IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee

v.

JESSE ANDREW,
Defendant-Appellant.

SUPREME COURT NO. TR-06-0048-GA
SUPERIOR COURT NO. 06-0136

Cite as: 2007 MP 25

Decided November 15, 2007

Richard C. Miller, Assistant Public Defender, Commonwealth Public Defender's Office for Defendant-Appellant.
Ann-Marie Roy, Assistant Attorney General, Commonwealth Attorney General's Office, for Plaintiff-Appellee.

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

MANGLONA, J.:

¶ 1 Appellant Jessie I. Andrew ("Andrew") appeals his conviction of driving under the influence of alcohol claiming there is insufficient evidence to support his conviction. There is no evidence of erratic driving typically associated with intoxication in this case, and no evidence of physical or mental impairment throughout an extended period of police observation. Accordingly, we conclude there is insufficient evidence for a reasonable trier of fact to conclude beyond a reasonable doubt that Andrew drove under the influence of alcohol. We therefore reverse the trial court and vacate Andrew's conviction for driving under the influence.[1]

I

¶ 2 During the early morning of November 24, 2005, Officer Sandy Hambros ("the officer") observed Andrew, who was driving a white vehicle, and the driver of another vehicle park next to each other in oncoming driving lanes. Suddenly, with both vehicles parallel to each other, they quickly drove down the road until the other vehicle eventually passed Andrew. As a result, the officer pulled both Andrew and the other vehicle over on suspicion of racing. The officer, however, neither determined Andrew's speed, nor saw him operate his vehicle out of his driving lane.

¶ 3 The officer approached Andrew and asked for his license and registration. Andrew produced the requested documents. The officer observed nine unopened cans of beer in the vehicle and smelled alcohol on Andrew's breath, but did not ask whether Andrew had anything to drink. Consequently, the officer ordered Andrew to exit the vehicle for a field sobriety test. According to the officer, Andrew exited the vehicle with no difficulties, and Andrew did not lean on the vehicle for support or stumble or sway. However, he refused to take the field sobriety test. After Andrew declined, the officer took him to the Department of Public Safety ("DPS") office. At DPS, Andrew again refused to take a field sobriety test and also declined a breathalyzer test. Andrew acted cooperatively throughout his time with the officer. After a bench trial, Andrew

[1] We note that on June 20, 2007, the Assistant Attorney General responsible for the instant case requested an extension of time to file opposition to Andrew's opening brief pursuant to Com. R. App. P. 31(e). We granted the request and extended the time to file to July 21, 2007. No opposition was ever filed nor was any request made for leave to file a late brief. According to Com. R. App. P. R. 31(c), "[i]f an appellee fails to file a brief, the appellee will not be heard at oral argument . . . ." Consequently, the Court did not hear the Commonwealth's arguments.

was convicted of driving under the influence of alcohol and refusing to submit to a breathalyzer test.[2]

II

¶ 4 Andrew argues that the evidence against him is insufficient to support his conviction for driving under the influence of alcohol. The issue of whether there is sufficient evidence to support Andrew's conviction of driving under the influence of alcohol is reviewed de novo. *Commonwealth v. Yan*, 4 NMI 334, 336 (1996). "Our review must encompass all of the evidence, direct or circumstantial . . . ." *Commonwealth v. Ramangmau*, 4 NMI 227, 237 (1995). We do not re-weigh the evidence, but we consider the evidence in the light most favorable to the government and determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See, e.g.*, *Commonwealth v. Yao*, 2007 MP 12 ¶ 5. We "will not reverse the finding unless, after reviewing all the evidence, we are left with a firm and definite conviction that a mistake has been made." *Tropic Isles Cable TV Corp. v. Mafnas*, 1998 MP 11 ¶ 3.

¶ 5 In the Commonwealth, drivers are prohibited from operating a vehicle with a blood alcohol concentration of 0.08% or greater, or driving under the influence of alcohol to any degree that renders the driver incapable of safely driving. 9 CMC § 7105(a). The driver of any vehicle impliedly consents to a breath test for alcohol. *Id.* § 7106(a). If a driver refuses to submit to a breath test, evidence of refusal is admissible at trial, *id.* § 7107(c), and the driver's license can be revoked for six months. *Id.* § 7106(c). Under Section 7107(c), it is proper for the trier of fact to consider a driver's refusal to take a blood or breath test, along with other evidence, in determining the driver's guilt of driving under the influence.

¶ 6 We previously decided cases where evidence was sufficient to convict drivers of driving under the influence of alcohol. For example, in *Commonwealth v. Martinez*, 2000 MP 5 ¶¶ 6-8, 27, we held there was sufficient evidence to support a conviction of driving under the influence of alcohol when officers saw a motorist drive erratically on the road, almost hit another driver, and drive on the sidewalk. The officers also smelled a strong odor of alcohol and the driver refused to take a breathalyzer test. *Id.* ¶¶ 8-9. Similarly, in *Commonwealth v. Delos Reyes*, 4 NMI 340, 344 (1996), we found sufficient evidence to support a conviction of driving under the influence of alcohol after defendant admitted to consuming three beers before driving. An officer also testified he observed defendant's vehicle speeding and swerving, defendant did not pull over immediately after the officer began pursuing him, defendant smelled of alcohol, defendant had

[2] Andrew was sentenced to thirty days imprisonment, all suspended except for three days, and sentenced to one year of supervised probation. Andrew was further ordered to attend an alcohol information class. Andrew's driver's license was also suspended for six months.

bloodshot eyes and slurred speech, and defendant failed two field sobriety tests. *Id.* Finally, in *Blas v. Commonwealth*, 2007 MP 17 ¶ 8, while there was no direct evidence of the driver's alcohol intake, we concluded there was sufficient evidence to support that the driver drove under the influence of alcohol because witnesses testified they saw the driver drink six or seven cans of beer, that he could not walk in a straight line, and he had a strong odor of alcohol.

¶ 7 However, these Commonwealth cases had ample evidence of intoxication for the trial court to convict the defendants of driving under the influence of alcohol. There is far less evidence of intoxication in the present case. The evidence against Andrew includes the smell of alcohol on his breath and his refusal to take a breathalyzer test. We are without guidance from our case law on whether the evidence mentioned above is sufficient to sustain a conviction for driving under the influence.

¶ 8 The Colorado Supreme Court in *People v. Roybal*, 655 P.2d 410, 413 (Colo. 1982) (en banc), provides persuasive guidance for the instant case. In *Roybal*, the issue was whether the police had probable cause to arrest defendant after a collision, when there was no evidence that defendant's misconduct caused the collision. 655 P.2d at 413. An officer testified that he did not observe any common signs of intoxication in defendant's speech, walk, and ability to understand. *Id.* The only evidence of defendant's intoxication was that an accident took place, defendant drove one of the vehicles involved, and his breath smelled of alcohol. *Id.* The Colorado Supreme Court held that in the absence of any indication that defendant was at fault in causing the collision, the police did not have probable cause to administer a blood test. *Id.*

¶ 9 Viewing all evidence presented in the light most favorable to the Commonwealth, we cannot conclude beyond a reasonable doubt that Andrew drove under the influence of alcohol. While probable cause is not in question here, the evidence presented at trial brings this case in line with *Roybal*. Like *Roybal*, except for the smell of alcohol on his breath, Andrew did not exhibit the common signs of intoxication. The most damaging evidence against Andrew was his refusal to take a breathalyzer test. Andrew's refusal to take the test supports an inference that he sought to suppress evidence of his guilt. *See* 9 CMC § 7107(c). However, "the probative value of this inference is not the same in all cases." *State v. Lorton*, 829 A.2d 647, 650 (N.H. 2003), "[S]ituations arising from a refusal present a difficult gradation" from silent refusal to refusal coupled with an admission. *South Dakota v. Neville*, 459 U.S. 553, 561-62 (1983). "The inference is much stronger, for example, when coupled with an admission." *Lorton*, 829 A.2d at 650; *see Neville*, 459 U.S. at 555 (defendant refused test, explaining, "I'm too drunk, I won't pass the test"); *State v. Parmenter*, 815 A.2d 946, 948 (N.H. 2002) (defendant refused test, concluding, "I know I'm over and you know I'm over"). The inference is also strong, as in *Delos Reyes*,

where defendant refused to take a breathalyzer but had, among other factors, "a flushed face, bloodshot eyes, slurred speech, and a strong odor of alcohol on his breath." 4 NMI at 342.

¶ 10 However, the absence of corroborating evidence weakens this inference. Andrew did not drive in an erratic manner typical of drunk driving. Andrew's driving, as the officer observed, did not indicate impaired reaction time, impaired ability to judge distances, or difficulty in multi-tasking. The officer testified that Andrew did not weave, swerve, follow too closely, fail to stop at a traffic light, or cause a traffic accident. Nor was any evidence presented that alcohol influenced or impaired Andrew's driving. The officer further testified that Andrew did not drive out of his lane, did not make a wide turn, and did not veer off the road like the defendants in the Commonwealth cases outlined above. There was nothing unusual about the way Andrew moved to the side of the road when the officer signaled for Andrew to pull over. Andrew did not brake suddenly or do anything erratic. Also, his behavior after the traffic stop did not indicate any inebriation. According to the officer, Andrew excited his vehicle without any difficulty, he did not need to lean on the vehicle for balance, and he did not stumble or sway. Throughout the officer's investigation, Andrew was cooperative and fully understood his instructions. In other words, this case presents no evidence of erratic driving typically associated with intoxication and no evidence of physical or mental impairment throughout an extended period of police observation during and after the traffic stop. Therefore, a reasonable trier of fact could not conclude, beyond a reasonable doubt, that Andrew drove under the influence of alcohol.

III

¶ 11 For the foregoing reasons, we hold there was insufficient evidence to convict Andrew of driving under the influence of alcohol. We hereby REVERSE the decision of the trial court, and VACATE Andrew's conviction for driving under the influence of alcohol.

Concurring:
Demapan, C.J., Castro, J.