

IN THE MUNICIPAL COURT OF APPEALS
OF THE CITY OF EL PASO, TEXAS

ANNE TRAHAN

Appellant,

vs.

STATE OF TEXAS,

Appellee.

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No. 04-MCA-2933

OPINION

Appellant appeals her conviction in Municipal Court for operating a motor vehicle in a public place as a minor while having a detectable amount of alcohol in her system as prohibited by Texas Alcohol and Beverage Code Section 106.041. A fine of \$150.00 was assessed.

Appellant's first point of error complains that the record does not reflect that the officer, who is the only witness against her, was properly sworn. The Statement of Facts which is contained in this record only reflects that when the officer was called as a witness, that he had been previously sworn, but the defendant and her mother and father claim that the officer was not in the court when all of the other persons were sworn, and therefore contends he was not properly sworn. Appellant's mother and father provide Affidavits to this court supporting that allegation, but those Affidavits cannot be considered by this court because they are evidence outside the record before the Trial Court.

Nonetheless, the record reflects that neither Appellant nor her attorney objected to the fact that the police officer may not have been sworn and thereby waived any error. **Beck v. State 719 SW 2d. 205 (Tex. Crim. App. 1986).**

Appellant next contends that the officer gave hearsay testimony concerning her state of intoxication, and that allowing such inadmissible evidence was error. Again, the record reflects that no objection was interposed to that testimony, and it is thereby waived. More importantly, however, is the fact that the officer did testify that he smelled alcohol on her breath and person, and then testified after

being recalled by the defense, that the officer evidently also administered a horizontal gaze nystagmus test to the defendant, which is a recognized field sobriety test. She failed to have lack of smooth pursuit in both her left and right eye indicating that she had alcohol in her system. That evidence was unchallenged.

From the cases that this court has reviewed in responding to Appellant's points of error, it does appear that there is a substantially reduced burden of proof in cases involving a minor and whether there is a detectable amount of alcohol in their system as opposed to establishing that they were intoxicated. Whether that should be so or not is not challenged in the case before this court, and the court, even though it has reservations about that fact, need not address the issue.

Lastly, Appellant contends that she was issued four (4) citations, and for reasons not reflected in the record, the other three (3) were dismissed, and that they should have been considered by the Trial Court to show that the present citation also lacked merit. The reasons the other citations were dismissed is immaterial and irrelevant to the issue before the Trial Court and this court on appeal, and this court finds it to be without merit.

Having found no reversible error, the judgment of the Trial Court is affirmed.

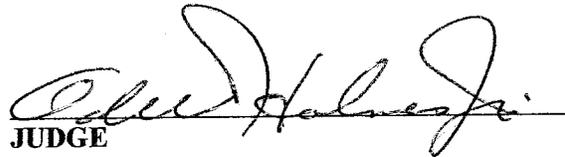
SIGNED this 26 day of Oct, 2004.


JUDGE

J U D G M E N T

This case came on to be heard on the Transcript of the Record of the Court below, the same being considered, it is ORDERED, ADJUDGED and DECREED by the Court that the Judgment be in all things affirmed, and that the Appellant pay all costs in this behalf expended, and that this decision be certified below for observance.

SIGNED this 26 day of Oct, 2004.


JUDGE