[Cite as *State v. Nutter*, 2009-Ohio-6207.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL NUTTER Defendant-Appellant	JUDGES: Hon. William B. Hoffman, P.J. Hon. John W. Wise, J. Hon. Patricia A. Delaney, J. Case No. 2009 CA 00045 O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Municipal Court, Case No. 08TRC06450
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 20, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
MARK GARDNER Village of Utica Prosecutor 23 South Park Place Suite 208 Newark, Ohio 43055	ANDREW T. SANDERSON Burkett & Sanderson 21 West Church Street Suite 201 Newark, Ohio 43055

Hoffman, P.J.

{¶1} Defendant-appellant Michael Nutter appeals his conviction entered by the Licking County Municipal Court, on one count of operating a motor vehicle while impaired, following a jury trial. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} On July 5, 2008, Appellant was cited with operating a motor vehicle while impaired, in violation of R.C. 4511.19 (A)(1)(a). Appellant appeared before the trial court for arraignment on July 9, 2008, and entered a plea of not guilty to the charge. The matter proceeded to jury trial on October 20, 2008. The following evidence was adduced at trial.

{¶3} Patrolman John Grover of the Utica Police Department testified he was on duty on July 4, 2008, and was dispatched to the area of Routes 62 and 13 in the Village of Utica at approximately 11:45pm. Upon his arrival, Patrolman Grover observed a minivan stationary in the middle of the intersection, blocking traffic. The officer positioned his cruiser behind the vehicle and approached to speak with the driver. Patrolman Grover asked the driver, who was subsequently identified as Appellant, what the problem was. Appellant stated he had just made a left hand turn at the traffic light when his vehicle simply stopped. Appellant began to shift the vehicle into different gears, attempting to get it to move. Patrolman Grover instructed Appellant to place the car in “neutral” so he could try to push it out of the roadway. Patrolman Grover’s attempt to push the minivan was unsuccessful. When he returned to the front of the vehicle, Patrolman Grover noticed Appellant was still shifting the gears; therefore, the

vehicle was not in "neutral" when the officer had tried to push it. Patrolman Grover again asked Appellant to leave the vehicle in "neutral" and again tried to push the vehicle out of the roadway. Several motorists assisted the officer in pushing the vehicle, but again with no success. Patrolman Grover subsequently called dispatch and requested a tow truck.

{¶4} The officer asked Appellant to exit the vehicle. As soon as Appellant stepped out of the vehicle, the front plate of his dentures fell out of his mouth onto the roadway. Patrolman Grover noticed the bottom portion of Appellant's shirt was wet along the pant line. When Appellant bent to pick up his dentures, the officer saw the entire rear side of Appellant's pants was soaking wet. Patrolman Grover believed Appellant had urinated himself. When asked about his wet pants, Appellant stated he had just left the Pioneer Bar and someone had thrown a glass of water on him. The officer stated Appellant's explanation was inconsistent with the wet areas of his pants.

{¶5} Patrolman Grover also noticed Appellant's eyes were red and bloodshot, his speech was slightly slurred, and there was an odor of alcohol emanating from his breath. Appellant agreed to submit to field sobriety tests. Patrolman Grover asked Appellant to say the alphabet. Appellant started with the letter "A", and proceeded to the letter "P", but was unable to continue. Patrolman Grover initiated the Horizontal Gaze Nystagmus. However, the officer was unable to complete the test because Appellant would not keep his hands out of his pockets and down to his side, and would not keep his head still despite the officer repeating these instructions two or three times. Due to medical conditions involving Appellant's back or neck, the officer did not conduct

additional field sobriety tests. Thereafter, Patrolman Grover placed Appellant under arrest and placed him in the rear of the cruiser.

{¶6} Patrolman Grover went to Appellant's vehicle. The driver's seat was soaking wet. The officer positioned himself behind the wheel, turned the key, shifted into "drive," and the vehicle worked properly. Returning to his cruiser, Patrolman Grover asked Appellant for identification. Appellant gave the officer a debit card. Patrolman Grover handed the debit card to Appellant who made two or three attempts to place the card back into his wallet. The officer transported Appellant to the police station, and asked him to submit to a breath test. Because the BAC machine at the Village of Utica Police Department was being repaired, Patrolman Grover transported Appellant to the Johnstown Police Department for the test.

{¶7} Appellant's first attempt at the breath test registered "invalid" as he was unable to give a full breath sample. Shortly before the requisite twenty minutes prior to re-testing had passed, a nickel fell out of Appellant's mouth while he was talking. Patrolman Grover checked Appellant's mouth and found a quarter. Officer Hatfield of the Johnstown Police Department, who was assisting Patrolman Grover, had checked Appellant's mouth prior to the first test and it had been clear. After waiting an additional twenty minutes, Officer Hatfield administered the last test. Appellant started to blow into the machine, but again the sample was invalid. Appellant advised the officers he had some type of COPD which affected his breath. During the entire time he spent with Appellant, Patrolman Grover had not observed Appellant having any difficulty breathing or shortness of breath. Patrolman Grover marked Appellant's BMV Form 2255 as a refusal.

{¶8} Upon completion of the State's case-in-chief, Appellant made an oral motion for a Crim.R. 29 directed verdict, which the trial court denied. Appellant did not present any witnesses on his behalf. After hearing all the evidence and deliberations, the jury found Appellant guilty as charged. The trial court sentenced Appellant to ninety days in jail, suspending sixty of those days, placed Appellant on probation for a period of two years, suspended Appellant's operators license for a period of two years, and ordered Appellant to attend alcohol counseling.

{¶9} It is from this conviction and sentence Appellant appeals, raising the following assignments of error:

{¶10} "I. THE CONVICTION OF THE DEFENDANT-APPELLANT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE TO SUSTAIN THE SAME.

{¶11} "II. THE TRIAL COURT COMMITTED HARMFUL ERROR IN DENYING THE DEFENDANT-APPELLANT'S MOTION FOR A DIRECTED VERDICT OF NOT GUILTY AT THE CLOSE OF THE GOVERNMENT'S CASE IN CHIEF."

I, II

{¶12} Because Appellant's assignments of error require similar analysis, we shall address said assignments of error together. In his first assignment of error, Appellant challenges his conviction as against the sufficiency of the evidence. In his second assignment of error, Appellant asserts the trial court erred in denying his motion for a directed verdict of not guilty at the close of the State's case-in-chief. Specifically, Appellant argues the State did not present sufficient evidence to prove the element of "operation".

{¶13} Crim. R. 29 provides, in pertinent part:

{¶14} "**(A) Motion for judgment of acquittal** The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

{¶15} In *State v. Bridgeman,* (1978), 55 Ohio St.2d 261, the Ohio Supreme Court established the standard for evaluating motions for acquittal, stating, "[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." Id. at syllabus. When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. Thus, "[a]n appellate court must look to the evidence presented to determine if the state offered evidence on each statutory element of the offense, so that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt." *State v. Clark,* 11th Dist. No.2002-A-0056, 2003-Ohio-6689, at ¶ 16. Furthermore, "[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the [jury]." *State v. Dennis* (1997), 79 Ohio St.3d 421, 430.

{¶16} Appellant was convicted of driving while under the influence of alcohol or drugs, in violation of R.C. 4511.19(A)(1)(a), which states as follows:

{¶17} "No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

{¶18} Appellant claims there was insufficient evidence to prove his ability to operate a motor vehicle was "appreciably impaired" by his consumption of an alcoholic beverage. We disagree.

{¶19} Patrolman Grover was dispatched to the intersection of Routes 62 and 13 in the Village of Utica at approximately 11:45pm on July 4, 2008. When he arrived, he found Appellant in the driver's seat of his vehicle, which was stopped in the middle of the intersection, blocking traffic. Appellant advised the officer he had just made a left-hand turn at the traffic light and his vehicle had stopped for no apparent reason. Patrolman Grover asked Appellant to place the vehicle into "neutral" so he (Patrolman Grover) could attempt to push it off of the roadway. The officer was unable to move the vehicle. He returned to the front to find Appellant shifting the gears. Patrolman Grover again asked Appellant to place the vehicle in "neutral" and to leave it in that gear. Patrolman Grover and other drivers were unable to move the vehicle. Subsequently, Patrolman Grover entered the vehicle, turned the key, shifted it into "drive", and the vehicle worked properly. We find the fact the officer could drive the vehicle without problem, but Appellant was unable to do so, is itself inferential evidence of Appellant's intoxication. Together with all the other indicia of intoxication Patrolman Grover related,

the jury could reasonably find Appellant was unable to drive because he was "appreciably impaired".

{¶20} Further, Appellant contends there was insufficient evidence to show he operated the vehicle. Appellant notes Patrolman Grover never observed him driving. Appellant adds "there was no evidence to establish the vehicle could have been put into motion by an action or series of actions undertaken by [him] at the time of his contact with the investigating officer." Brief of Appellant at 9. We again disagree.

{¶21} Patrolman Grover found Appellant seated in the driver's seat with the keys in the ignition. Appellant was attempting to restart and move the vehicle. Additionally, Appellant told Patrolman Grover he had been driving the vehicle when it just stopped in the middle of an intersection. This is a clear indication Appellant operated the vehicle to that point. Upon review, we conclude there was sufficient credible evidence to find Appellant had operated the motor vehicle. Furthermore, Patrolman Grover was able to operate the vehicle after Appellant had been placed in the cruiser.

{¶22} Based upon the foregoing, we find Appellant's conviction was not based upon insufficient evidence and the trial court did not err in overruling his Crim. R. 29 motion for directed verdict of not guilty.

{¶23} Appellant's first and second assignments of error are overruled.

{¶24} The judgment of the Licking County Municipal Court is affirmed.

By: Hoffman, P.J.

Wise, J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MICHAEL NUTTER	:	
	:	
Defendant-Appellant	:	Case No. 2009 CA 00045

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Municipal Court is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ John W. Wise
HON. JOHN W. WISE

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY