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IN THE
COURT OF APPEALS OF INDIANA

CLINT CULLEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 31A04-1009-CR-626
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HARRISON SUPERIOR COURT
The Honorable Roger Davis, Judge
Cause No. 31D01-0712-FD-868

May 25, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Clint Cullen (Cullen), appeals the trial court's denial of his verified petition for judicial review of alleged refusal to submit to a chemical test.

We affirm.

ISSUE

Cullen raises one issue on appeal, which we restate as the following: Whether the trial court abused its discretion by refusing to admit Cullen's physicians' depositions.

FACTS AND PROCEDURAL HISTORY

On the evening of December 7, 2007, Cullen was involved in a vehicle collision in Corydon, Indiana. When Harrison County Sheriff Lieutenant Roy Wiseman (Officer Wiseman) arrived at the scene, he believed Cullen to be intoxicated based on the "odor of alcoholic beverages," and Cullen's "blood shot eyes," unsure balance, and clumsy dexterity. (Appellant's App. p. 10). Cullen participated in four field sobriety tests, all of which he failed. Thereafter, Officer Wiseman read Cullen the Indiana Implied Consent Form, which Cullen signed. Cullen submitted to the Portable Breath Test which indicated a 0.15% "Blood or Breath Alcohol Content." (Appellant's App. p. 10). Subsequently, Officer Wiseman requested Cullen to take a chemical test. Cullen agreed.

Cullen accompanied Officer Wiseman to the Sheriff's Department where he signed an implied consent form to take a chemical test. Officer Wiseman explained the process and instructed Cullen to blow long and steady into the mouthpiece. Officer Wiseman determined Cullen to be uncooperative because he "wasn't blowing into the instrument hardly at all."

(Transcript p. 15). As such, Officer Wiseman noted that Cullen had refused to take the chemical test.

On December 17, 2007, the State filed an Information charging Cullen with Count I, operating while intoxicated, a Class D felony, Ind. Code §9-30-5-3; Count II, operating while intoxicated, a Class A misdemeanor, I.C. § 9-30-5-2; Count III, operating while intoxicated, a Class C misdemeanor, I.C. § 9-30-5-2; Count IV, public intoxication, a Class B misdemeanor, I.C. § 7.1-5-1-3. On February 5, 2008, the State amended the Information, charging Cullen to be an habitual substance offender pursuant to I.C. § 35-50-2-10.

On January 14, 2008, Cullen filed a motion to stay certification of refusal to submit to chemical test, alleging that an obstructive lung disease limited his ability to comply with Officer Wiseman's directions for the chemical test. The trial court denied the motion. On March 5, 2008, Cullen filed his verified petition to vacate refusal. Thereafter, on September 28, 2009, Cullen filed an amended verified petition for judicial review of alleged refusal to submit to a chemical test. On August 9, 2010, the trial court conducted a hearing on Cullen's petition to vacate, which was denied on August 18, 2010.

Cullen now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Cullen contends that the trial court improperly denied his verified petition for judicial review of alleged refusal to submit to a chemical test. Specifically, Cullen claims that the trial court abused its discretion when it refused to admit the depositions of two of Cullen's

treating physicians who stated that Cullen was unable to perform the chemical test due to a pulmonary disease.

We note that a trial court's denial of a defendant's petition for judicial review of a chemical breath test refusal determination is a final appealable judgment. *See* I.C. § 9-30-6-10(g). However, our review of this judgment is limited. We can only determine whether the evidence is sufficient as a matter of law to support the findings that: (1) the arresting officer had probable cause to believe that the driver was operating a vehicle while intoxicated and (2) the driver refused to submit to a chemical test offered by a law enforcement officer after being informed of the consequences of such refusal. *Upchurch v. State*, 839 N.E.2d 1218, 1220 (Ind. Ct. App. 2005). In doing so, we will not weigh the evidence nor judge the credibility of the witnesses and we will consider only the evidence favorable to the trial court's decision. *Id*. The petitioner has the burden of proving by a preponderance of the evidence the allegations in his or her petition. I.C. § 9-30-6-10(f).

Here, Cullen's treating physicians were not present at the hearing where he attempted to admit their depositions. "The State objected on the grounds that the depositions were hearsay" and the trial court "sustain[ed] the State's objection." (Appellant's App. p. 101). Generally, deposition testimony of an absent witness offered in court to prove the truth of the matter asserted constitutes classic hearsay. *Jackson v. State*, 735 N.E.2d 1146, 1150 (Ind. 2000). Possible exceptions to the hearsay rule lie under both Indiana Trial Rule 32 and Indiana Evidence Rule 804, which allow the use of prior recorded testimony in lieu of live testimony in certain circumstances. *See Garner v. State*, 777 N.E.2d 721, 723 (Ind. 2002).

Specifically, under Indiana Trial Rule 32 deposition testimony may be admitted if the trial court finds that "the witness is outside the state" or "upon exceptional circumstances." *See* Ind. Trial Rule 32(A). Pursuant to Indiana Rule of Evidence 804, deposition testimony may be admitted if the witness is "unavailable." *See* Ind. Rule Evid. 804. The proponent of the deposition testimony carries the burden to demonstrate the declarant's unavailability. *See Garner*, 777 N.E.2d at 723. Here, Cullen made no argument that his treating physicians were unavailable to testify or that exceptional circumstances existed to admit the depositions.[1] We conclude that the trial court did not abuse its discretion.[2]

CONCLUSION

Based on the foregoing, we conclude that the trial court properly denied the admission of two proposed depositions.

Affirmed.

DARDEN, J., concurs.

BARNES, J., concurs in result.

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[1] Cullen's argument centers on the application of Indiana Trial Rule 30 and Indiana Rule of Evidence 804 to hearsay within hearsay. However, we do not need to address the double hearsay issue as Cullen never showed that the physician's were unavailable within the confines of Ind. T. R. 32 or Ind. Evid. R. 804.

[2] Because we decide this case based on Indiana Trial Rule 32 and Indiana Rule of Evidence 804, we will not address the State's argument that as this is an essential civil matter, "[b]y improperly appealing under his criminal cause number, Cullen has effectively taken an interlocutory appeal without leave of the court." (Appellee's Br. p. 4).