

COURT OF APPEALS OF VIRGINIA

Record No. 0786-26-3

GABRIEL KUTCHKO WILL
v.
COMMONWEALTH OF VIRGINIA

Present: Judges Friedman, White and Frucci

Opinion Issued October 6, 2026*

FROM THE CIRCUIT COURT OF BOTETOURT COUNTY

Joel R. Branscom, Judge

(Malcolm McL. Doubles; Wiegandt & Doubles, P.C., on brief), for appellant. Appellant submitting on brief.

(Jay Jones, Attorney General; Celtia R. Rokebrand, Assistant Attorney General, on brief), for appellee.

MEMORANDUM OPINION
PER CURIAM

Following a bench trial, the circuit court convicted Gabriel Kutchko Will of driving under the influence (DUI). On appeal, Will contends that the evidence is insufficient to support his conviction. For the following reasons, we affirm the circuit court's judgment.¹

* This opinion is not designated for publication. *See* Code § 17.1-413(A).

¹ Having examined the briefs and record in this case, the panel unanimously agrees that oral argument is unnecessary because “the appeal is wholly without merit.” Code § 17.1-403(ii)(a); Rule 5A:27(a). Furthermore, we note that Will waived oral argument.

BACKGROUND²

On August 18, 2025, Botetourt County Police Deputy Richer was operating stationary radar late at night when he saw a red pickup truck driving at 70 miles per hour in a 55 mile per hour zone. He followed the truck, driven by Will, and saw it weaving back and forth more than once. Deputy Richer activated his emergency equipment and initiated a stop.

Will stopped and immediately opened his door and attempted to get out, but Deputy Richer ordered him to remain in his vehicle. As Deputy Richer spoke with Will, he noted that Will was sweating profusely and slurred his speech. When Deputy Richer asked Will for his license and registration, Will reached for an Alcoholics Anonymous (AA) card and stated he was an AA member. Instead of producing his registration, Will removed a Bible from the truck's center console and stated, "this is the word of God." Eventually, Will provided his documentation. Will initially stated that he had not been drinking but later admitted having consumed a 12-ounce beer.

When backup arrived, Will agreed to perform field sobriety tests. Deputy Richer noted Will lacked smooth pursuit in both eyes during the horizontal gaze nystagmus test. Will started to perform the walk-and-turn test but complained of knee pain so Deputy Richer stopped the test. When instructed to count backwards from 69 to 53 and to recite the alphabet from the letter 'E' to 'R,' Will performed poorly on the tests. Will haltingly executed the one-leg-stand test. Deputy Richer arrested Will for DUI.

Deputy Richer explained that he initiated the traffic stop at 10:48 p.m., arrested Will at 11:19 p.m., and they arrived at the jail at 11:47 p.m. Will submitted to an Intoxilyzer breath test

² We recite the facts "in the 'light most favorable' to the Commonwealth, the prevailing party in the trial court." *Hammer v. Commonwealth*, 74 Va. App. 225, 231 (2022) (quoting *Commonwealth v. Cady*, 300 Va. 325, 329 (2021)). In doing so, we discard any evidence that conflicts with the Commonwealth's evidence, and regard as true all the credible evidence favorable to the Commonwealth and all inferences that can be fairly drawn from that evidence. *Cady*, 300 Va. at 329.

which initially began at 11:52 p.m., but it had to be restarted five minutes later because Will burped. The breath certificate was printed at 12:28 a.m., approximately an hour and 40 minutes after Deputy Richer stopped Will. Will's breath-alcohol content (BAC) was 0.07 grams per 210 liters of breath.

While waiting for the magistrate, Will told another arrestee and deputies that he "was probably a .10" when Deputy Richer pulled him over. He also stated that he was probably driving up to 90 miles per hour. At trial, Will admitted that he had consumed alcohol on the day of the stop and estimated that he drank "probably" an entire six-pack of beer. Regarding the discrepancy between his testimony and his statement to Deputy Richer at the scene, Will stated that he was not in his "normal state of mind" due to his bipolar disorder and not taking his medication.

Considering Will's driving behavior, statements, and the test results, the circuit court convicted Will of DUI. The court acknowledged that a 0.07 BAC test result did not carry any presumption but found that it was still evidence the court could consider. Will appeals.

ANALYSIS

Will contends that the evidence was insufficient to convict him of DUI, primarily arguing that because his blood alcohol level was 0.07 he should have been found not guilty. "When an appellate court reviews the sufficiency of the evidence underlying a criminal conviction, its role is a limited one." *Commonwealth v. Garrick*, 303 Va. 176, 182 (2024). "The judgment of the trial court is presumed correct and will not be disturbed unless it is 'plainly wrong or without evidence to support it.'" *Pijor v. Commonwealth*, 294 Va. 502, 512 (2017) (quoting Code § 8.01-680). "Thus, 'it is not for this [C]ourt to say that the evidence does or does not establish [the defendant's] guilt beyond a reasonable doubt because as an original proposition it might have reached a different conclusion.'" *Commonwealth v. Barney*, 302 Va. 84, 97 (2023) (alterations in original) (quoting *Cobb v. Commonwealth*, 152 Va. 941, 953 (1929)). "The only 'relevant question [for this Court on review] is, after reviewing the evidence in the light most

favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *Id.* (quoting *Sullivan v. Commonwealth*, 280 Va. 672, 676 (2010)).

“It shall be unlawful for any person to drive or operate any motor vehicle . . . while such person is under the influence of alcohol” Code § 18.2-266. Under Code § 18.2-269(A)(2), if a suspect’s blood test after an arrest for DUI reflects a BAC:

in excess of 0.05 percent but less than 0.08 percent by weight by volume . . . such facts shall not give rise to any presumption that the accused was or was not under the influence of alcohol intoxicants at the time of the alleged offense, *but such facts may be considered with other competent evidence in determining the guilt or innocence of the accused*[.]

(Emphasis added).

In the absence of forensic testing demonstrating blood alcohol content in excess of the proscribed limit, the degree of intoxication “is established when any person has consumed enough alcoholic beverages to ‘so affect his manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation.’” *Hogle v. Commonwealth*, 75 Va. App. 743, 753-54 (2022) (quoting *Thurston v. City of Lynchburg*, 15 Va. App. 475, 483 (1992)); *see* Code § 4.1-100. “In determining whether a defendant was under the influence, a factfinder considers ‘all of the evidence of his condition at the time of the alleged offense.’” *Hogle*, 75 Va. App. at 754 (quoting *Leake v. Commonwealth*, 27 Va. App. 101, 109 (1998)). “This Court has found that ‘[a] defendant’s admission that he consumed several alcoholic beverages, together with the testimony of the arresting officer regarding the defendant’s appearance and lack of coordination, is sufficient to support a conviction for driving under the influence of alcohol.’” *Id.* (alteration in original) (quoting *Lemond v. Commonwealth*, 19 Va. App. 687, 694 (1995)).

Here, based upon the totality of evidence in this record, a rational finder of fact could have found beyond a reasonable doubt that Will was operating his vehicle while under the influence of alcohol. Will's BAC registered 0.07 an hour and 40 minutes after Deputy Richer saw him driving. Although Will's BAC did not give rise to a presumption that he was under the influence of alcohol, the circuit court was entitled to consider the BAC along with other competent evidence. *See* Code § 18.2-269(A)(2). Will himself speculated that his BAC when he was driving probably was 0.10. Will admitted having consumed at least six beers before driving, even though he initially told Deputy Richer that he had only had one beer. Will smelled of alcohol, slurred his speech, and was sweating profusely. He was unable to perform the field sobriety tests successfully. Deputy Richer also reported that Will was speeding and weaving before the stop. Upon stopping, Will immediately attempted to exit his truck. Will responded oddly to Deputy Richer's request for his license and registration, initially producing an AA card and a Bible before producing his documents. *See Lemond*, 19 Va. App. at 694 (holding that "[a] defendant's admission that he consumed several alcoholic beverages, together with the testimony of the arresting officer regarding the defendant's appearance and lack of coordination, is sufficient to support a conviction for driving under the influence of alcohol").

Considering all of these facts and circumstances, a reasonable finder of fact could conclude that Will had consumed enough alcohol to "affect his manner, disposition, speech, muscular movement, general appearance, or behavior." Code § 4.1-100; *Thurston*, 15 Va. App. at 483. Accordingly, we find that the circuit court did not err in finding Will guilty of DUI in violation of Code § 18.2-266.

CONCLUSION

For the reasons stated above, we affirm the circuit court's judgment.

Affirmed.