[Cite as *Cleveland v. Schlegel*, 2009-Ohio-2484.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91500

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

KRISTIE M. SCHLEGEL

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 07 TRC 69764

BEFORE: Kilbane, P.J., Dyke, J., and Celebrezze, J.

RELEASED: May 28, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Kristie Schlegel, appeals from a jury verdict in the Cleveland Municipal Court. Finding merit to her appeal, we reverse and remand.

{¶ 2} On November 29, 2007, appellant was charged with operating a vehicle while under the influence of alcohol under Cleveland Codified Ordinance ("C.C.O.") 433.01(A)(1). On March 20, 2008, a jury trial took place. The jury found appellant guilty. On March 27, 2008, appellant filed a motion for a new trial. On March 31, 2008, appellant filed an amended motion for a new trial, which the trial court denied on April 24, 2008. Also on April 24, 2008, the trial court sentenced her to 180 days in jail and fined her $1,000. The trial judge suspended 178 days of the sentence and $600 of the fine. On that same date, the trial court stayed execution of the sentence pending appeal. On May 22, 2008, appellant filed a notice of appeal.

{¶ 3} The following facts give rise to this appeal.

{¶ 4} On November 28, 2007, appellant and Greg Witkowski arrived at the Dirty Dog Saloon ("the bar"), on State Road in Cleveland. At around 9:00 p.m., appellant began arguing with the waitress regarding a dispute about receiving the appropriate amount of change.

{¶ 5} At around 11:45 p.m., Cleveland Police Officer Ray O'Connor responded to a call about an intoxicated female causing problems at the bar. He testified that, upon arriving at the bar, he noticed a car in the parking lot with its engine running. The officer found appellant in the driver's seat, and when he spoke to her, she appeared intoxicated. The officer arrested appellant after she admitted she had been drinking, failed sobriety tests, and refused a Breathalyzer.

{¶ 6} Appellant testified on her own behalf. She stated that she had gotten into a disagreement with the waitress. After the dispute, she decided to call someone for a ride and went to wait in her own car because it was too cold to stand outside. According to appellant, at no time did she start the car.

ASSIGNMENT OF ERROR NUMBER ONE

> "The trial court committed reversible error in its jury instruction on the definition of the word "operate" contained in Cleveland Municipal Ordinance 433.01."

{¶ 7} Appellant argues that the trial court erred when it provided incorrect jury instructions. More specifically, she alleges that the trial judge defined the word "operate" incorrectly. We find that this argument has merit.

{¶ 8} "When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested instruction constituted an abuse of discretion under the facts and circumstances of the case." *State v. Sims,* Cuyahoga App. No. 85608*,* 2005-Ohio-5846, ¶12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

{¶ 9} An abuse of discretion implies that the trial court acted unreasonably, arbitrarily, or unconscionably. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 10} The jury convicted appellant of operating a vehicle while under the influence under C.C.O. 433.01(A)(1), which reads "[n]o person shall operate any vehicle, [if] [t]he person is under the influence of alcohol."

{¶ 11} The jury instructions defined the word "operate" as follows.

> "Operate. The term operate is a broader term than driving. It includes not only a person being in control of a vehicle while it is in motion, but also a person whether conscious or unconscious, in the driver's location, in the front seat of a stationary vehicle, so as to be capable of doing any act or series of acts which would cause the vehicle to be put in motion.
>
> It is not necessary to prove that the person in the driver's location of a stationary vehicle ever had the vehicle in motion or intended to put the vehicle in motion." (Tr. 149.)

{¶ 12} In *State v. Schultz,* Cuyahoga App. No. 90412, 2008-Ohio-4448, ¶18, this court briefly summarized the history of the definition of "operate." In *Schultz,* we stated, "[b]efore the General Assembly enacted S.B. 123, effective January 1, 2004, there was no statutory definition of 'operate.' The meaning of the term 'operate' in R.C. 4511.19(A) and (B) had been exclusively a matter of judicial interpretation." Id.

> "But in S.B. 123, the General Assembly modified the definition in *Gill* [*State v. Gill*, 70 Ohio St.3d 150, 152-153, 1994-Ohio-403] and its predecessors by specifically defining 'operate' in R.C. 4511.01(HHH), as well as by adding the words 'at the time of the operation' to R.C. 4511.19(A)(1). *State v. Wallace*, 166 Ohio App.3d 845, 848-849, 2006-Ohio-2477, 853 N.E.2d 704. Effective January 1, 2004, the term 'operate,' as used in R.C. Chapter 4511, 'means to cause or have caused movement of a vehicle ***.' R.C. 4511.01 (HHH). This modification narrows the definition of 'operate,' which effectively eliminates 'drunk radio listeners, or people who use their cars as a four-wheel, heated hotel room' from being convicted of OVI. *Gill* (Pfeifer, J., dissenting).
>
> In S.B. 123, the General Assembly created a new statutory offense of 'Having physical control of a vehicle while under the influence of alcohol.' See R.C. 4511.194(B). Cleveland, as well as other

> municipalities, already prohibited being in physical control of a vehicle while under the influence of alcohol.[1]
>
> The new statutory offense, like the municipal offense, prohibits being in physical control of a vehicle while under the influence of alcohol or other drug of abuse. R.C. 4511.194(B). R.C. 4511.194(A)(2) defines 'physical control' as being in the driver's position of the front seat of a vehicle and having possession of the vehicle's ignition key or other ignition device." Id. at ¶19, 20, 21.

{¶ 13} A review of the appropriate statutes and *Schultz* demonstrates that appellant's argument has merit. It is clear that the trial judge erroneously instructed the jury when she stated:

{¶ 14} "It is not necessary to prove that the person in the driver's location of a stationary vehicle ever had the vehicle in motion or intended to put the vehicle in motion." (Tr. 149.)

{¶ 15} In fact, the statutory definition of "operate" requires exactly the type of proof that the trial judge stated was not necessary. Namely, that appellant "caused or have caused movement of a vehicle." R.C. 4511.01 (HHH). Therefore, the jury instructions, which specifically stated that it was not necessary to prove that the

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[1] The prior comparable Cleveland offense was previously found at Section 433.01, division (b), as amended by Ordinance No. 1592-2000, passed December 18, 2000. It prohibited being in actual physical control of any vehicle within the city of Cleveland when under the influence of alcohol or a drug of abuse. With the adoption of S.B. 123, Cleveland allowed the original Section 433.01 (b) to expire and have no further force and effect as of January 1, 2004. Cleveland's new physical control ordinance is found in section 433.011 and mirrors the state code. It went into effect the same day as the provisions of S.B. 123. (See R.C. 4511.194; Ord. No. 835-03. Passed 6-10-03, eff. 1-1-04).

vehicle had been in motion, were incorrect, and appellant's first assignment of error is sustained.

ASSIGNMENT OF ERROR NUMBER TWO

"The jury verdict of guilty was against the manifest weight of the evidence."

{¶ 16} Appellant argues that the jury verdict was against the manifest weight of the evidence. More specifically, she alleges that there was "no evidence presented from which a jury could reasonably infer that [she] had operated her vehicle."

{¶ 17} Our disposition of the first assignment of error renders the second assignment of error moot for the following reasons. As discussed in the first assignment of error, the judge provided the jury with the wrong instruction on the definition of the word "operate." We do not reach appellant's manifest weight argument because it asks us to determine whether, if properly instructed, the jury would have found appellant guilty. We cannot suppose how the jury would have found if provided the correct instructions. Accordingly, appellant's second assignment of error is moot.

Judgment reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cleveland Municipal court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

ANN DYKE, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR