[Cite as *State v. Allen*, 2010-Ohio-4124.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-853 (M.C. No. 2009 TRC 104597)
Christopher A. Allen,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 2, 2010

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, Chief Prosecutor, *Melanie R. Tobias* and *Peter J. Scranton*, for appellee.

Yeura R. Venters, Public Defender, and *Allen V. Adair*, for appellant.

APPEAL from the Franklin County Municipal Court.

McGRATH, J.

{¶1} Defendant-appellant, Christopher A. Allen ("appellant"), appeals from the judgment of conviction entered by the Franklin County Municipal Court. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Appellant was cited for nine separate traffic violations in the early morning hours of January 22, 2009. At a subsequent hearing on pretrial motions, three of the traffic violations were dismissed. A jury trial commenced on August 29, 2009, and

proceeded on the remaining traffic violations and a separate charge of falsification. Appellant's appeal concerns the convictions for violating Columbus City Code 2133.01(A)(1)(a), operating a vehicle under the influence ("OVI"), and R.C. 4511.19(A)(2), OVI with a refusal to submit to testing and a qualifying prior conviction within the past 20 years.

{¶3} At trial, the following facts were adduced. Just before 12:42 a.m. on January 22, 2009, Columbus Police Officer Steven Wolfangel ("Officer Wolfangel"), who was in a marked cruiser equipped with a dashboard video camera, clocked appellant traveling at 69 miles per hour in a 55 miles per hour zone. Officer Wolfangel pulled into traffic and followed appellant. After observing appellant make a safe lane change, Officer Wolfangel activated his beacon. Appellant pulled over to the right shoulder but did not stop immediately. Rather, Officer Wolfangel testified, "[h]e continued to roll forward" about 100 to 150 feet. (Tr. 45-46.) Officer Wolfangel approached appellant's vehicle on the passenger side and testified that he "could smell the odor of an alcoholic beverage coming from within the car." (Tr. 47.) Officer Wolfangel further testified that appellant's eyes were bloodshot, glassy, and unfocused, and that when appellant rummaged for the requested registration and insurance, appellant was "swaying forward and back while he was seated." (Tr. 47.) Officer Wolfangel testified that appellant told him that he did not have his license and said that his name was Robert Denham.

{¶4} The video from the cruiser's camera was played in court as Officer Wolfangel testified as to the events at the scene. Officer Wolfangel testified that appellant got out of the car and that he could smell the alcohol "coming directly from [appellant's] breath as we talked face to face." (Tr. 48.) He further testified that appellant was polite

and did not give him any problems as he placed appellant in the back of his cruiser. Officer Wolfangel testified that while appellant claimed not to know his social security number, he eventually recited a number. Officer Wolfangel ran the number through the Law Enforcement Automated Data System ("LEADS") on his cruiser's computer, which produced a photo of an individual who was definitely not appellant. Officer Wolfangel also ran the name Robert Denham and the date of birth that appellant provided through the computer, and, again, another photo was produced that was definitely not appellant. When confronted, Officer Wolfangel testified that appellant admitted that his name was Christopher Allen and provided his valid social security number and date of birth. Officer Wolfangel stated that this information was confirmed after running it through the LEADS system. Officer Wolfangel testified that the LEADS system also revealed that appellant was under various license suspensions and had a prior OVI conviction within the last 20 years; the offense date being April 17, 2008.

{¶5} Officer Wolfangel testified that appellant first denied having consumed alcohol earlier in the evening but, subsequently, admitted to the same. Officer Wolfangel also testified that appellant stated that he was diabetic and that he had taken his last dose of medication at 4:00 p.m.

{¶6} Prior to administering the three standardized field sobriety tests, Officer Wolfangel testified that he asked appellant to take a cough drop out of his mouth. Officer Wolfangel first administered the Horizontal Gaze Nystagmus ("HGN") test, which analyzes the involuntary jerking of the eye, and, as Officer Wolfangel testified, "is used to estimate someone's blood alcohol content ["BAC"]." (Tr. 103.) According to Officer Wolfangel, there are six possible clues of impairment that can be detected, and appellant

exhibited all six clues. Officer Wolfangel further testified that a detection of four out of the six possible clues indicate a 77 percent probability that the individual being tested would test at a .10 or above BAC.

{¶7} Officer Wolfangel then administered the walk-and-turn test, testifying that a total of eight possible clues could be observed on this test and that appellant had exhibited five clues. Officer Wolfangel further testified that the detection of two clues out of the possible eight would indicate a 68 percent probability that the person being tested had a BAC at .10 or above. Officer Wolfangel testified that he demonstrated how to perform the walk-and-turn test and gave instructions to appellant twice because when he asked appellant if he understood what he was required to do, appellant could not repeat the instructions correctly. Officer Wolfangel testified that one of the clues he observed was appellant took the incorrect number of steps. On cross-examination, Officer Wolfangel conceded that the straight line he drew on the ground was not long enough for the instructed nine steps and that appellant walked the length of the line that he had drawn. During the walk-and-turn test, Officer Wolfangel testified that he also observed appellant begin to walk the line before being instructed to, step off the line, break the position he had been instructed to stand in, raise his arms, and turn incorrectly.

{¶8} The final test that Officer Wolfangel administered was the one-leg-stand test. This test required appellant to stand on one foot for 30 seconds with his hands down to his sides. Officer Wolfangel testified that four possible clues can be detected on this test and that appellant exhibited three clues. Officer Wolfangel categorized the detection of three clues out of the four as "failing." (Tr. 84.) After giving appellant the instructions twice because appellant did not understand them the first time, after demonstrating how

the test was to be performed, and after numerous false starts, Officer Wolfangel testified that the three clues that he observed during the test were that appellant "put his foot down multiple times, raised his arms [almost to shoulder length], and swayed." (Tr. 83.)

{¶9} Officer Wolfangel testified that he is trained and certified to administer the three standardized field sobriety tests, and that he takes a refresher National Highway Traffic Safety Administration ("NHTSA") course every other year and employs the NHTSA manual as a guide to detect impairment and administer the tests. Officer Wolfangel further testified that when he administered the standardized field sobriety tests to appellant in the early morning hours of January 22, 2009, he conducted himself in accordance with the training. Also, Officer Wolfangel testified that he had training specific to the detection of one who is under the influence of alcohol and drugs, and that during his 17 years as a Columbus police officer, nine of which were on traffic patrol, he had occasion to come into contact with and observe both persons under the influence and persons not under the influence.

{¶10} In his testimony, Officer Wolfangel acknowledged that prior to pulling appellant over, he observed no signs of impaired driving by appellant, and that, according to the NHTSA Manual, speeding is not a visual clue indicator of impaired driving. (Tr. 99.) However, as Officer Wolfangel further testified, he subsequently determined that appellant was impaired after he smelled alcohol on appellant's breath, observed appellant's bloodshot, glassy and unfocused eyes, observed appellant swaying and being unsteady, and after appellant admitted to drinking and failed the field sobriety tests. It was after these observations and events that Officer Wolfangel arrested appellant and informed him that he was under arrest for operating a vehicle while under the influence of

alcohol. Officer Wolfangel testified that it is "my responsibility to make sure that a person is able to drive that vehicle safely, that they're not impaired, that they're able to leave--if I'm going to put them back behind the wheel." (Tr. 111.)

{¶11} Officer Wolfangel testified that after the arrest, appellant was transported to the Columbus police headquarters, where appellant was processed and refused to submit to a breath test. Officer Wolfangel testified that, as required, he read to appellant from the Bureau of Motor Vehicles form 2255, the relevant consequences of the test and refusal, and that he also provided appellant a copy of the form to read himself. Officer Wolfangel testified that appellant indicated that he understood the consequences and refused to sign the form. Officer Wolfangel further testified that after another request, appellant refused again to submit to a chemical test of his breath.

{¶12} On cross-examination, Officer Wolfangel confirmed that he asked appellant to take a cough drop out of his mouth before administering the field sobriety tests. Officer Wolfangel also testified that he was trained on how the BAC DataMaster machine ("breathalyzer") worked and how the test was administered; and, thus, he had the knowledge that, prior to taking the breathalyzer test, a subject is not allowed to have anything in their mouth for 20 minutes. When asked whether he did this to set appellant up for the breathalyzer, Officer Wolfangel testified that at the time his "intention was to administer a preliminary breath test at the side of the road * * * [which had] nothing to do with the breath test that would have taken place at police headquarters." (Tr. 107-108.) In his testimony, Officer Wolfangel did acknowledge that removing the cough drop put appellant in a position to take the breathalyzer test 20 minutes from the removal.

{¶13} After the state rested, appellant motioned for acquittal pursuant to Crim.R. 29, arguing that the state had failed to make an adequate showing as to the fact that appellant was impaired. The court denied appellant's motion for acquittal. The motion was renewed, and again denied, when the defense rested without calling any witnesses. The jury found appellant guilty of operating a vehicle under the influence of alcohol and the trial court sentenced him accordingly.

{¶14} Appellant appeals and sets forth the following three assignments of error:

> **FIRST ASSIGNMENT OF ERROR**
>
> Appellant's operating a vehicle under the influence of alcohol conviction is not supported by the evidence.
>
> **SECOND ASSIGNMENT OF ERROR**
>
> The court erroneously overruled appellant's motions for acquittal pursuant to Criminal Rule 29.
>
> **THIRD ASSIGNMENT OF ERROR**
>
> Appellant's conviction was against the manifest weight of the evidence.

{¶15} In his first assignment of error, appellant contends that his conviction of operating a vehicle under the influence of alcohol is not supported by sufficient evidence. We disagree.

{¶16} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the

> defendant's guilt beyond a reasonable doubt. 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. * * *

{¶17} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273.

{¶18} In order to convict appellant of operating a vehicle under the influence of alcohol, the state had to prove beyond a reasonable doubt that appellant, in fact, operated a vehicle under the influence of alcohol. Appellant contends that he was charged with the traditional form of drunk driving, premised on actual impairment, and that the state failed to present sufficient evidence to establish actual impairment beyond a reasonable doubt. We disagree.

{¶19} Appellant points out that Officer Wolfangel pulled him over for speeding, which, according to the NHTSA Manual, is not a visual clue indicator of impaired driving.

Appellant further points out that not only did Officer Wolfangel testify that prior to pulling appellant over he saw no indication of impaired driving by appellant, he, in fact, observed appellant make a safe lane change and bring his car to a safe stop. This is correct. However, according to Officer Wolfangel's testimony, while appellant did come to a safe stop, he did not come to an immediate stop. Rather, "he continued to roll forward" about 100 to 150 feet. (Tr. 45-46.) Officer Wolfangel also testified that he subsequently determined that appellant was impaired after he smelled alcohol on appellant's breath, observed appellant's bloodshot, glassy and unfocused eyes, observed appellant swaying and being unsteady, and after appellant admitted to drinking and failed all three of the field sobriety tests. It was after these observations and events that Officer Wolfangel arrested appellant and informed him that, in addition to the speeding violation, he was under arrest for operating a vehicle while under the influence of alcohol.

{¶20} Appellant also argues that the admission of Officer Wolfangel's testimony, based on appellant's performance in the HGN and walk-and-turn field sobriety tests, regarding the statistical probability that appellant would have tested "at .10 or above blood alcohol content," was improper because expert testimony was required. (Tr. 75, 81.) Appellant brings forth the case of *State v. French*, 72 Ohio St.3d 446, 1995-Ohio-32, wherein the Ohio Supreme Court restated its position that "when introducing the results of a legally obtained breathalyzer test into evidence in prosecutions under R.C. 4511.19(A)(1), the state must present expert testimony." Id. at 452. In *French*, the court held that "the trial court committed reversible error by allowing the actual numerical figure of the BAC test to be introduced into evidence in the absence of expert testimony explaining the significance of the figure." Id. However, our case is different than the

French case. In the case at hand, appellant did not submit to a breathalyzer test, and so there was no testimony as to an actual numerical figure of appellant's BAC. Rather, Officer Wolfangel simply testified, based on what he learned in training, as to the statistical probability of an individual's BAC when he fails the HGN or walk-and-turn field sobriety test.

{¶21} The Ohio Supreme Court spoke directly to the issue of testimony regarding the HGN test and held that "although results on an HGN test may be admissible at trial by a properly trained officer, such an officer may not testify as to what he or she believes a driver's actual or specific BAC level would be, based solely on the HGN test results." *State v. Bresson* (1990), 51 Ohio St.3d 123, 129.

{¶22} The Fourth Appellate District interpreted the language of *Bresson* in a case where the appellant had been convicted of driving while under the influence in violation of R.C. 4511.19(A)(1), and, at trial, the arresting officer testified that "on the [HGN] test there's a total of six clues[;] however, [if] four or more clues are detected it's a 77% probability and at the time that this manual I was trained on came out that the person would test over the legal limit which at that point was .10." *State v. Martin*, 4th Dist. No. 04CA24, 2005-Ohio-1732, ¶15. The *Martin* court questioned this testimony and noted, "the trooper did not testify that the HGN test results would show appellant's exact alcohol concentration. Instead, his testimony indicated to the jury that because appellant exhibited more than four clues on the test, a 77% probability exists that appellant would test over .10." Id. at ¶37. But, the court continued, "[w]e believe, however, that testimony to suggest a specific mathematical probability that the appellant would have tested over the statutory limit if she had taken a test is problematic." Id. Nevertheless, the *Martin*

court concluded that, in light of the other evidence presented, such as the glassy bloodshot eyes, the odor of alcohol, and the failure of the field sobriety tests, the admission of the trooper's testimony as to statistical probabilities was harmless error. Id. at ¶39.

{¶23} The First Appellate District, however, in *State v. Grizovic*, 177 Ohio App.3d 161, 2008-Ohio-3162, concluded differently, finding that the trial court had "erred by admitting [the arresting trooper's] testimony concerning the statistical probability that [appellant] would have tested over .10," and that this error was not harmless. Id. at ¶17. The *Grizovic* court stated that "[e]xpert testimony linking blood-alcohol content to impairment" was necessary and that the court "[could not] determine what weight the jury gave to this prejudicial testimony," that they "[could not] conclude, based on the other evidence presented at trial that the admission of such testimony amounted to harmless error, as in the *Martin* case." Id. at ¶17-18.

{¶24} We hold like the Fourth Appellate District in *Martin*. Officer Wolfangel did not testify, based solely on the HGN test results, as to what he believed appellant's actual or specific BAC level was. Rather, he testified, based on his training, as to a statistical probability that an individual who failed the test would have a BAC level over the legal limit. While this may be problematic and perhaps should not have been admitted absent expert testimony, in light of the other evidence presented, the admission of Officer Wolfangel's testimony concerning statistical probabilities amounted to harmless error. The other evidence taken into consideration includes the fact that Officer Wolfangel smelled alcohol on appellant's breath, the fact that appellant admitted to drinking, the fact that Officer Wolfangel observed that appellant's eyes were bloodshot, glassy and

unfocused, the fact that appellant was swaying and being unsteady, and the fact that appellant failed all three field sobriety tests. All of the foregoing testimony, coupled with Officer Wolfangel's up-to-date training specific to the detection of one who is under the influence of alcohol and/or drugs, as well as his years of experience coming into contact and observing both persons under the influence and not under the influence, we find that the admission of Officer Wolfangel's testimony regarding statistical probabilities amounted to harmless error.

{¶25} After viewing the evidence in the light most favorable to the prosecution, we determine that reasonable minds could reach the conclusion, beyond a reasonable doubt, that, on January 29, 2009, appellant was impaired and operated a vehicle under the influence of alcohol. Accordingly, we find that appellant's conviction is supported by sufficient evidence as a matter of law, and we therefore overrule appellant's first assignment of error.

{¶26} Appellant contends in his second assignment of error that the court erroneously overruled appellant's motions for acquittal pursuant to Crim.R. 29. We disagree. Crim.R. 29(A) requires the court to "order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Crim.R. 29(A). Given that under appellant's first assignment of error we determined that appellant's conviction of operating a vehicle under the influence is supported by sufficient evidence, we also find that the court did not erroneously overrule appellant's motions for acquittal. Accordingly, appellant's second assignment of error is overruled.

{¶27} In his third assignment of error, appellant contends that his conviction of operating a vehicle under the influence of alcohol was against the manifest weight of the evidence. We disagree.

{¶28} In determining whether a verdict is against the manifest weight of the evidence, we sit as a "thirteenth juror." *Thompkins*, supra, at 387. Thus, we review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. Id. Additionally, we determine " 'whether in resolving conflicts in the evidence, the [trier of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. We reverse a conviction on manifest weight grounds for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶29} Appellant points out that a court may find a verdict against the manifest weight of the evidence even though the evidence may have been technically sufficient to sustain the verdict. *Thompkins* at 386-87. This is correct, but will not be the case here.

{¶30} In the present case, the jury did not lose its way and create a manifest miscarriage of justice when it found appellant guilty of operating a vehicle under the influence of alcohol in violation of Columbus City Code 2133.01(A)(1)(a) and R.C. 4511.19(A)(2). Officer Wolfangel testified that after he stopped appellant's vehicle for

speeding and came face-to-face with appellant, he smelled alcohol and observed appellant's bloodshot, glassy and unfocused eyes, as well as appellant swaying and being unsteady. Officer Wolfangel testified that appellant admitted that he had consumed alcohol. Officer Wolfangel further testified that appellant disclosed that he had no driver's license and then gave Officer Wolfangel a false name and social security number. Appellant subsequently gave Officer Wolfangel his correct name and social security number, and, through the LEADS system, it was determined that appellant had a previous conviction for OVI in 2008. Additionally, Officer Wolfangel testified that when he administered the three field sobriety tests, appellant exhibited six out of six clues on the HGN test and that appellant also failed the walk-and-turn test and the one-leg-stand test. Appellant's movements during the field sobriety tests were verified by the video from the cruiser's camera that was played in court as Officer Wolfangel testified. Officer Wolfangel added that during the administration of the field sobriety tests, appellant had difficulty remembering and following the instructions. It was after these events that Officer Wolfangel decided to arrest appellant, and he explained in his testimony that, before allowing a driver pulled over for a traffic offense back on the road, he has an obligation to make sure that the individual can safely operate his vehicle. Furthermore, Officer Wolfangel testified that twice appellant refused to take the chemical breath test and was instructed as to the consequences of submission or refusal.

{¶31} The jury evidently found Officer Wolfangel to be a credible witness. Officer Wolfangel is experienced and has been a Columbus police officer for 17 years, nine of which he was on traffic patrol. Officer Wolfangel is trained to administer the field sobriety tests, and, as required, updates his training every other year through a refresher NHTSA

course. Additionally, Officer Wolfangel testified that he has had training specific to the detection of one who is under the influence of alcohol and/or drugs, and that he has had substantial opportunity to come into contact with and observe both persons under the influence and persons not under the influence.

{¶32} A reasonable juror could find that Officer Wolfangel's testimony is credible and that his statements as to the odor of alcohol on appellant's breath, appellant's admission to alcohol consumption, appellant's poor coordination, appellant's difficulty following directions, and appellant's failure to adequately perform the field sobriety tests, are related to alcohol consumption and impairment. Additionally, appellant refused to take a breath test, which the jury could permissibly consider as evidence of appellant's guilt of impairment. *South Dakota v. Neville* (1983), 459 U.S. 553, 103 S.Ct. 916. *Maumee v. Anistik*, 69 Ohio St.3d 339, 1994-Ohio-157.

{¶33} After carefully reviewing the trial court's record in its entirety, we cannot find that the trier of fact clearly lost its way or that any miscarriage of justice resulted. Therefore, we cannot find that appellant's conviction is against the manifest weight of the evidence. Appellant's third assignment of error is also overruled.

{¶34} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

TYACK, P.J., and BROWN, J., concur.

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