

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Brian D. Pieper,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 31, 2023

Court of Appeals Case No.
23A-CR-971

Appeal from the Wayne Superior
Court

The Honorable Darrin M.
Dolehanty, Judge

Trial Court Cause No.
89D03-2209-F5-79

Memorandum Decision by Judge Brown
Judges Vaidik and Bradford concur.

Brown, Judge.

[1] Brian D. Pieper appeals his conviction and sentence for operating a motor vehicle after forfeiture of license for life as a level 5 felony. He claims the evidence is insufficient to sustain his conviction and his sentence is inappropriate. We affirm.

Facts and Procedural History

[2] On September 14, 2022, Centerville Chief of Police William Buchholz was on patrol and had Officer Devon Robbins riding with him in a field training position. Chief Buchholz was familiar with the neighborhood and noticed a gold Oldsmobile which he did not recognize parked on a street. He ran the license plate on the vehicle, “[i]t came back to a maroon Lincoln, to Brian Pieper as the registered owner,” and he learned that Pieper’s driver’s license had been forfeited for life. Transcript Volume II at 76. Approximately four or five hours later, Chief Buchholz noticed the Oldsmobile was located across the street from where it had been previously parked. Chief Buchholz and Officer Robbins observed two men enter the Oldsmobile and saw Pieper enter the driver’s door of the vehicle. The Oldsmobile began moving, and Chief Buchholz increased his speed to catch up with the vehicle. Chief Buchholz activated his lights and initiated a traffic stop. When the Oldsmobile stopped, Pieper exited the driver’s door and walked to the rear of the vehicle. The officers did not see any movement inside the Oldsmobile before they observed Pieper exit the vehicle through the driver’s door. Officer Robbins approached the man in the front passenger seat of the Oldsmobile and identified him as Arlace Moore.

[3] On September 19, 2022, the State charged Pieper with operating a motor vehicle after forfeiture of license for life as a level 5 felony. In March 2023, the court held a jury trial. The parties stipulated that Pieper’s “driving privileges were validly suspended for life . . . throughout September 14th of 2022.” *Id.* at 62. Officer Robbins testified that he observed Pieper enter the driver’s seat of the gold vehicle and, after the traffic stop, saw Pieper exit the driver’s seat. When asked “just to confirm, you were familiar with Brian Pieper, and you observed him get in the driver’s seat, and exit the driver’s seat from the car,” Officer Robbins responded “[y]es,” and when asked “did you observe any movement in that vehicle while you were following it, prior to the stop,” he replied “[n]o, I did not.” *Id.* at 66. He further indicated he was approximately thirty feet from the vehicle when it was in motion and could reasonably see if anyone was moving in the vehicle and was approximately fifteen to twenty feet away when he watched Pieper exit the vehicle.

[4] The prosecutor asked Chief Buchholz: “when you were following the vehicle, did you see anyone in the car moving? Like was anyone changing seats? Was anyone moving around?” *Id.* at 78. Chief Buchholz replied: “No. I did not see any movement whatsoever.” *Id.* When asked “about how far behind the car were you,” he answered: “To begin with, we were about four (4) to five (5) car-lengths behind it, until I caught up with it After he crossed the intersection . . . I was caught up to him, and had activated my lights . . . to initiate a traffic stop. So I was probably a car length away by that time.” *Id.* When asked what happened when he initiated the stop, he testified: “Just prior to me being able to

put my vehicle in park and actually calling in the stop, I observed Mr. Pieper immediately exit the driver's door and come to the rear of the vehicle." *Id.* at 78-79. When asked "[s]o prior to you seeing him exit the door, . . . you saw no movement inside the car before he exited," he answered "[n]o," and when asked "about how far away from the gold Oldsmobile were you," he replied "[t]he front bumper of my truck probably would have been about eight (8) to ten (10) feet, at the most, from the rear bumper of the Oldsmobile." *Id.* at 79.

[5] On cross-examination, Chief Buchholz testified he also "ran [Moore's] driving privileges" and "he was suspended as [an] habitual traffic violator for life as well." *Id.* at 83. When asked "[s]o when you observed the individuals get into the vehicle when it was parked . . . were you personally able to identify which person got into which seat in the vehicle," Chief Buchholz replied: "Yeah. I believe Arlace Moore was a little taller, and of course they were dressed differently, so you could distinguish who was who getting in the vehicle. But as facial recognition, since I didn't know either one of them on sight like Officer Robbins did, no." *Id.* On redirect examination, when asked "the outfit on the person that you observed get in the driver's seat, is that the same outfit on the person that you saw exit the driver's seat," he answered "[y]es." *Id.* at 84.

[6] Pieper's aunt testified that Pieper lived with her and that, on September 14, 2022, she had driven him to a jobsite in Centerville. Pieper testified that Moore drove the gold Oldsmobile to the jobsite and that he rode with his aunt to the site. He testified that he and Moore left the site in the Oldsmobile, that Moore was driving, and that he was in the backseat. He testified that Moore stopped

the vehicle so he could check on tools in the trunk, he exited the vehicle on the driver's side and walked to the trunk, Moore moved to the passenger seat, and as he opened the trunk the officers pulled up and activated their lights. The jury found Pieper guilty.

[7] At sentencing, Pieper's aunt testified that, prior to his incarceration, Pieper had been living with her and her husband and that Pieper helped with their yardwork and did everything they could no longer do. She testified as to her husband's medical issues, that Pieper's incarceration would be a great hardship on her and her husband, and that Pieper had been like a son to them. Pieper asked for leniency and stated a lengthy sentence would have a detrimental effect on his family. He stated he would "happily accept any alternatives and obtain gainful employment immediately upon [his] release." *Id.* at 122. Pieper's counsel recommended a sentence of three to four years with two to three years suspended to probation and one of the conditions being home detention for one year. The prosecutor recommended a sentence of three years. The court stated:

Today's conviction is the thirteen[th] (13[th]) felony conviction on Mr. Pieper's record, and his twenty-third (23rd) overall criminal conviction. He was on probation in Ohio at the time of the commission of the crime in this case. According to the information in the pre-sentence report, there have been violations of probation, there have been failures to appear for hearings, and a variety of sentencing options have been pursued including jail time, suspended jail time, prison time, suspended prison time, probation, community correction efforts, and for reasons that nobody's been able to explain, Mr. Pieper just continues to operate a motor vehicle, even though he's lost his driving privileges for life many years ago.

Id. at 126. The court found the mitigating circumstances included that the offense was not violent and did not result in harm to an individual and that his incarceration would cause a hardship to his aunt and uncle who depended on him for help. The court found “[t]he massive criminal history by itself far outweighs the mitigating factors . . . and justif[ies] deviation from the advisory sentence.” *Id.* The court sentenced Pieper to five years.

Discussion

I.

[8] Pieper asserts the evidence was insufficient to overcome his claim that he was not driving. He does not challenge the evidence “that he was a Lifetime Suspended Driver,” but asserts “the State did not prove that he was the man driving beyond a reasonable doubt.” Appellant’s Brief at 14. He argues that Officer Robbins “admitted that his ability to observe the vehicle was visually impaired due to its location and his distance,” that his own testimony “was clear that he exited the rear seat and Arlace Moore moved from the driver’s seat into the passenger seat,” and that, “[w]hile this appears to invite this Court to reweigh the evidence, [he] believes the testimony of the officers is incredibly dubious – enough so as to cast doubt on the sole issue at hand.” *Id.* at 15.

[9] When reviewing claims of insufficiency of the evidence, we do not reweigh the evidence or judge the credibility of witnesses. *Jordan v. State*, 656 N.E.2d 816, 817 (Ind. 1995), *reh’g denied*. We look to the evidence and the reasonable inferences therefrom supporting the verdict. *Id.* We will affirm the conviction

if evidence of probative value exists from which a reasonable jury could find the defendant guilty beyond a reasonable doubt. *Id.* Ind. Code § 9-30-10-17 provides that a person who operates a motor vehicle after the person's driving privileges are forfeited for life commits a level 5 felony. Identity may be established entirely by circumstantial evidence and the logical inferences drawn therefrom. *Cherry v. State*, 57 N.E.3d 867, 877 (Ind. Ct. App. 2016), *trans. denied*. Identification testimony need not necessarily be unequivocal to sustain a conviction. *Id.* Inconsistencies in identification testimony impact only the weight of that testimony because it is the task of the trier of fact to weigh the evidence and determine the credibility of the witnesses. *Gleaves v. State*, 859 N.E.2d 766, 770 (Ind. Ct. App. 2007). As with other sufficiency matters, we will not weigh the evidence or resolve questions of credibility when determining whether identification evidence is sufficient to sustain a conviction. *Holloway v. State*, 983 N.E.2d 1175, 1178 (Ind. Ct. App. 2013).

[10] To the extent Pieper asserts the incredible dubiousity rule requires reversal, we note that this rule applies only in very narrow circumstances. *See Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). The rule is expressed as follows:

If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed. This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiousity. Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.

Id. (citations omitted).

[11] Pieper fails to show that the testimony of Chief Buchholz or Officer Robbins was inherently contradictory or so inherently improbable that no reasonable person could believe it. To the extent there was any conflict between the officers' testimony and the testimony of Pieper, this is an issue of witness credibility, and we do not assess witness credibility or reweigh the evidence. *See Jordan*, 656 N.E.2d at 817. The officers were thoroughly examined and cross-examined regarding their observations, the position and distance of the Oldsmobile relative to their position at the time they observed Pieper enter the vehicle and until he exited the vehicle, their ability to see movement in the Oldsmobile, and their identification of Pieper as the driver of the vehicle. Based upon our review of the evidence as set forth above and in the record, we conclude the State presented evidence of a probative nature from which a trier of fact could find beyond a reasonable doubt that Pieper committed the charged offense.

II.

[12] Pieper next argues that his sentence is inappropriate. He contends the offense was a nonviolent crime related to driving and he did not cause any direct harm or injury. He argues that his criminal history is mainly comprised of nonviolent offenses, he expressed remorse and a willingness to find gainful employment, and he was offering support to his relatives. He requests that this Court revise his sentence to three years.

[13] Ind. Appellate Rule 7(B) provides that we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006). Ind. Code § 35-50-2-6 provides that a person who commits a level 5 felony shall be imprisoned for a fixed term of between one and six years with the advisory sentence being three years.

[14] Our review of the nature of the offense reveals that on September 14, 2022, while his driving privileges were validly suspended for life, Pieper operated a motor vehicle. Our review of the character of the offender reveals Pieper was born in 1968 and his criminal history includes convictions for driving without insurance as a class C misdemeanor in 1988; driving while suspended as a class A misdemeanor and minor consuming alcohol as a class C misdemeanor in 1989; dealing in marijuana as a class A misdemeanor in 1990; operating a vehicle while intoxicated as a class A misdemeanor in January 1992; operating a vehicle while intoxicated and possession of marijuana as class D felonies in October 1992; theft as a class D felony in 1995; operating a vehicle with an ACE of 0.15 or more as a class D felony in 1997; public intoxication as a class B misdemeanor in 1999; public intoxication as a class B misdemeanor in 2001; battery as a class A misdemeanor in 2000; possession of cocaine as a class D felony in 2002; operating a vehicle as an habitual traffic violator as a class D

felony in 2003; forgery as a class C felony in 2006¹; public intoxication as a class B misdemeanor in 2012; disorderly conduct as a class B misdemeanor in 2013; operating a motor vehicle after forfeiture of license for life as a level 5 felony in 2018; aggravated possession of drugs as a 3rd degree felony, aggravated possession of drugs as a 5th degree felony, and tampering with evidence as a 3rd degree felony in Ohio in 2019; and maintaining a common nuisance as a level 6 felony in 2019. He has been placed on probation and had his probation revoked. The presentence investigation report (“PSI”) provides “[t]he instant case will be defendant’s 13th Felony conviction and the 3rd for HTV” and he “was on Felony probation at [the] time of the instant offense.” Appellant’s Appendix Volume II at 88.

[15] The PSI provides that, “[p]rior to going to prison in 2018, he was self-employed in construction/remodeling” and that, “[s]ince getting out of prison in 2018, he reported working mostly for the family doing odd jobs in exchange for rent and other expenses.” *Id.* at 89. With respect to substance abuse, the PSI states that Pieper reported drinking “a lot of beer” on a daily basis beginning at age twenty-one, “reported periods of both binge drinking and abstinence,” and indicated he had not consumed alcohol since 2016. *Id.* He “reported regular use of marijuana, as often as daily, since 18 years of age” and “reported he reduced his use to once per week or less and last used about 2 months ago.” *Id.* at 89-90. He reported “misusing Xanax ‘off and on’ for several years” and “he

¹ Pieper was also found to be an habitual offender under the cause in 2006.

has not used Xanax for 10 years or longer.” *Id.* at 90. He “described crack cocaine as ‘one of [his] downfalls,’” “reported he binged ‘off and on’ from 1989 until 2016, noting particularly bad periods in 1995 and 2004,” and reported he had not used cocaine since 2016. *Id.* He reported he began using methamphetamine in 2017, “reported daily use, to help with aches and energy” and indicated “he last used in 2018.” *Id.* The PSI also indicates that Pieper’s overall risk assessment score using Indiana’s risk assessment tool places him in the high risk to reoffend category.

[16] After due consideration, we conclude that Pieper has not sustained his burden of establishing that his sentence is inappropriate in light of the nature of the offense and his character.

[17] For the foregoing reasons, we affirm Pieper’s conviction and sentence.

[18] Affirmed.

Vaidik, J., and Bradford, J., concur.