[Cite as *State v. Pasiecznik*, 2014-Ohio-342.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio	Court of Appeals No. E-13-026
Appellee	Trial Court No. TRC 1201713
v.	
Jeffrey P. Pasiecznik	**DECISION AND JUDGMENT**
Appellant	Decided: January 31, 2014

* * * * *

Laura E. Alkire, Law Director, City of Huron, for appellee.

Terrence R. Rudes, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Jeffrey Pasiecznik, appeals the judgment of the Huron Municipal Court, sentencing him to 180 days in jail following a jury's determination of guilt on charges of operating a motor vehicle while under the influence of alcohol and marked lanes violations.

A. Facts and Procedural Background

{¶ 2} In the early morning hours of September 24, 2012, appellant was travelling eastbound on S.R. 6. Ryan Boesch, a Huron police officer, was directly behind appellant in his cruiser. At some point, Boesch witnessed appellant make two lane violations. Additionally, Boesch determined that appellant was travelling at speeds of 40 to 50 miles per hour in a 35 miles per hour zone. Consequently, Boesch activated his lights and initiated a traffic stop.

{¶ 3} Upon approaching appellant's vehicle, Boesch asked appellant why his vehicle crossed the lane marking. Appellant stated that he was "messing with his radio." Boesch noticed that appellant's motor skills were impaired as appellant was attempting to get his license and registration out of his wallet. However, because appellant had been smoking cigarettes in his car prior to the stop, Boesch was not able to detect an odor of alcohol in the vehicle. Nonetheless, because Boesch suspected that appellant's driving was impaired due to alcohol consumption, he asked appellant to step out of the vehicle.

{¶ 4} Once appellant stepped out of the vehicle, Boesch was able to detect an odor of alcohol emitting from appellant's facial area. Boesch began questioning appellant about whether he had consumed any alcoholic beverages. Appellant initially insisted that he had not consumed any alcohol. However, appellant eventually admitted to having consumed four drinks earlier in the day.

{¶ 5} Based on his concern that appellant was impaired, Boesch initiated field sobriety tests. Initially, Boesch administered the horizontal gaze nystagmus test. Boesch

testified that four out of six indicators of impairment were present. Consequently, he proceeded to administer the walk and turn test. Boesch provided instructions as to how the test was to be performed. Boesch determined that appellant failed the test based on his observations that appellant could not maintain balance, follow instructions, turn without losing his balance, or walk in a straight line. Finally, Boesch administered the "one legged stand" test, in which the driver is asked to stand on one leg and hold the other leg in the air for 30 seconds. Appellant began the test, but Boesch had to terminate it prematurely out of concern that appellant was going to fall because he could not maintain his balance. Appellant claimed that he was unable to successfully complete the test due to a spinal condition that made it painful to perform the test.

{¶ 6} Following completion of the field sobriety tests, Boesch placed appellant under arrest and transferred him to the Huron police department. At the police department, appellant was advised of his rights, and was asked to submit to a breath test. Appellant refused.

{¶ 7} Appellant was subsequently charged with operating a vehicle while impaired, refusal to submit to a breath test, and failure to drive in marked lanes. At the beginning of the trial, appellant sought to present the testimony of Harold Wright. Wright picked appellant up from the police station on the morning of the incident, and was expected to testify that appellant did not appear impaired when he picked him up. The state objected to Wright's testimony, arguing that Wright lacked personal knowledge under Evid.R. 602 since he was not present during conduction of the field sobriety tests.

The trial court determined that the issue in this case was whether appellant was impaired at the time of the stop. Since Wright was not present at that time, the court concluded that he lacked personal knowledge and excluded his testimony.

{¶ 8} Following the presentation of Boesch's testimony, the state rested. Thereafter, appellant verbally moved for acquittal under Crim.R. 29. The trial court denied appellant's motion, and appellant proceeded to testify in his own defense. During his testimony, appellant insisted that his driving was not impaired on September 24, 2012. Notably, at trial, appellant acknowledged that he consumed six alcoholic beverages prior to being stopped by Boesch.

{¶ 9} After closing arguments, the jury found appellant guilty of all charges. Appellant was subsequently ordered to serve 180 days in jail, with 160 days suspended pending good behavior. Appellant was also ordered to pay fines totaling $1,775. Appellant's timely appeal followed.

B. Assignments of Error

{¶ 10} On appeal, appellant assigns the following errors for our review:

> I. THE COURT COMMITTED PREJUDICIAL ERROR IN DENYING THE DEFENDANT THE RIGHT TO PRESENT A DEFENSE.
>
> II. THE COURT COMMITTED PREJUDICIAL ERROR AND DENIED THE DEFENDANT A FAIR TRIAL BY OVERRULING

DEFENDANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29.

III. THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. Analysis

A. Exclusion of Wright's Testimony

{¶ 11} In his first assignment of error, appellant argues that the trial court erred in denying him the right to present a defense. Specifically, appellant argues that the trial court infringed upon his ability to defend himself by preventing Wright from testifying.

{¶ 12} The trial court's determination of the admissibility or exclusion of evidence is generally a matter of discretion that will not be overturned on appeal absent a showing that the trial court abused its discretion. *State v. Robb*, 88 Ohio St.3d 59, 68, 723 N.E.2d 1019 (2000). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 13} Here, the court engaged in the following colloquy in an effort to evaluate the admissibility of Wright's testimony:

> [Prosecutor]: Your Honor, the State is going to challenge the presentation of Mr. Wright as a witness based on our discussion in chambers. I believe that he is – he does not possess the personal knowledge required under Evidence Rule 602 to serve as a witness in this

case. And we will explain that Mr. Wright, it's my understanding, took custody of this Defendant approximately five minutes after 4:00 in the morning on the night in question, the morning in question. Right now I don't believe that he has any personal knowledge, as he was not present during the conduction of the field sobriety tests, the observations made by Officer Boesch of this Defendant's driving and of his motor skills.

The Court: [Defense counsel], response?

[Defense counsel]: Well, Your Honor, the evidence, I think, would show that within an hour and a few minutes of being arrested, he was released and Mr. Wright is the person who came to the police station, he picked him up. That is well within the two hours that the State has to request a breath test and certainly within the three hours that he has – the State has to obtain a breath test. And I would think under Evidence Rule 701 he has personal observations and would be able to express an opinion regarding Mr. Pasiecznik's impairment, or lack of impairment, within that two-hour time frame after being arrested.

The Court: In light of the arguments, I will not allow Mr. Wright to be called as a witness. The issue in this case is the impairment of the Defendant at the time of the stop. Since Mr. Wright had no personal knowledge or was not present during this time, I don't feel that his

testimony offers any help in regards to the issue again at the time of the stop. So I will not allow Mr. Wright to be a witness in this case.

{¶ 14} Having considered the parties' respective arguments, we find that the trial court's decision to exclude Wright's testimony was not unreasonable, arbitrary, or unconscionable. Thus, we conclude the trial court did not abuse its discretion in excluding the testimony.

{¶ 15} Accordingly, appellant's first assignment of error is not well-taken.

B. Denial of Crim.R. 29 Motion

{¶ 16} In his second assignment of error, appellant argues that the trial court erroneously denied his Crim.R. 29 motion for acquittal.

{¶ 17} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979); *see also State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, "[t]he verdict will not be disturbed unless

the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact." *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 18} In the present case, appellant argues that "[t]he testimony of Officer Boesch, the state's only witness, was contradictory and such as to give rise to a reasonable doubt as to the defendant's impairment." Appellant references the fact that he was allegedly free from any signs of impairment upon arriving at the police station or when he was released. Essentially, appellant seeks to establish his lack of impairment at the time of the arrest by demonstrating that he was not impaired by the time he arrived at the police station. Of course, his condition at the police station is immaterial to the disposition of the underlying charges, since they are premised on his impairment while operating the motor vehicle. His impairment while operating the motor vehicle is determined at the time of the stop, not later at the police station. Thus, appellant's argument is without merit.

{¶ 19} At trial, Boesch testified that he observed appellant commit two marked lanes violations and operate his vehicle in excess of the posted speed limit. He further testified that appellant's motor skills were visibly impaired. After smelling an odor of alcohol, Boesch asked appellant if he had consumed any alcohol. Appellant admitted to consuming four alcoholic beverages, which he later increased to six beverages when he was questioned at trial. Boesch proceeded to conduct several field sobriety tests. He testified that appellant failed every test. After viewing Boesch's testimony in a light most

favorable to the state, we find that a rational trier of fact could have found that appellant was impaired beyond a reasonable doubt. Thus, we find that the trial court properly denied appellant's Crim.R. 29 motion for acquittal.

{¶ 20} Accordingly, appellant's second assignment of error is not well-taken.

C. Manifest Weight of the Evidence

{¶ 21} In his third assignment of error, appellant argues that the guilty verdict is against the manifest weight of the evidence. Essentially, appellant contends that the state failed to establish that his impairment was the result of alcohol consumption and not the result of appellant's spinal injury.

{¶ 22} When reviewing a manifest weight claim,

> The 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. 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 23} Having carefully considered the record in its entirety, we do not find that this is the exceptional case warranting reversal on manifest weight grounds. Although appellant testified that his spinal condition made it difficult to complete the "one legged

stand" test, he offered no explanation as to why he was unable to successfully complete the other field sobriety tests. Assuming, arguendo, that his spinal condition inhibited his ability to complete the walk and turn test, there remains no viable explanation for failing the horizontal gaze nystagmus test. Indeed, that test merely requires visual concentration. As such, the results of the horizontal gaze nystagmus test were not impacted by appellant's spinal condition. Taken together, the results of the field sobriety tests, coupled with the smell of odor on appellant's breath and his acknowledgement at trial that he had consumed six alcoholic beverages prior to being apprehended, leads us to conclude that the verdict was not against the manifest weight of the evidence.

{¶ 24} Accordingly, appellant's third assignment of error is not well-taken.

III. Conclusion

{¶ 25} For the foregoing reasons, the judgment of the Huron Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Stephen A. Yarbrough, P.J.
CONCUR.

JUDGE