

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 2183

STATE OF LOUISIANA

VERSUS

TODD J. CONSTANTINE

JKW

gall

[Signature]

Judgment Rendered: March 26, 2008

Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 7-05-0261

Honorable Michael Erwin, Judge

Doug Moreau, District Attorney
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Baton Rouge, LA

Attorneys for
State – Appellee

Carl E. Babin
Baton Rouge, LA

Attorney for
Defendant – Appellant
Todd J. Constantine

BEFORE: CARTER, C.J., PETTIGREW AND WELCH, JJ.

WELCH, J.

The defendant, Todd J. Constantine, was charged by bill of information with operating a vehicle while intoxicated (fourth offense DWI), in violation of La. R.S. 14:98. The defendant entered a plea of not guilty. The defendant waived his right to a jury trial. Following a bench trial, the defendant was found guilty as charged.

The trial court sentenced the defendant to ten years imprisonment at hard labor. The trial court suspended all but sixty days of the sentence and placed the defendant on active, supervised probation for a period of five years. In addition to general conditions of probation, the trial court ordered the defendant to pay a fine of five thousand dollars (suspended) plus court costs and fees, to undergo substance abuse treatment, and to serve one-year supervised, monitored home incarceration. The trial court also noted that the defendant would be prohibited from operating any vehicle that is not equipped with an ignition interlocking device. The defendant was ordered to pay costs associated with conditions of probation, to complete a driver improvement program, to attend Alcoholics Anonymous meetings, to maintain full-time and/or gainful employment, to remain conviction, alcohol, and illegal drug free, and to submit to random drug and alcohol testing.

The defendant now appeals, arguing that the trial court erred in finding sufficient evidence to convict the defendant. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

On or about May 12, 2005, near 1:00 p.m., Louisiana State Police Trooper Darryl Davis, while on patrol on Bluebonnet Road near Perkins Road in Baton Rouge, observed the defendant toss a piece of plastic from the driver's window of the vehicle he was operating. Trooper Davis initiated a traffic stop for littering.

Trooper Davis advised the defendant of the reason for the stop and requested his driver's license and vehicle documentation. The defendant was unable to produce proper identification or documentation. Trooper Davis read the defendant his **Miranda** rights, questioned him, and administered a field sobriety test. Trooper Davis ultimately placed the defendant under arrest for driving while intoxicated.

ASSIGNMENT OF ERROR

In the sole assignment of error, the defendant contends that there was insufficient evidence to support the conviction because the State failed to prove that he was under the influence of a controlled dangerous substance. While not contesting that he was wearing a Fentanyl patch at the time of the stop or his consumption of a Lortab and a Klonopin the morning of the stop, the defendant complains that the officers did not determine the dosage or frequency of consumption. The defendant stresses every medication affects each person differently. The defendant further contends that the officers observed virtually no behavioral manifestations of intoxication and that there was no evidence that his driving was impaired. The defendant notes that he was cooperative, had no trouble answering questions or providing information, and the troopers had no problem understanding him. Finally, the defendant notes that Trooper Davis did not elaborate on or describe the clues that were observed during the sole field sobriety test, the horizontal gaze nystagmus test.

The constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979), requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. La. C.Cr.P. art. 821. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every

fact to be proved that the evidence tends to prove,” every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. **State v. Wright**, 98-0601, p. 2 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732.

Initially, we note that because the defendant passed the breath test, but refused to take a urine test, the legal presumption of intoxication contained in La. R.S. 14:98A(1)(b) is inapplicable herein. Nevertheless, in order to convict an accused of driving while intoxicated, the State need only prove that the defendant was operating a vehicle and that he was under the influence of alcohol or drugs. **State v. Pitre**, 532 So.2d 424, 428 (La. App. 1st Cir. 1988), writ denied, 538 So.2d 590 (La. 1989).

Intoxication, with its attendant behavioral manifestations, is an observable condition about which a witness may testify. What behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. Some behavioral manifestations, independent of any scientific tests, are sufficient to support a charge of driving while intoxicated. **Pitre**, 532 So.2d at 428.

Trooper Davis testified that the defendant fumbled through papers in an attempt to locate the requested documentation and displayed motor-skill and hand/eye coordination deficiencies. Trooper Davis described the defendant’s speech as low, slurred, and incoherent. Trooper Davis became suspicious that the defendant was impaired but noted that he did not smell any alcohol. After Trooper Davis read the defendant his **Miranda** rights, he asked the defendant if he was injured or had a speech impediment. The defendant informed the trooper that he had injured his leg in a motorcycle accident. The defendant further informed the trooper that at the time of the stop he was wearing a patch that injects Fentanyl pain medication and that he had taken Soma, a Lortab, and a Klonopin earlier that

morning. Trooper Davis testified that he observed intoxication clues while performing the horizontal gaze nystagmus field sobriety test. Trooper Davis did not administer the walk-and-turn or one-leg-stand tests due to the defendant's injured leg.

The defendant was placed under arrest for DWI and transported to State Police Troop A. The defendant stated that he had not consumed any alcohol and agreed to take a breathalyzer test. The breathalyzer test did not detect the presence of alcohol. The defendant refused a urine test, stating that he did not want anything to show up. When the defendant was allowed to use the rest room, without handcuffs, Trooper Davis observed him urinate on the floor as he missed the urinal. While at Troop A, the defendant appeared very relaxed and sedated and his speech remained low, slurred, and garbled. Trooper Davis had to repeat several of the questions that he asked the defendant and also had to ask the defendant to repeat several responses to questions.

Louisiana State Trooper Gerald Varnado observed the defendant at Troop A. Trooper Varnado testified that the defendant told him he had taken Lortab and Klonopin at 10:00 that morning, and had put the patch on before he took these medications. Trooper Varnado stated that the defendant's eyes were barely open. Trooper Varnado described the defendant's speech as slow, sluggish, and unclear. He attested that the defendant drifted off while he was speaking, as though in a "semi-conscious" state. According to Trooper Varnado, the dosage on the Fentanyl patch (a narcotic analgesic) was 25 mcg. Trooper Varnado concluded that the defendant's symptoms were narcotic related. Trooper Varnado testified that the defendant's consumption of Klonopin, a depressant, was consistent with his performance on the horizontal gaze nystagmus test. Trooper Varnado checked the defendant's pulse and determined that the defendant's heart rate was fifty-eight beats per minute. Trooper Varnado stated that the rate was an indication that the

defendant's system was slowing down, noting that sixty to ninety beats per minute would be considered normal. Trooper Varnado confirmed that the defendant's heart rate was consistent with the use of Lortab and the Fentanyl pain patch. Further, he stated the decrease in heart rate would indicate a decrease in one's ability to react or properly operate a vehicle.

Stephen Fugarino, the passenger of the vehicle operated by the defendant at the time of the stop, also testified. Fugarino rode with the defendant on prior occasions. The defendant picked Fugarino up near 11:00 a.m. on the date in question. Fugarino testified that the defendant was not driving to the best of his ability on the date in question. Fugarino added, "he just, it didn't seem like he was all mentally there that day, for some reason. I don't know if he was mad at something or what it was, but he, I don't know if it was something that set him off to make him drive a different way that day but he really wasn't driving the same way that he usually was, seemed like." The defendant's erratic driving made Fugarino fearful that day. Fugarino specified that the defendant was driving fast and was weaving in and out of traffic. The defendant swerved as he reached for a sandwich located in the center console. Fugarino recalled a near collision when the defendant pulled out in front of an oncoming vehicle. Fugarino testified that he routinely feared for his life while riding with the defendant; however Fugarino reiterated that the defendant "didn't seem right" on the date in question and was driving differently. Fugarino was aware of the defendant's pain medication prescriptions and also noted that the defendant frequently complained of pain on other occasions. The defendant had complained of leg pain on the date in question; however, the two had plans to ride motorcycles. During cross-examination, Fugarino stated that the defendant had a head injury and suffers from seizures. Fugarino stated that the defendant would take seizure medication and had a daily tablet dispenser. At the time of the stop, Fugarino informed the trooper that the

defendant was taking medication. Fugarino noted that the defendant could barely walk when he exited the vehicle and stated that he assumed the trooper noticed. Fugarino clarified that the defendant's inability to walk was due to his leg injury.

Janice Landry, a registered pharmacist, testified that Fentanyl is an opiate drug, a Schedule II controlled dangerous substance, prescribed for long-term chronic pain. The patch is applied to the skin and absorbed through the fat in the body. The patch lasts for three days and the dose is transfused every hour. Slurred speech, loss of consciousness, and incoherence are possible side effects. Lortab is the brand name for a combination of hydrocodone (an opiate analgesic), a Schedule II controlled dangerous substance, and acetaminophen. Trouble staying awake, slurred speech and blurred vision are typical side effects. This medication peaks in approximately one hour and its half-life is three and one-half hours. Klonopin is the brand name for clonazepam, a Schedule IV controlled dangerous substance. It is an antianxiety agent and can be used to prevent seizures. Results of the medication begin within an hour and the half-life is about thirty hours. Landry testified that someone who took these drugs at 10:00 a.m. would be sluggish with an abnormal mental state by noon. They would suffer from memory loss and lack of coherence. Landry further testified that patients consuming such drugs would be cautioned not to drive (due to the lack of motor skills) or to do anything that would require them to be alert or react quickly. Landry never examined the defendant and was not aware of his medical history or prescription or dosage specifications. Landry testified that the mixture of the above-named drugs could strengthen the effect of all the drugs.

The sole defense witness, Mary Debate (an assistant nursing services director with the East Baton Rouge Parish Prison E.M.S.) stated that the defendant was taking three hundred milligrams of Dilantin since his May 2005 incarceration. Side effects of the drug include blurred vision, dizziness, slurred speech, unsteady

gait, and nausea and it could possibly impair the ability to operate a vehicle. On cross-examination, Debate confirmed that she was not aware of what the defendant took on the date in question or prior to his admission into parish prison. She further testified that the defendant had not reported side effects to Dilantin such as blurred vision, dizziness, or nausea.

After a careful review of the record, we find that the evidence supports the trial court's determination of guilt. There was sufficient evidence of behavioral manifestations to support a finding of driving while intoxicated. The officers consistently testified that the defendant had slurred speech, was sluggish, incoherent and had deficient motor skills. The defendant volunteered information regarding his consumption of drugs that could clearly influence and impair his ability to operate a vehicle at the time of the stop. The passenger of the vehicle stated that the defendant's driving and state of mind were abnormal on the date in question. We are convinced that a rational trier of fact, viewing all of the evidence as favorable to the prosecution as any rational fact finder can, could have concluded that the State proved beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the instant DWI offense. The defendant does not contest the evidence of the predicate DWI convictions. Due to the foregoing conclusions, the sole assignment of error lacks merit.

CONCLUSION

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

CONVICTION AND SENTENCE AFFIRMED.