

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RICHARD LEON YARBROUGH,

Defendant-Appellant.

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UNPUBLISHED

August 15, 2006

No. 261513

Oakland Circuit Court

LC No. 04-194603-FH

Before: Whitbeck, CJ., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant was charged with operating while intoxicated, MCL 257.625(1), third offense felony, MCL 257.625(6)(D), and violating a license restriction, MCL 257.312. Defendant pleaded guilty to violating a license restriction, MCL 257.312, and, following a jury trial, defendant was convicted of the lesser offense of driving while impaired, MCL 257.625(3). Defendant made a motion for a directed verdict, which was denied, and a motion to adjourn sentencing, which was granted. Defendant was sentenced to two years' probation with 30 days in jail, subject to work release. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's first issue on appeal is that the trial court erred in denying his motion for a directed verdict because there was insufficient evidence to support the conviction of operating while impaired. We disagree. A sufficiency of the evidence claim is reviewed de novo to determine whether a rational fact-finder could have concluded that the prosecution proved all elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v McGhee*, 268 Mich App 600, 612; 709 NW2d 595 (2005). A challenge raised in a motion for a directed verdict of acquittal to the sufficiency of the evidence is resolved by considering all evidence presented up to the time of the motion for a directed verdict. *People v Allay*, 171 Mich App 602, 605; 430 NW2d 794 (1988). Direct and circumstantial evidence is viewed in the light most favorable to the prosecution. *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002). "It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *Id.*

Defendant was convicted of driving while impaired, which is "shown when a defendant's 'ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver,' and that

the ‘weakening or reduction of ability to drive [was] visible to an ordinary, observant person.’” *People v Fett (On Remand)*, 261 Mich App 638, 640; 684 NW2d 369 (2004), quoting *People v Calvin*, 216 Mich App 403, 407; 548 NW2d 720 (1996). A defendant can be convicted of driving under the influence or for driving while impaired where he is observed driving in a normal fashion. *People v Walters*, 160 Mich App 396, 401-402; 407 NW2d 662 (1987). In making its determination, the fact-finder may consider both direct and circumstantial evidence. *Walters, supra*, p 403.

[W]here there is sufficient circumstantial evidence that, due to the consumption of alcohol, a defendant could not drive normally and there is also observational evidence that defendant drove normally for a limited distance, it is possible to conclude that the defendant was operating under the influence of an intoxicating liquor. [*Walters, supra*, p 402].

The evidence shows that Officer Bryan Honsowetz pulled defendant over for making an illegal U-turn to avoid waiting for a train to pass. Defendant could have turned right or left down a side street before getting to the train to avoid it. While talking to defendant, Honsowetz noticed a “moderate odor of intoxicants coming from inside the car.” Defendant told Honsowetz he had just finished drinking. Honsowetz has received training for drunk driving detection, standardized alcohol sobriety, and standardized field sobriety testing. Defendant did not do well on three of the five field sobriety tests. The entire incident was captured on videotape from Honsowetz’s dash-mounted camera, and this was played for the jury. Honsowetz testified that, since January 1, 1998, he had made 223 drunk driving arrests. Based on his experience, Honsowetz felt defendant could not safely operate a motor vehicle and would test as legally intoxicated. The result for both breath samples taken at the station was .08 percent alcohol content. We hold, therefore, that the direct and circumstantial evidence was sufficient to justify a rational trier of fact in finding that, due to his alcohol consumption, defendant was driving while impaired.

Defendant’s second issue on appeal is that the trial court erred in scoring ten points for Offense Variable (OV) 18 under the Michigan Statutory Sentencing Guidelines. We disagree. In reviewing the number of points scored at the trial level, this Court determines whether there was an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *Id.*

The statutory sentencing guidelines apply to enumerated felonies committed on or after January 1, 1999. *People v Babcock*, 469 Mich 247, 255; 666 NW2d 231 (2003); MCL 769.34(2). The trial court uses the guidelines to score the applicable offense and prior record variables to establish the proper range for the minimum sentence. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). These scores are then used with the sentencing grids to determine the minimum sentence range. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The trial court is required to assign the highest number of points that can be assessed under the statute. *Id.*, p 260; MCL 777.48(1).

Offense variable 18 covers “operator ability affected by alcohol or drugs.” MCL 777.48(1). Defendant should receive ten points under OV 18 if his blood alcohol content was .08 grams or more but less than .15 grams per 210 liters of breath. MCL 777.48(1)(c).

Defendant argues he should have received five points under MCL 777.48(1)(d), which covers operating while visibly impaired by the use of alcohol. Defendant argues that the jury's verdict that defendant was not guilty of the greater charge of driving while intoxicated shows that it did not find that he had a blood alcohol level of .08, and under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant is entitled to be sentenced on the facts actually found by the jury. However, *Blakely* has been held to apply only to determinate sentencing based on judicial fact-finding, and therefore, not to the Michigan sentencing guidelines. *People v Drohan*, \_\_\_ Mich \_\_\_; \_\_\_ NW2d \_\_\_; 2006 WL 1642618; *People v Claypool*, 470 Mich 715, 730, n 14; 684 NW2d 278 (2004).

If the evidence supports that defendant had a blood alcohol content of .08, then the trial court was required to assign a score of ten points. *Morson, supra*, p 260; *Hornsby, supra*, p 468; MCL 777.48(1). Honsowetz placed defendant under arrest and transported him to the station to submit him to a breath test on a machine called the DataMaster. Honsowetz was certified in October 1996 as an operator of the DataMaster. The DataMaster used on defendant passed its recent calibration tests. The calibration tests consist of exposing the DataMaster to an air sample with a know quantity of alcohol in it (.08 percent). A detective with the Royal Oak Police Department testified that the machine does not round up in the thousandths, so a .078 would come back as .07. The machine and procedures are designed so that any malfunction would be to the benefit of the subject. Defendant was placed under observation for 15 minutes before being given the test to make sure nothing would contaminate the air sample. Two samples were taken in quick succession, the first at 2:05 am and the second at 2:07 am. The result for both samples was .08. The evidence supports the finding that defendant's blood alcohol level was .08 grams per 210 liters of breath, so the trial court did not err in assigning ten points under OV 18.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder