Not Reported in N.W.2d, 2003 WL 1873338 (Neb.App.)
(Cite as: 2003 WL 1873338 (Neb.App.))

Court of Appeals of Nebraska.
STATE of Nebraska, Appellee,
v.
Jason R. FOSTER, Appellant.

No. A-02-1089.
April 15, 2003.

Appeal from the District Court for Douglas County, Gary B. Randall, Judge, on appeal thereto from the County Court for Douglas County, Samuel V. Cooper, Judge. Judgment of District Court affirmed in part, and in part reversed and remanded with directions.

Jason E. Troia, of Gallup & Schaefer, for appellant.

Paul D. Kratz, Omaha City Attorney, Martin J. Conboy III, Omaha City Prosecutor, and J. Michael Tesar for appellee.

HANNON, SIEVERS, and INBODY, Judges.

SIEVERS, Judge.

***1** After being observed "smoking the tires" on his car and fishtailing while turning a corner, **Jason R. Foster** was stopped, charged, and eventually convicted of driving under the influence of alcohol; reckless driving, second offense; and driving during suspension. He appeals, claiming that there was insufficient evidence to support his convictions.

FACTUAL AND PROCEDURAL BACKGROUND

Foster's bench trial for the above-listed charges occurred in the county court for Douglas County, Nebraska, on December 10, 2001. At the beginning of the trial, Foster's attorney made a motion to suppress evidence and statements of Foster, based on a lack of probable cause for the traffic stop by Officer Kenneth Oetter on May 18, 2001. The trial court heard the motion. Oetter, after testifying that he had been an Omaha police officer for nearly 13 years, related the events of the stop. The court overruled the motion to suppress and then asked, "Are you ready for the trial? ... Can we incorporate the previous testimony?" A voice answered, "Yes, Judge. So incorporated," but the court reporter did not identify the speaker in the bill of exceptions beyond "unidentified male voice." We assume that the speaker was likely the prosecutor. But, in any event, Foster's attorney objected at trial to incorporating the testimony from the hearing on the motion to suppress. The court sustained the motion and did not "incorporate" Oetter's suppression hearing testimony.

The trial began, and on direct examination, the State questioned Oetter about the events of May 18, 2001. Oetter testified that at 12:30 a.m., he saw a Corvette stopped at a red light at 102d and Blondo Streets. When the light turned green, the driver accelerated very quickly, "[l]etting the clutch out very quickly and smoking the tires, causing the car to fishtail and nearly striking the curb as it turned westbound onto Blondo Street." Oetter testified that the traffic was light and that no vehicles other than Oetter's cruiser were close to the Corvette, although there were vehicles going eastbound on Blondo Street as the Corvette's driver headed westbound.

After Oetter stopped the car, he approached the car and noticed that the driver's breath emitted an odor of alcohol, that his fine motor skills appeared impaired, and that his eyes were somewhat glassy and bloodshot. Oetter asked the driver, Foster, for a driver's license. Foster produced a Nebraska employment driving permit. Oetter ran a data check and found that Foster's driver's license was suspended. Oetter asked Foster to perform field sobriety

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tests.

Oetter testified that Foster successfully performed the alphabet test, reciting the letters E through P, as Oetter had directed, in a smooth, steady, rapid rate. Oetter asked Foster to count backward by ones from 93 to 64. Foster did so successfully until he reached the number 67, when he went back to 68 and then stated, "67, 66, 65, 64, 64." He then asked, "Isn't that it?"

***2** Foster then performed the one-legged stand, but according to Oetter, Foster was unable to keep his hands at his sides as directed-he used his arms for balance, and he was "hopping" to maintain balance on one leg. No details about the "hopping" were elicited.

Oetter also asked Foster to do the walk-and-turn test, in which Foster was directed to stand with his feet heel-to-toe and his fingers along his pants seams. Oetter directed Foster to take nine steps forward, touching each step heel-to-toe, take a pivot step, and then take nine steps back to the point of origin. Foster took 10 steps instead of 9, could not keep his balance while listening to Oetter's directions, and did not touch his feet heel-to-toe on the first step. Oetter testified that he then called for an Alco-Sensor test. An Officer Liddick, who did not testify, came to the scene and gave Foster a field breath test. When the State asked whether Foster failed or passed the test, Foster's attorney objected as to foundation. The court overruled the objection, and Oetter testified that Foster failed the test. Oetter testified that he placed Foster under arrest, took him to a hospital, and required him to submit to a chemical blood test. No results are in evidence.

According to Oetter, on the way to the hospital, Foster spontaneously "made a statement to the effect that, you know, what's wrong with him a guy stopping [at] a quote, titty bar, and having a few beers after work?"

On cross-examination, Oetter testified that on the walk-and-turn test, Foster's first step revealed pavement-more than an inch and less than 6 inches-between his heel and toe. In addition, Oetter testified that there was another individual present in the vehicle. Foster's attorney moved for a directed verdict on the driving during suspension, driving under the influence of alcohol, and reckless driving charges, which motion was overruled.

Foster then testified that on May 17, 2001, he worked at ConAgra from 8 p.m. until midnight and then took Tony Baud home. According to Foster, it was his responsibility to provide workers to complete the project on a "swing shift" like the one he worked that night, so he was responsible for providing transportation. Foster testified that while driving Baud home, Foster was still "on the clock.... I'm not done with work until I got everything taken care of and that includes getting employees to and from their destination if required by my employer, which at this time was required."

Foster testified that he was driving straight to Baud's house-and had made no stops after work-when Oetter stopped him within a "couple blocks" of Baud's home. Foster testified that from Baud's home, he was going to return straight to his own home. Baud did not testify.

Foster admitted that instead of maintaining a safe, steady speed as he turned the corner, he accelerated quickly, and that his tires did spin and the car did pitch a little to the side. He corrected the turn and took his foot off the accelerator, and then he saw Oetter's lights behind him. Foster denied stopping at any bars and did not recall making a statement about going to a "titty bar," but said that if he had made such a statement, he was making small talk and being sarcastic. On cross-examination, Foster testified that he had no timesheets to show that he had worked until midnight that night, but he could provide them if necessary. He also testified that he did have two or three beers that night at work as he and other crew members cleaned up the project site.

***3** The trial court found Foster guilty on all charges and sentenced him to probation for 1 year and a $500 fine. The court ordered Foster to obtain an evaluation for chemical dependency and to abstain from drinking alcohol during his probation.

Foster appealed to the district court for Douglas County, claiming that there was insufficient evidence to support the convictions, insufficient foundation for Oetter's opinion, and insufficient foundation for the preliminary breath test evidence. The court affirmed Foster's convictions and sentences. Foster appeals.

ASSIGNMENTS OF ERROR

Foster claims that the trial court erred in receiving the preliminary breath test results over his objection, in allowing Oetter's opinion over Foster's objection, and in finding Foster guilty beyond a reasonable doubt.

STANDARD OF REVIEW

A conviction in a bench trial of a criminal case is sustained if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support that conviction. *State v. Tyma,* 264 Neb. 712, 651 N.W.2d 582 (2002).

ANALYSIS

Driving During Suspension.

Foster claims in his brief, citing Neb.Rev.Stat. § 60-4,129 (Reissue 1998), that the court erred in convicting him of driving during suspension, because the only evidence suggesting that he was not driving during the course of his employment when stopped was Oetter's testimony that Foster said, "what's wrong with him a guy stopping [at] a quote, titty bar, and having a few beers after work?" Such statement would clearly be an admission, given that on his employment driving permit, Foster was to be driving only back and forth to work.

In a bench trial of a criminal case and in determining the sufficiency of evidence to sustain a conviction, it is not the province of an appellate court to resolve conflicts in the evidence, pass on the credibility of witnesses, determine the plausibility of explanations, or weigh the evidence. *State v. Clark,* 229 Neb. 103, 425 N.W.2d 347 (1988). Such matters are for the finder of fact. *Id.* The finding of a defendant's guilt must be sustained if, taking the view most favorable to the State, there is sufficient evidence to support such finding. *Id.*

Taking the view most favorable to the State, we determine that Foster admitted he had gone to a bar on his way home from work, that there was evidence he had made such a stop, and that he had been drinking. In a bench trial of a law action, the court, as the trier of fact, is the sole judge of the credibility of the witnesses and the weight to be given their testimony. *Fu v. State,* 263 Neb. 848, 643 N.W.2d 659 (2002). The trial court was free to believe that Foster had made the admission. Additionally, no other evidence (not even Baud) supported Foster's claim. Clearly, there was sufficient evidence in the record to support Foster's conviction for driving during suspension.

Reckless Driving.

Foster argues that the State did not prove all the elements of reckless driving as defined by Neb.Rev.Stat. § 60-6,213 (Reissue 1998), which provides that "[a]ny person who drives any motor vehicle in such a manner as to indicate an indifferent or wanton disregard for the safety of persons or property shall be guilty of reckless driving."

***4** According to Foster, "[n]o evidence was offered that [Foster] came close to hitting anyone or anything other than a curb," brief for appellant at 14, so there was no evidence that any persons or property was subjected to danger in that area. Foster cites *State v. Douglass,* 239 Neb. 891, 894, 479 N.W.2d 457, 460 (1992), which found insufficient evidence to support a conviction for reckless driving where "[t]here was no evidence of the presence of any persons or property subjected to any danger in the area."

However, *Douglass* involved Neb.Rev.Stat. § 39-669.03 (Reissue 1988), the *willful reckless driv-*

ing statute. This statute, now Neb.Rev.Stat. § 60-6,214 (Reissue 1998), states that "[a]ny person who drives any motor vehicle in such a manner as to indicate a *willful disregard* for the safety of persons or property shall be guilty of willful reckless driving." (Emphasis supplied.) The *Douglass* court held that the State had to prove "intentional or deliberate disregard for the safety or property of others." (Emphasis omitted.) 239 Neb. at 894, 479 N.W.2d at 460. An example of such conduct is found in *State v. Cook,* 212 Neb. 718, 325 N.W.2d 159 (1982), where the defendant, who was in the process of obtaining a dissolution of her marriage, drove her automobile across the road and struck her husband's vehicle coming from the opposite direction. Immediately after the impact, she told her estranged spouse that she would run into him " 'again and again .' " *Id.* at 719, 325 N.W.2d at 160.

The statute under which Foster was charged, § 60-6,213, requires proof only of "an *indifferent or wanton disregard* for the safety of persons or property." (Emphasis supplied.) Oetter testified that when the red light at 102d and Blondo Streets turned green, Foster accelerated his car "under extreme circumstances." Foster let the clutch out very quickly, "smok[ed] the tires," and caused the car to fishtail, nearly striking the curb. While Oetter testified that there were no vehicles close to Foster's car at the time, he did testify that traffic was coming eastbound on Blondo Street as Foster drove westbound. And, Foster had a passenger, obviously a "person" under § 60-6,213. Given our standard of review, we determine there clearly is sufficient evidence of "indifferent disregard" and reckless driving to support the conviction.

Driving Under Influence of Alcohol.

Finally, Foster argues that because the trial court erred in receiving the preliminary breath test results over his objection and erred in allowing Oetter's opinion over Foster's objection, there was insufficient evidence to support Foster's conviction for driving under the influence of alcohol.

Neb.Rev.Stat. § 60-6,196(1) (Cum.Supp.2000) provides:

> It shall be unlawful for any person to operate or be in the actual physical control of any motor vehicle:
>
> (a) While under the influence of alcoholic liquor or of any drug;
>
> ***5** (b) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or
>
> (c) When such person has a concentration of ten-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath.

The State is also required to prove that Foster was in actual physical control of a motor vehicle. See *State v. Falcon,* 260 Neb. 119, 615 N.W.2d 436 (2000). There was obviously sufficient proof of this element. As used in § 60-6,196(1)(a), the phrase "under the influence of alcoholic liquor or of any drug" means the ingestion of alcohol or drugs in an amount sufficient to impair to any appreciable degree the driver's ability to operate a motor vehicle in a prudent and cautious manner. *State v. Falcon, supra.* See *State v. Green,* 238 Neb. 328, 470 N.W.2d 736 (1991). Either a law enforcement officer's observations of a defendant's intoxicated behavior or the defendant's poor performance on field sobriety tests may constitute sufficient evidence to sustain a conviction of driving while under the influence of alcoholic liquor. *Id.*

The State concedes that admission of the preliminary breath test in this case was erroneous. Reasonable proof that a breath-testing machine was accurate and functioning properly is all that is required as foundational evidence for admission of a preliminary breath test. *State v. Lowrey,* 239 Neb. 343, 476 N.W.2d 540 (1991). No such testimony was offered, and thus, it was error for the court to admit the results of Foster's preliminary breath test.

To establish reversible error, the appellant must show that trial court actually made a factual determination, or otherwise resolved a factual issue or question, through the use of erroneously admitted evidence in a case tried without jury. *State v. Lara,* 258 Neb. 996, 607 N.W.2d 487 (2000). In announcing its judgment after the bench trial, the court stated as follows: "I can't see where the Officer did anything wrong. I appreciate the way he testified. He didn't exaggerate a bit. No question in my mind the defendant was under the influence of intoxicating liquors at the time and that his judgment and driving was impaired." Thus, it is clear that the court relied on Oetter's testimony, but not expressly upon the preliminary breath test. Accordingly, the error in admitting the breath test without proper foundation was not reversible error.

After sufficient foundation is laid, a law enforcement officer may testify that in his or her opinion, the defendant was driving while intoxicated. *State v. Howard,* 253 Neb. 523, 571 N.W.2d 308 (1997). Foundation for such an opinion includes both evidence of the officer's training and experience as well as the officer's observation of the defendant at the time of the alleged offense. For example, in *State v. Howard, supra,* the court found that sufficient foundation had been laid for the officer's opinion, because the officer testified that he had been trained to detect the mental and physical effects of alcohol on people and that he had been involved in the arrest of 150 to 200 intoxicated drivers. He also testified that the defendant was driving dangerously; smelled of alcohol; had watery eyes and slow, slurred speech; admitted he had been drinking; and twice failed in attempts to recite the alphabet. *Id.*

***6** In *State v. Cash,* 3 Neb.App. 319, 526 N.W.2d 447 (1995), we found that there was sufficient foundation for an officer's opinion after he testified that he observed the defendant's vehicle crossing the centerline, that the defendant could not keep her balance as she walked, and that he detected the smell of alcohol on her breath. The officer also testified that he had been employed as a police officer for 2 years, had received training in investigating alcohol-related offenses, had observed others drink to the point of intoxication, and had performed 100 to 150 alcohol-related investigations.

In Foster's trial, Oetter's testimony from the hearing on the motion to suppress, which testimony contained evidence of his training, experience, and observations, was not incorporated into the trial. Accordingly, the only foundational testimony for Oetter's opinion was his testimony that he had been with and observed Foster from approximately 12:30 a.m. until after 2 a.m., plus the following testi- mony:

> Q-And, sir ... part of your training as a police officer and also as part of your experience are you around people who are under the influence of alcoholic beverages?
>
> A-Yes, I am.
>
> Q-Sir, did ... Foster exhibit any of the signs of being under the influence?
>
> A-Yes, he did.
>
> Q-Sir, in your opinion-did you reach an opinion as to whether ... Foster was impaired that evening?
>
> [Defense counsel]: I'm going to object as to foundation.
>
> THE COURT: Objection is overruled.
>
> A-Yes, I did feel that he was impaired and showed impairment, both, on my observation of his driving behavior and my personal observations of him at the time of field sobriety tests and during the field sobriety tests.

There is no testimony regarding the extent of Oetter's training or what he learned from being around intoxicated people. And while Oetter said that Foster exhibited "signs" of being under the in-

fluence, there was no testimony recounting such signs before Oetter's opinion.

While there was testimony that Foster had some problems, which appear to have been minor, with the field sobriety tests, there is no testimony connecting such problems to the key element of the crime-that he had ingested alcohol in an amount that impaired to an appreciable degree his ability to operate a motor vehicle in a prudent and cautious manner. For example, there is no evidence showing that the minor mistakes made by Foster while counting nearly 30 numbers backward equates to, or is evidence of, such impairment. In this connection, we cannot ignore that he recited that portion of the alphabet he was asked to recite. There is evidence of Foster's reckless driving, but "popping the clutch" on a Corvette does not necessarily mean intoxication-although with other properly admitted evidence, it could mean such. It could simply be volitional "showing off." In sum, Foster was not such an obviously drunken driver that we can rely merely on Oetter's observations of Foster to find sufficient evidence of driving under the influence of alcohol without evidence of Oetter's training and experience. And, we cannot use our own knowledge of the classic signs and symptoms from reviewing hundreds and hundreds of such cases to fill in the gaps in the State's proof.

***7** The State argues that *State v. Back,* 241 Neb. 301, 488 N.W.2d 26 (1992), holds that opinion testimony is not needed. However, in *Back,* the court first noted that the violation of Neb.Rev.Stat. § 39-669.07 (Reissue 1988), operating a motor vehicle while under the influence of alcoholic liquor or with a concentration of ten-hundredths of 1 gram or more by weight of alcohol per 100 milliliters of blood or urine, is one offense which may be proved in one of several ways, citing *State v. Parker,* 221 Neb. 570, 379 N . W.2d 259 (1986). The evidence was that a blood sample taken from Back tested at .106 grams of alcohol per 100 milliliters of blood. A pathologist said that Back's blood alcohol content would have been at least .140 at the time of the accident. Back assigned error to the submission to the jury of "driving under the influence," but the court found that since no argument was made about the illegal concentration of alcohol in his blood, there was no prejudice in the submission of driving under the influence to the jury. Nonetheless, the *Back* court wrote considerable dicta about the facts and why the court would justify a conviction for driving under the influence. Included in that decision was evidence from a pathologist about the effect of various concentrations of alcohol on humans, including limitations on vision, judgment, perception, and reaction time. The *Back* court recounted how the accident happened and said that such facts show circumstantially the same limitations as related by the pathologist. Thus, we do not see that *Back* means that foundation is not needed for an opinion on intoxication, because the *Back* court's dicta relates the facts of the accident to the expert testimony.

We find that insufficient foundation was laid for Oetter's opinion that Foster was intoxicated and that therefore, the trial court erroneously admitted the opinion. Without such opinion, the evidence is clearly insufficient to support Foster's conviction for driving under the influence of alcohol.

CONCLUSION

Having found sufficient evidence to support Foster's reckless driving conviction and his conviction for driving during suspension, we affirm those convictions. We reverse Foster's conviction for driving under the influence of alcohol, because there is insufficient competent and admissible testimony in the record to support the conviction. Our review of the sentencing proceeding shows that Foster was placed on probation, in effect for all three crimes because various conditions of probation were not tied to specific crimes, nor were the fine and jail time. Therefore, it is just and appropriate that Foster be resentenced only on the convictions we have upheld. The matter is remanded to the district court with directions to remand to the county court for resentencing.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED WITH DIRECTIONS.

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