

[Cite as *State v. DiFabio*, 2017-Ohio-8028.]

STATE OF OHIO MAHONING COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,)	
)	
PLAINTIFF-APPELLEE,)	
)	CASE NO. 16 MA 0139
V.)	
)	OPINION
DINO A. DIFABIO,)	
)	
DEFENDANT-APPELLANT.)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Youngstown Municipal Court of Mahoning County, Ohio Case No. 15 TRC 4070 Y
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JUDGMENT:	Affirmed
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APPEARANCES:	
For Plaintiff-Appellee	Attorney Jeffrey Moliterno Assistant Prosecutor 26 South Phelps Street Fourth Floor Youngstown, Ohio 44503
For Defendant-Appellant	Attorney James Lanzo 4126 Youngstown-Poland Road Youngstown, Ohio 44514

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: September 25, 2017

[Cite as *State v. DiFabio*, 2017-Ohio-8028.]
DONOFRIO, J.

{¶1} Defendant-appellant, Dino DiFabio, appeals from a Youngstown Municipal Court judgment convicting him of operating a vehicle while intoxicated, following a jury trial.

{¶2} On December 10, 2015, Youngstown Police Officer Mohamed Awad responded to a single car accident at the intersection of Woodland and Hadnet. When he arrived at the scene, Officer Awad noticed that a vehicle had collided with a tree. Officer Awad witnessed appellant stumbling around the wrecked vehicle as he attempted to use a handsaw to remove the branches blocking in the vehicle. The officer noticed a distinct odor of alcohol emanating from appellant, noticed that appellant's pupils were constricted, and noticed appellant had difficulty maintaining his balance. Officer Awad also observed a passenger drifting in and out of consciousness. He believed this to be a sign of a heroin overdose.

{¶3} Officer Awad called an ambulance for the passenger. Once the ambulance arrived, the officer directed his attention back to appellant. Upon engaging appellant in conversation, Officer Awad noticed that appellant's speech was slurred. Despite appellant's slurred speech, he was able to articulate to Officer Awad what had transpired. Appellant informed Officer Awad that the brakes on the vehicle failed and he lost control. Despite appellant's belief of mechanical brake failure, and the bumper being off the car, Officer Awad testified that appellant intended to drive the vehicle away from the accident scene.

{¶4} Officer Awad conducted field sobriety tests on appellant. He observed four clues of intoxication when performing the horizontal gaze nystagmus test. Officer Awad stated that appellant failed the walk and turn test. Officer Awad also asked appellant to stand on one leg for ten seconds, but appellant was unable to maintain his balance on one leg for more than two seconds at a time. Officer Awad arrested appellant for OVI and escorted him to the precinct to conduct a breathalyzer test. The breathalyzer machine was unable to register a reading on the first attempt. However, on the second attempt appellant registered a 0.028, which is below the legal limit of 0.08. Officer Awad requested that appellant submit to a urine test, but

appellant refused.

{¶15} Appellant was subsequently charged with operating a vehicle while under the influence, a first-degree misdemeanor in violation of R.C. 4511.19(A)(1)(a), and failure to control one's vehicle, a minor misdemeanor in violation of R.C. 4511.202.

{¶16} The matter proceeded to a jury trial. The jury found appellant guilty of both charges. The trial court sentenced appellant to 90 days in jail, five years of intensive probation, and suspended his driver's license for three years upon his release. The court also fined appellant \$1,000 for the OVI and \$100 for failure to control his vehicle.

{¶17} Appellant filed a timely notice of appeal on September 2, 2016. He now asserts two assignments of error.

{¶18} Appellant's first assignment of error states:

THE TRIAL COURT ABUSED ITS DISCRETION BY [sic]
STRIKING THE DEFENDANT'S MOTION TO SUPPRESS AND
DENYING LEAVE TO FILE SAID MOTION TO SUPPRESS.

{¶19} In his first assignment of error, appellant argues that the trial court abused its discretion by striking his motion to suppress and denying him leave to file a motion to suppress. He notes that plaintiff-appellee, the State of Ohio, did not object to his motion. He further asserts that there was a likelihood of success on his motion, had the court allowed it.

{¶10} A defendant's failure to timely file a motion to suppress results in the waiver of that issue. *State v. Skorvanek*, 9th Dist. No. 07CA009229, 2008-Ohio-4937, ¶ 55. But upon good cause shown, the trial court may grant relief from the waiver. *Id.*, citing Crim.R. 12(H).

{¶11} The decision whether to permit leave to file an untimely motion to suppress is within the trial court's sound discretion. *State v. Bryson*, 5th Dist. No. 16 CA 70, 2017-Ohio-830, ¶ 10. Therefore, we will not reverse a trial court's decision

regarding an untimely filed motion absent an abuse of discretion. *Id.* Abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E .2d 144 (1980).

{¶12} Traf.R.11(C) provides that all pretrial motions, including motions to suppress, shall be made within 35 days after arraignment or seven days before trial, whichever is earlier. It further provides that the trial court, in the interest of justice, may extend the time for making pre-plea or pretrial motions. Traf.R.11(C).

{¶13} Likewise, Crim.R. 12(D) provides that all pretrial motions, including motions to suppress, shall be made within 35 days after arraignment or seven days before trial, whichever is earlier and that in the interest of justice, the trial court may extend the time for making pretrial motions.

{¶14} Appellant's arraignment took place on December 11, 2015. On February 4, 2016, appellant filed a motion to suppress the results of his field sobriety tests, his statements, and the observations of the arresting officer. He filed this motion 55 days after arraignment. The trial court dismissed the motion based on its untimeliness.

{¶15} Appellant next filed a motion for leave to file a motion to suppress. The trial court overruled this motion as well.

{¶16} We cannot conclude that the trial court abused its discretion in denying appellant leave to file his untimely motion to suppress. In his motion for leave, appellant gave no reasons why his motion was 20 days late, he simply asked for leave. He did not give the trial court any support for why his motion was untimely. Moreover, this was not a case where the motion was just a day or two past the deadline. The motion was 20 days late without explanation. Based on these facts, the trial court did not abuse its discretion in denying appellant leave to file his motion to suppress.

{¶17} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶18} Appellant's second assignment of error states:

THE DEFENDANT'S CRIMINAL RULE 29 MOTION SHOULD HAVE BEEN GRANTED INASMUCH AS THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT HEREIN.

{¶19} Appellant argues his OVI conviction is not supported by sufficient evidence. He does not take issue with his failure to control conviction. Appellant points out that Officer Awad did not observe him driving. Appellant claims that any signs of intoxication could just as easily be disorientation brought on by the head on collision with the tree.

{¶20} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113, 684 N.E.2d 668. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113, 684 N.E.2d 668.

{¶21} The jury convicted appellant of OVI in violation of R.C. 4511.19(A)(1)(a), which provides: "No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶22} Officer Awad was the only witness. Officer Awad testified that he responded to the scene of an accident and saw "a vehicle into a tree" and appellant stumbling around with a handsaw trying to saw the tree in an attempt to free the vehicle. (Tr. 19-20). The officer saw appellant fall multiple times in his attempt. (Tr.

20). Officer Awad also stated the vehicle's bumper was on the ground. (Tr. 20). Appellant informed Officer Awad that he intended to drive the vehicle away from the scene despite telling Officer Awad that the vehicle lacked functioning brakes. (Tr. 21).

{¶23} While talking with appellant, Officer Awad stated that he noticed an odor of an alcoholic beverage coming from appellant's mouth. (Tr. 22). The officer also noticed that appellant's eyes were glazed over, his speech was slurred, and he had a difficult time keeping his balance. (Tr. 22). Officer Awad further testified that appellant's pupils were the size of pinholes, which indicated opiate use. (Tr. 22). Based on these observations, Officer Awad administered field sobriety tests to appellant. (Tr. 25).

{¶24} Officer Awad conducted three field sobriety tests. The officer testified that during the horizontal gaze nystagmus test, he observed nystagmus in both of appellant's eyes and appellant did not follow the directions. (Tr. 27). The officer stated that appellant failed the horizontal gaze nystagmus test. (Tr. 28). Officer Awad testified that during the walk-and-turn test, appellant did not walk heel to toe as instructed and did not take the instructed number of steps. (Tr. 29-30). And as to the one-leg-stand test, Officer Awad testified that appellant was not able to complete the test. (Tr. 32). The officer stated that appellant was not able to keep his foot off of the ground for more than one or two seconds. (Tr. 33).

{¶25} After the failed field sobriety tests, Officer Awad placed appellant under arrest for driving under the influence of drugs or alcohol. (Tr. 34). The officer transported appellant to the police station for a breathalyzer test. (Tr. 35). The breathalyzer test registered a blood alcohol level of .028, which is below the legal limit of .08. (Tr. 39). Officer Awad also believed there to be opiates in appellant's system so he asked appellant to submit to a urine test. (Tr. 39-40). Appellant refused. (Tr. 41). Due to the refusal, appellant was placed under an administrative license suspension. (Tr. 42).

{¶26} This evidence was sufficient to convict appellant of OVI. The state

presented evidence that appellant crashed his vehicle into a tree. It also presented evidence that appellant smelled of an alcoholic beverage, slurred his speed, stumbled, and had dilated pupils indicative of opiate use. Moreover, it presented evidence of appellant's failed field sobriety tests. The testimony provided by Officer Awad was sufficient to cause a reasonable person to believe appellant operated his vehicle while under the influence of alcohol or drugs.

{¶27} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶28} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.