Cite as 2010 Ark. App. 776

# ARKANSAS COURT OF APPEALS

## DIVISION III

No. CACR 10-574

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| EDWARD TOM GAZAWAY, JR. APPELLANT<br><br>V.<br><br>STATE OF ARKANSAS APPELLEE | Opinion Delivered NOVEMBER 17, 2010<br><br>APPEAL FROM THE CLEBURNE COUNTY CIRCUIT COURT [NO. CR-2009-164]<br><br>HONORABLE JOHN DAN KEMP, JUDGE<br><br>AFFIRMED |

**JOHN B. ROBBINS, Judge**

Appellant Edward Tom Gazaway, Jr., appeals his conviction entered in Cleburne County Circuit Court for driving while intoxicated. Appellant was first convicted of this offense in district court in Heber Springs, and he appealed to circuit court for a trial de novo, where he was tried to the bench on stipulated facts. Appellant was also convicted in district court of driving left of center, which he did not contest at the circuit-court level. Appellant argues to our court that the trial court's finding is not supported by substantial evidence. He contends that the stipulated facts reasonably suggest that his blood-alcohol content was under .08 at the time he was operating his vehicle.[1] Because appellant failed to preserve his argument for appellate review, we affirm. The means to challenge the sufficiency of the evidence after

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[1]The parties and the judge use the terms "blood-alcohol" interchangeably with "breath-alcohol." For simplicity, we will use "blood-alcohol" throughout this opinion.

this bench trial would be by a motion for dismissal, which must be made at the close of all the evidence and before closing arguments. Ark. R. Crim. P. 33.1(b) (2010). Rule 33.1 is strictly construed. *Elkins v. State*, 2010 Ark. 171. Failure to adhere to the requirements in subsection (b) "will constitute a waiver of any question pertaining to the sufficiency of the evidence to support the verdict or judgment." Ark. R. Crim. P. 33.1(c). Arguing that the State has failed to prove its case, without asking for a dismissal, will not suffice. *Grube v. State*, 2010 Ark. 171.

As demonstrated by the record, appellant failed at any time to ask for dismissal of the charge. The State, represented by the city attorney, and defense counsel appeared before the circuit court judge and presented a two-page typed set of stipulated facts. The judge then asked, "are there any arguments to be presented?"

The city attorney first responded by offering a recited summary of the facts and stating that those proved appellant was operating his vehicle at a time when his blood-alcohol level was .08 or more. Then, defense counsel argued his point of view, that because the tests taken showed appellant's blood-alcohol level rising, then by implication it was lower in the previous minutes when he was operating the vehicle. Defense counsel then stated, "That's our argument, Your Honor."

Immediately thereafter, the judge responded, "after considering the stipulated set of facts and the argument presented the Court finds that Mr. Gazaway was operating a motor vehicle at a time when his alcohol concentration was .08 or above and therefore is guilty of the offense of driving while intoxicated." After this, the judge moved the case along to the

punishment phase. Defense counsel interjected that he might want to file a postjudgment motion because "I thought the facts were sufficient enough to raise the Court to a level of reasonable doubt." However, at no time did defense counsel move to dismiss the charges. This bars consideration of the sufficiency of the State's proof to sustain a conviction for DWI. *See Higgins v. State*, 2010 Ark. App. 442 (holding that arguments in the nature of closing do not qualify as a motion to dismiss).

Here, appellant contends that because the case was tried on stipulated facts, this somehow excuses the requirement set forth in Rule 33.1 and as interpreted by our appellate case law. We cannot agree. Evidence—whether brought to the trial court through witnesses, exhibits, or stipulated facts—is the substance of a trial, the sufficiency of which must be challenged in the manner required by Rule 33.1 as interpreted by our appellate courts. We cannot reach the merits of the argument.

Even if we were to consider the merits, we would affirm. When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or another. *Id*. In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id*.

As applied here, the State was required to prove that appellant was operating or in physical control of a motor vehicle "at a time" when the alcohol concentration in his breath or blood was .08 or more. Ark. Code Ann. § 5-65-103(b) (Repl. 2005). The stipulated facts were that appellant was pulled over late at night on January 17, 2009, by a state policeman, Trooper Bittle. Probable cause existed to stop him because he was driving left of center. Bittle suspected appellant of alcohol use, and approximately ten minutes after the stop, Bittle had appellant take a portable breath test, registering .08. Another breath test was taken approximately ten minutes after the first test, and it registered .09. Appellant was arrested and taken to the detention center where he submitted to a test using a BAC Datamaster. This test registered .10. This test was taken approximately thirty to forty minutes after the original stop.

On these facts, the trial judge concluded that the State had proven beyond a reasonable doubt that appellant operated his vehicle at a time when his breath-alcohol content was .08 or greater. Appellant argues that the evidence here "would require a mere guess to conclude" that appellant was operating his vehicle with a blood-alcohol content of .08 or more. We disagree.

The state policeman stopped his vehicle because he observed appellant driving left of center, late at night. The state policeman suspected alcohol use. Both portable breath tests taken shortly after the stop gave readings over the legal limit. As a general rule, portable breath tests are only valid evidence to support an arrest, which appellant did not contest, and not as substantive evidence absent proof of reliability. *See Elser v. State*, 353 Ark. 143, 114

S.W.3d 168 (2003); *Daniels v. State*, 84 Ark. App. 263, 139 S.W.3d 140 (2003). The "official" test taken at the detention center proved that appellant was well over the legal limit. This test was conducted forty minutes, at most, after appellant was stopped that night for driving left of center.[2]

The *possibility* that appellant's blood-alcohol level was less than .08 at the time of the stop was a proper argument to be made to the judge, the ultimate fact-finder. But, it does not render the judge's finding of guilt without substantial evidence.

Affirmed.

KINARD and ABRAMSON, JJ., agree.

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[2]Regulations promulgated by the Arkansas Department of Health require a minimum waiting period of twenty minutes prior to collection of a breath sample on a certified machine. *See Rules and Regulations Pertaining to Alcohol Testing*, III Sample Collection and Handling, Part D. "Breath Sampling" at 3.40. found at www.healthy.arkansas.gov/about ADH/Pages/RulesRegulations.