[Cite as *State v. Rode*, 2011-Ohio-2455.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2010-P-0015**
- vs -	:	
NICOLE C. RODE,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Municipal Court, Ravenna Division, Case No. 2009 TRD 5916 R.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Connie J. Lewandowski*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Paul J. Mooney, Law Office of Paul J. Mooney, 3401 Enterprise Parkway, #340, Beachwood, OH 44122 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Nicole C. Rode, appeals her conviction in the Portage County Municipal Court, Ravenna Division, after a bench trial, of failing to stop after an accident and a marked lane violation. Appellant challenges the sufficiency and weight of the state's evidence. For the reasons that follow, we affirm.

{¶2} On May 4, 2009, appellant was cited by Officer Jon Hurley of the Streetsboro Police Department with failing to stop after an accident, a misdemeanor of

the first degree, in violation of R.C. 4549.02, and a violation of marked lanes, a minor misdemeanor, in violation of R.C. 4511.33. The ticket charging these offenses was filed on May 11, 2009. Appellant pled not guilty and the case proceeded to bench trial.

{¶3} Nicole Fiorta, a senior at Kent State University, testified that on May 3, 2009, at about 4:20 p.m., she was driving her gray 2008 Subaru eastbound on Interstate 480 in Streetsboro in Portage County, Ohio. Interstate 480 eastbound is a two-lane road divided by a white, dotted line. Ms. Fiorta's friend Nicole Klasa, also a student at Kent State, was with her in the front passenger seat.

{¶4} Ms. Fiorta was driving in the left passing lane when she noticed a white Chevrolet Impala approach her from the rear, which was driven by appellant. She was concerned because the car was dangerously close to her vehicle. Through her rear view mirror, Ms. Fiorta saw that appellant appeared to be angry, apparently because she believed Ms. Fiorta was driving too slowly, and was giving her "the finger." At that time, Ms. Fiorta was driving her Subaru about 72 mph and the speed limit is 65 mph.

{¶5} Ms. Fiorta and Ms. Klasa testified that after appellant was tailing them for some time, she drove her vehicle into the right non-passing lane and was driving beside their car. Appellant was yelling at them while still giving them the finger, but they could not hear what she was saying because their windows were rolled up.

{¶6} After about 30 seconds, appellant crossed back into the passing lane in front of Ms. Fiorta's vehicle and hit the front passenger side of her car. The impact from the collision pushed Ms. Fiorta's car off the road and onto the grass in the median. Appellant continued driving without stopping. The victims returned to the road, and Ms.

Klasa took down appellant's license plate number before she sped off and left the highway at the next exit, which was the Frost Road exit.

{¶7} Ms. Fiorta called the Streetsboro Police and reported the collision. She then drove to the station. Officer Hurley took photographs of the damage to Ms. Fiorta's car, and the victims made written statements. The cost to repair the damage was in excess of $2,000.

{¶8} Officer Hurley testified that he observed the damage to the victims' car. There was a dent at the edge of the fender well on the passenger side, and scrapes and a white paint transfer on the front bumper on the passenger side. They gave him the make and model of appellant's vehicle and her license plate number. He ran the number through LEADS, and obtained appellant's information and a description of her vehicle, which matched the information provided by the victims. He then called appellant and asked her to come to the station with her vehicle.

{¶9} On the following day, appellant came to the Streetsboro Police Station. Officer Hurley saw there was damage to the rear bumper on the driver's side of her Impala, which was consistent with the damage sustained by the victims' vehicle.

{¶10} Appellant's police statement was generally consistent with her trial testimony. She said that as she was following Ms. Fiorta's car, she was only one car length behind her when, she claimed, the driver slammed on her brakes. Appellant said she was aggravated and raised her hand and said, "What the hell?" She decided to pass the car, so she left the passing lane and drove into the non-passing lane next to the victims. She said the girls were giggling, which made her more aggravated. She said that as she was passing the victims, she came up behind a third car in the slow

lane. She decided to pass that car, so she returned to the passing lane, still behind Ms. Fiorta's vehicle. Shortly thereafter, appellant again decided to pass the victims, and she went back into the non-passing lane. Once again, appellant came upon the same third vehicle ahead of her. She tried to pass it by crossing into the fast lane, but did not have enough room. She admitted to Officer Hurley that her car made contact with Ms. Fiorta's car and that she felt a slight contact. However, she continued driving and got off at the Frost Road exit. Officer Hurley testified that after taking appellant's statement, observing the damage to her car, and determining what happened, he issued his citation.

{¶11} The trial court entered judgment finding appellant guilty of the crimes charged. She was previously convicted in 2006 of OVI. In that same year, she was convicted of three speeding offenses and one marked lane violation. Appellant was sentenced to 180 days in jail and fined $1,000. The court suspended the jail time and $800 of the fine. This appeal follows.

{¶12} Appellant asserts five assignments of error. For her first assigned error, she alleges:

{¶13} "To the prejudice of appellant the Portage County Municipal Court did not have jurisdiction to determine the case and further the court failed to take judicial notice of adjudicative facts which clearly placed the incident outside the jurisdiction of the court."

{¶14} A challenge to the court's territorial jurisdiction is presented by way of a motion to dismiss. See *State v. Davis*, 5th Dist. No. 2004-CA-00202, 2005-Ohio-494, at ¶36. A motion to dismiss filed pursuant to Crim.R. 12 tests the sufficiency of the

charging document, without regard to the quantity or quality of the evidence that may eventually be produced by the state. *State v. Patterson* (1989), 63 Ohio App.3d 91, 95; *State v. Green* (July 12, 1998), 5th Dist. No. 97CAA11052, 1998 Ohio App. LEXIS 3534, *5-*6. Therefore, in addressing the defendant's motion to dismiss, the court is limited to determining whether the language within the charging instrument alleges an offense. *State v. Heebsh* (1992), 85 Ohio App.3d 551, 556. We review a trial court's decision on a motion to dismiss pursuant to a de novo standard of review. *State v. Wendel* (Dec. 23, 1999), 11th Dist. No. 97-G-2116, 1999 Ohio App. LEXIS 6237, *5. If a motion to dismiss requires examination of evidence beyond the face of the complaint, it must be presented as a motion for acquittal under Crim.R. 29 at the close of the state's case. *State v. Varner* (1991), 81 Ohio App.3d 85, 86.

{¶15} "*** Jurisdiction *** is the 'right and power to *** apply the law'. The American Heritage Dictionary, Second College Edition (1982), 694. Subject matter jurisdiction focuses on the court as a forum and on the case as one of a class of cases, not on the particular facts of a case or the particular tribunal that hears the case. In the civil context, the standard applied to determine whether to dismiss a case for lack of subject matter jurisdiction is whether the plaintiff has alleged 'any cause of action cognizable by the forum.' *Avco Fin. Serv. Loan, Inc. v. Hale* (1987), 36 Ohio App.3d 65, 67. In the criminal context, the proper inquiry likewise centers on what is the proper forum to hear the type of case in question, i.e., municipal or common pleas, court of general jurisdiction or juvenile court if, of course, there is a proper forum at all. See, e.g., *State v. Nelson* (1977), 51 Ohio App.2d 31; *State v. Wilson*, 73 Ohio St.3d 40." *State v. Garretson* (2000), 140 Ohio App.3d 554, 558.

{¶16} "The judicial power of the state is vested in 'such other courts inferior to the supreme court as may from time to time be established by law.' Section 1, Article IV, Ohio Constitution. The constitution gives the General Assembly the power to provide for municipal courts and their jurisdiction. *Behrle v. Beam* (1983), 6 Ohio St.3d 41, 42. Municipal courts, as they exist today in Ohio, were established in 1951 with the enactment of R.C. Chapter 1901. Id. ***" *State v. Spartz* (Feb. 22, 2000), 12th Dist No. CA99-11-026, 2000 Ohio App. LEXIS 612, *2.

{¶17} A municipal court has jurisdiction over misdemeanor offenses committed within the limits of its territory. R.C. 1901.20(A)(1). The territorial jurisdiction of the Portage County Municipal Court encompasses Portage County. R.C. 1901.02(B).

{¶18} Appellant argues the trial court did not have jurisdiction to adjudicate this matter because, she claims, the offenses took place in Summit, rather than Portage, County, Ohio. Appellant argues the victims testified the crash occurred one mile before the Frost Road exit. She also argues that the Summit County/Portage County boundary is one-half mile before that exit. Therefore, she argues the crash occurred in Summit County. Appellant's argument fails for several reasons.

{¶19} First, it was undisputed at trial that the crash occurred in Portage County. Ms. Fiorta testified that when she first noticed appellant tailing her, she was in Streetsboro in Portage County. She also testified that when her car came to a rest after being pushed off the road by appellant's car, her car was still in Portage County. Further, Ms. Klasa testified that at the time of the crash, she and Ms. Fiorta were traveling on I-480 in Portage County. Next, Officer Hurley testified that as part of his investigation, he drove out to the scene and observed the area where the crash

occurred. Based on his investigation, he testified that appellant's traffic violations took place in Streetsboro in Portage County.

{¶20} Second, the citation charged appellant with committing two misdemeanors within the territorial jurisdiction of the trial court. That citation alleges that the offenses occurred "between mm 41/mm 41.4 *** in the city of Streetsboro in Portage County, State of Ohio." As a result, appellant was subject to both the territorial and subject matter jurisdiction of the court.

{¶21} Third, while the victims were less than certain about the distance in terms of mileage between the scene of the crash and the exit, this testimony did not necessarily conflict with their testimony that the crash occurred in Portage County. When Ms. Fiorta was asked about the distance in miles between the crash and the Frost Road exit, she said, "I'm not sure. *** I don't know exact." When Ms. Klasa was asked about the distance, she said, "I'm not good at distances." Although both victims had difficulty estimating these distances, they both testified that the crash took place in Portage County. As the trier of fact, the trial court was entitled to resolve any conflicts in the testimony, and it is not our function to substitute our judgment for that of the trial court. *State v. Awan* (1986), 22 Ohio St.3d 120, 123.

{¶22} Fourth, there is no evidence in the record concerning the location of the Portage County line. While appellant argues that the county line is one-half mile from the Frost Road exit, there is nothing in the record to establish this alleged fact.

{¶23} Fifth, appellant argues the trial court should have taken judicial notice of the Portage County line. However, because the record is silent concerning the location of the county line and judicial notice was never requested, judicial notice was

discretionary, Evid.R. 201(C), not mandatory. Appellant has failed to argue, let alone demonstrate, that the court abused its discretion.

{¶24} We therefore hold the trial court did not err in asserting jurisdiction over this matter.

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

{¶26} For her second assigned error, appellant maintains:

{¶27} "The trial court erred when failing to determine whether appellant acted knowingly as an essential element of the charge where appellant was found guilty of failure to stop after an accident in violation of R.C. 4549.02."

{¶28} Appellant argues the trial court erred in finding her guilty of failing to stop after an accident in violation of R.C. 4549.02 without specifically finding that she acted knowingly. That section provides:

{¶29} "(A) In case of accident to or collision with persons or property upon any of the public roads or highways, due to the driving *** thereon of any motor vehicle, the person driving *** the motor vehicle, *having knowledge of the accident or collision*, immediately shall stop the driver's *** motor vehicle at the scene of the accident or collision and shall remain at the scene of the accident or collision until the driver *** has given the driver's *** name and address *** to the operator *** of any motor vehicle damaged in the accident or collision ***." (Emphasis added.)

{¶30} "A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "When knowledge suffices to establish an element of an offense, then purpose is also sufficient culpability for such element." R.C. 2901.22(E).

{¶31} The trial court in its judgment entry found that appellant was "guilty beyond a reasonable doubt, of the offenses of failing to stop after an accident *** and of marked lanes ***." The court did not expressly find that when she failed to stop, she was acting with knowledge of the accident or collision. However, the trial court in its judgment finding appellant guilty was not required to make such finding. Crim.R. 23(C); *Cleveland Heights v. Watson*, 8th Dist. No. 85344, 2005-Ohio-3595, at ¶15.

{¶32} Further, we note that appellant has failed to reference any authority requiring the trial court in its guilty finding to make specific findings regarding each element of the offense. Her argument, therefore, violates App.R. 16(A)(7), and for this additional reason, is not well taken.

{¶33} In any event, while the court did not make an express finding regarding appellant's knowledge, the record supported such finding. The court heard Officer Hurley testify that appellant admitted "she felt a slight contact and continued on going." Further, the trial court's findings as a whole demonstrate it impliedly found that appellant acted with knowledge of the accident or collision. The court found that appellant "drove outside of her designated lane and struck the vehicle of the complaining witness; that the complaining witness' front passenger panel sustained observable damage and that the Defendant's left rear bumper was damaged with paint markings from the complaining witness' vehicle; and further that Defendant failed to stop immediately after the accident to provide her name and address."

{¶34} Because one cannot look into the mind of another, "knowledge is determined from all the facts and circumstances in evidence." 4 OJI 409.13. There is no suggestion in this case that appellant suffered from any infirmity that might have

affected her ability to sense the environment around her. From the trial court's findings regarding the facts and circumstances in this case, it can reasonably be inferred that the trial court found that when appellant left the scene without providing her name and address, she had knowledge that she had been involved in an accident or collision.

{¶35} Finally, it is well-settled that the law presumes the regularity and legality of the proceedings below as well as the validity of the judgment under review. *Swonger v. Swonger* (Sep. 12, 1994), 5th Dist. No. 94-CA-00080, 1994 Ohio App. LEXIS 4369, *4-*6. The law also presumes that every court complies with the law, and unless the record shows something to the contrary, it will be presumed that the lower court acted wholly within the law; that the judgment was made upon proper grounds; that the court below applied the law correctly; that a trial judge performed his duty; and that action below was justified. Id. As a result of the presumption of validity and regularity of the proceedings below, it is the law in Ohio that error will not be presumed, but rather must be made to appear affirmatively on the record, i.e., the burden is on the appellant to show that error has occurred. Id. at *6.

{¶36} Because the trial court found that appellant was "guilty beyond a reasonable doubt," and appellant has failed to demonstrate that the court did not find she acted with knowledge, we presume the court found that the state proved every element of the offense, including appellant's knowledge of the accident at the time she left the scene.

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

{¶38} For her third assigned error, appellant contends:

{¶39} "The trial court erred in finding appellant guilty in violation of R.C. 4511.33, marked lanes, a minor misdemeanor."

{¶40} R.C. 4511.33 provides:

{¶41} "(A) Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever within municipal corporations traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following rules apply:

{¶42} "(1) A vehicle *** shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶43} Appellant argues that because Officer Hurley did not personally observe her cross a marked lane, she could not be found guilty of this offense. However, once again, appellant has failed to cite any authority for this proposition, in violation of App.R. 16(A)(7).

{¶44} Appellant's reliance on *In re V.S. Jr.*, 9th Dist. No. 22632, 2005-Ohio-6324, is misplaced. In that case, the Ninth District held that the officer was justified in making a traffic stop because he had observed a traffic violation. Id. at ¶10. The Ninth District did *not* hold that the officer's observation was essential to the issuance of a citation.

{¶45} The circumstances here are similar to those presented in *Beachwood v. Sims* (1994), 98 Ohio App.3d 9. In *Sims*, an identified citizen reported to police on his cellular phone that the defendant was driving erratically. The informant followed the defendant home and waited for police to arrive. The defendant was standing in the

garage when the police officer began to question him. The officer observed that the defendant appeared visibly intoxicated. Though the officer *did not personally observe the erratic driving*, the defendant admitted drinking three beers and driving from downtown. The Eighth District held that the "citizen-informant's tip was corroborated by sufficient details to serve as a basis for the police officer's investigatory stop" and subsequent arrest for DUI. Id. at 14.

{¶46} The holding in *Sims* applies with greater force here because two citizens reported that appellant had crossed the marked lane and crashed into their car, pushing it off to the side of the road. Officer Hurley observed damage to the vehicles consistent with this report. Appellant admitted to him that she had been involved in a confrontation with this vehicle and that she had crossed the marked lane. Although appellant attempted to minimize the seriousness of the collision, she admitted she was aware that there was at least a slight contact between her vehicle and the victims' car. These facts supported the officer's citation, and his observation of the offense was not required to find appellant guilty.

{¶47} Appellant's third assignment of error is overruled.

{¶48} For her fourth assigned error, appellant alleges:

{¶49} "The trial court erred to the prejudice of appellant as there was insufficient evidence to support the convictions and the convictions were against the manifest weight of the evidence."

{¶50} An appellate court reviewing the sufficiency of the evidence examines the evidence admitted at trial and determines whether, after viewing the evidence most favorably to the state, the jury could have found the essential elements of the crime

proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. "On review for sufficiency, courts are to assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52 (Cook, J., concurring).

{¶51} In contrast, a court reviewing the manifest weight observes the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the 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. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-*15. "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." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court must defer to the factual findings of the jury regarding the weight to be given to the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶52} Appellant argues that because the trial court asked Officer Hurley whether appellant had called the police station to report the incident, this shows the court did not follow the law because the statute did not require her to call police after the fact. However, while we agree that appellant's crime was complete when she left the scene, the court's single question does not show that the court did not require the state to prove knowledge.

{¶53} Moreover, we do not agree with appellant's argument that simply because she denied at trial that she was aware of the collision when she sped away, the trial court was required to believe her testimony and to disregard the countervailing evidence. We note that Ms. Fiorta testified that it was not "possible that [appellant] wasn't aware that she hit [Ms. Fiorta's vehicle]." Ms. Klasa testified that appellant intended to hit their car because at the time appellant was visibly angry and giving them the finger. Moreover, appellant admitted to Officer Hurley that, before speeding off, she was aware her vehicle had made contact with the victims' car.

{¶54} In support of her manifest-weight argument, appellant argues the testimony of the state's witnesses was unbelievable because, despite their speed, they did not crash or turn over. However, based on our review of the record, there is nothing about the extent of damage sustained by both cars that demonstrates the victims' testimony was not credible. Officer Hurley's testimony supports this conclusion:

{¶55} "Q. The victims' account of events, did they appear to be consistent, basically to each other and to what you had observed as it relates to the vehicle and the physical evidence that you had at that point?

{¶56} "A. To that point yes, it was all consistent with what their statements were saying."

{¶57} He further testified: "When [appellant] arrived at the Police Department she filled out the statement. *** With that statement and seeing the damage to her car, which was consistent with the victim's vehicle, I was able to determine that some contact was made on the road *** before the Frost Road exit."

{¶58} Next, appellant argues the victims' testimony was inconsistent and thus unbelievable because Ms. Fiorta said that when appellant pushed her vehicle off the road, it briefly stopped before continuing, while Ms. Klasa said that she did not recall coming to a complete stop. However, both witnesses testified that appellant crashed into the front passenger side of their car, forcing it to go off the side of the road. Thus, any inconsistency between the victims' testimony concerning whether their car came to a complete stop on the side of the road was inconsequential.

{¶59} Appellant's fourth assignment of error is overruled.

{¶60} For her fifth and final assigned error, appellant contends:

{¶61} "The appellant was denied the effective assistance of counsel as defense counsel's actions and omissions deprived appellant of the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the U.S. Constitution and Article I, Section 10 of the Ohio Constitution."

{¶62} The standard of review for ineffective assistance of counsel was set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 687. Accord, *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256, at ¶187. In order to support a claim of ineffective assistance of counsel, the defendant must satisfy a two-prong test. First, he must show that counsel's performance was deficient. *Strickland*, supra. Second, the defendant must show the deficient performance prejudiced the defense. In order to satisfy this prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's *** errors, the result of the [trial] would have been different." Id. at 694; accord, *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶63} Appellant argues his trial counsel was ineffective because he failed to file a motion to suppress arguing: (1) that the trial court lacked jurisdiction and (2) that Officer Hurley lacked probable cause to cite her because he did not personally observe her marked lane violation. However, in light of our holding on these issues, there would have been no legal basis for such motion. We therefore hold that trial counsel was not ineffective.

{¶64} Appellant's fifth assignment of error is overruled.

{¶65} For the reasons stated in the opinion of this court, appellant's assignments of error are overruled. It is the judgment and order of this court that the judgment of the Portage County Municipal Court, Ravenna Division, is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.