IN THE TENTH JUDICIAL CIRCUIT COURT FOR HARDEE, HIGHLANDS AND POLK COUNTY, FLORIDA

County Case No.: TT01-000306-XX
TT01-000305-XX

Appeal No.: DD-58

DAVID PALELLA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.
_________________________________/

OPINION OF THE COURT

This is an appeal of a ruling in the county court of Polk County, Judge Ellen S. Masters presiding. Appellant, David Palella raises on appeal the trial judge's ruling on defense counsel's motion for judgment of acquittal. This court has jurisdiction. Fla. R. App. P. 9.030(a). The ruling of the county court is AFFIRMED.

On January 15, 2001, Deputy Kathy Thompson of the Polk County Sheriff's Office was patrolling east on Memorial Boulevard in Lakeland when she noticed a vehicle approaching without its headlights on, which according to her testimony is a possible indicator that the driver is under the influence. After observing Appellant make a wide right turn, she initiated a traffic stop. When Appellant rolled down his window, Deputy Thompson testified that she smelled a strong odor of alcoholic beverage and she noted that Appellant's eyes were bloodshot, his face flushed, and his voice slurred. Further, Appellant was not wearing corrective lenses, which his driver's license required him to wear. Appellant was then asked to exit the vehicle and perform two field sobriety tests, the walk and turn and the one-legged stand, which he failed. Based on her observations and based on experience gathered from making more than 100 DUI arrests, Deputy Thompson concluded that Appellant was driving under the influence.

On May 4, 2001, Appellant was charged with one count of driving in violation of driver's license restriction, in violation of §322.16, Florida Statutes (2000), and one count of driving under the influence, in violation of §316.193. Following a jury trial, Appellant was adjudicated guilty on both charges. For the DUI conviction, he was sentenced to one year in county jail and in addition, the trial court imposed $1331 in court costs and fines, a public defender fee of $300, F6 statutory license restrictions, and revoked his driver's license permanently. Further, he was ordered to complete multi-offender DUI school, attend a victim impact panel session, and

undergo alcohol evaluation and treatment. On the driving in violation of driver's license restriction conviction, Appellant was sentenced to 60 days in jail, concurrent to the one-year jail sentence. In addition, the trial court imposed $183.50 in court costs and fines as well as D6 statutory license restrictions. Appellant argues two issues on appeal, each of which will be addressed in turn.

First, the Appellant argues that the trial court erred in denying his motion for judgment of acquittal. At trial, defense counsel moved for a judgment of acquittal because there was no testimony that Appellant's normal faculties were impaired. The trial court denied the motion for judgment of acquittal and Appellant seeks review of the denial of this motion.

Florida Rules of Criminal Procedure 3.380 governs motions for judgment of acquittal and states in relevant part as follows:

> (a) If, at the close of the evidence for the State or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant, shall, enter a judgment of acquittal.
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> (b) A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant, but after introduction of evidence by the defendant, the motion for judgment of acquittal must be renewed at the close of all the evidence. Such motion must fully set forth the grounds upon which it is based.

A trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed. San Martin v. State, 717 So.2d 462 (Fla. 1998).

Based upon Deputy Thompson's testimony concerning the Appellant's erratic driving, field sobriety test performance, and the strong smell of alcohol, the Court finds that there was substantial, competent evidence that Appellant was guilty of driving under the influence. Therefore, the trial court did not abuse its discretion in denying the motion for judgment of acquittal.

Second, Appellant argues that the trial court erred in permanently revoking his driver's license. At sentencing, the trial court took judicial notice of Mr. Palella's driving record and recognized it to be his fourth driving under the influence conviction. Appellant argues that since he was facing a permanent license revocation, he is entitled to have the prior convictions proven by more than a driving record. According to Appellant, driving records are not sufficiently reliable to prove a defendant's prior record in a DUI conviction. Jackson v. State, 788 So.2d 373 (Fla. 4th DCA 1996). However, a misdemeanor DUI does not require proof of earlier convictions since it is not an element of the charge. Haddix v. State, 668 So.2d 1064 (Fla. 4th DCA 1996). Appellant also alleges that his license should not have been revoked because his last DUI conviction was outside the ten-year window required in §322.28, Fla. Stat. (2000). Under §322.28(2)(e), the only requirement is that at least one of the convictions occurred after July 1,

1982. Since Appellant's last DUI conviction occurred in 1987, the requirement is met. Therefore, the trial court did not err in permanent revoking Appellant's driver's license.

Accordingly, it is ORDERED that the ruling of the county court is AFFIRMED.

ORDERED January 30, 2003.

CHARLES B. CURRY, Chief Judge