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IN THE COURT OF APPEALS OF INDIANA

GREGORY MINOR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0702-CR-184
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Reuben B. Hill, Judge and The Honorable Scott Devries, Commissioner
Cause No. 49F18-0506-FD-100025

November 28, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Gregory Minor appeals his conviction of operating a vehicle while intoxicate (OWI), elevated to a class D felony because of a prior OWI conviction. Minor presents the following restated issues for review:

1. Did the State present sufficient evidence to support the OWI conviction?

2. Did the trial court err in ruling that Minor had refused a chemical test?

We affirm.

The facts favorable to the conviction are that at about 7:40 p.m. on June 12, 2005, Officer Andrew Spalding of the Indianapolis Police Department was dispatched to the scene of a reported vehicular accident in Indianapolis. When he arrived approximately twenty minutes later, he observed two vehicles, one with damage to the front, the other with damage to the rear. He saw a man, later identified as Minor, sitting alone, slumped over the steering wheel of the vehicle with front-end damage. According to Officer Spalding, "He was out." *Transcript* at 10. Rain was falling on Minor through the open driver's side window.

Officer Spalding approached Minor and noted that he smelled of alcohol. After unsuccessfully attempting to rouse Minor, Officer Spalding gave him a sternum rub. At that point, Minor "came around" and "kind of just looked up at" Officer Spalding. *Transcript* at 81. The officer noted that Spalding eyes were glassy and bloodshot. Officer Spalding began asking questions, but Minor was "very incoherent" and the officer "couldn't really understand what he was saying." *Id*. at 82. When asked for his driver's license, Minor produced only an identification card instead. Officer Spalding

asked Minor to step out of his car and Minor complied. Once outside the vehicle, Minor started to stumble and the Officer "grabbed him to make sure he didn't fall down." *Id*. at 83. Minor then leaned on the car. Officer Spalding formed the opinion that Minor was intoxicated.

Paramedics arrived, examined Minor, and determined that he was not injured. Officer Spalding decided not to administer field sobriety tests to Minor, for two reasons. First, police department personnel were busy that night with an unusually high number of calls. Second, as explained by Officer Spalding: "I just believed it was a danger to Mr. Minor, I mean, just the way it was, by me having to pretty much carry him to the medics, I just [did not] want him to get hurt trying to perform the test." *Id*. at 87. Officer Spalding then read Minor the implied consent warning, as follows:

> I have probable cause to believe you have operated a vehicle while intoxicated. I must now offer you the opportunity to submit to a chemical test, and inform you that your refusal to submit to a chemical test will result in the suspension of your driver's license for a year.

Id. at 88. Minor responded, "No". *Id*. Officer Spalding placed Minor in the back seat of his squad car and began the paperwork. While he was doing so, Officer Spalding again read the implied consent warning to Minor, who again responded in the negative, then slumped over in the seat and passed out.

On June 13, 2005, Minor was charged under Count I with OWI as a class A misdemeanor, under Count II with public intoxication as a class B misdemeanor, and under Count III with OWI as a class C misdemeanor. A separate count alleged that the

charge under Count I should be enhanced to a class D felony because Minor was convicted of an OWI offense within five years immediately preceding the date the instant offense was alleged to have occurred. In a bifurcated trial, after the jury found Minor guilty of Counts I – III, Minor pleaded guilty to the class D felony enhancement, with sentencing left to the court's discretion. At a subsequent hearing, the court entered judgment of conviction against Minor only on the class D felony OWI offense. The court sentenced him to 730 days imprisonment, with 545 days executed (180 days in prison, followed by 365 days on home detention) and the remaining 185 days on probation.

1.

Minor contends the evidence was not sufficient to support his conviction. In order to sustain a conviction under I.C. § 9-30-5-2, the State must prove beyond a reasonable doubt that (1) the accused (2) operated (3) a vehicle (4) while (5) intoxicated. *Flanangan v. State*, 832 N.E.2d 1139 (Ind. Ct. App. 2005). Minor challenges the State's proof only with respect to the fourth element. As Minor phrases it: "The State failed to prove when Mr. Minor drove." *Appellant's Brief* at 5.

When considering a challenge to the sufficiency of evidence supporting a conviction, we neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). This review "respects 'the [fact-finder]'s exclusive province to weigh conflicting evidence.'" *Id*. at 126 (quoting *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind. 2001)). Considering only the probative evidence and reasonable inferences supporting the verdict, we must affirm "'if the probative evidence and

reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *McHenry v. State*, 820 N.E.2d at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

In support of his contention, Minor cites *Flanagan*. In that case, the defendant was traveling on a highway when his vehicle became disabled. A sheriff's deputy saw the disabled vehicle on the side of the road and also saw the defendant and another man standing near the rear of the vehicle. The deputy could not stop to assist the men at the time, but later returned. By that time, the men had started walking. The deputy gave the men a ride to a nearby convenience store. Before doing so, however, he drove the men back to their vehicle. At that time, the deputy noted the defendant had the keys to the broken-down vehicle in his pocket. While transporting the men to the store, the deputy detected the odor of alcohol on the defendant and observed that his eyes were red and watery and his speech was slurred. The deputy asked the defendant to submit to a portable breath test, which the defendant failed. The deputy then transported the defendant to jail, where the defendant informed jail personnel that he had been driving from Fort Wayne when his vehicle broke down. When the officer later returned to the vehicle to secure it, he observed empty beer cans in paper bags on the back seat floorboard behind the driver's seat. The defendant was subsequently convicted of OWI and appealed, claiming insufficient evidence.

We reversed, noting that the deputy first spotted the defendant's broken-down vehicle at around 4:00 p.m. He did not know how long the vehicle had been sitting on

the side of the roadway before he first encountered it. When he returned to the vehicle he observed beer cans inside the car. Although the defendant subsequently admitted he had consumed some beer, there was no evidence presented concerning when he did so. Identifying that as a critical piece of evidence, we concluded "because it could be that [the defendant] consumed beer after the vehicle broke down, and when the beers were all gone, the men decided to venture to a nearby store to call for assistance", *id*. at 1141, the State failed to meet its burden of proving beyond a reasonable doubt that the defendant operated a vehicle while intoxicated, and therefore the conviction was reversed.

Minor contends the *Flanagan* rationale applies here, stating, "[j]ust as with *Flanagan*, the State did not prove when Mr. Minor drank in relation to when he drove. The State presented no evidence to show when the driving occurred." *Appellant's Brief* at 7. Minor further notes that no one, including Minor, offered testimony as to when the accident occurred. Thus, the argument goes, because no one saw him drive and no one saw him consume alcohol, there is not sufficient evidence that he drove while intoxicated.

We agree with the State that the facts of this case differ significantly from those in *Flanagan.* In *Flanagan*, the defendant's car was broken down beside the road when the police officer came upon it. There was no evidence, circumstantial or otherwise, that tended to indicate when the defendant drove the vehicle relative to the time he was discovered to be intoxicated. In the instant case, on the other hand, Officer Spalding arrived at the scene of a reported accident approximately twenty minutes after receiving

the call. He discovered two vehicles. It may be inferred, based upon their locations relative to each other and the street and their respective damaged conditions, that they had just collided with each other and sat where they had come to a stop following the collision. Minor sat alone and intoxicated in the driver's seat of one of those vehicles. There was no evidence that alcohol containers were found in the vehicle, and no evidence presented at trial gives rise to a reasonable inference that Minor came to the scene of the accident by means other than driving the car in which he was found passed out in the driver's seat. Thus, unlike *Flanagan*, the evidence in this case reflects that Minor's operation of a vehicle and his intoxicated condition both occurred in a relatively short time period. *See McCray v. State*, 850 N.E.2d 998 (Ind. Ct. App. 2006); *see also Weida v. State*, 693 N.E.2d 598 (Ind. Ct. App. 1998), *trans. denied*. In fact, the evidence permits a reasonable inference that those events occurred simultaneously.

Minor's actions, presence, and location at the scene of the accident permit a reasonable inference that he drove there while intoxicated and was involved in a collision at that location. The evidence was sufficient to support the judgment.

2.

Minor contends the trial court erred in ruling that Minor had refused a chemical test. Minor argues that, in fact, "he was unable to refuse the test," *Appellant's Brief* at 9, meaning he was too intoxicated at the time to knowingly respond to the request.

In *Roberts v. State*, 474 N.E.2d 144 (Ind. Ct. App. 1985), we held that a driver's state of intoxication may not be used as a basis for avoiding the consequences of a refusal

to submit to chemical testing on grounds the driver was incapable of making a knowing and valid decision. All that is required is the defendant knows he has been asked to submit to a chemical test and has been advised of consequences of refusal, whether or not he is able to make reasoned judgment as to what course of action to take. *Id.;* see *also Zakhi v. State*, 560 N.E.2d 683, 686 (Ind. Ct. App. 1990) ("[t]here is no requirement that a driver's refusal of a breathalyzer test be knowing").

In summary, to establish an adequate refusal under the implied consent statute, the driver must know he has been asked to consent to a chemical test, and the arresting officer must inform the accused that refusal to take the test will result in the suspension of driving privileges. Upon direct examination, Officer Spalding testified that he read Indiana's implied consent warning to Minor on two separate occasions. Officer Spalding testified that on both occasions, Minor responded "no". *Transcript* at 88, 90. The evidence clearly indicates that Minor was informed in this manner.

Judgment affirmed.

RILEY, J., and SHARPNACK, J., concur.