STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

State of West Virginia,
Plaintiff Below, Respondent

vs) **No. 11-1505** (Jefferson County 11-F-40)

Adam Leatherman,
Defendant Below, Petitioner

FILED
November 16, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner, Adam Leatherman, by counsel Christopher J. Prezioso, appeals from the "Conviction Order – A Bifurcated Trial and Sentencing" entered by the Circuit Court of Jefferson County on October 3, 2011, adjudging petitioner convicted of driving under the influence, third-offense, following a jury trial. Respondent, the State of West Virginia, appears by its counsel, Brandon C. H. Sims.

This Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules of Appellate Procedure.

In the early morning hours of November 11, 2010, Jefferson County law enforcement issued a BOLO (be on the lookout) alert for a car bearing a Virginia license plate with the letters "POOBGON" as a possible drunken driver in the Shepherdstown area. Less than thirty minutes later, a Jefferson County Deputy Sheriff witnessed a car with the specified license plate cross the centerline and exit the roadway after which it struck a highway sign and a tree. Petitioner was the driver and sole occupant of the vehicle. The deputy helped petitioner exit the vehicle and noticed a strong odor of alcohol on petitioner's person. The State indicates that petitioner told the deputy that he had consumed three beers that evening.

The deputy administered the Horizontal Gaze Nystagmus Test, which petitioner failed. While another field sobriety test was started—the walk-and-turn test—the deputy discontinued that test because petitioner was too unsteady on his feet and he was concerned for petitioner's safety. For this same reason, the one-leg-stand field sobriety test was not administered. A preliminary breath test at the accident scene showed petitioner's blood alcohol concentration (BAC) to be above the legal limit and he was placed under arrest for driving under the influence ("DUI"). Petitioner was taken to the Sheriff's Office where, at 4:35 a.m., the deputy conducted a further breath test of petitioner with an Intoxilyzer which showed his BAC to be .240%.

The deputy determined that petitioner had been previously convicted of DUI: once in September of 2003, in the State of Virginia, and once in June of 2010, in Jefferson County, West Virginia. Petitioner was later indicted by the grand jury on one count of DUI, third offense, in violation of West Virginia Code § 17C-5-2, with the indictment listing these two prior convictions as the predicate offenses.

On September 15, 2011, a bifurcated jury trial began. The jury returned its verdict finding petitioner guilty of DUI. The jury then returned a verdict finding that petitioner had two prior DUI convictions and, therefore, found him guilty of DUI, third offense.

On appeal, petitioner argues that the circuit court wrongfully denied his motions for judgment of acquittal at the close of the State's case-in-chief and at the close of all the evidence. Petitioner asserts that the State did not present sufficient evidence to prove beyond a reasonable doubt that he was DUI on November 11, 2010, or that he had the two prior DUI convictions as indicated above. Petitioner states that the only testimony offered by the State at trial was that of the arresting officer. He attributes his failure of the field sobriety test to having been in the automobile accident and because it was a cold and dark night. Petitioner contends that his breath test should be considered unreliable as such tests are not the most accurate method by which to measure a person's blood alcohol level. Regarding his two prior DUI convictions, petitioner states that the only evidence offered by the State were certified court records regarding the same. He argues that actual testimony or evidence beyond a cold record should be required for conviction.

The Court applies a de novo standard of review to the denial of a motion for judgment of acquittal based upon the sufficiency of the evidence. *State v. LaRock*, 196 W.Va. 294, 304, 470 S.E.2d 613, 623 (1996). As this Court has further explained:

> "[a] criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syl. pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

Syl. Pt. 2, *State v. McFarland*, 228 W.Va. 492, 721 S.E.2d 62 (2011). Having applied this standard to our review of the evidence adduced at trial, as set forth in the appendix record, and having considered the parties' arguments as set forth in their respective briefs, the Court concludes that the circuit court did not err in denying petitioner's motions for judgment of

acquittal under the facts and circumstances of this case. We find that the State's evidence at trial was sufficient to convict and, that under Rule 902 of the West Virginia Rules of Evidence, no testimony or extrinsic evidence was needed for the certified court documents evidencing petitioner's prior DUI convictions.

Next, petitioner asserts that the circuit court committed reversible error when it failed to grant his motion for a new trial. Petitioner points to questions raised by the jury during its deliberations regarding his earlier DUI convictions. In response and with the agreement of petitioner, the circuit court essentially told the jury that a first and second offense DUI are each misdemeanors, that a third offense DUI is a felony, that the State has the burden of proof, and that the documents presented at trial are the only documents that will be presented. In response to a second question from the jury, the circuit court essentially responded, over petitioner's objection, that the jury was to simply determine the number of prior DUI convictions beyond a reasonable doubt, not the level of the offense of the prior convictions. The circuit court also reminded the jury that the prosecution bears the burden of proof and that the look-back period for a prior conviction is ten years. Thereafter, the jury sent out a third question at which point the circuit court stood upon its prior responses. Petitioner asserts that he wanted the circuit court to stand solely upon its response to the jury's first question and, because it did not, his motion for a new trial should have been granted.

As we have previously stated:

> "A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion." Syl. Pt. 3, in part, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994), cert. denied sub nom. *W.R. Grace & Co. v. West Virginia*, 515 U.S. 1160, 115 S.Ct. 2614, 132 L.Ed.2d 857 (1995).

Syl. Pt. 2, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000). We note that petitioner does not assert in his brief, nor did he argue at trial, that the circuit court's responses to the jury's second and third questions were incorrect statements of the law. His argument is essentially that the circuit court should not have responded to the jury's second and third questions. As we have previously stated, however, "[i]t is well established that a circuit judge may answer a question posed by a jury during its deliberations." *Matheny v. Fairmont General Hosp., Inc.*, 212 W.Va. 740, 751, 575 S.E.2d 350, 361 (2002) (internal citations omitted). We have reviewed the questions posed by the jury, the answers provided by the circuit court, the arguments of the parties as set forth in their respective briefs, and the appendix record. We find neither error nor an abuse of discretion in the circuit court's denial of petitioner's motion for a new trial or directed verdict of acquittal.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 16, 2012

CONCURRED IN BY:

Chief Justice Menis E. Ketchum
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Margaret L. Workman
Justice Thomas E. McHugh