STATE V. AVERY

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GLEN AVERY,
Defendant-Appellant.

No. 33,686

COURT OF APPEALS OF NEW MEXICO

December 15, 2014

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Briana H. Zamora, District Judge

COUNSEL

Gary K. King, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Vicki W. Zelle, Assistant Appellate Defender, Albuquerque, NM, for Appellee

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, J. MILES HANISEE, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} Defendant appeals from the district court's judgment on on-record metropolitan court appeal affirming the metropolitan court judgment convicting Defendant of DWI

(first offense) and failure to maintain lane. [RP 109] In the docketing statement, Defendant raised one issue on appeal, contending that the State "failed to prove beyond a reasonable doubt that the alcohol in [Defendant]'s system impaired his driving to the slightest degree, rendering his DWI (first) conviction invalid as a violation of due process." [DS 10] The first calendar notice proposed summary affirmance on this issue. [CN1]

{2} Defendant then filed a motion to amend the docketing statement proposing to add a new issue: whether there was sufficient evidence to support Defendant's conviction for failure to maintain his lane. [MIO 1-2, 13-18] In particular, Defendant argues that the State did not present any evidence that Defendant's tires' momentary, and quickly corrected, drifting over the dashed lane lines into the right lane of Central Avenue presented any safety concerns as required by applicable law. [MIO 2-3, 13-18] In a second calendar notice, this Court granted the motion to amend and proposed summary reversal on the new issue and summary affirmance on the sufficiency of the evidence to support Defendant's DWI conviction (the original issue on appeal).

1. We Reverse Defendant's Conviction for Failure to Maintain His Lane

{3} In its response to the second calendar notice, the State does not add any new facts or authority to the proposed summary reversal of Defendant's conviction for failure to maintain his lane, and "asks for the relief this Court contemplates in the Second Calendar Notice issued on September 26, 2014." [State's Response, 2] Accordingly, for the reasons set forth in the second calendar notice, we reverse Defendant's conviction for failure to maintain his lane and remand for resentencing in light of such reversal.

2. We Affirm Defendant's Conviction for DWI

{4} In his response to the second calendar notice, Defendant briefly reiterates his argument that the State lacked evidence beyond a reasonable doubt that Defendant was impaired by alcohol. [Defendant's Response, 2] We continue to disagree. As we discussed in the second calendar notice, while Defendant's conduct leading up to the stop did not support a conviction for failure to maintain his lane, the totality of the circumstances do support Defendant's conviction for DWI.

{5} NMSA 1978, Section 66-8-102 (A) (2010) provides that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state." A defendant is "under the influence of intoxicating liquor" if "as a result of drinking liquor the defendant [is] less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to the person and the public." UJI 14-4501 NMRA; *see also State v. Gurule*, 2011-NMCA-042, ¶ 7, 149 N.M. 599, 252 P.3d 823 (discussing the impaired to the slightest degree standard).

{6} With respect to the question of driving a motor vehicle, Officer Carr testified that he observed Defendant behind the wheel of a vehicle traveling in the left eastbound

lane of Central in Albuquerque, New Mexico, at about 2 a.m. on December 1, 2010. [RP 102, DS 3] We hold that this evidence is sufficient to establish the element of driving.

{7} With respect to the influence of alcohol on Defendant's driving ability, Officer Carr testified that he initiated a traffic stop of Defendant's vehicle after observing it drift from the left eastbound lane of Central into the right eastbound lane and drift back again on at least two occasions, and when the officer initiated a traffic stop, instead of pulling over to the right, Defendant made a left turn before stopping. [RP 102-103, DS 2-3; RP 103, DS 3] *See, e.g, State v. Anaya*, 2008-NMCA-020, ¶ 15-17, 143 N.M. 431, 176 P.3d 1163 (recognizing that conduct premised totally on a mistake of law cannot create the reasonable suspicion needed to make a traffic stop; but if the facts articulated by the officer support reasonable suspicion on another basis, the stop can be upheld).

{8} After making contact with Defendant, the officer noticed that Defendant had bloodshot, watery eyes, and slurred speech, and that there was a strong odor of alcohol coming from his facial area. [RP 103, DS 4] Defendant admitted to drinking two beers in the last four hours. [Id.] When performing the walk-and-turn and the one-leg-stand field sobriety tests, Defendant failed to follow instructions, and he swayed from side to side during the one-leg-stand test. [RP 103, DS 6, 7]

{9} Defendant testified at trial that a childhood eye injury affected his performance on the field sobriety tests and that he told the officer about it prior to taking the tests, while the officer testified that he did not remember Defendant telling him about an eye injury. [DS 9] As the finder of fact, the trial court was in the best position to assess witness credibility, and we cannot second-guess such determinations. *See State v. Nevarez*, 2010-NMCA-049, ¶ 37, 148 N.M. 820, 242 P.3d 387 (observing that "this Court cannot judge the credibility of the witnesses who testified at trial or substitute its judgment for that of the fact finder where substantial evidence supports the outcome"); *see also State v. Suazo*, 1993-NMCA-039, ¶ 8, 117 N.M. 794, 877 P.2d 1097 (observing that where conflicting evidence concerning a defendant's ability or willingness to comply with sobriety testing is presented, it is for the fact-finder to resolve the conflict; the reviewing court cannot reweigh the evidence).

CONCLUSION

{10} For the reasons set forth in the first and second calendar notices and above, we reverse Defendant's conviction for failure to maintain his lane, and we affirm Defendant's conviction for DWI.

{11} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge