[Cite as *State v. Rizzo*, 2003-Ohio-4724.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2002-T-0121**
- vs -	:	
ERNEST F. RIZZO, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court, Eastern Division, Case No. 02 TRC 00214.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, *Sean J. O'Brien*, Assistant Prosecutor, Administration Building, Fourth Floor 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito Co., L.P.A., 623 St. Clair Avenue, N.W., Cleveland, OH 44113-1204 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Ernest Rizzo, Jr. ("appellant") appeals the decision of the Eastern District Court of Trumbull County. In that decision, the trial court found appellant guilty of driving under the influence of drugs, a violation of R.C. 4511.19(A)(1). For the following reasons, we affirm the decision of the trial court in this matter.

{¶2} The following facts were testified to at trial. On March 30, 2002, the Trumbull County 911 Center received a cellular phone call from a citizen complaining of an intoxicated driver heading southbound on State Route 7. The citizen stated that appellant was driving "all over the road." While following appellant, the caller then told the dispatcher that appellant's vehicle had pulled into Maloney's Market on State Route 7 in Vernon Township, Ohio. Further, the citizen caller also correctly identified the make and license plate of appellant's vehicle.

{¶3} While receiving the citizen's cellular phone call, the 911 dispatcher relayed the information to Deputy Carr, who proceeded to Maloney's Market to try and find the vehicle in question. Upon arriving at Maloney's Market at approximately 11 P.M., Deputy Carr located appellant's vehicle in the parking lot, noticed that the engine was still running, observed that the headlights were on, and noticed appellant slumped over the steering wheel. After closer examination, Deputy Carr noticed that appellant's vehicle was still in drive and that appellant's foot was on the brake. Afraid that appellant would be startled and remove his foot from the brake when awakened, Deputy Carr reached into the vehicle and placed it into park.

{¶4} As he proceeded to wake up appellant, Deputy Carr noted that appellant had glossy, bloodshot eyes and slurred speech. Deputy Carr also noticed that appellant was disoriented and could not identify his location. Subsequently, appellant admitted to taking medication earlier in the day and Deputy Carr found a bottle of mixed pills in appellant's possession. Due to a shift change at the time of this incident, Deputy Carr turned the investigation over to Deputy Diehl and Officer Schimpf.

{¶5} Officer Schimpf, noting that appellant appeared to be under "some kind of influence", spoke with appellant for about fifteen minutes. Officer Schimpf also noticed appellant had slurred speech and appeared very groggy. Officer Schimpf then gave appellant the HGN test, the step test, and the one-legged stand test. Appellant failed all three of the field sobriety tests administered by Officer Schimpf. Appellant was taken to a nearby hospital and given a Breathalyzer test, where he registered a .001. Appellant was subsequently arrested for driving under the influence of drugs.

{¶6} At the June 13, 2002 bench trial, appellant was found guilty of driving under the influence of drugs, a violation of R.C. 4511.19(A)(1). This timely appeal followed. Appellant raises one assignment of error for our review:

{¶7} "The appellant's conviction is against the manifest weight of the evidence."

{¶8} In reviewing a manifest weight of the evidence claim, the appellate court, "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id. Furthermore, "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶9} Appellant argues that the trial court lost its way in convicting appellant because the trial court: "(1) mistook the uncontroverted evidence that appellant had registered a .001 on the B.A.C. test, rather than a .01 as stated by the trial court; (2) believed that appellant was not getting all of his medications from one doctor ***; and (3) relied upon its own 'experience' concerning pharmaceuticals such as Oxycontins ***." Following a thorough review of the record, we disagree with appellant.

{¶10} Appellant contends that the trial court mistakenly thought that appellant's Breathalyzer test resulted in a reading of .01 instead of .001. However, the record indicates that it was appellant who corrected the trial court stating: "I have no idea. It was .001." As to the issue of the number of doctors prescribing medication to appellant, the record again indicates that it was appellant, when asked by the trial court if he was receiving the prescriptions from one doctor, who responded "Yes, I am." Further, prior to its discussion of Oxycontin, the trial court began by saying "Based on your own testimony ***." As a result, we conclude that the trial court was made aware of any inaccuracies prior to issuing its decision and the arguments raised by appellant are without merit.

{¶11} R.C. 4511.19(A)(1) states: "No person shall operate any vehicle, ***, if any of the following apply: (1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse." Under R.C. 4729.01, drugs that "may be dispensed only upon a prescription" qualify as drugs of abuse under R.C. 4511.19(A)(1). See R.C. 3799.011. At trial, appellant admitted that he had several prescriptions for strong pain relievers such as Oxycontin and Percocet, as well as a prescription for Valium to help combat his depression. This was confirmed at trial as the single bottle appellant

handed to the Deputy contained two Oxycontins, three Percocets, and six Valiums. Deputy Diehl also testified that none of the pills found in the bottle matched the label on the bottle. No objections were raised by appellant, at trial, relating to the description and identification of the pills found on him at the time of his arrest.

{¶12} Appellant testified that he had taken at least one Oxycontin and one Wellbutrin earlier in the day prior to driving. Appellant also acknowledged that his doctor had warned him about the effects these medications would have on appellant's ability to drive. Further, Deputy Diehl and Officer Schimpf both testified that appellant could not tell them where he was or where he was coming from when they questioned him. This testimony support appellant's conviction, especially when appellant himself testified that he had driven State Route 7 "thirty to fifty times" prior to the night in question.

{¶13} It is uncontroverted that when Deputy Carr approached appellant, the keys were in the ignition, the car was running, the headlights were on, and the car was in drive. The Supreme Court of Ohio has determined that the above factors satisfy the definition of operating a motor vehicle within the context of R.C. 4511.19. *State v. Cleary* (1986), 22 Ohio St.3d 198. Further, the testimony of Deputies Carr and Diehl, along with that of Officer Schimpf, indicate that appellant was groggy, glossy eyed, and slurred his speech throughout the course of the stop. Appellant also failed three field sobriety tests. This court has held that the above factors are sufficient to support a conviction for driving under the influence. *State v. Livengood*, 11th Dist. No. 2002-L-044, 2003-Ohio-1208, 2003 Ohio App. LEXIS 1137; *State v. Lawless* (June 25, 1999), 11th Dist. No. 98-P-0048, 1999 Ohio App. LEXIS 2941. Furthermore, this court has

held that a cellular phone tip made by a citizen informant reporting erratic driving to the police is reliable if the stop is challenged and the state is able to show the factual basis for the stop. *Livengood*, supra, at *9 (citation omitted).

{¶14} The record indicates appellant was reported to have engaged in a pattern of erratic driving prior to pulling into Maloney's Market. After receiving an accurate description of the vehicle's location, make and license plates, Deputy Carr then had reasonable suspicion to initiate an investigatory stop of appellant. Id. Upon engaging appellant, Deputy Carr found appellant's vehicle to be operable within the meaning of R.C. 4511.19. *Cleary*, supra. Appellant admitted to have taken several powerful prescription drugs earlier in the day. Appellant was groggy, disoriented, and could not remember a location that he had driven past at least thirty to fifty times prior to this incident. Appellant subsequently gave the police a pill bottle containing a mixture of at least three different medications including Oxycontin, Percocet, and Valium. Further, appellant failed the three field sobriety tests administered to him during the stop.

{¶15} Because neither the citizen informant, nor the dispatcher testified at the suppression hearing in this case, the testimony of the police officer concerning the citizen informant's tip was arguably hearsay. Appellant, however, failed to object to the admission of such testimony. "[A]n appellate court will not consider any error which . . . [the complaining party] could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Glaros* (1960), 170 Ohio St. 471, paragraph one of the syllabus. Such errors are waived and cannot be raised upon appeal. *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43.

{¶16} In the absence of an objection, the trial court may rule evidence inadmissible to avoid plain error. Evid.R. 103(D). Evidentiary rulings, however, are within the discretion of the trial court. *State v. Long* (1978), 53 Ohio St.2d 91, 98. Such evidentiary rulings by the trial court will not be found in error absent an abuse of discretion. Id. An abuse of discretion consists of more than an error of law or judgment, rather it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157. Because this court cannot conclude that the trial court's decision to allow the testimony was unreasonable, arbitrary or unconscionable, permitting such testimony did not constitute plain error.

{¶17} Based on the record before us, we hold that the trial court did not lose its way in convicting appellant of driving under the influence of drugs. Appellant's sole assignment of error is overruled. The decision of the trial court is hereby affirmed.

Judgment affirmed.

DONALD R. FORD, P.J., concurs.

JUDITH A. CHRISTLEY, J., concurs in judgment only with a concurring opinion.

JUDITH A. CHRISTLEY, J., concurring.

{¶18} I respectfully concur in judgment only with the following observations.

{¶19} The majority correctly indicates that "a cellular phone tip made by a citizen informant reporting erratic driving to the police is reliable if the stop is challenged and the state is able to show the factual basis for the stop." *State v. Livengood*, 11th Dist.

No. 2002-L-044, 2003-Ohio-1208, at ¶9. While I agree that this is the law in Ohio, it is inapplicable to the case currently before the court.

{¶20} In *Livengood*, the citizen informant testified during the suppression hearing. Here, neither the citizen informant nor the dispatcher testified. The police officers who did testify, clearly had no personal knowledge as to what the informant said. Appellant however failed to object when the officers testified as to the content of the dispatch. Nevertheless, even without an objection, the consideration of such testimony by the court would be a clear abuse of discretion as it constituted double hearsay. *State v. Swick* (Dec. 21, 2001), 97-L-254, 2001 WL 1647220, at 4 (holding that "evidentiary rulings are within the broad discretion of the trial court and will not be disturbed on appeal absent a clear showing of an abuse of that discretion").

{¶21} With a total absence of evidence concerning the reliability of the "tip," the trial court would have abused its discretion if it had relied upon this evidence in reaching its decision. I, therefore, strongly disagree with the majority that consideration of double hearsay would somehow not be an abuse of discretion. Presumably, the trial court did not rely on such inherently unreliable testimony. Thus, this court, on appeal, should be obligated to determine if sufficient additional evidence existed to support the trial court's finding of guilt.

{¶22} Fortunately, there was no need for the trial court to rely on the double hearsay citizen informant's information as this was not a traffic stop. There is considerable case law in this state holding that when a vehicle is parked or stopped in a public place, such as a parking lot, a police officer, under the appropriate circumstances, can approach the stationary vehicle and engage its occupants in

conversation without having to first satisfy the general prerequisites for an investigative stop. *State v. Santiago*, 11th Dist. No. 2000-L-168, 2002-Ohio-1469, 2002 Ohio App. LEXIS 1488, at 4; *State v. Barno*, 11th Dist. No. 2000-P-0100, 2001-Ohio-4319, 2001 Ohio App. LEXIS 4280, at 3. In fact, the majority of case law concerning investigative stops focuses almost entirely on a moving vehicle that is stopped by a police officer, who must then establish the criteria justifying the stop.

{¶23} Even a *Terry* stop focuses on the detainment of a person, for example, walking on a sidewalk, and not on a person who is already immobile. See, e.g., *Mentor v. Krejsa* (Dec. 20, 2002), 11th Dist. No. 2001-L-188, 2002 WL 31862680; *State v. Brown* (Dec. 13, 2002), 11th Dist. No. 2001-L-168, 2002 WL 31812935. When the safety and well being of an individual is an immediate and obvious concern, police officers clearly have a duty to investigate. Fourth Amendment considerations are only triggered when criminal activity is suspected, not when urgent personal safety issues exist. *State v. Hunter*, 151 Ohio App.3d 276, 2002-Ohio-7326, at ¶¶33-34.

{¶24} Regardless of the reason or motive that Deputy Carr may have had for originally seeking out appellant's vehicle, his testimony indicated that prior to approaching the car, he noticed the engine was running, the headlights were on, and that the driver was slumped over the steering wheel. These observations satisfied any constitutional issue as to his ability to approach the car and assess the situation. *State v. Evans* (1998), 127 Ohio App.3d 56; *State v. Boys* (1998), 128 Ohio App.3d 640.

{¶25} Accordingly, I believe that the majority's reliance on the double hearsay account of the citizen informant's tip is not only unnecessary, but also incorrect. Notwithstanding the original motivation of the investigating officer, he had ample cause

to approach and investigate a visibly incapacitated individual, whose personal well being was clearly and immediately at issue. Under these facts, the officer's intervention was reasonable and withstands Fourth Amendment scrutiny.

{¶26} That being said, I am far more concerned with the paucity of evidence presented by the state. The trial court's denial of appellant's motion to acquit after the state completed its case had to have rested on a single, unchallenged statement from one of the arresting officers: "He did have pills. He told us afterwards that he had been taking them, and that he was on a prescription from his doctor." Other than appellant's apparent physical condition, there was no other evidence that appellant had been abusing an illicit drug, or that he had abused his prescribed medication.

{¶27} Fortunately for the state, any prescription medication can be considered a dangerous drug. R.C. 4729.01(F)(1)(a) ("dangerous drugs" include any drug that must have a restrictive statement providing that the drug may be dispensed only upon a prescription). Moreover, once appellant testified, it was his own testimony that provided evidence of the nature and effect of the various drugs ingested. Therefore, the argument that the verdict was against the manifest weight of the evidence fails.

{¶28} For these reasons, I respectfully concur in judgment only.