[Cite as *State v. Vanoss*, 2010-Ohio-1453.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-T-0047**
- vs -	:	
JEFFERY D. VANOSS,	:	
Defendant-Appellant.	:	

Criminal Appeal from Newton Falls Municipal Court, Case No. 09 TRD 00432.

Judgment: Affirmed.

Richard F. Schwartz, Newton Falls City Prosecutor, 19 North Canal Street, Newton Falls, OH 44444 (For Plaintiff-Appellee).

Charles A. Ziegler, 127-B North Canal Street, Newton Falls, OH 44444 (For Defendant-Appellant).

MARY JANE TRAPP, P.J.

{¶1} Jeffrey D. Vanoss appeals from a judgment of the Newton Falls Municipal Court convicting him of reckless operation of a motor vehicle. For the following reasons, we affirm.

{¶2} On January 29, 2009, Mr. Vanoss was cited by Trooper Kevin Brown for reckless operation of a motor vehicle, in violation of R.C. 4511.20. He pled not guilty. Following trial, where both Trooper Brown and Mr. Vanoss testified, Mr. Vanoss was convicted of the offense. The following testimony was presented at trial:

{¶3} In the early morning of January 29, 2009, Trooper Brown, a nine-year trooper of the Ohio State Highway Patrol, travelled on State Route 534 to assist with a two-vehicle crash. The road conditions at the time, as described by Trooper Brown, were "extremely poor" and "extremely slippery and covered with snow and ice." While the posted speed limit on the road was 55 m.p.h., Trooper Brown was travelling at 35 m.p.h. due to the hazardous conditions. He stated that "35 is about as fast as I could go to maintain control of the car."

{¶4} At 6:30 a.m., Trooper Brown encountered the vehicle driven by Mr. Vanoss, which approached his cruiser from behind. Mr. Vanoss's vehicle passed the cruiser, returned to its lane, and then passed two other vehicles, causing the lead vehicle to apply the brakes, a dangerous maneuver on the icy road. As Trooper Brown described it, "due to the road conditions, it's highly probable that [applying the brakes] could cause a crash," because "the roads are extremely slick and [the vehicles] can spin off and cause a crash." Trooper Brown had training at making visual estimates, and, according to his visual estimate, Mr. Vanoss was traveling at 45 m.p.h., 10 m.p.h. above what the trooper considered a safe driving speed at the time. After being stopped by the trooper, Mr. Vanoss stated he passed the trooper because the trooper "was going slow and [he] had places to be."

{¶5} Mr. Vanoss testified the road was not slippery, he did reduce his speed due to the weather conditions, and he was at all times in control of his vehicle.

{¶6} The court found Mr. Vanoss guilty of reckless operation of a motor vehicle. Mr. Vanoss now appeals, assigning the following error for our review:

{¶7} "The State of Ohio failed to prove that appellant violated Ohio's Reckless Operations Statutes."

{¶8} He frames the question for our consideration as follows: "Whether a trial court's [sic] commits reversible error by ruling that a Defendant is guilty of reckless operation of a motor vehicle under circumstances whereby the Defendant has violated no other section of the Ohio traffic laws."

{¶9} R.C. 4511.20(A) sets forth the offense of reckless operation of a motor vehicle as follows:

{¶10} "No person shall operate a vehicle, trackless trolley, or streetcar on any street or highway in willful or wanton disregard of the safety of persons or property."

{¶11} Mr. Vanoss claims that a motorist cannot be found guilty of reckless operation of a motor vehicle when he or she has violated no other traffic laws. However, he cites no authority for this proposition and we are aware of none. The standard to be applied to determine whether a motorist is guilty of reckless operation of a motor vehicle is set forth in *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19. In analyzing R.C. 4511.20, the Supreme Court of Ohio stated:

{¶12} "A person may be found guilty of violating R.C. 4511.20 if he acts willfully. Such conduct implies an act done intentionally, designedly, knowingly, or purposely, without justifiable excuse. Or, conversely, R.C. 4511.20 is violated when a person acts wantonly in disregard of the safety of others. A wanton act is an act done in reckless disregard of the rights of others which evinces a reckless indifference of the consequences to the life, limb, health, reputation, or property of others. Similarly, when the operator of a vehicle, with full knowledge of the surrounding circumstances,

recklessly and inexcusably disregards the rights of other motorists, his conduct may be characterized as wanton." Id. at 21-22 (citations and footnotes omitted). See, also, *State v. Poptic* (Nov. 29, 1991), 11th Dist. No. 90-T-4467, 1991 Ohio App. LEXIS 5720, *6.

{¶13} Our review of the record indicates that the state produced evidence that Mr. Vanoss acted "wantonly in disregard of the safety of others" upon which the trial court could find him in violation of R.C. 4511.20. On a dark, slippery road covered with ice and snow, described by the trooper as "extremely slick" and only safe to drive at 35 m.p.h., 20 m.p.h. under the posted speed limit, Mr. Vanoss traveled at an estimated 45 m.p.h. He passed several vehicles, including the trooper's cruiser, causing one of the drivers to apply the brakes, a maneuver highly likely to cause the vehicle to spin out of control due to the precarious road conditions. On this record, sufficient evidence was presented by the state to show that Mr. Vanoss's operation of his vehicle demonstrated a "reckless disregard of the rights of others which evinces a reckless indifference of the consequences" to the safety and property of other motorists traveling on the road; the evidence was also sufficient to show that Mr. Vanoss, "with full knowledge of the surrounding circumstances, recklessly and inexcusably disregards the rights of other motorists." *Earlenbaugh* at 21-22.

{¶14} For these reasons, we overrule appellant's assignment of error. The judgment of the Newton Falls Municipal Court is affirmed.

TIMOTHY P. CANNON, J., concurs,

CYNTHIA WESTCOTT RICE, J., dissents with Dissenting Opinion.

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{¶15} Because I believe the state failed to present sufficient evidence to convict appellant of reckless operation, I respectfully dissent.

{¶16} It is undisputed that at the time of his citation, appellant, who was driving a Chrysler minivan, approached Trooper Brown's cruiser from the rear traveling northbound on Route 534, a two-lane road, in a rural area in Farmington Township. Appellant went in the southbound lane, passed the trooper, and then, using his flashers, signaled his return to the northbound lane. Shortly after returning to his lane, appellant passed two other vehicles at the same time that were ahead of the trooper. During this pass, the driver of the lead vehicle activated his brake lights in an apparent attempt to give appellant additional space to return to his lane of travel. Trooper Brown then stopped appellant and cited him for reckless operation.

{¶17} The posted speed limit in that area is 55 miles per hour. Trooper Brown did not clock appellant's speed on radar, but visually estimated his speed at 45 miles per hour. Appellant did not exceed this speed in passing any of the vehicles. Trooper Brown testified that there was snow, ice, and slush on the road, but it was not snowing. He said that, due to these conditions, the fastest he could drive and still maintain control of his cruiser would have been 35 miles per hour. He said that in his opinion, in traveling at 45 miles per hour, appellant's speed was unreasonable for the conditions. R.C. 4511.21 provides in part:

{¶18} "(A) No person shall operate a motor vehicle *** at a speed greater *** than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions ***.

{¶19} "(B) It is prima-facie lawful, in the absence of a lower limit declared or established pursuant to this section by the director of transportation or local authorities, for the operator of a motor vehicle *** to operate the same at a speed not exceeding the following:

{¶20} "***

{¶21} "(5) Fifty-five miles per hour on highways outside municipal corporations ***."

{¶22} Because appellant never exceeded the posted speed limit, his speed at 45 miles per hour was prima-facie lawful. However, even if 35 miles per hour was the reasonable speed limit, Ohio courts have held that speeding does not invariably constitute reckless operation; the facts surrounding the violation must be examined. The speed must be "grossly excessive" and involve facts demonstrating a clear safety hazard to other drivers, such as alcohol consumption and heavy traffic. *State v. Pessefall* (1993), 87 Ohio App.3d 222, 226; *State v. Hartman* (1987), 41 Ohio App.3d 142, 144. In *Pessefall*, the Fourth District held that a speed of 70 miles per hour in a 55-mile-per-hour zone was not grossly excessive. That court also viewed a speed of 65 miles per hour in a 50-mile-per-hour zone as "nominal excess." In *Hartman*, the Twelfth District held that 65 miles per hour in a 55-mile-per-hour zone was not grossly excessive. This court adopted the holdings in *Pessefall* and *Hartman* in *Mentor v. Pappas* (Oct. 27, 1995), 11th Dist. No. 94-L-182, 1995 Ohio App. LEXIS 4766. In

Pappas, this court affirmed the trial court's finding of reckless operation because the defendant was driving 68 miles per hour in a 35-mile-per-hour zone at night, in the rain, in a residential area, with moderate traffic. However, in the instant case, even if 35 miles per hour was the lawful speed limit, based on the foregoing authority, driving 10 miles per hour over that limit was not grossly excessive. Moreover, there are no facts demonstrating that appellant presented a clear safety hazard to other drivers.

{¶23} Further, Trooper Brown testified that he was not going to stop appellant for passing him, but decided to stop him only because appellant passed the two other vehicles and the lead vehicle applied his brakes. I would first point out that, based on Trooper Brown's testimony, appellant operated his vehicle in the same manner when he passed the trooper and later when he passed the two other drivers. Appellant's speed remained constant, and there is no evidence appellant ever drove in an erratic manner. Therefore, if appellant's operation was not reckless in passing the trooper, it was not reckless in passing the other vehicles. See *Hartman*, supra, at 144.

{¶24} Next, I would note that the mere act of passing another vehicle does not constitute reckless operation. In *State v. Hellickson* (Jul. 31, 1991), 9th Dist. No. 91CA004963, 1991 Ohio App. LEXIS 3693, while the defendant-school bus driver was driving a group of students, she passed a semi that was traveling at 55 miles per hour. The Ninth District held that "the trial court erred in finding Hellickson in violation of R.C. 4511.20, based solely on 'the pass' which occurred on a four-lane highway." Id. at *3.

{¶25} While I recognize that passing a vehicle in an unlawful manner may result in reckless operation, there is no evidence here that in passing the vehicles, appellant was in a no-passing zone or violated R.C. 4511.27, which prohibits improper passing.

That section provides: "The operator of a vehicle *** overtaking another vehicle *** proceeding in the same direction shall *** signal to the vehicle *** to be overtaken, shall pass to the left thereof at a safe distance, and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle ***." There is no evidence that appellant failed to signal to the overtaken vehicles. Nor is there any evidence that appellant did not pass to the left of the vehicles at a safe distance or that he failed to return to his lane without safely clearing the overtaken vehicles.

{¶26} Next, while the trooper testified that applying one's brakes under the prevailing conditions created a likelihood that a crash would occur, it was the driver of the lead vehicle, not appellant, who applied his brakes.

{¶27} Moreover, the trooper testified that neither appellant nor the other two drivers ever lost control of their vehicles. There is no evidence that appellant swerved or slid his van; that he was weaving or improperly changing lanes; that he caused any other driver to leave the road or lose control of his vehicle; or that he ever came close to causing a crash.

{¶28} Finally, based on a review of a wide range of reckless operation cases, it is manifest that most, if not all, such cases involve one or more traffic offenses, such as failing to provide the assured clear distance, speeding, unlawfully stopping, failure to yield, crossing marked lanes, and/or driving under the influence of alcohol. The state has failed to prove that appellant committed any traffic offense that would serve as a predicate for appellant's conviction of reckless operation. I would also note that the trooper did not cite appellant for traveling at an unreasonable speed under R.C.

4511.21(A) or for improper passing under R.C. 4511.27. In these circumstances, I believe that affirming appellant's conviction departs from established precedent.

{¶29} In view of the foregoing, I do not believe that sufficient evidence was presented to prove that appellant willfully or wantonly disregarded the safety of other drivers.

{¶30} For the foregoing reasons, I respectfully dissent.