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FILED
Mar 17 2009, 9:10 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

TERRY SMITH,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A05-0810-CR-621
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Michael Morrissey, Judge
Cause No. 79D06-0702-FD-46

March 17, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Terry Smith appeals his convictions for operating a vehicle while intoxicated as a class D felony[1] and operating a motor vehicle while privileges are suspended as a class D felony[2] and his status as a habitual substance offender.[3] Smith raises two issues, which we revise and restate as:

I. Whether the trial court erred by denying his motion for discharge under Ind. Criminal Rule 4(C); and

II. Whether the evidence is sufficient to sustain his convictions.

We affirm.

The relevant facts follow. On the evening of December 20, 2006, Father John Schultz let Smith borrow his silver sport utility vehicle ("SUV") on condition that someone with a valid driver's license drive it, as Smith's license had been suspended. Smith and Father Schultz agreed that their friend Teresa Allio would drive the vehicle, and the three of them went out to dinner together. After dinner, Allio and Smith dropped Father Schultz off at his home.

Later that night, Benjamin Irvin was returning home to his apartment with some friends when he saw the silver SUV "driving from behind the apartment complex where there is no road." Transcript at 12. Irvin and his friends parked their car at the side of the apartment building and walked to the front of the building to check on the driver of the vehicle. They found Smith sitting in the driver's seat with his head slumped over the

[1] Ind. Code §§ 9-30-5-2 & -3 (2004).

[2] Ind. Code § 9-30-10-16 (2004).

[3] Ind. Code § 35-50-2-10 (Supp. 2006).

steering wheel. They asked Smith if he was okay, and Smith responded by asking for "a light or a smoke or something." Id. at 16. When Irvin and his friends replied that they did not have a light, Smith "cussed at [them]," so they left and called the police. Id.

When West Lafayette Police Department Officer Mark Ridge arrived at the scene, Smith exited the driver's side of the vehicle, staggered to the back of the vehicle, and "was basically hugging the back wheel" as Officer Ridge approached him. Id. at 25. Officer Ridge asked Smith what had happened, and Smith replied that "he was tired of waiting so he decided to drive home." Id. When Officer Ridge questioned him further, Smith responded that the vehicle was owned by his boss and that he was unsure of his own location. A blood draw revealed that Smith had a blood alcohol level of 0.211. An investigation conducted by West Lafayette Police Department Officer J. Coomey later revealed that the vehicle had scraped against a guard rail in the back of the apartment parking lot and then struck a tree.

On February 8, 2007, the State charged Smith with: (1) Count I, operating a vehicle while intoxicated as a class A misdemeanor; (2) Count II, operating a vehicle with at least 0.15 gram of alcohol as a class A misdemeanor; (3) Count III, operating a vehicle while intoxicated while having a prior conviction for operating a vehicle while intoxicated as a class D felony; (4) Count IV, operating a vehicle while privileges are suspended as a class D felony; and (5) Count V, false and fictitious display of license and registration information on a vehicle. The State also filed a habitual substance offender enhancement.

At an initial hearing on March 19, 2007, the trial court scheduled the jury trial for May 10, 2007. On May 3, 2007, the trial court continued the trial to July 26, 2007. On July 26, 2007, because of congestion of the court's calendar, the trial court continued the trial to October 18, 2007. On October 25, 2007, because of congestion of the court's calendar, the trial court continued the trial to January 24, 2008.[4] On January 24, 2008, because of congestion of the court's calendar, the trial court continued the trial to March 6, 2008. On March 6, 2008, because of congestion of the court's calendar, the trial court continued the jury trial to April 10, 2008. On April 10, 2008, because of congestion of the court's calendar, the trial court continued the trial to May 15, 2008.

On April 22, 2008, Smith filed a motion for discharge pursuant to Ind. Criminal Rule 4(C), which the trial court denied.[5] Smith moved to file an interlocutory appeal, but the trial court denied the motion. On May 7, 2008, Smith filed a pro se motion for a fast and speedy trial, which the trial court referred to Smith's attorney for review. On May 19, 2008, because of congestion of the court's calendar, the trial court continued the trial to June 19, 2008. On May 22, 2008, the State moved, and Smith agreed, to reschedule the trial for August 14, 2008, and the trial court granted the motion.

At the bench trial on August 14, 2008, Smith stipulated that he was a habitual traffic offender on the night in question. The trial court found Smith guilty of operating a vehicle while intoxicated as a class D felony and operating a motor vehicle while

[4] The record does not reveal why Smith was not tried on October 18, 2007.

[5] Smith does not provide us with a copy of his motion for discharge.

privileges are suspended as a class D felony and found that Smith is a habitual substance offender. The trial court sentenced Smith to three years for the operating while intoxicated conviction and a concurrent term of three years for the operating while privileges are suspended conviction. The trial court enhanced the operating while intoxicated conviction by five years for Smith's status as a habitual substance offender and ordered that, of the eight year aggregate sentence, four years be executed in the Indiana Department of Correction, two years served in community corrections, and two years suspended to probation.

I.

The first issue is whether the trial court erred by denying Smith's motion for discharge under Ind. Criminal Rule 4(C). The right of an accused to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and by Article 1, Section 12 of the Indiana Constitution. Alter v. State, 860 N.E.2d 874, 876 (Ind. Ct. App. 2007) (citing Clark v. State, 659 N.E.2d 548, 551 (Ind. 1995)). The provisions of Ind. Criminal Rule 4 implement the defendant's speedy trial right by establishing time deadlines by which trials must be held. Id. Rule 4(C) provides the following:

> No person shall be held on recognizance or otherwise to answer a criminal charge for a period in aggregate embracing more than one year from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge, whichever is later; except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall file a timely motion

> for continuance as under subdivision (A) of this rule.[6] Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so held shall, on motion, be discharged.

The duty to bring the defendant to trial within one year of being charged or arrested is an affirmative one which rests with the State. Alter, 860 N.E.2d at 877 (citing Cook v. State, 810 N.E.2d 1064, 1065 (Ind. 2004)). Criminal Rule 4 authorizes trial courts to exceed the deadlines when required to do so by congestion of the court's calendar. Id. Further, if a defendant seeks or acquiesces in a delay which results in a later trial date, the time limitation is extended by the length of such delay. Id. (citing Vermillion v. State, 719 N.E.2d 1201, 1204 (Ind. 1999), reh'g denied).

Smith challenges the trial court's findings of court congestion. Specifically, Smith argues that the prosecuting attorney failed to file a motion for a continuance because of

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[6] Ind. Criminal Rule 4(A) provides:

> No defendant shall be detained in jail on a charge, without a trial, for a period in aggregate embracing more than six (6) months from the date the criminal charge against such defendant is filed, or from the date of his arrest on such charge (whichever is later); except where a continuance was had on his motion, or the delay was caused by his act, or where there was not sufficient time to try him during such period because of congestion of the court calendar; provided, however, that in the last-mentioned circumstance, the prosecuting attorney shall make such statement in a motion for continuance not later than ten (10) days prior to the date set for trial, or if such motion is filed less than ten (10) days prior to trial, the prosecuting attorney shall show additionally that the delay in filing the motion was not the fault of the prosecutor. Provided further, that a trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time. Any defendant so detained shall be released on his own recognizance at the conclusion of the six-month period aforesaid and may be held to answer a criminal charge against him within the limitations provided for in subsection (C) of this rule.

court congestion and that, therefore, "[t]his makes the finding of congestion to look suspect at best." Appellant's Brief at 8. However, Smith ignores the fact that, under Ind. Criminal Rule 4(C), "a trial court may take note of congestion or an emergency *without the necessity of a motion*, and upon so finding may order a continuance." (emphasis added).

Here, the trial court made several findings of congestion. Upon appellate review, a trial court's finding of congestion will be presumed valid and need not be contemporaneously explained or documented by the trial court. Id. (citing Clark, 659 N.E.2d at 552). However, a defendant may overcome this presumption by demonstrating that the findings of congestion were factually or legally inaccurate. James v. State, 716 N.E.2d 935, 939 (Ind. 1999) (citing Clark, 659 N.E.2d at 552). Smith has not developed an argument that the finding of congestion was factually or legally inaccurate and has therefore waived the argument. Accordingly, we cannot say that the trial court erred by denying Smith's motion for discharge under Ind. Criminal Rule 4(C).

II.

The next issue is whether the evidence is sufficient to sustain Smith's convictions. When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess witness credibility or reweigh the evidence. Id. We consider conflicting evidence most favorably to the trial court's ruling. Id. We affirm the conviction unless "no reasonable fact-finder could find

the elements of the crime proven beyond a reasonable doubt." Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. Id.

Smith argues that "it is just as likely that Allio was the driver as was Smith" and that "there was not testimony that the vehicle was being operated or that it was even running." Appellant's Brief at 9. Our review of the record reveals that Irvin saw the silver SUV "driving from behind the apartment complex where there is no road." Transcript at 12. When Irvin and his friends approached the vehicle, they found Smith in the driver's seat slumped over the steering wheel. Smith later told Officer Ridge that "he was tired of waiting so he decided to drive home." Id. at 25. We conclude that Smith merely asks us to reweigh the evidence and assess witness credibility, which we cannot do. See Drane, 867 N.E.2d at 146. We find sufficient evidence to sustain Smith's convictions.

For the foregoing reasons, we affirm the trial court's denial of Smith's motion for discharge as well as his convictions for operating while intoxicated as a class D felony and operating a motor vehicle while privileges are suspended as a class D felony and his status as a habitual substance offender.

Affirmed.

ROBB, J. and CRONE, J. concur