

[Cite as *Brooklyn Hts. v. Yee*, 2009-Ohio-4552.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92038

S/O, VILLAGE OF BROOKLYN HEIGHTS

PLAINTIFF-APPELLEE

vs.

LYNN A. YEE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Parma Municipal Court
Case No. 08 TRC 0455

BEFORE: Sweeney, J., Kilbane, P.J., and Jones, J.

RELEASED: September 3, 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).

JAMES J. SWEENEY, J.:

{¶ 1} Appellant Lynn Yee (“Yee”) appeals her conviction for operating a vehicle under the influence of alcohol following a bench trial in the Village of Brooklyn Heights, Parma Municipal Court. For the following reasons, we affirm the trial court’s decision.

{¶ 2} At approximately 9:20 p.m. on January 17, 2008, Lieutenant Algeri of the Brooklyn Heights Police Department was on routine patrol in the vicinity of Lancaster Road and Interstate 480 in Cuyahoga County, Ohio. At that time, Lieutenant Algeri observed a black 1997 Lincoln automobile, that was operating south bound on Lancaster Road, weave across the center lane and then abruptly crossed back. As Lieutenant Algeri followed behind in his cruiser, he observed the automobile weave two more times across the center line and then abruptly crossed back. In one such instance, the Lincoln almost struck an oncoming vehicle.

{¶ 3} As a result of his observation, Lieutenant Algeri initiated a traffic stop, administered field sobriety tests, which Yee, the operator of the vehicle, failed. Thereafter, Yee was arrested and escorted to the police station where the officer attempted to conduct a Blood Alcohol Content test (“BAC”). After Yee failed several times to blow hard enough into the BAC machine to register a reading, the officers marked it as a refusal to take the test.

{¶ 4} At the time of her arrest, the officers discovered that Yee had previously been arrested and convicted of driving under the influence of alcohol

within the preceding 20 years in the Bedford Municipal Court. Subsequently, the Village of Brooklyn Heights charged Yee with operating a vehicle while under the influence of alcohol or other drugs ("O.V.I."), refusal of the BAC, and improper lane usage. On June 30, 2008, Yee pleaded not guilty at her arraignment, and a bench trial commenced.

Bench Trial

{¶ 5} At trial, Lieutenant Algeri, a 22 year veteran of the Brooklyn Heights Police Department, stated that on the evening of January 17, 2008, while on routine patrol, he observed Yee weave three times across the center lane as she traveled along Lancaster Road. Upon initiating a traffic stop, Lieutenant Algeri noticed that Yee's eyes were glassy, detected the odor of an alcoholic beverage, and noticed that she had trouble finding her license. As she fumbled through her purse, she displayed poor manual dexterity, and staggered slightly when she exited her car.

{¶ 6} As a result of the above observations, Lieutenant Algeri suspected Yee of operating a motor vehicle while under the influence of alcohol, which led him to administer several field sobriety tests. Lieutenant Algeri initially elected to administer the finger to nose test, the one legged stand, and the walk and turn test, but Yee indicated that she could not perform the latter two tests because she had been injured in a motorcycle accident.

{¶ 7} Thereafter, Lieutenant Algeri decided to administer the finger to nose test, the alphabet test, and the finger count test. Yee failed the finger to nose test, performed satisfactorily on the alphabet test, but failed the finger count test.

Lieutenant Algeri stated that in the finger count test, Yee failed to count in sequence, while touching her fingers to her thumb, and was actually touching her fingers faster than she was counting.

{¶ 8} Sergeant Lewis Baudo, also a 22 year veteran with the Brooklyn Heights Police Department, responded to the traffic stop to provide back-up for Lieutenant Algeri. Sergeant Baudo observed Yee attempting the finger to nose test. Sergeant Baudo stated that Yee could not differentiate between her pinky and index fingers. He also stated that Yee was swaying and had difficulty comprehending and following the instructions.

{¶ 9} After Yee was arrested and taken to the police station, she was given the opportunity to submit to a BAC test. Before administering the test, Sergeant Baudo explained to Yee that she had to take a deep breath, blow long, hard, and steady until she hears a tone. Sergeant Baudo instructed Yee to keep blowing into the machine until the tone stopped. Sergeant Baudo stated that Yee had made six or ten separate attempts to blow into the machine, but failed to give a sufficient sample. Sergeant Baudo recorded the test as a refusal because it appeared that Yee was deliberately trying not to provide the requested sample.

{¶ 10} Robert Lee Jablonski, Yee's business partner, testified on Yee's behalf. On January 17, 2008, Yee arrived at his house around 4:00 p.m. to discuss a project that was in litigation, and then left around 7:00 p.m. Jablonski stated that Yee did not consume any alcohol at his house.

{¶ 11} Vincent Ruta, who has known Yee for approximately 15 years, also testified on Yee's behalf. Ruta stated that on January 17, 2008, Yee stopped by his house around 7:45 p.m. to drop off a compact disc and a t-shirt and stayed for about an hour and ate potato chips, but did not consume any alcohol.

{¶ 12} At trial, Yee testified in her own defense. Yee stated that on the night in question, she was heading home after a long day, which started with her getting up at 5:00 a.m., traveling to Grafton, Ohio, meeting with Jablonski for several hours, and then stopping at Ruta's home for a short time. As she was chewing gum while driving home, she choked and evidently veered left of the center lane.

{¶ 13} As a result of a fall, she has metal rods and pins in her legs. She has not fully recovered and currently does not have a normal gait. She thought she did well on all the tests Lieutenant Algeri administered and tried very hard to blow into the Breathalyzer machine, but had no more air to give. Finally, on the night in question, she maintained throughout the traffic stop and subsequent arrest that she had not been drinking, nor had she consumed any alcohol.

{¶ 14} The trial court found Yee guilty of all three counts. On August 4, 2008, the trial court sentenced her to a prison term of 180 days, but suspended 170 days. Yee now appeals and raises three assignments of error for our review.

{¶ 15} In the first assignment of error, Yee argues her conviction for O.V.I. is against the manifest weight of the evidence. We disagree.

{¶ 16} In *State v. Wilson*,¹¹³ Ohio St.3d 382, 2007-Ohio-2202, the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence’s effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state’s or the defendant’s? We went on

to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. ‘When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘thirteenth juror’ and disagrees with the factfinder’s resolution of the conflicting testimony.’ *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.”

{¶ 17} In the instant case, Yee was convicted of operating a motor vehicle while under the influence of alcohol (O.V.I.) with one prior conviction in violation of R.C. 4511.19. In order to meet its burden in a prosecution under R.C. 4511.19(A)(1), the State must prove beyond a reasonable doubt that the defendant operated a motor vehicle while “under the influence.” See R.C. 4511.19(A)(1).

{¶ 18} The term “under the influence” means that “the defendant consumed some [alcohol], * * * in such a quantity, whether small or great, that it adversely affected and appreciably impaired the defendant’s actions, reactions, or mental processes under the circumstances then existing * * *.” 4 Ohio Jury Instructions 6, Section 545.25; see, also, *State v. Hardy* (1971), 28 Ohio St.2d 89; *State v. Harding*, 2nd Dist. No. 20801, 2006-Ohio-481.

{¶ 19} We note at the outset that Yee has not disputed that she was weaving. Thus, Lieutenant Algeri had a valid reason to initiate the traffic stop. What Yee maintains is that she had not consumed any alcohol on the night in question. In support of her contention, Yee offered the testimony of Jablonski and Ruta. However, we find the testimony of both men inconclusive.

{¶ 20} First, Jablonski, who testified that Yee had not consumed any alcohol at his residence, also testified that Yee left his residence at 7:00 p.m. Here, Yee left Jablonski's residence more than two hours prior to the traffic stop.

Thus, the value of Jablonski's testimony is questionable as to Yee's subsequent alcohol consumption because he was not with her after 7:00 p.m.

{¶ 21} In addition, Ruta's testimony suffers the same fate as Jablonski's because Ruta testified that Yee came to his house at approximately 7:45 p.m., which is almost an hour after leaving Jablonski's home. Ruta testified that Yee stayed for about an hour. Thus, despite Ruta's testimony that Yee did not consume any alcohol at his home, Ruta's testimony is also questionable as to Yee's subsequent alcohol consumption because he was not with her after 7:45 p.m., which is approximately forty-five minutes before the traffic stop.

{¶ 22} Here, even though both Jablonski and Ruta testified that Yee had not consumed any alcohol in their presence, a reasonable person could conclude that Yee had two windows of opportunity to consume alcohol prior to the traffic stop. Turning our attention to the testimony of the two officers who observed

Yee's conduct after leaving the company of the witnesses on her behalf. Lieutenant Algeri testified that he observed Yee cross the center lines three separate times, and in one instant, almost struck an oncoming car. Lieutenant Algeri testified that upon initiating the traffic stop, he observed that Yee's eyes were glassy, he smelled the odor of an alcoholic beverage emanating from her vehicle, and he observed her fumbling around for her license.

{¶ 23} In addition, Lieutenant Algeri stated that Yee stumbled upon exiting her car and was unsteady on her feet as she stood by the car, and that she failed two of the three sobriety tests he administered.

{¶ 24} Finally, Lieutenant Algeri stated that based on his 22 years of experience conducting traffic stops, it was his professional opinion that Yee was operating her vehicle while under the influence of alcohol. It is generally accepted that virtually any lay witness, including a police officer, may testify as to whether an individual appears intoxicated. *State v. Schmitt*, 101 Ohio St.3d 79, 83, 2004-Ohio-37, citing *Columbus v. Mullins* (1954), 162 Ohio St. 419, 421. See, also, *State v. McKee*, 91 Ohio St.3d 292, 296, 2001-Ohio-41.

{¶ 25} "An opinion with reference to intoxication is probably one of the most familiar subjects of nonexpert evidence, and almost any lay witness, without having any special qualifications, can testify as to whether a person was intoxicated. It follows that, where one says that in his opinion a person is intoxicated, he is really stating it as a fact rather than an expert opinion." *Mullins*,

162 Ohio St. at 421-422. Such lay testimony is often crucial in prosecuting drunk driving cases. *Schmitt*, 101 Ohio St.3d at 83.

{¶ 26} In addition, courts have recognized that “to prove impaired driving ability, the State can rely on physiological factors (e.g., slurred speech, bloodshot eyes, odor of alcohol) and coordination tests (e.g., field sobriety tests) to demonstrate that a person's physical and mental ability to drive is impaired.” *Id.*, quoting, *State v. Wargo* (Oct. 31, 1997), 11th Dist. No. 96-T-5528. Here, Lieutenant Algeri relied on several psychological factors and Yee’s performance of the field sobriety tests to conclude that she was operating a vehicle under the influence.

{¶ 27} Further, Sergeant Baudo, who provided back-up for Lieutenant Algeri on the night in question, observed Yee unsuccessfully perform the finger to nose test. Sergeant Baudo further stated that he operated the BAC machine after Yee was arrested. Sergeant Baudo stated that despite repeated instructions, Yee failed to perform the test to the level, which would provide an adequate reading, thus he had to mark it as a refusal.

{¶ 28} Here, we find that a rational trier of fact could conclude that Yee’s conduct as described by the two veteran law enforcement officers was consistent with operating a vehicle while under the influence of alcohol. Under *State v. DeHass* (1987), 10 Ohio St.2d 230, the trier of fact was free to accept or reject any or all of the testimony of the witnesses and assess the credibility of

those witnesses. Accordingly, whether the officers' testimonies were credible or not was for the trier of fact to determine. *Id.*

{¶ 29} Upon careful review of the testimony and evidence presented at trial, we hold that the trial court did not act contrary to the manifest weight of the evidence in finding Yee guilty of operating a vehicle while under the influence of alcohol. Substantial, competent, credible evidence supports the court's verdict.

{¶ 30} Assignment of Error I is overruled.

{¶ 31} In the second assignment of error, Yee argues the trial court erred by admitting into evidence testimony of the officers as to non-standardized field sobriety tests. We disagree.

{¶ 32} In the instant case, Yee argues that Ohio only recognizes three standardized field sobriety tests, namely: the Horizontal Gaze Nystagmus Test (HGN), the One-Leg Stand, and the Walk and Turn. Thus, the tests Lieutenant Algeri administered were inadmissible. We are not persuaded.

{¶ 33} In *State v. Schmitt*, 101 Ohio St.3d 79, 2004-Ohio-37, the Supreme Court of Ohio held that an officer's observations regarding a defendant's performance on nonscientific field sobriety tests is admissible as lay evidence of intoxication.

{¶ 34} In *Schmitt*, the court stated that "[t]he manner in which a defendant performs these tests may easily reveal to the average lay person whether the individual is intoxicated." *Id.* at ¶ 14. The Supreme Court reasoned, "[w]e see no

reason to treat an officer's testimony regarding the defendant's performance on a nonscientific field sobriety test any differently from his testimony addressing other indicia of intoxication, such as slurred speech, bloodshot eyes, and odor of alcohol." *Id.*

{¶ 35} Consequently, the testimony of the alleged non-standardized tests administered was admissible. Moreover, the evidence shows that Yee said that she was unable to perform two of the standardized tests because she had a problem with her leg. Nonetheless, we have concluded in the first assigned error that Yee's conduct as described by the two veteran law enforcement officers was consistent with operating a vehicle under the influence of alcohol.

{¶ 36} Assignment of error II is overruled.

{¶ 37} In the third assignment of error, Yee argues her conviction for refusing the BAC is against the manifest weight of the evidence. We disagree.

{¶ 38} R.C. 4511.19(A)(2) prohibits a person who has been convicted of a prior O.V.I. offense in the previous 20 years from (1) operating a motor vehicle under the influence of alcohol, and (2) refusing to submit to a chemical test after being asked to do so by a law enforcement officer. *State v. Turner*, 11th Dist. No. 2007-P-0090, 2008-Ohio-3898.

{¶ 39} Initially, we note that at trial, Yee stipulated to having been convicted of a prior O.V.I. conviction within the past twenty years. We also note that at trial a videotape of the of Sergeant Baudo's attempts to administer the BAC was

played. As the videotape played, Sergeant Baudo explained what was occurring as follows:

“Q. Okay, pause. At what stage of the procedure are we at now?”

A. At the initial, the initial starting her having to take the first attempted breath.

Q. Okay. Pause. Why did you stop?”

A. Well when she first put her mouth on the mouthpiece she’s not blowing enough and you heard that tone start and as soon as the pump started within a second it stopped.

Q. What does it mean when the tone stops?”

A. There’s no air coming through.

Q. And where is the air supposed to come from?”

A. The lungs.

Q. Okay. Proceed. Pause. What do those beeps mean?”

A. It’s a start and stop, start, stop, start, stop, start, stop.

Q. What does that mean?”

A. It’s not getting a sufficient sample.

Q. Okay proceed. Pause. What is going on there?”

A. She was acting as if she was blowing but she wasn’t.” Tr. at 49.

{¶ 40} A review of the above excerpt indicates the extensive efforts Sergeant Baudo undertook to administer the BAC. Further, the record indicates that prior to the attempted administration of the BAC, Yee was advised of the

consequences of refusal. Despite being advised and given six to ten opportunities to blow into the machine, Yee failed to blow hard enough, even once, to register a reading.

{¶ 41} We conclude on the record before us that Sergeant Baudo had no recourse but to consider Yee's conduct a refusal to take the BAC. As such, Yee's conviction for O.V.I. refusal was not against the manifest weight of the evidence.

{¶ 42} Assignment of error III is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR

