

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 0503

STATE OF LOUISIANA

VERSUS

MICHAEL A. SEYMOUR

Judgment Rendered: March 23, 2007

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 05-01-0005

Honorable Todd W. Hernandez, Judge

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Michael A. Seymour

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BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

WELCH, J.

The defendant, Michael A. Seymour, was charged by bill of information with one count of driving while intoxicated, fourth offense. His counsel filed a motion to quash one of the predicate offenses. The trial court granted the motion, and the matter proceeded on one count of driving while intoxicated, third offense, in violation of La. R.S. 14:98(D)(1). The defendant pled not guilty, and after a preliminary examination, the trial court found probable cause to support the charge. The defendant waived a jury trial, and following a bench trial, the court found the defendant guilty as charged. The trial court sentenced the defendant to three years imprisonment at hard labor with all but thirty days of the sentence suspended. The court placed the defendant on supervised probation for a period of three years, with special conditions imposed, including that the defendant pay a fine of two thousand dollars.

In this appeal, the defendant urges one assignment of error: that the trial court erred in finding the defendant guilty of driving while intoxicated even though the breath intoxilyzer test was administered without the prerequisite fifteen-minute observation period.

For the reasons assigned, we affirm the conviction and sentence.

STATEMENT OF THE FACTS

Officer Philip Brownleader of the Baton Rouge City Police made a traffic stop of the defendant at approximately 10:28 p.m. on February 23, 2001, after the officer observed the defendant accelerate northbound into a southbound lane on College Drive. He observed the defendant then cut back into the appropriate lane. Initially, the officer heard the defendant's tires screech as the defendant pulled out of a Chevron service station onto College Drive. The defendant did not have his headlights on although it was dark outside. After stopping the defendant, the officer learned that the defendant had no proof of insurance and was driving with a

suspended license. The defendant was very talkative and smelled of alcohol. He appeared to be upset and pleaded with the officer not to arrest him because he had a new baby at home. Believing the defendant to be intoxicated, Officer Brownleader called for assistance. He remained with the defendant until Officer David Delaughter of the Baton Rouge City Police DWI Task Force arrived.

When Officer Delaughter arrived on the scene, he observed that the defendant smelled of alcohol and he noticed that the defendant's balance seemed uncertain. He advised the defendant of his **Miranda**¹ rights and then asked him if he would agree to take the horizontal gaze nystagmus test, one of the standard field sobriety tests. The defendant agreed, and the test was administered. Officer Delaughter concluded that the defendant had "onset at 45 degrees and distinct nystagmus at maximum deviation." Because Officer Delaughter believed the defendant to be intoxicated, he transported him to the DWI van, which was located in the Albertson's parking lot off College Drive. Officer Delaughter testified at trial that although he was not certain, once they arrived at the DWI van, he thinks they might have had to wait before entering until other officers were finished with someone being tested ahead of the defendant. He testified further at trial that he kept the defendant in his constant sight from the time he arrived at the area of the traffic stop through the time they arrived at the Albertson's parking lot. Once inside the van, Officer Delaughter conducted other field sobriety tests on the defendant. Officer Delaughter wrote in his report that the defendant performed well, although not perfectly, on these tests. Officer Delaughter testified that the defendant told him that he had drunk about four sixteen-ounce beers over a period of several hours. Officer Delaughter testified at trial that he was able to observe the defendant for fifteen minutes prior to the administration of the breath intoxilyzer test and did not see the defendant put anything into his mouth, vomit or

¹ **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

belch. The rights form pertaining to the administration of the intoxilyzer test was read to the defendant, and the defendant signed the form. The form was completed at 11:10 p.m. The test showed the defendant's blood alcohol level to be above the legal limit, at .116 grams percent.

Corporal Darryl Honore testified at trial that he videotaped Officer Delaughter administering the field sobriety tests to the defendant. Corporal Honore testified that he observed the defendant for over fifteen minutes prior to the administration of the breath intoxilyzer test and that the defendant did not regurgitate or vomit. Furthermore, he testified that he did not see the defendant put anything into his mouth prior to the administration of the intoxilyzer test. Corporal Honore testified that when Officer Delaughter and the defendant entered the van, Corporal Honore helped Officer Delaughter fill out some paperwork on the defendant, and he contacted the crime information unit to obtain dates of the defendant's previous arrests. Corporal Honore testified that he then filled out an intoxilyzer operational checklist form prior to the administration of the intoxilyzer test. In the form, he confirmed the following: that the defendant was under observation for at least fifteen minutes prior to the test; that during this time, the defendant took nothing by mouth; that a new and clean mouthpiece was used for the intoxilyzer test; and that the defendant was instructed to blow into the mouthpiece until the sound of the tone made by the intoxilyzer stopped. Corporal Honore checked off each item, one by one. The time that observation of the defendant began was noted on the form to be 10:28 p.m., the time of the initial traffic stop. This form was admitted in evidence at trial. The affidavit of arrest form, signed by Corporal Honore, which states that the accused was observed for fifteen minutes and did not regurgitate, vomit or take anything by mouth, was also admitted in evidence at trial. Corporal Honore testified that although he did not have independent recollection of the case, he had no doubt in his mind that more

than fifteen minutes had passed between the time he first began to observe the defendant and the time of the intoxilyzer test. Corporal Honore testified that the total time of observation was easily over fifteen minutes.

The videotape made of the defendant inside the DWI van reflects the following: The videotape begins with the defendant inside the van. It does not reveal whether the videotape was begun shortly after the defendant entered the van or whether it was begun after the defendant was in the van for some time. It does not reflect whether the officers filled out any paperwork prior to the time the videotape was begun. Officer Delaughter read the defendant his rights from the intoxilyzer form and his **Miranda** rights. The defendant then signed the form, indicating that his rights had been read to him. Officer Delaughter then began the administration of the field sobriety tests. According to Officer Delaughter, the defendant performed “well” on the test. However, the defendant did let one foot drop down on one occasion during the leg-raising test. When questioned, the defendant stated that he left Baton Rouge for Lafayette and then returned to Baton Rouge prior to his being stopped on College Drive. He admitted that he drank beer “on the way.” He stated that he drank four sixteen-ounce beers. When the officer asked him whether he was under the influence, the defendant stated, “I had a few.” When asked whether he was taking any medication, he stated only that he took sinus medicine. He did not tell the officers that he suffered from acid reflux or that he took medicine for acid reflux. The defendant stated to the officers, “I’m screwing up my life.” After the videotape had been running for approximately eight minutes and fifty-five seconds, Corporal Honore asked Officer Delaughter whether he had been observing the defendant for fifteen minutes, and Officer Delaughter responded affirmatively. Approximately eleven minutes and forty-six seconds after the videotape had begun, the defendant blew into the intoxilyzer adequately for a reading, after several failed attempts.

ASSIGNMENT OF ERROR

The defendant argues that the officers failed to observe him for fifteen minutes prior to administering the breath intoxilyzer test, as required by La. Admin. Code 55:I.513, as follows:

Procedure for Analysis Using the Intoxilyzer 5000

(A) General observation of the subject for a period of not less than 15 minutes prior to testing whereby the subject shall not have ingested alcohol, alcoholic beverages, regurgitated, vomited, or taken anything by mouth.

The defendant contends that he suffers from acid reflux and that his regurgitation of alcohol caused alcohol to be present in his mouth at the time of the intoxilyzer test, resulting in an inaccurate reading.

The defendant argues on appeal that the intoxilyzer test results should have been inadmissible at trial because of the failure of the officers to observe him for fifteen minutes. He also argues that there was insufficient evidence presented at trial to support the trial court's factual conclusion that he was intoxicated, in light of the officers' inability to unequivocally testify that the defendant was observed for fifteen minutes prior to the administration of the test.

The defendant filed a pretrial motion to suppress the results of the intoxilyzer test based on his assertion that the officers failed to observe the defendant for at least fifteen minutes prior to administering the test. A hearing was held on April 8, 2003, on the motion. At the hearing, Officer Delaughter testified that he was in the DWI van with the defendant for at least fifteen minutes prior to the time at which the breath test was administered. He testified that the defendant was under observation the entire time he was in the van. Corporal Honore testified that the defendant was under observation in the DWI van between fifteen and twenty minutes prior to the administration of the breath test. He stated that, once the defendant was inside the van, the officers began completing the paperwork and

getting everything set up before starting the audio equipment. He stated that both he and Officer Delaughter observed the defendant inside the van for at least fifteen minutes prior to the breath test. Corporal Honore testified that, during that time, he did not notice the defendant regurgitate, vomit or take anything by mouth. Corporal Honore stated that he was in a position to notice if any of those things had occurred, and he stated that there was no doubt in his mind that the fifteen-minute requirement was observed. At the hearing on the motion to suppress, the defendant repeatedly stated that he had no idea how much time had lapsed in the van prior to the administration of the breath test. The trial judge denied the motion to suppress, concluding that the totality of the evidence supported a finding that the defendant had been observed for at least fifteen minutes prior to taking the intoxilyzer test.

The State's trial counsel pointed out at trial that the trial court had previously considered this issue in a motion to suppress the breath test results and had denied the motion. When the defense counsel began to question Officer Delaughter at trial concerning the issue of whether the officers observed the defendant for fifteen minutes prior to administering the intoxilyzer test, the State's counsel objected, asserting that the trial court had already ruled on this issue in favor of the State, denying the defendant's motion to suppress the intoxilyzer test results. The trial court responded that it would allow the defense counsel to question the officer at trial regarding the fifteen-minute observation period.

According to La. C.Cr.P. art. 703(F), a ruling prior to trial on the merits, upon a motion to suppress, is binding at the trial. According to La. C.Cr.P. art. 703(D), the burden of proof is on the defendant to prove the ground of his motion. The evidence presented at the hearing on the motion supports the trial court's conclusion that the fifteen-minute observation requirement had been met. This ruling was then binding at trial.

On appeal, the defendant challenges the breath test evidence, claiming that the introduction of the results points out that he performed well on the field sobriety tests. He alleges that the videotape began to run as soon as he entered the DWI van, and he points out that the videotape is under fifteen minutes long. He points out that there are inconsistencies in Officer Delaughter's testimony. Officer Delaughter testified at trial that the videotape made of the defendant in the DWI van was begun shortly after Officer Delaughter and the defendant entered the van. Officer Delaughter stated at trial, "If I was in the van, I observed him (defendant) for 15 minutes." Officer Delaughter explained that he had no independent recollection of the event, which had occurred four years earlier, but that he was familiar with the procedure of observing the accused for fifteen minutes prior to the administration of the intoxilyzer test. He stated that he was always required to state, prior to the test, whether he had observed the accused for fifteen minutes. Officer Delaughter further stated in cross-examination, "I felt like it was 15 minutes, but I can't be dependent on it." When asked during cross-examination whether he knew how long he was required to have the defendant under observation, Officer Delaughter responded, "I don't recall."

The defendant argues that there were times when the defendant was in the police car and then in the DWI van during which the officers were not watching him. He points out that although Officer Delaughter testified at trial that he kept the defendant in his constant sight, Officer Delaughter testified at the preliminary examination that he did not remember whether he left the defendant in the patrol unit "for a minute" upon arriving at the DWI van. Officer Delaughter testified upon redirect examination at trial that he did have to go inside (the van) and leave the defendant momentarily in the patrol unit. Officer Delaughter stated in conclusion, upon redirect examination at trial, that he did not know exactly how much time transpired from the time he left the van, went to get the defendant from

the patrol unit, and then took him inside the van. He stated that the time beginning when he retrieved the defendant from the patrol unit until he walked him into the van could possibly have been five minutes or more. He stated that to his knowledge, during that time, the defendant did not burp, vomit, regurgitate or put anything in his mouth.

The defendant testified at trial that as soon as he arrived at the DWI van, he was taken straight to the back of the van and was handed the intoxilyzer test rights form. He testified that the videotape was begun immediately and that he was not under observation for a full fifteen minutes prior to giving his breath sample. He testified that Officer Delaughter left him in the patrol unit for about five minutes before then coming to the unit to get him and walk him to the van. He testified that he suffered from acid reflux and that in the video taken inside the DWI van, he can be seen at one point to belch prior to blowing into the intoxilyzer machine. He admitted at trial that he did not tell the officers that he had acid reflux and that he was not taking medicine for acid reflux on the evening of his arrest.²

The evidence and testimony presented at trial support a factual finding that the defendant was observed by both Corporal Honore and Officer Delaughter, for a total of at least fifteen minutes prior to the administration of the intoxilyzer test. The parties stipulated on the trial record that the videotape is eleven minutes and forty-six seconds long. Officer Delaughter walked the defendant from the patrol unit to the van, and the officers filled out some paperwork before the videotape began. Accordingly, the trial court did not abuse its discretion in concluding that the defendant had been observed for at least fifteen minutes before the administration of the intoxilyzer test. Furthermore, the evidence and testimony presented at trial do not support a factual conclusion that an inaccuracy in the

² In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

intoxilyzer test results was caused by the defendant's regurgitating alcohol into this mouth prior to blowing into the intoxilyzer machine. At no time during the video taken inside the DWI van does it appear that the defendant regurgitates or belches.

The defense counsel argues that once the defendant testified that the officers failed to follow the fifteen-minute observation rule, the State had the burden to provide rebuttal evidence at trial. The defendant's counsel cites **State v. Schaub**, 563 So.2d 974, 975-976 (La. App. 1st Cir. 1990), in which this court stated that in order for the State to avail itself of the statutory presumption of a defendant's intoxication arising from a chemical analysis conducted pursuant to La. R.S. 32:662, the State must show that there has been strict compliance with the promulgated regulations assuring the integrity and reliability of the test. In **Schaub**, this court conditionally affirmed the DWI conviction and sentence and remanded for a reopened hearing on the defendant's motion to suppress the results of the breath test. In **Schaub**, unlike the instant case, the State failed to present any evidence to prove that the fifteen-minute observation rule had been followed. In the instant case, both Corporal Honore and Officer Delaughter testified that they observed the defendant prior to the intoxilyzer test for at least fifteen minutes. Furthermore, contemporaneous records in the form of the affidavit of arrest and the operational checklist form reflect that the defendant was observed for fifteen minutes prior to his breath test.

The defendant points out that Officer Delaughter was unable on cross-examination to articulate the time he started to observe the defendant and the time at which he actually arrived with the defendant at the test van. The defendant further points out that, upon cross-examination, Corporal Honore repeatedly admitted that he did not remember specifically how long the defendant was in the test van prior to the breath test. Both officers admitted that they did not have independent recollection of the case without first reviewing their reports and other

documents. Regardless, Corporal Honore stated on redirect examination that he had observed the defendant for at least fifteen minutes prior to the breath test. The defendant's own expert witness, Tommy Hyle, a Louisiana State Police Breath Analysis Instructor Specialist, admitted that he could not say that the officers in this case did not observe the defendant for fifteen minutes.

The standard of reviewing the sufficiency of the evidence supporting a conviction is whether or not, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. A determination of what weight to give evidence is a question of fact for the trier of fact and is not subject to appellate review. **State v. Gordon**, 2001-0236 (La. App. 1st Cir. 2/15/02), 809 So.2d 549, 552, writ denied, 2004-2438 (La. 6/24/05), 904 So.2d 733. When analyzing circumstantial evidence, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. La. R.S. 15:438; **State v. McLean**, 525 So.2d 1251, 1255 (La. App. 1st Cir.), writ denied, 532 So.2d 130 (La. 1988). However, when a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis which raises a reasonable doubt. **State v. Captville**, 448 So.2d 676, 680 (La. 1984).

In the instant case, the fact finder was free to reject the defendant's testimony that he regurgitated alcohol into his mouth prior to taking the breath test. The fact finder was free to reject the defendant's trial testimony that the officers failed to observe him for fifteenth minutes prior to the breath test. We note that the defendant testified at the hearing on his motion to suppress that he did not know

how long he was under observation in the DWI van. Although the two officers could not give a precise start time for the fifteen-minute observation period, the fact finder was free to accept that they had in fact watched the defendant for fifteen minutes prior to the breath test and saw no signs that he belched or regurgitated. Because the officers had not independent recollection of the event that had occurred four years earlier, the officers relied on their records, which reflected that the defendant was in fact observed for at least fifteen minutes prior to administration of the breath test. The intoxilyzer test revealed the defendant's blood alcohol was above the legal limit. Additionally, the defendant admitted to drinking alcohol prior to the traffic stop. His statements on the videotape and reckless driving support a conclusion that he was driving while intoxicated. We find that the evidence is sufficient for a rational trier of fact, having reasonably rejected the defendant's hypothesis of innocence, to conclude beyond a reasonable doubt that the defendant was driving while intoxicated. See Captville, 448 So.2d at 680. This assignment of error is without merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.