NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 1306

STATE OF LOUISIANA

VERSUS

MICHAEL GILL

DATE OF JUDGMENT: February 9, 2007

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT
(NUMBER 05-04-0465 "VII"), PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

THE HONORABLE TODD HERNANDEZ, JUDGE

* * * * * *

Hon. Doug Moreau
District Attorney
Dylan Alge
Assistant District Attorney
Parish of East Baton Rouge
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

D. Carson Marcantel
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Michael Gill

* * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: CONVICTION AND SENTENCE AFFIRMED.

KUHN, J.

Defendant, Michael Gill, was charged by bill of information with one count of driving while intoxicated, fourth offense, a violation of La. R.S. 14:98(E). Defendant waived his right to a jury trial and was tried before a judge. Following trial, the trial court found defendant guilty as charged. The trial court sentenced defendant to serve twenty-five years at hard labor, with the first twelve years to be without benefit of parole, probation, or suspension of sentence. The trial court further ordered the revocation of defendant's probation for another DWI conviction and made his three-year sentence for that conviction executory. Defendant appeals, urging three assignments of error. After a thorough review of the record and applicable law, defendant's conviction and sentence are affirmed.

FACTS

On the evening of March 5, 2004, Woodrow Waskom was driving northbound on Louisiana Highway 410 (Blackwater Road) in East Baton Rouge Parish when he observed a white truck in the adjacent ditch. The rear of the truck was near the road and posed a hazard to passing traffic. Waskom, an employee of the Baker Fire Department and a reserve police officer, activated his strobe lights and turned around to return to the scene to determine if there were any injuries. As Waskom drove back to the truck in the ditch, he saw defendant sitting in the driver's side of the truck with his legs hanging out of the door. Defendant was talking on a cell phone. As Waskom pulled up, defendant got out of his truck and approached the passenger side of Waskom's truck. Because defendant had difficulty standing, he fell against Waskom's truck, causing the collapsible side-view mirror to fold back against the truck.

In response to Waskom's inquiries, defendant replied he was not hurt and that he had been alone. Defendant also told Waskom that he had been driving the truck and lost control as he came out of the turn. Defendant told Waskom that he was on the phone with his sister in order to get his brother to come and get him and that he just needed to get the truck out of the ditch. Waskom advised defendant that he could not leave the truck where it was, partially in the ditch and partially on the roadway, because the 911 system would get calls about it all night.

Waskom observed that defendant's speech was slurred and there was an odor of alcohol on his breath. Waskom called the Sheriff's Office to notify them of the wreck. Shortly after Waskom phoned the Sheriff's Office, the occupant of a trailer about a hundred yards away walked to the accident scene. The unidentified man spoke with Gill and the two men began walking toward the man's trailer.

Shortly thereafter, Trooper John Lazard of the Louisiana State Police arrived at the scene. Trooper Lazard asked Waskom where the driver of the truck was and Waskom replied that he had walked towards the trailer with another man. Trooper Lazard and Waskom got into Lazard's unit and drove towards the trailer. As Trooper Lazard pulled into the driveway of the trailer, he noticed a man run along the front of the trailer and turn towards the side of the trailer. Waskom informed the trooper that was the man who had been in the truck. Trooper Lazard ordered defendant to stop, which he did. When asked by Trooper Lazard why he was running, defendant replied that he was scared. Trooper Lazard transported defendant back to the scene of the accident while Waskom walked back.

After he arrived at the scene, Trooper Lazard asked defendant for his driver's license. Defendant told Trooper Lazard that he had not been driving the

truck, that a friend had been driving the truck, and that his friend ran away following the accident. Because Waskom had told him that defendant previously admitted to driving the truck, Trooper Lazard informed defendant of his ***Miranda*** rights. Trooper Lazard could also detect the odor of alcohol on defendant's breath and that his speech was slurred. Trooper Lazard asked defendant if he had anything to drink, and defendant responded that he had consumed six beers.

Trooper Lazard then attempted to have defendant perform field sobriety tests. Trooper Lazard explained each test to defendant, but defendant refused to perform the tests. Defendant was placed under arrest and placed into the back of Trooper Lazard's unit.

A tow truck arrived to pull defendant's truck out of the ditch. Because the towing service needed the keys to the truck, Trooper Lazard asked defendant if he had the keys. Defendant denied having the keys. Trooper Lazard searched defendant and found the keys in defendant's pocket. Following his arrest, defendant refused to take the Breathalyzer test. Trooper Lazard also requested a registration check of the truck in the ditch and discovered that it was registered to defendant.

At trial, the state introduced the videotape from the camera in Trooper Lazard's unit, which showed some of the events detailed by the witnesses. Defendant did not testify.

CREDIBILITY OF WOODROW WASKOM

In his first assignment of error, defendant argues that the trial court erred under La. Code Evid. article 403 by assigning undue weight to the credibility of Woodrow Waskom. Defendant points to three discrepancies between Waskom's

deposition testimony and trial testimony and claims that such inconsistencies render Waskom's testimony not credible.

The discrepancies defendant complains of include Waskom's deposition testimony claiming he saw Trooper Lazard administer the field sobriety tests to defendant, whereas at trial, Waskom testified that he did not observe any field sobriety tests being administered. Defendant also complains that in Waskom's deposition testimony he stated he saw moderate damage to defendant's truck, while at trial, Waskom testified that it was hard to tell how much damage was sustained by defendant's truck. Finally, defendant claims that Waskom's deposition and trial testimony differed on whether defendant spoke to Waskom through the passenger window or driver's side window of Waskom's truck.

Louisiana Code of Evidence article 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." Article 403 addresses the *admissibility* of evidence. At no time did defendant object to the admissibility of Waskom's testimony. Accordingly, there can be no Article 403 violation, due to defendant's failure to timely object to those portions of Waskom's testimony. See La. Code Crim. P. art. 841; La. Code Evid. art. 103(A)(1).

In an effort to fully address defendant's concerns on this issue, we note that the trier of fact may accept or reject in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of witnesses, the matter is one of the weight of the evidence, not its sufficiency. The court of

appeal will not assess the credibility of witnesses or reweigh the evidence to overturn a factfinder's determination of guilt. ***State v. Jones***, 97-1687, p. 8 (La. App. 1st Cir. 5/15/98), 714 So.2d 819, 823, ***writ denied***, 98-1597 (La. 10/30/98), 723 So.2d 975.

Obviously, the trial court was unaffected by the discrepancies between Waskom's trial testimony and his deposition testimony in resolving the issue of defendant's guilt, namely, whether defendant was operating a vehicle while under the influence. Moreover, we find it was reasonable for the trial court to ignore certain minor discrepancies such as those outlined by defendant, in light of other evidence supporting the conclusion that defendant was driving a vehicle while under the influence of alcohol.

This assignment of error is without merit.

SUFFICIENCY OF THE EVIDENCE

In his second assignment of error, defendant argues that the trial court erred in finding sufficient evidence to convict defendant of driving while intoxicated.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude that the state proved all the essential elements of the crime beyond a reasonable doubt. See La. Code Crim. P. art. 821. The ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated into Article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that the

fact finder must be satisfied that the overall evidence excludes every reasonable hypothesis of innocence. ***State v. Jones***, 97-1687 at p. 3, 714 So.2d at 820.

In order to convict an accused of driving while intoxicated, the state need prove only: (1) that the defendant was operating a vehicle, and (2) that he was under the influence of alcohol or drugs. La. R.S. 14:98(A). Intoxication with its attendant behavioral manifestations is an observable condition about which a witness may testify. What behavioral manifestations are sufficient to support a charge of driving while intoxicated must be determined on a case-by-case basis. Some behavioral manifestations, independent of any scientific test, are sufficient to support a charge of driving while intoxicated. ***State v. Sampia***, 96-1460, pp. 4-5 (La. App. 1st Cir. 6/20/97), 696 So.2d 618, 620-21.

The evidence presented by the state establishes that Waskom arrived on the scene to find defendant sitting in his truck, which was in a ditch. As defendant walked toward Waskom's vehicle, he stumbled and fell against Waskom's vehicle, causing a side mirror to collapse. Waskom detected the odor of alcohol on defendant's breath and defendant admitted that he had lost control of his vehicle as he came out of the preceding curve.

Waskom and Trooper Lazard both testified that as Trooper Lazard's unit approached the trailer, defendant attempted to flee. According to Waskom, Trooper Lazard arrived within two minutes of defendant walking over to the trailer. At no time did Waskom see defendant consume any alcohol following his arrival at the scene. Trooper Lazard also testified that he could detect a strong odor of alcohol on defendant's breath and defendant admitted he had consumed five to six beers. Although defendant denied driving the truck, Trooper Lazard

searched his person and seized the keys to the truck from defendant's front pants pocket.

Although an individual's flight does not in and of itself indicate guilt, it can be considered as circumstantial evidence that the individual has committed a crime; flight shows consciousness of guilt. Flight is one of the circumstances from which guilt may be inferred. ***State v. Williams***, 610 So.2d 991, 998 (La. App. 1st Cir. 1992), ***writ denied***, 617 So.2d 930 (La. 1993). Moreover, "lying" has been recognized as indicative of an awareness of wrongdoing. ***State v. Alpaugh***, 568 So.2d 1379, 1384 (La. App. 1st Cir. 1990), ***writ denied***, 572 So.2d 65 (La. 1991).

Based on the record evidence, the trial court could have reasonably concluded that defendant was driving his truck while intoxicated. The circumstances that support a determination that defendant was guilty of this offense include: defendant appeared intoxicated to both Waskom and Trooper Lazard; his flight from Trooper Lazard; his admission to Trooper Lazard that he consumed five to six beers; his admission to Waskom that he was driving the truck when he lost control and entered the ditch; his later contradictory claim to Trooper Lazard that an unnamed friend was driving and subsequently fled the scene; and the discovery of the truck keys in defendant's pocket.

Considering the evidence in the light most favorable to the state, we find the evidence sufficiently supports defendant's conviction for driving while intoxicated. We also find the evidence negates the possibility that defendant consumed any alcohol after he lost control of his truck, or that an unnamed third person was driving the truck when the crash occurred.

This assignment of error is without merit.

SENTENCING

In defendant's third assignment of error, he argues that the trial court erred in sentencing him to a term of imprisonment of twenty-five years, as opposed to home incarceration or a lesser term. Defendant's initial argument is that the sentence for his prior conviction of DWI third offense, under docket number 3-02-287 in the Nineteenth Judicial District Court, was illegal because the trial court failed to comply with the provisions of La. R.S. 14:98(D)(1)(b)(i) and (ii). Specifically, defendant claims that the minute entry for this conviction reveals the trial court gave him credit for undergoing substance abuse evaluation and inpatient treatment at sentencing, but there is no proof in the minute entry that the treatment met the provisions of La. R.S. 14:98(D)(1)(b)(i) and (ii). According to defendant's brief, these provisions show that "an immediate evaluation is required by the Department of Health and Hospitals and that the treatment program administered by the Department is in compliance with La. R.S. 13:5301 et seq." Defendant argues that he has not received this statutory benefit.

In ***State v. Mayeux***, 2001-3195, p. 1 (La. 6/21/02), 820 So.2d 526, 527, the Louisiana Supreme Court held that the provisions of the statute in effect at the time of conviction are applicable to cases involving DWI offenses. In his third offense predicate (3-02-287), defendant was convicted and sentenced on November 10, 2003. At the time of defendant's third predicate conviction, the pertinent part of La. R.S. 14:98(D) regarding substance abuse treatment provided as follows:

> (1)(a)... The remainder of the sentence of imprisonment shall be suspended and the offender undergo an evaluation to determine the nature and extent of the offender's substance abuse disorder.

> (b) The treatment professional performing the evaluation shall recommend appropriate treatment modalities which shall include substance abuse treatment at an inpatient facility recommended by the Department of Health and Hospitals, office for addictive disorders and approved by the Department of Public Safety and Corrections for a period of not less than four weeks nor more than six weeks.

The November 10, 2003 minute entry in docket number 3-02-287 reflects the trial court gave defendant credit for completion of an inpatient substance abuse treatment program. Defendant now argues that there is no evidence this treatment met the requirements set forth by the statute.

Defendant is attempting to collaterally attack a prior sentence in the context of the appeal for his current conviction. We find that any claims of sentencing error for a prior conviction should have been raised in the context of that prior conviction and are not properly before this court. See La. Code Crim. P. arts. 912(C) and 920.

Moreover, we note that defendant introduced no evidence in conjunction with his motion to reconsider sentence that would support his argument that the treatment he was given credit for at his DWI third offense sentencing was not in compliance with the statute. We note that there is a presumption of regularity in judicial proceedings and based on the record, we find no validity in defendant's attempt to have his sentence for DWI third offense found invalid for use as a predicate DWI conviction. See La. R.S. 15:432; ***State v. Davis***, 559 So.2d 114 (La. 1990) (per curiam).

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may fall within statutory limits, it may nevertheless violate a defendant's constitutional right against excessive

punishment and is subject to appellate review. ***State v. Sepulvado***, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. ***State v. Reed***, 409 So.2d 266, 267 (La. 1982). A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. ***State v. Lanclos***, 419 So.2d 475, 478 (La. 1982).

Defendant was convicted of the present offense on May 2, 2006. The applicable penalty provision for DWI fourth offense under La. R.S. 14:98(E) in this matter provides as follows:

> (4)(a) If the offender has previously been required to participate in substance abuse treatment and home incarceration pursuant to Subsection D of this Section, the offender shall not be sentenced to substance abuse treatment and home incarceration for a fourth or subsequent offense, but shall be imprisoned at hard labor for not less than ten nor more than thirty years, and at least three years of the sentence shall be imposed without benefit of suspension of sentence, probation, or parole.

Louisiana Code of Criminal Procedure article 894.1 sets forth the items that must be considered by the trial court before imposing sentence. Generally, the trial court need not recite the entire checklist of factors, but the record must reflect that it adequately considered the guidelines. ***State v. Shipp***, 98-2670, p. 6 (La. App. 1st Cir. 9/24/99), 754 So.2d 1068, 1072.

Despite defendant's argument that the trial court ignored the recommendation in the Pre-Sentence Investigation (PSI) for home incarceration, we note defendant was not eligible for such since he had previously received the benefit of such as a DWI third offender. Accordingly the statute mandated that defendant be sentenced to imprisonment at hard labor, and that at least three of these years be served without benefit of parole, probation, or suspension of sentence.

The trial court sentenced defendant to a term of twenty-five years at hard labor, with the first twelve years to be served without benefit of probation, parole or suspension of sentence. During sentencing, the trial court noted that defendant had personally acknowledged having a problem with alcohol. The court also noted that it had considered letters submitted by defendant's family, which requested that defendant be given some form of long-term treatment. The trial court noted that defendant had previously been ordered to seek treatment and had failed to do so when he had numerous opportunities.

The trial court also reviewed defendant's DWI history. Defendant's first DWI conviction occurred in November 1988, and defendant failed to complete a substance abuse evaluation and treatment. Defendant was also convicted in 1992 for DWI, for which he received bench probation. Defendant was also convicted in 1995 for DWI third offense, for which he was released on good-time supervision, which was eventually revoked when he was arrested for yet another DWI. The trial court noted that even after his initial good-time was revoked, he was allowed to be released again for good-time behavior.

In December 2001, defendant was arrested for fourth offense DWI, and he pleaded guilty to third offense DWI. For that conviction, defendant was sentenced to three years at hard labor with all but thirty days suspended and placed on probation with a condition and order that he obtain and successfully complete substance abuse treatment. While on probation for this conviction, defendant was arrested for another DWI offense.

In September 2002, defendant pleaded guilty to another DWI, and received a sentence of five years probation, which was never activated because of defendant's current arrest for DWI. The court noted that it was "an absolute miracle" that defendant had not hurt himself or some innocent motorist as a result of his propensity to drink and drive. The trial court noted that defendant had violated the law prohibiting drinking and driving on seven prior occasions. Finally, the trial court noted that it was not willing to risk allowing defendant to have another opportunity to harm someone. The court then imposed a twenty-five year sentence at hard labor.

We conclude that the circumstances of defendant's present offense indicate a complete lack of responsibility for his actions. Based on the evidence in the record of defendant's past behavior and the circumstances surrounding the instant conviction, we cannot say the trial court abused its discretion in sentencing defendant. Defendant's continued behavior of driving while intoxicated presents a serious threat to the public, and he has been given numerous opportunities to change his behavior, to no avail.

This assignment of error is without merit.

DECREE

For these reasons, we affirm the conviction of and sentence imposed upon defendant, Michael Gill.

CONVICTION AND SENTENCE AFFIRMED.