[Cite as *Geneva v. Alekseyev*, 2011-Ohio-6518.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

CITY OF GENEVA,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-A-0019**
- vs -	:	
ANDREY P. ALEKSEYEV,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula County Court, Western District, Case No. 2010 TRD 1866.

Judgment: Affirmed.

Lauren A. Gardner, City of Geneva Law Director, 44 North Forest Street, Geneva, OH 44041 (For Plaintiff-Appellee).

Eric M. Levy, 55 Public Square, Suite 1600, Cleveland, OH 44113; and *Irina Vinogradsky*, 27600 Chagrin Boulevard, Suite 420, Woodmere, OH 44122 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} After a trial to the bench, appellant, Andrey P. Alekseyev, was found guilty of reckless operation, in violation of Geneva Municipal Code ("GMC") 434.02(a), a minor misdemeanor. He now appeals the conviction and, for the reasons discussed in this opinion, we affirm.

{¶2} On October 29, 2010, at approximately 2:40 a.m., Officer Christopher Cahill of the City of Geneva Police Department was doing routine patrol while driving on

Route 20 in the City of Geneva, Ohio. The officer testified he was between eight and 10 car lengths behind a vehicle that was pulling away from a traffic signal at a low rate of speed. As the officer began to "randomly run the plate," the vehicle slammed on its brakes. The officer quickly stepped on his brakes but did not immediately think the action was necessarily abnormal. He testified:

{¶3} "I thought, well, maybe he slammed on his brakes because a cat ran across or some other object or some other thing blocked his path to cause him to do that. That would be the normal response. So I didn't really give it too much other thought and continued behind this vehicle and continued to run the plate."

{¶4} As the vehicle moved on, Officer Cahill was approximately "three, maybe three-and-a-half" car lengths behind. And, after reaching the speed limit of 35 miles-per-hour, the lead vehicle again "braked heavily." The officer quickly applied the brake "in order to not have any kind of ** collision with this vehicle." The vehicle did not completely stop and again accelerated to the lawful speed limit. The officer continued to follow the vehicle, attempting to discern whether there was anything in the roadway that would cause the motorist to abruptly apply the brakes. He noticed nothing.

{¶5} The vehicle again reached the posted speed limit and, again, "slammed on the brakes." The officer noticed that, although the vehicle did not come to a complete stop, he was moving at approximately "15 to 20" miles-per-hour. The officer testified the three sudden stops occurred within "a little more than a quarter of a mile." The officer looked but did not observe anything that would have prompted the vehicle to abruptly apply his brakes. Officer Cahill consequently initiated a traffic stop because he felt the vehicle was causing a hazard and placing the officer "*** in direct harm's way by

slamming on his brakes abruptly from the speed he was going for no apparent reason whatsoever and doing that three times."

{¶6} The officer approached the vehicle and asked appellant to explain his reasons for repeatedly applying his brakes in such an abrupt fashion. Appellant explained that, to the extent he was not breaking any traffic laws, he could drive how he wished. Because he was not aware of a law prohibiting him from driving the speed limit and slowing down, he did so. Officer Cahill then issued appellant a citation for reckless operation.

{¶7} At trial, appellant admitted he "slammed" on his brakes three times. He further testified he did this because there was no traffic on the road; and, furthermore, he felt there was no reason for the officer to be following him. He conceded his actions were prompted, in part, by a desire to "see what police officer is going to do because he was following me." Appellant further explained that, under the circumstances, he did not believe his abrupt braking caused a risk to the officer. He specifically testified:

{¶8} "I know that police officers learn to drive masterly, in a master way, and police officer could - - his job is to avoid very serious crashes. And I was absolutely sure that if police officer is able to drive a car, he - - he could not stick my car because his ability to drive can be - - must be verified."

{¶9} After the defense rested, the trial court found appellant guilty of reckless operation, in violation of GMC 434.02. Appellant was issued a fine of $75 plus costs, which was stayed pending resolution of this appeal.

{¶10} For his first assignment of error, appellant asserts:

{¶11} "The trial court erred by denying appellant's Motion for Acquittal pursuant to Crim.R. 29, which was decided under the wrong section of the Geneva Code, and

also erred by finding the appellant guilty under the facts presented which was against the manifest weight and sufficiency of the evidence."

{¶12} Appellant's initial assignment of error makes several challenges to the trial court's judgment. We shall first consider appellant's contention that his conviction was improper because the trial court purportedly relied upon the wrong code section when entering its judgment of conviction. Appellant asserts the trial court's judgment of conviction was premised upon the application of GMC 432.02, the section that governs "passing to the right when proceeding in opposite directions," instead of GMC 434.02, the reckless operation section. Appellant's argument is based upon the following exchange that occurred in the course of the trial court overruling appellant's Crim.R. 29 motion:

{¶13} "THE COURT: *** I pulled out the statute *** and I have reviewed it and I'm going to overrule your motion.

{¶14} "[DEFENSE COUNSEL]: Which statute, Your Honor?

{¶15} "THE COURT: *432.02(a)*. I am very familiar with the state reckless operation statute, but this is filed under the city code, so I pulled that out to look at it. It's roughly the similar language of the state code, and I see - - my view is that the dismissal under Rule 29 motion is not appropriate, so your motion is overruled." (Emphasis added.)

{¶16} Initially, there was no objection to the court's statement that it had reviewed a code section that was irrelevant to the case. We, however, find no plain error. The court's reference to the wrong code section can be reasonably read as a misstatement.

{¶17} First of all, nothing in the record indicates appellant improperly passed another motorist. Furthermore, the judgment entry reflects appellant was found guilty of violating GMC 434.02(a), the reckless operation section. Finally, the court observed that the GMC and Ohio Revised Code sections relating to *reckless operation* are similar, therefore indicating the court was cognizant of the charge for which appellant was on trial. A review of the record therefore demonstrates that the trial court did not rely upon the wrong code section and its statement on record was nothing more than a coincidental misidentification.

{¶18} Appellant next argues his conviction is neither supported by sufficient evidence nor the weight of the evidence. To avoid redundancy, we shall consider these arguments together.

{¶19} A challenge to the sufficiency of the evidence invokes an inquiry into due process and examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13. Generally speaking, a "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence on each element of the charged offense. *State v. Windle*, 11th Dist. No. 2010-L-0033, 2011-Ohio-4171, at ¶25. The proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶20} Alternatively, a manifest weight challenge concerns:

{¶21} "'[T]he inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the

[finder of fact] that the party having the burden of proof will be entitled to [its] verdict, if, on weighing the evidence in [its] mind[], [it] shall find the *greater amount of credible* evidence sustains the issue which is to be established before [it]. Weight is not a question of mathematics, but depends on its *effect in inducing belief*.'" (Emphasis sic.) *State v. Thomkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing Black's Law Dictionary (6th Ed. 1990).

{¶22} Preliminarily, appellant asserts the trial court erred because it found him guilty of reckless operation on the wrong date; to wit: October 29, 2010. Appellant contends the traffic ticket demonstrates he was cited on October 25, 2010, not October 29, 2010. Because the prosecution only offered evidence to prove he was operating his vehicle recklessly on October 29, 2010, he argues there was insufficient evidence to find him guilty of the crime. The record does not support this claim.

{¶23} Defense counsel failed to object to this purported problem. A careful reading of the record, however, demonstrates there was no basis for leveling an objection. Although written in less-than-perfect penmanship, the traffic citation states it was issued on October 29, 2010, *not* October 25, 2010. This date was additionally confirmed by the officer's testimony. In short, appellant has simply misread the citation. Because the evidence conforms to the date on which the citation was issued and the conduct occurred, appellant's argument is without merit.[1]

{¶24} Next, appellant asserts the evidence submitted by the prosecution was insufficient to find him guilty, and even if sufficient, was against the evidential weight. We do not agree.

[1] Even, assuming arguendo, the date on the ticket was inaccurate, this court has observed that such an error, standing alone, is a "harmless and clerical error" as the date of the traffic violation is not an element of the offense. *State v. McFeely*, 11th Dist. No. 2008-A-0067, 2009-Ohio-1436, at ¶30.

{¶25} GMC 434.02(a) provides:

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

{¶27} Appellant contends that his actions were justified to discourage the dangerous condition Officer Cahill created in tailgating his vehicle. In support of his position, appellant cites *Marietta v. Dunn* (July 9, 1993), 4th Dist. No. 92 CA 23, 1993 Ohio App. LEXIS 3472.

{¶28} In *Dunn*, the defendant was traveling in front of a police car. The officer proceeded to tailgate the defendant at a distance of 12 to 14 feet. The defendant subsequently tapped his brakes as a warning to the officer; the officer slowed but again approached and followed the defendant at the same distance. The defendant pulled off the road and the officer issued him a citation for reckless operation. The defendant was eventually convicted. In reversing the trial court's conviction, the Fourth Appellate District determined that the defendant's actions were consistent with a motorist attempting to avoid a dangerous condition and did not amount to a wanton or willful disregard for the safety of others. Id. at *6.

{¶29} The facts in this case are distinguishable from *Dunn*. Here, there was no specific testimony that the officer was "tailgating" appellant. The officer indicated he was three to three and one-half car lengths behind the defendant and that distance remained consistent prior to appellant's various applications of his brakes. The officer in *Dunn* was approximately one car length behind the defendant. Furthermore, the facts of *Dunn* indicate the defendant merely "tapped" his brakes once and, after the officer proceeded to tailgate, the defendant pulled off the traveled portion of the roadway. Here, appellant spiked or "slammed on" his brakes repeatedly, and made no effort to

remove himself from the dangerous condition in which he alleges the officer placed him. The holding in *Dunn*, therefore, does not apply to the instant factual scenario.

{¶30} The Supreme Court of Ohio has observed that willful conduct "implies an act done intentionally, designedly, knowingly, or purposely, without justifiable excuse." *State v. Earlenbaugh* (1985), 18 Ohio St.3d 19, 21, citing Black's law Dictionary (5 Ed. 1979), 1434. Wanton conduct, on the other hand, is defined as "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." Id. at 21-22.

{¶31} Appellant conceded he abruptly applied his brakes on three separate occasions. Although appellant argues on appeal he did this to avoid a dangerous condition (the officer's alleged tailgating), his testimony at trial indicates he was less interested in averting danger and more interested in provoking a response from the officer.

{¶32} Moreover, appellant testified he directed his actions at the police officer because, in his belief, the officer would be able to avoid a collision due to his training. Although most police officers are skilled defensive drivers, this does not imply a motorist has free license to test their skills on public roadways. And, moreover, the officer expressly testified that, regardless of his driving skills, appellant's repeated act of slamming on his brakes created a hazardous condition that placed him directly in harm's way.

{¶33} All motorists, including police officers, have an obligation to maintain a sensible, reasonable distance when driving behind others. This does not imply, however, that a motorist is permitted to intentionally disregard the safety of others simply because he is in front of a second vehicle. By his own testimony, appellant

slammed on his brakes three times with the officer three car lengths behind him. By his own testimony, he did this because he wanted a reaction. Finally, appellant implicitly acknowledged the danger of his conduct by stating that he believed the officer's defensive driving acumen would prevent any potential collision. In our view, appellant willfully disregarded the safety of the officer behind him. We therefore hold appellant's conviction is supported by sufficient, credible evidence.

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

{¶35} For his second assignment of error, appellant alleges:

{¶36} "The trial court erred in convicting appellant who had been represented by ineffective trial counsel in violation of his right to effective counsel afforded to the appellant by the Sixth Amendment to the United States Constitution."

{¶37} To establish a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that his trial attorney's performance was deficient and the purported deficiencies prejudiced his defense. *State v. Warren*, 11th Dist. No. 2010-T-0027, 2011-Ohio-4886, at ¶70, citing *Strickland v. Washington*, (1984), 466 U.S. 6668, 687. The performance and prejudice prongs are conjunctive and therefore must both be established to demonstrate ineffectiveness of counsel. *Warren*, supra.

{¶38} An attorney's performance is deficient if, under the totality of the circumstances, his or her representation fell below an objective standard of reasonableness. *Strickland*, supra, at 688. A court, however, "must indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." Id. at 689.

{¶39} To establish prejudice, an appellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have

been different. Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome" of the proceeding. Id. "If it is easier to dispose of ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed." *State v. Loza*, 71 Ohio St.3d 61, 83, 1994-Ohio-409, citing *Strickland*, supra, at 697.

{¶40} Under his second assignment of error, appellant initially asserts he received ineffective assistance of counsel because his trial attorney failed to file a motion to suppress the evidence of his traffic stop. Appellant contends the stop was based upon a mere hunch; therefore, he maintains, "the stop, the video of the interaction between the officer and the appellant and the resulting ticket should have been suppressed." We do not agree.

{¶41} The purpose of a motion to suppress evidence is to eliminate from trial any evidence that has been unconstitutionally obtained. *State v. French* (1995), 72 Ohio St.3d 446, 449. In this case, no search was conducted and no evidence was seized. And, while we acknowledge appellant made statements in response to preliminary questions asked by the officer, the statements did not occur in the course of a custodial interrogation. *State v. Chrzanowski*, 180 Ohio App.3d 324, 334, 2008-Ohio-6993 (a motorist is not in custody for purposes of *Miranda v. Arizona* (1966), 384 U.S. 486, when temporarily detained by a police officer during a routine traffic stop); see, also, *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶45 (a person is not "in custody" when questioned during a routine traffic stop).

{¶42} Furthermore, it is well-settled that, during a routine traffic stop, an "*** officer may ask the suspect a 'moderate number of questions' to determine her identity and to obtain information confirming or allaying the officer's suspicions." *State v.*

McEndree, 11th Dist. No. 2004-A-0025, 2005-Ohio-6909, at ¶27, quoting *Berkemer v. McCarty* (1984), 468 U.S. 420, 442. It cannot be disputed that the officer's post-stop questions fell squarely within these narrow parameters.

{¶43} Given these points, we therefore hold counsel's decision not to file a motion to suppress was a reasonable strategic decision. Put simply, on this record, there was no basis for such a motion.

{¶44} Appellant next asserts his counsel was ineffective for failing to seek acquittal on the state's failure to establish his identity at trial. Again, we do not agree.

{¶45} Identification of a defendant must be established in a criminal prosecution. *In re W.S.*, 11th Dist. No. 2009-G-2878, 2009-Ohio-5427, at ¶41. An "in-court" identification, however, is not required in a criminal case. Id., citing *State v. Irby*, 7th Dist. No. 03 MA 54, 2004-Ohio-5929, at ¶16. Thus, identity may be established by either direct or circumstantial evidence. *In re W.S.*, supra.

{¶46} In this case, the court addressed appellant by name, asking him directly: "You are Mr. Alekseyev, correct?" Appellant responded in the affirmative. Also, after playing the video recording of the exchange Officer Cahill had with appellant during the stop, the prosecutor asked: "Officer Cahill, is what we just saw, *** the DVD of your encounter, a faithful representation of your discussion *with the Defendant* on this particular evening that you issued him the citation for reckless operation?" The officer testified it was.

{¶47} The record indicates there was both direct and circumstantial evidence of appellant's identity disclosed at trial. We therefore hold counsel was not ineffective for failing to move the court for an acquittal on this basis.

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

{¶49} For the reasons discussed in this opinion, the judgment of the Ashtabula County Court, Western District, is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.