STATE OF MINNESOTA
IN COURT OF APPEALS
A09-205

State of Minnesota,
Respondent,

vs.

Breanna Lee Vesaas,
Appellant.

Filed December 15, 2009
Affirmed
Hudson, Judge

Anoka County District Court
File No. 02-CR-07-14170

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Christian R. Peterson, Ramsey City Prosecutor, Randall and Goodrich, P.L.C., 2140 Fourth Avenue, Anoka, Minnesota 55303 (for respondent)

Rebecca Waxse, 7984 University Avenue Northeast, Fridley, Minnesota 55432 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from her conviction of third-degree driving with an alcohol concentration of 0.08 or more with one aggravating factor, appellant argues that the

evidence is insufficient to support her conviction. Because the district court's findings support its conclusion, we affirm.

FACTS

Appellant Breanna Lee Vesaas challenges her conviction of third-degree driving with an alcohol concentration of 0.08 or more with one aggravating factor, in violation of Minn. Stat. §§ 169A.20, subd. 1(5) and 169A.26, subd. 1(a) (2006). The case was submitted to the district court on stipulated facts, pursuant to Minn. R. Crim. P. 26.01, subd. 3.

At approximately 1:38 a.m. on November 23, 2007, an Anoka police officer observed a pickup truck driving erratically. The officer followed the vehicle and observed it cross the right fog line. The vehicle pulled off the road and into a strip-mall parking lot. The officer observed two passengers exit the vehicle and determined that the driver, identified as appellant, was attempting to evade him. He asked appellant to speak with him, and he noticed an odor of alcohol coming from appellant. The officer performed three field sobriety tests on appellant and observed multiple indicators of impairment. The officer administered a preliminary breath test, which appellant failed. He then placed appellant under arrest for driving while impaired. Appellant was taken to the Anoka County jail where she was read the implied consent advisory. Appellant submitted to Intoxilyzer testing after being given an opportunity to consult with counsel. The officer administered the test consistent with the BCA Intoxilyzer 5000 training manual. The test results indicated that appellant had an alcohol concentration of 0.18 at 2:29 a.m.

Appellant was charged with third-degree driving while impaired (DWI) and third-degree driving with an alcohol concentration of 0.08 or more. Appellant appeared before the district court on September 10, 2008 and signed a jury-trial waiver. Following a stipulated-facts trial, the district court found appellant not guilty of third-degree driving while impaired and guilty of third-degree driving with an alcohol concentration of 0.08 or more with one aggravating factor. This appeal follows.

D E C I S I O N

Appellant argues that the evidence is insufficient to support the guilty verdict because the state provided no expert testimony that the Intoxilyzer or its results were reliable or accurate.

In considering a claim of insufficient evidence, this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the fact finder to reach the verdict it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). If the fact finder could have reasonably found the defendant guilty, giving due regard to the presumption of innocence and the state's burden of proof beyond a reasonable doubt, the verdict will not be reversed. *State v. Pierson*, 530 N.W.2d 784, 787 (Minn. 1995).

This trial was on stipulated facts. No transcript was provided to this court. Lack of a transcript limits this court's scope of review to "whether the district court's conclusions of law are supported by its findings of fact." *In re Bender*, 671 N.W.2d 602, 605 (Minn. App. 2003).

The state had the burden of proving beyond a reasonable doubt that appellant's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of a motor vehicle was 0.08 or more. Minn. Stat. § 169A.20, subd. 1(5) (2006).[1]

"[T]he results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument . . . are admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath." Minn. Stat. § 634.16 (2006). The standard of proof beyond a reasonable doubt for a DWI conviction does not require any particular type of evidence and does not require expert testimony on the reliability of the Intoxilyzer. *State v. Birk*, 687 N.W.2d 634, 638–39 (Minn. App. 2004). Here, the test was performed by the police officer, a certified Intoxilyzer operator, in accordance with standard BCA testing procedure. This is sufficient to negate the need for expert testimony on the reliability of the test results.

Appellant further argues that the presumed reliability of Intoxilyzer evidence functions as a rebuttable presumption of guilt in violation of due process. This argument has previously been rejected by this court. *See Birk*, 687 N.W.2d at 639 (rejecting the argument that admitting Intoxilyzer results without antecedent testimony creates an

[1] To convict of third-degree driving while impaired, the state also had to prove that one aggravating factor was present when the violation was committed. Minn. Stat. § 169A.26, subd. 1(a) (2006). Here, the state showed as an aggravating factor that appellant had a prior alcohol-related license revocation from October 26, 2001. Appellant does not contest this evidence.

improper presumption of guilt); *see also State v. Chirpich*, 392 N.W.2d 34, 37 (Minn. App. 1986), *review denied* (Minn. Oct. 17, 1986) (rejecting the argument that the DWI (over 0.10) statute impermissibly shifts the burden of proof). The presumption of reliability of Intoxilyzer results is not a presumption of guilt, as the state must still prove every element of the offense. Whether a breath test is reliable is an evidentiary issue. The presumption of reliability only goes toward whether the results are "admissible in evidence without antecedent expert testimony." Minn. Stat. § 634.16. Appellant was properly required to rebut the reliability of the Intoxilyzer if she wanted to keep the evidence from being considered. *See Bond v. Comm'r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997) ("Once a prima facie showing of trustworthy [Intoxilyzer] administration has occurred, it is incumbent on the opponent to suggest a reason why the test was untrustworthy.") (quotation omitted). Requiring appellant to present evidence that the test was untrustworthy does not impermissibly shift the burden of proof. *State, Dep't of Pub. Safety v. Habisch*, 313 N.W.2d 13, 16 (Minn. 1981).

The police officer's report and affidavit describe appellant's erratic driving and poor performance during the field sobriety tests. Appellant also stipulated to the Intoxilyzer results showing an alcohol concentration of 0.18, above the legal limit of 0.08, within two hours of the traffic stop. Given the record before the district court, the findings are sufficient to support the verdict.

Affirmed.