[Cite as *State v. Nick*, 2013-Ohio-3453.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-845
v.	:	(M.C. No. 2012 TRD 152481)
Phillip Donley Nick,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 8, 2013

Ronald J. O'Brien, Prosecuting Attorney, and *David M. Kennedy*, for appellee.

Dennis C. Belli, for appellant.

APPEAL from the Franklin County Municipal Court

McCORMAC, J.

{¶ 1} Phillip Donley Nick, defendant-appellant, appeals from the judgment of the Franklin County Municipal Court in which, during a bench trial, the court found him guilty of reckless operation of a motor vehicle, a minor misdemeanor in violation of R.C. 4511.20. The trial court imposed a sentence of a $30 fine and court costs.

{¶ 2} Appellant asserts the following two assignments of error:

Assignment of Error No. 1:

> The municipal court erred in denying Defendant-Appellant's motion for a judgment of acquittal where the prosecution failed to offer any eyewitness testimony from which a reasonable fact-finder could find that his responsive actions to the tailgating and aggressive conduct of another driver rose to the level a willful or wanton disregard for the safety of persons or property.

Assignment of Error No. 2:

> The municipal court's use of an incorrect culpability standard for determining Defendant-Appellant's guilt of reckless operation of a vehicle resulted in a judgment of conviction that is against the manifest weight of the evidence and is contrary to law.

{¶ 3} This case involves a series of interactions between the appellant, 49 years of age, and Charles Peugh, 68 years of age, that occurred between 3:30 and 4:00 p.m. on June 4, 2012. Those interactions commenced while the parties were negotiating a roundabout at the intersection of Morse Road and State Route 62 and ended approximately ten minutes later, resulting in a rather severe collision between the vehicles. Each party was charged with reckless operation, a minor misdemeanor. Peugh was also charged with failure of assured clear distance ahead. This case, however, involved only the issue of appellant's guilt or innocence of the reckless operation charge brought against him.

{¶ 4} At the conclusion of the testimony of four witnesses, three for the state and one by appellant on his own behalf, the trial court found appellant guilty, as follows:

> Having considered all of the evidence and exhibits and the testimony, I've gone back and forth a little bit as this trial went on, but ultimately I can boil it down to a couple of things. And based upon that, Mr. Nick, I am going [to] find you guilty of reckless operation of a motor vehicle. I think the bottom line is this crash, and whatever happened out there that day was avoidable by one of you or both of you or either of you. And I think if you don't engage in a situation like this, it never happens. So I probably would have found Mr. Peugh guilty of the same charge, because I think looking at the impact here, it was not a minor impact. The fact that I am thinking maybe there was a pretty good hit on the brakes before the crash because of the way that the Hyundai is underneath the Audi and they do appear to be stuck together. And even to the point of lifting up the car that I can see from the pictures and the front dip that happens when brakes are applied. And it's not just that one thing. It's the distance I'm seeing on the road where this all happened. If you don't engage, it doesn't happen. So I just say two wrongs don't make a right. This was avoidable, but I am going to find you guilty.

(Tr. 145.)

{¶ 5} The first witness for the state was Charles Peugh, age 68, who was returning from a medical appointment in Columbus to his home in Mt. Vernon, Ohio. To do so, he entered a roundabout at the intersection of Johnstown and Morse Roads to head north on U.S. Route 62 to Mt. Vernon. As he entered the roundabout, he stayed in the right-hand lane because he thought it would lead to his exit on U.S. Route 62. He admitted that he later discovered that he should have been in the left-hand lane. Approaching from behind, appellant passed him in the left-hand lane, also headed for U.S. Route 62. Peugh stated that he was visibly upset because he felt that appellant's vehicle had dangerously passed him. Although appellant's vehicle did not pull in front of him, the situation did not end there.

{¶ 6} As they both merged onto U.S. Route 62, a two-lane road that is rather heavily traveled, a series of events occurred, leading Peugh to apply his brakes three times in the first 50 yards in an attempt to deal with appellant's anger and erratic driving. He stated that, at one time, appellant stopped on a bridge area for approximately 15 to 30 seconds just to hold him up. The bridge area was a double-yellow line area, and Peugh said he was worried that another car might strike him from behind. He stated that he finally decided to pass and swung left of center to see if there was an opening to pass, at which time appellant took off and gunned it. Peugh said that he put on his brakes to fall behind, but then appellant abruptly hit his brakes, causing Peugh to collide with the left portion of the rear bumper of appellant's vehicle. He said he could not stop and that the two cars became locked together, swerving into the left lane, where he feared they might be struck by an oncoming vehicle. He then pushed the two locked vehicles into the gravel area on the opposite side of the road. At that time he called 911, as apparently did appellant, and some angry conversation between the two took place. In essence, Peugh blamed the accident on appellant's actions, other than his admission that he was at fault about who had the right-of-way in the roundabout. He further stated that he pushed appellant's vehicle off the road to protect the cars from colliding with an oncoming vehicle.

{¶ 7} The next witness was Officer Ken Hamilton of the New Albany Police Department. Officer Hamilton testified that he had no jurisdiction over the roundabout area and that his jurisdiction started on the other side of the bridge overpass. He also stated that appellant was badly injured in the collision and that the other driver (Peugh)

was angry. He testified that medics came and statements were taken, all of which were admitted into evidence. Officer Hamilton wrote up a police report, in which he stated that, from the collision marks on the vehicles and the debris left from the collision, the accident took place entirely in the lane which was headed toward Mt. Vernon. However, he stated that he had no personal knowledge of what type of driving took place prior to that time.

{¶ 8} The third witness for the state was Chris Senitt, who had observed the interaction between the drivers on the roundabout and was just ahead of the parties on U.S. Route 62 headed to Mt. Vernon. He did not know either of the parties, but as he looked in his rearview mirror and saw some of the behavior that was taking place between the parties, he decided to stop and come back to the scene because he thought there was a possibility that something more serious might happen between the parties. Senitt testified that, from his observation, he thought the vehicles were drag racing and that appellant's black vehicle was preventing Peugh's red vehicle from passing. When he arrived at the scene, he also called 911 and stopped to give his statement to the police officer. The pictures taken at the scene seemed to indicate that the collision took place in the right-hand lane in a double-yellow line area, other than partially in the left lane where neither vehicle was supposed to be.

{¶ 9} All of the witnesses considered the accident to be a severe one and not simply a minor, low-speed accident. Both cars were severely damaged. Peugh claimed no injuries, but appellant was badly injured and needed to be transported immediately to a hospital.

{¶ 10} After the state rested its case, appellant moved to dismiss the case for failure of the state to meet the burden of proof of reckless operation. Before ruling on the motion, the trial court stated: "I'm going to take a look at this Exhibit L, since I haven't seen it before, before I rule on that motion." (Tr. 114.) (Exhibit L is the police report which Officer Hamilton had discussed in his testimony and which had been introduced into evidence. Tr. 99-112.) After reviewing Exhibit L, the trial court overruled the motion to dismiss, finding that there was sufficient evidence to present a case for the state.

{¶ 11} The defense presented only one witness, appellant on behalf of himself. Appellant testified that he rarely used that roundabout but that he was in the correct lane to merge with U.S. Route 62. He testified that, when he passed Peugh, Peugh made angry

and threatening gestures, and appellant was very concerned about road rage. Appellant further testified that, when he was on the bridge leading down onto U.S. Route 62 North, he stopped there for a short period of time in an attempt to get Peugh to pass him. That period of time was estimated at various times from approximately thirty seconds to three minutes. At trial, defense counsel questioned appellant as follows:

> Q. You heard the prosecutor ask Mr. Peugh if he did anything wrong. Were you in anyway violating any traffic offenses that you were aware of?
>
> A. Well, I later learned that the first time I stopped I shouldn't have stopped where I stopped.
>
> Q. But the stopping was to allow him to go by?
>
> A. It was to allow him to go by, but, you know, there was really nowhere to pull off and I did stop. I did stop in the road. And I am very sorry about that. And I'm doubly sorry that when I stopped I just didn't call 911 and be done with it.

(Tr. 125.)

{¶ 12} The context given to this testimony by the defense was that appellant knew that it was a dangerous and bad place to stop but that he was simply attempting to get Peugh to pass him and have the situation over with, as admittedly there were other options. Appellant testified that, when he could not get Peugh to pass him after slowing down, he then decided to speed up to get away from Peugh but that Peugh was speeding up and remaining right behind him. He then braked but not to a complete stop, and Peugh crashed into him at a high rate of speed, resulting in severe damage to his vehicle and injuries causing him to become nauseous from the pain. Appellant stated that he thought Peugh was going to push him into the opposite lane in order to have him hit by another vehicle. He denied having road rage or any other intention other than to avoid this man that he considered to be angry and extremely dangerous.

{¶ 13} Appellant's first assignment of error is based upon the contention that there was insufficient evidence to sustain a conviction for reckless operation, which required that the state prove that appellant acted with a willful or wanton state of mind.

{¶ 14} Appellant's counsel argues in this court that the credibility of witnesses is ordinarily to be resolved by the trier of fact, but one important exception to that principle

is the "physical facts rule," citing *McDonald v. Ford Motor Co.*, 42 Ohio St.2d 8, 12 (1975). In the so-called physical facts rule, testimony of a witness which is positively contradicted by the physical facts cannot be given any probative value. However, contrary to the facts in *McDonald*, the physical facts of this case concerning the location of the crash, if believed, proves the elements of reckless operation by appellant. Appellant admitted that he had slowed down and did not think he had come to a complete stop when he was struck by Peugh's vehicle. That testimony does not negate the contention that the accident was not caused recklessly in part by a sudden stop by appellant. The trial court observed that the two vehicles were approximately the same height and that the sudden stop of appellant apparently caused the rear of his car to elevate, resulting in the front of Peugh's vehicle being physically locked into appellant's vehicle. Additionally, it does not render insufficient or worthless the observations of Senitt as he observed the continuing actions between the two drivers, and it does not make incredible and of no value the prior testimony of Peugh concerning the dangerous and reckless driving of appellant, such as his stopping for a lengthy period of time on the bridge. It also does not render insufficient the testimony of Peugh other than possibly the point of final contact. Peugh's testimony varies substantially in other important details and must be considered for its credibility.

{¶ 15} Appellant's first assignment of error is overruled.

{¶ 16} Appellant's second assignment of error is that the trial court used an incorrect culpability standard for determining appellant's guilt of reckless operation, resulting in the judgment of conviction that is against the manifest weight of the evidence and is contrary to law. The trial court was fully aware of the requirement for proof of reckless operation and the wanton-and-willful standard. The arguments made by counsel both pertain to whether that standard applied to the conduct of appellant. The trial court found that there was sufficient evidence based upon credible evidence of dangerous and reckless conduct by appellant during the course of the approximate ten-minute period that Peugh and appellant interacted together prior to the final collision. Furthermore, there was conflicting testimony that the jockeying back in forth was willful and wanton, and was done intentionally, putting both drivers involved in this collision, as well as others on the highway, in a highly vulnerable position.

{¶ 17} The trial court did not err in finding the evidence to be sufficient. Circumstantial evidence may be used to prove a defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991).

{¶ 18} This case was tried to the court, and there was no timely request for separate findings of fact and law. We do not act as a thirteenth juror in a non-jury case.

{¶ 19} Appellant's second assignment of error is overruled.

{¶ 20} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under the authority of the Ohio Constitution, Article IV, Section 6(C).

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