Affirmed and Opinion filed September 28, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-98-01180-CR

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RODNEY GRANT BAREFIELD, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 122nd District Court
Galveston County, Texas
Trial Court Cause No. 95-CR-1486

O P I N I O N

Appellant appeals from the revocation of his community supervision (probation). Following a hearing on the State's motion to revoke community supervision, the trial court found "true" to the allegation that appellant had violated his probation by driving while intoxicated, revoked his probation and sentenced him to five years' confinement in the Institutional Division of the Texas Department of Criminal Justice. Appellant presents five points of error, complaining that the trial court erred (i) in allowing certain testimony by a police officer who was not certified to perform field sobriety tests; (ii) in denying appellant's motion for instructed verdict; (iii) in not requiring the State to produce a videotape of

appellant's sobriety testing; (iv) in denying appellant's request that the trial court consider "mistake of fact" as a defense to driving while intoxicated, and (v) error in the State's failure to prove that defendant was the person on probation. We affirm.

At the hearing on the State's motion to revoke community supervision, Officer Clark testified that late on the evening of March 27, 1998, he observed appellant's vehicle being operated in an erratic and dangerous manner. Upon stopping the vehicle, he noticed that appellant's eyes were completely red and his pupils were tiny, his clothing was disheveled, he could barely stand up, and his speech was thick and slurred. An adult female and young child were also in the car with appellant. As the officer did not detect the odor of any alcoholic beverage, he believed appellant was intoxicated by a substance other than alcohol. Officer Clark performed several "field sobriety tests," all of which appellant failed. Appellant was arrested for suspicion of driving while intoxicated.

Appellant testified in his own behalf, stating that earlier in the evening of his arrest, he had taken some medication prescribed by his doctor for muscle pain and had fallen asleep. His wife woke him up later that evening and told him to pick up a child from a local skating rink. Appellant got out of bed and drove over to the skating rink, and was driving home when he was stopped and arrested by Officer Clark on suspicion of intoxication.

In his first point of error, appellant contends that the trial court erred in allowing Officer Clark to testify as to appellant's performance in the field sobriety tests, as the officer was not certified by the Highway and Transportation Safety Administration in field sobriety tests. We understand appellant's complaint to be that the evidence is insufficient to support the finding of "true," inasmuch as the testimony as to intoxication was from an officer who was not certified to administer the sobriety tests to appellant.

We overrule this point of error. Officer Clark testified that he had attended numerous classes in D.W.I. investigation where he had been instructed on the various signs of intoxication, had been administering sobriety field tests for ten years as a police officer and had learned much about the tests from other officers and through police academy seminars and

statewide training . Officer Clark testified, without rebuttal from appellant, that police officers can administer these tests without being certified. While appellant cites *Emerson v. State*, 880 S.W.2d 759 (Tex. Crim. App. 1994) as proving that Officer Clark could not administer or testify about the field sobriety tests without certification, we do not read *Emerson* to require such, as *Emerson* specifically addressed the requirements for admissibility of the HGN (nystagmus) test. The HGN test is not involved in this appeal. Moreover, appellant did not specifically object at trial as to the reliability and admissibility of the field tests administered by Officer Clark, but rather raised only a generalized sufficiency argument which presumed that Officer Clark's testimony was insufficient. Appellant did not establish that Officer Clark's testimony was inadmissible or unreliable due to lack of state certification.

Appellant's second point of error complains of the trial court's denial of his motion for instructed verdict. Such motion stands as an attack on the sufficiency of the evidence. *See Cook v. State*, 858 S.W.2d 467, 470 (Tex. Crim. App. 1993). In a motion to revoke probation, the State has the burden to prove by a preponderance of the evidence that appellant violated the terms and conditions of his probation as alleged in the motion. *See Jenkins v. State*, 740 S.W.2d 435, 437 (Tex. Crim. App. 1983). The trial court is the trier of fact and of the credibility of the witnesses and the weight to be given to the testimony. *See Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. 1981).

After reviewing the record, we find the evidence sufficient to support the trial court's finding of "true" to appellant's alleged violation of probation based on driving while intoxicated. Officer Clark testified to appellant's erratic driving, his having red eyes with tiny pupils, his difficulty in standing up, his thick slurred speech, his inability to perform field sobriety tests, and his statement of having ingested prescription "sore back" drugs earlier that evening. Appellant's physician testified that the prescription drugs being taken by appellant were tranquilizers, pain reducers and muscle relaxants, which, if taken in combination, would produce red eyes, changes in pupil size, staggering and slurred speech, as well as drowsiness and confusion. The physician testified that the drugs interact with one another and produce a type of intoxication, and that they contain warnings not to operate heavy machinery following

consumption. Appellant testified to having taken his medication earlier in the evening prior to his arrest and having fallen asleep afterwards. We overrule the second point of error.

Appellant's third point of error complains that the trial court erred in not requiring the State to produce the video of appellant taken at the police station following his arrest. The State had subpoenaed the video, but Officer Clark did not produce it at trial as the tape could not be located. He did, however, testify as to what appeared on the video, including appellant's performance of three sobriety tests.

The record reveals the following exchange between appellant's counsel and the State, immediately prior to trial, regarding the videotape:

> STATE: Your Honor, I have subpoenaed from the Lumberton Police Department an Officer Clark who's in the courtroom. It was a subpoena duces tecum, and Officer Clark was instructed to bring with him a videotape on the latest DWI of Mr. Barefield in Hardin County. They're having problems at this point finding the tape, and the State's confident that after Officer Clark's testimony, you will be convinced by a preponderance of the evidence that the defendant has violated his community supervision. But we would like to produce the tape for the Court if it still exists and I have the D.A.'s Office in Hardin County and also the County Attorney's Office in Hardin County looking for the tape.
>
> I explained this to [appellant's trial counsel] before we came into the courtroom today. And basically what I would like for the Court to do is to hear some evidence today. We don't have any objection to the defense presenting evidence today and then continuing the case until at some point later on. And then we can hopefully produce the tape for the Court; *and if we can't, then we'll just close with the evidence as it exists at that time.*
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> APPELLANT: *Your Honor, we would have no objection to what [the State] said.* [request for personal bond during any continuance deleted]. (emphasis added).

This exchange evidences appellant's understanding and agreement that if the tape could not be found, then the State would be resting its case without submitting it as evidence. The record further shows that at the close of the State's case, the tape had not been found, and the trial court indicated that based on the evidence it had heard, the tape would be immaterial. Appellant raised no objections, and did not request the trial court to order the tape produced or grant a continuance while it was being located. We find that appellant has waived any argument on appeal regarding the absence of the videotape, and we overrule the third point of error.

By his fourth point of error, appellant contends that the trial court erred in refusing to consider "mistake of fact" as a defense to driving while intoxicated. Specifically, appellant argues that under TEX. PEN. CODE ANN. § 8.02(a), a party can avoid criminal liability if, through mistake of fact, he formed a reasonable belief about a fact and the mistaken belief negates the culpability required for the offense. Stated differently, appellant contends that his ingestion of prescription medication according to his doctor's orders negates the "mens rea" necessary to commit the offense of driving while intoxicated.

We disagree. Proof of a mens rea or particular state of mind was not required to be established here by the State, nor is the voluntary taking of prescription drugs, which impair mental or physical faculties, a defense to driving while intoxicated. *See Aliff v. State*, 955 S.W.2d 891 (Tex. App.—El Paso 1997, no pet.). Contrary to appellant's unsupported allegations, the law does not require the State to prove that appellant was aware of his impairment. We overrule the fourth point of error.

By his fifth and final point of error, appellant argues that the State failed to establish that he was the person who had previously been convicted and placed on community supervision probation, in that the record is silent as to whether he had been placed on community supervision or violated any conditions of his probation. To the contrary, we find that the record is replete with such proof: during his testimony, appellant discussed his efforts to please his probation officer; he identified his signature on a court document showing when

he had been placed on probation, and a probation officer identified appellant as being on probation in Hardin County. During punishment, appellant stated he would do anything necessary to go back to being on probation.

Regardless, we note that appellant did not raise any issue regarding identification below, and has not preserved any error. *Kent v. State*, 809 S.W.2d 664, 666 (Tex. App. – Amarillo 1991, pet. ref'd.). Appellant's fifth point of error is overruled.

The judgment is affirmed.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed September 28, 2000.
Panel consists of Justices Robertson, Sears and Hutson-Dunn.*
Do Not Publish — TEX. R. APP. P. 47.3(b).

* Senior Justices Sam Robertson, Ross A. Sears, and D. Camille Hutson-Dunn sitting by assignment.