation was given for why he did not have it, or if it ever existed why it was never turned over to the state or defendant. No such record was ever shown to have existed at trial.

The video of the defendant's stop clearly shows him performing the field sobriety tests in compliance with Officer Huggins' request and directions. The defendant's speech is clear and understandable during all conversations with the officer, and he gave no indication or clues of intoxication or impairment throughout the testing procedure. The defendant's single sway during part of the walk and turn test did not mean test failure even according to the officer, and the instance of repeating a number during the counting backwards test was unremarkable and not in violation of the officers instructions to him. The defendant, by any objective measure, passed all the administered field sobriety tests that he was given. The best proof of this is the actual video which was put in evidence. [R. Exhibit 1 – DVD of Arrest].

The defendant retained the services of Dr. Henry Spiller, a Toxicology Expert with the American Board of Applied Toxicology and American Board of Forensic Examiners. [T. p.79].

Dr. Spiller reviewed the information regarding the arrest of the defendant, including the video footage from the officer, the Tennessee Bureau of Investigation Alcohol report and the arrest report and testified as to the same information during the trial. Based upon this information, the time elapsed between the arrest of the defendant at 12:30 a.m. and the blood draw at 1:50 a.m., and Dr. Spiller's knowledge of the absorption rate of alcohol into the blood stream, Dr. Spiller concluded that the defendant's BAC was actually lower than 0.10 at the time he was operating his vehicle. His findings showed that the defendant's BAC level was more likely a 0.06 or 0.07 at the time he was pulled over and given the field sobriety tests [T. p. 84] but had risen to its "peak level" by the time his blood was drawn. [R. Exhibit 6 – Toxicology Consultant Report]. This finding was based upon the amount of alcohol consumed, as well as the defendant's height, weight, and the time in which the alcohol was consumed. [T. pp. 108-109]. He further confirmed that the defendant's actions on the video were consistent with a person having a BAC level of 0.06 or 0.07. [T. p. 116]. Dr. Spiller made the following observation regarding the video:

> "He's appropriate. His speech is clear, his mentation is clear. He's paying attention. He's accurate in his responses and his responses are – they're not delayed. He's helpful. I think he's just nervous, but I think – I don't see any evidence of impairment." [T. p. 116, lines 12-17].

Testimony concluded the evening of September 28, and court resumed the following morning with jury instructions. After several hours of deliberation, the jury returned an acquittal as to count two, light law violation and count four, DUI *per se*. However, the jury convicted the defendant as to counts one, speeding, and count three, DUI.

The defendant filed a Motion for Judgment of Acquittal and Memorandum in Support prior to his sentencing hearing. He argued that due to his acquittal as to Count Four, there was

insufficient evidence to convict him of Count Three, as the essential element to driving under the influence is to have a BAC of 0.08 or higher.

This motion was denied by the trial court at the Sentencing Hearing. Upon this denial, the Defendant filed a Notice of Appeal on October 25, 2010.

LAW AND ARGUMENT

I. INSUFFICIENCY OF THE EVIDENCE

The defendant asserts that there was insufficient evidence to convict him of driving under the influence as defined in T.C.A. §55-10-401. Simply put, there were no observations of impaired driving and there was minimal proof put before the jury (other than the BAC test) that could lead a reasonable juror to conclude that the defendant was impaired. As noted in the facts above, the defendant was acquitted by the jury of DUI *per se*, but he was found guilty of another count of DUI related to this single incident.

It is understood and familiar that where the sufficiency of the evidence is challenged, the relevant question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the [State], any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789 (1979); see also Tenn. R. App. P. 13(e). It is long settled in Tennessee law that on appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn there from. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). And, a guilty verdict removes the presumption of innocence which the defendant enjoyed at trial and raises a presumption of guilt on appeal. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The defendant is aware that he has the burden of overcoming this presumption of guilt.

It is also accepted that the state has the discretion to indict a defendant on two separate DUI counts stemming from a single alleged incident of DUI; and, both counts can be determined by the jury without the requirement of an election. *State v. Delfro Willis*, C.C.A. No.02C01-9810-CC-00336, 1999 WL 487032, at *2-3 (Tenn. Crim. App. filed July 12, 1999), perm. to app. denied (Tenn. 1999). However, when a jury makes a factual finding and acquits the defendant on the DUI *per se* charge, the Court should look at other evidence (other than the BAC) to see if

such evidence supports the conviction of driving under the influence. Here, even when viewed in a light most favorably to the state, there was insufficient evidence to convict. The rationale supporting this argument is that the jury did actually make a factual finding and conclude that the defendant is not guilty of DUI *per se*. By stating its findings with a not guilty verdict, the jury has said that the state did not meet its burden of proving the defendant guilty beyond a reasonable doubt for this count. Significantly, the indictment is for a single alleged act of DUI and the proof was straightforward at trial. If the Court is not satisfied that the remaining evidence (other than the BAC) establishes guilt of the offense, then the Court should set aside the jury conviction.

The defendant is aware that even if the verdicts are inconsistent, any seeming inconsistency is in most cases irrelevant since each count is considered a separate indictment and consistency is not required. *Wiggins v. State*, 498 S.W. 2d. 92, 93-94 (Tenn. 1973). However, this case is different from most in that the only meaningful evidence of impairment is from the results of the BAC test, an element of the DUI count on which he was acquitted. No other reasonable evidence of impairment exists to support a DUI conviction, even when viewed in favor of the prosecution.

Officer Huggins offered minimal testimony on defendant's alleged DUI. He testified that on the night of the defendant's arrest, conditions on Shallowford Road were foggy, and his visibility was poor. Officer Huggins observed no suspect driving other than defendant's apparent speeding that was picked up by radar. The officer's radar recorded the defendant's vehicle traveling fifty-eight miles per hour in a forty mile-an-hour zone.[2] The defendant does not dispute speeding.

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[2] "My radar picked him up first a good distance before he came out of the fog." [T. p. 8, lines 1-2].
"Raining earlier that evening. Fog was extremely heavy at that time… You couldn't see two to three car's possibly in front of you." [T. p. 7, lines 11-14].

When the officer fell in behind the defendant and activated his blue lights, the defendant appropriately complied with this show of authority and obeyed all traffic regulations and rules as he pulled his vehicle over. Officer Huggins testified that he did not observe any poor driving that might trigger a DUI stop (i.e. swerving, improper lane changes, or being involved in an accident).[3]

Once the vehicle stopped, Officer Huggins approached the defendant's car and requested his license and proof of insurance, commands that the defendant understood and with which he immediately complied.[4] At that time, the officer stated he smelled some alcohol on the defendant's breath. The defendant replied that he had two drinks at a nearby restaurant.[5] Officer Huggins then asked the defendant to perform a series of field sobriety tests (FSTs) to determine if he was impaired. The defendant complied with each request made by the officer and as the video clearly shows he gave no indication of impairment as he remained articulate and steady on

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3 Q: "For the jury's benefit, there is no indication of any other driving issues except speeding."
A: "Correct."
Q: "There's no accident in this case, right?"
A: "Right."
Q: "There's no jumping a curb, right?"
A: "Correct."
Q: "No changing lanes."
A: "Correct." [T. p. 22, lines 17-25].

4 Q: "…you asked him for his license, he got his license, no problem."
A: "Correct."
Q: "He understood your commands, right?"
A: "Correct."
Q: "He followed your instructions."
A: "Correct."
Q: "You understood him."
A: "Correct."
Q: "And there was no problem communicating with each other."
A: "He understood."
Q: "…he got out of his car; he was cooperative, polite and did what you asked him to do."
A: "Correct." [T. p. 24, lines 10-25; p. 25, lines 2-4].

5 Q: "And he indicated to you on more than one statement that he had how much to drink?"
A: "Two." [T. p. 12, lines 14-18].

his feet throughout the entire stop. The officer further agreed that his speech was clear.[6]

The police video taken from Officer Huggins' car was played before the jury, and the defendant appears to pass all field sobriety tests that he was given. During testimony, the officer claimed that he swayed once on the walk-the-line test but then the officer correctly testified that this does not constitute a failure.[7] Officer Huggins also said the defendant repeated two numbers when counting from seventy-nine to forty-six but then testified that he did not instruct the defendant that repeating a number would be a violation of the test. Officer Huggins also stated that he did not keep a written test reports or records of the defendant's performance for most if not all of the FSTs.[8]

The defendant performed all field sobriety tests well, as depicted on the video submitted into evidence. The results of the field sobriety tests do not support a factual finding of impairment. Any reasonable juror observing the video of this stop could not find sufficient evidence upon which to convict the defendant of DUI.

However, the relevant question the reviewing Court must answer is whether any rational trier of fact could have found the accused guilty of every element of this DUI count beyond a

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6 Q: "You'd agree with me there's not any slurred speech in this video."
A: "To some extent, yes." [T. p. 24, lines 3-5].

7 Q: "And then he performs the walk-the-line test, including the counterclockwise turn and even finishes it and does a finishing turn at your request. No problem with that test."
A: "Other than the sway on the line on the walk and turn test."
Q: "There is one step with one partial sway, right? I mean, there are all sorts of clues that you can have stepping off the lines, hands going up, falling out, and he doesn't do any of those things. He doesn't flunk any of those things, right?"
A: (Witness moves head up and down.)
Q: "Well, let me ask it differently for the jury's benefit. You don't flunk the test merely by swaying one time on a step, do you?" "No." "And on this video from what we observe he's got one sway on one step, correct?"
A: (Witness moves head up and down.) [T. p. 33, lines 8-25; p. 34, lines 1-3].

8 Q: "Did you write out the score sheet saying that he flunked this field sobriety test?"
A: "I did not."
Q: "Did you write out a score sheet for the counting test?"
A: "No."
Q: "Did you do a score sheet for the walk-on-the-line test?"
A: "That I cannot answer."
Q: "…you didn't keep any score sheets for any of these tests; is that true?"
A: "I do not have it with me at this time." [T. p. 31, lines 9-23].

reasonable doubt. *Tennessee Rules of Appellate Procedure*, Rule 13(e); *State v. Harris*, 839 S.W.2d 54, 75 (Tenn.1992). If the Court determines that the evidence preponderates against the weight of the verdict, it is within its authority to overturn the guilty verdict. *State v. Blanton*, 926 S.W. 2d. 953, 958 (Tenn.Crim.App. 1996).

In this instance, the defendant asserts that video is the best evidence and it shows unambiguously that the defendant was not impaired. The trial court erred by not overturning the guilty verdict, due to a lack of evidence that supported a conviction of driving under the influence. By the arresting officer's testimony, the defendant was guilty of speeding but of no other driving infraction. The police video of the FSTs show the defendant passed each test he was given. Minor mistakes that he made while performing two of the tests were not grounds for failure, even when reviewing in a light most favorable to the state. The defendant was not driving while impaired when he was pulled over by Officer Huggins, and any reasonable juror could not return a conviction of DUI based upon the evidence presented by the state. Here, the Court should review the video and if it agrees that there is insufficient evidence then it should set aside the conviction.

CONCLUSION

Based upon the insufficiency of the evidence, the defendant requests that this Court reverse the verdict of the jury and decision of the trial court and grant the defendant's Motion for Judgment of Acquittal for DUI.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this Motion has been served upon the following individuals via first-class mail, postage pre-paid, on this the _____ day of April, 2011:

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