

[Cite as *Cleveland v. Dove*, 2009-Ohio-6463.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92768

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

VS.

DAVID A. DOVE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cleveland Municipal Court
Case No. 08 TRD 50109

BEFORE: Rocco, P.J., Dyke, J., and Boyle, J.

RELEASED: December 10, 2009

JOURNALIZED:

ATTORNEY FOR APPELLANT

Brent L. English
Law Offices of Brent L. English
M.K. Ferguson Plaza, Suite 470
1500 West Third Street
Cleveland, Ohio 44113-1422

ATTORNEYS FOR APPELLEE

Robert J. Triozzi
Director of Law

BY: Victor R. Perez
Chief City Prosecutor
Angela Rodriguez
Assistant City Prosecutor
Jude Smith
Certified Legal Intern
City of Cleveland
The Justice Center - 8th Floor
1200 Ontario Street
Cleveland, Ohio 44113

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).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant David A. Dove appeals from his conviction in the Cleveland Municipal Court for violation of Cleveland Codified Ordinance (“CCO”) §431.14, failure to signal before changing course.

{¶ 2} Dove presents two assignments of error, asserting his conviction is unsupported by either sufficient evidence or the manifest weight of the evidence. Upon a review of the record, this court disagrees. Consequently, his assignments of error are overruled, and his conviction is affirmed.

{¶ 3} Only two witnesses testified at Dove’s trial. Cleveland police officer Gasiewski¹ stated he was on duty in the early morning hours of July 24, 2008, performing traffic enforcement on Interstate 480.

{¶ 4} Gasiewski testified he was in a zone car; at approximately 12:49 a.m., as he traveled westbound between State Route 176 and the State Road interchange, he noticed a vehicle ahead of him in the high speed, or “first” lane. As he watched it, the vehicle set off Gasiewski’s radar unit, and he “observed it’s [sic] change of course from lane one to lane two without a signal.”

¹He failed to provide his first name.

{¶ 5} Gasiewski testified that his radar unit indicated the vehicle's speed as "76" miles per hour. He immediately "activated [his] lights and sirens, pulling the individual over." Dove was the driver of the vehicle.

{¶ 6} Gasiewski stated that he advised Dove "of the reason [for] the stop, of the two infractions, the Speed as well as the Change of Course." Gasiewski additionally noted that Dove's vehicle lacked a "front plate." He therefore issued a Uniform Traffic Ticket to Dove that cited him for three separate CCO violations: §433.03, excessive speed; §435.09A, failure to display front plate; and, §431.14, failure to signal before changing course.

{¶ 7} Dove pleaded not guilty to the charges, and his case proceeded to a bench trial. After Gasiewski testified, Dove testified in his own defense.

{¶ 8} Dove admitted he traveled the interstate on his way home from work that morning, admitted his rate of speed was more than the posted 60 miles per hour, admitted he changed lanes from an outside lane to the middle, and admitted that he lacked a front license plate. Dove asserted, however, that Gasiewski's zone car had been stationary as he passed, estimated his own vehicle's speed at between "60, 65" miles an hour, and Gasiewski failed to inform him that he was cited for failure to "use my turn signal which I did."

{¶ 9} At the conclusion of trial, the municipal court found Dove guilty of the three offenses, and imposed a fine for each conviction. Subsequently, the court sua sponte vacated Dove's conviction and fine for the speeding violation. The

court additionally stayed execution of the fines pending the outcome of this appeal.

{¶ 10} Dove challenges only his conviction for violation of CCO 431.14, presenting the following two assignments of error.

{¶ 11} “I. The city failed to prove that Appellant violated Section 431.14 of the city’s ordinances relating to signaling before changing course. Accordingly, there was insufficient evidence to support a conviction.

{¶ 12} “II. Even if the evidence was somehow legally sufficient to support the judgment, the judgment was nevertheless against the manifest weight of the evidence.”

{¶ 13} Dove argues that his conviction for violating CCO 431.14 must be vacated on the basis that the city provided insufficient evidence of each element of the offense. He further argues that his conviction remained unsupported by the manifest weight of the evidence, since he provided a more distinct version of the events that occurred.

{¶ 14} When determining whether a conviction is supported by sufficient evidence, this court is required to view the evidence adduced at trial, both direct and circumstantial, in a light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the offense were proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61 Ohio St.3d 259. Viewing the evidence

adduced at Dove’s trial in a light most favorable to the city leads to the conclusion the offense was supported by sufficient evidence.

{¶ 15} Dove was convicted of violating CCO 431.14, failure to signal before changing course, turning or stopping. In pertinent part, that ordinance states:

{¶ 16} “No person shall turn a vehicle or move right or left upon a highway unless and until such person has exercised due care to ascertain that the movement can be made with reasonable safety, nor without giving an appropriate signal in the manner hereinafter provided.

{¶ 17} “When required, a signal of intention to move right or left shall be given continuously during not less than the last 100 feet traveled by the vehicle before turning. * * *

{¶ 18} “Any * * * turn signal required by this section shall be given either by means of the hand and arm, or by signal lights that clearly indicate * * * intention to turn right or left, except that any motor vehicle in use on a highway shall be equipped with, and the required signal shall be given by, signal lights when the distance from the center of the top of the steering post to the left outside limit of the body, cab or load of such motor vehicle exceeds twenty-four inches, or when the distance from the center of the top of the steering post to the rear limit of the body or load thereof exceeds fourteen feet * * *.” (Emphasis added.)

{¶ 19} In making his argument that the city failed to provide proof of every element of the offense, Dove focuses on the latter portion of the foregoing

paragraph. He asserts on appeal, in spite of the fact that he failed to raise this issue in the municipal court,² that the ordinance requires the city to present evidence concerning the dimensions of his vehicle. This court disagrees.

{¶ 20} The ordinance requires, in the first instance, that the driver cannot change lanes without exercising “due care.” *State v. Clark*, Portage App. No. 2001-P-0099, 2002-Ohio-4816. In addition, the driver must provide an “appropriate” signal. The failure to do either constitutes a violation of the ordinance. *State v. Bailey* (May 17, 2000), Wayne App. No. 99CA0054, citing *Cuyahoga Falls v. Green* (July 3, 1996), Summit App. No. 17566.

{¶ 21} Obviously, at night, even if Dove had used one, a “hand signal” would be inappropriate; only a signal light would be visible. In this case, Gasiewski testified that, as he observed Dove driving his vehicle at 12:49 a.m., he did not see a turn signal light; rather, Dove went from “lane one to lane two without the signaling.” This testimony provided sufficient evidence to prove Dove was in violation of CCO 431.14. *Id.*

{¶ 22} Consequently, Dove’s first assignment of error is overruled.

{¶ 23} Dove further claims his conviction is against the manifest weight of the evidence. The test to be applied when reviewing a claim that a conviction is

²Indeed, the record reflects Dove limited his Crim.R. 29 motion for acquittal to only the speeding charge; he raised no challenge at all to the city’s evidence on this charge.

against the manifest weight of the evidence was set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, citing *State v. Martin*, supra. The test is “much broader” than the test for sufficiency; i.e., this court reviews the entire record to determine whether in resolving any conflicts in the evidence, the factfinder “clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Id.*, at 175.

{¶ 24} Moreover, this court must remain mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the factfinder to assess. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 25} In this case, the municipal court determined that Gasiewski provided a more credible version of the incident. Gasiewski testified he visually observed Dove’s vehicle, he was less than a mile behind Dove’s vehicle, no other cars were between his zone car and Dove’s vehicle, and Dove’s vehicle changed lanes without any noticeable signal.

{¶ 26} Since Dove admitted he was traveling westbound at that time and admitted he changed lanes, Gasiewski’s version was corroborated by the other evidence produced at trial. The municipal court acted within its prerogative to discount Dove’s assertion that he “did” use his turn signal.

{¶ 27} Therefore, the municipal court’s judgment also found support in the manifest weight of the evidence.

{¶ 28} Accordingly, Dove’s second assignment of error also is overruled.

{¶ 29} Dove’s conviction is affirmed.

It is ordered that appellee recover from appellant 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 municipal court to carry this judgment into execution. 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.

KENNETH A. ROCCO, PRESIDING JUDGE

ANN DYKE, J., and
MARY J. BOYLE, J., CONCUR