**[Cite as *Cleveland v. Crawford*, 2015-Ohio-2402.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 102110**

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## CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

## HARVEY CRAWFORD

DEFENDANT-APPELLANT

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**JUDGMENT:**
AFFIRMED

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Criminal Appeal from the
Cleveland Municipal Court
Case No. 2014 TRC 027796

**BEFORE:** Laster Mays, J., Celebrezze, A.J., E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 18, 2015

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ANITA LASTER MAYS, J.:

**{¶1}** Defendant-appellant Harvey Crawford ("Crawford") appeals from his conviction in Cleveland Municipal Court for driving a motor vehicle while under the influence of alcohol with a prohibited alcohol concentration in his breath ("OVI/BC"), in violation of Cleveland Codified Ordinances ("CCO") 433.01(a)(8).

**{¶2}** Crawford presents two assignments of error. He first asserts that the municipal court's comments indicate that the court improperly found him guilty of violating CCO 433.011, physical control, rather than the one that he was charged with violating. He further asserts that the city presented insufficient evidence to prove an essential element of OVI/BC, viz., his "operation" of the motor vehicle.

**{¶3}** Upon review of the record, this court disagrees with Crawford's assertions. His assignments of error, therefore, are overruled and his conviction is affirmed.

**{¶4}** Crawford received his citation in this case on May 24, 2014. Cleveland police officer Christopher Hoover ("Hoover") testified at Crawford's trial and stated as follows.

**{¶5}** At approximately 12:35 a.m., Hoover and his partner were on patrol proceeding westbound on Lakeside Avenue in the area of West 3rd Street when their police radio broadcast a report of "a small, dark colored vehicle" that "had sideswiped another vehicle on West 6th Street." When they arrived at the scene moments later, they observed Crawford's dark green Honda Civic "parked partially by a meter out into the

street" on the south side of Lakeside Avenue. Crawford was exiting the driver's side of the car with the keys in his hand, preparing to confront a crowd of pedestrians who stood on the sidewalk.

**{¶6}** The officers restrained Crawford. Crawford had "a strong odor of alcohol" about him, his speech was "slurred," and he was "staggering." After the officers "Mirandized" him, Crawford told them that he had been "drinking at * * * the Tequila Ranch bar on West 6th Street." Hoover then observed Crawford's car, which displayed fresh damage to its "front and right front" in the form of "dents, scratches," and a cracked bumper. The vehicle parked in front of Crawford's car "had some minor damage to the rear bumper."

**{¶7}** The officers arrested Crawford for OVI, took him to the police station, where they administered a breath test; the results showed an alcohol concentration of .239. The citation the officers eventually issued to Crawford stated that, at "0040" hours, he had violated CCO 433.01, 433.01(a)(8), 431.34(a) and 435.09(e).

**{¶8}** Crawford testified on his own behalf at trial. He admitted he "had drinks" at the Tequila Ranch bar; he stated that he left the bar "a little before one o'clock" in the morning because he was "nauseated," went to his car, which was parked on "West 6th and Lakeside," and fell asleep. "No more than ten minutes after falling asleep," Crawford awoke; a police officer was opening his car door and then "tried to pull [him] out the car."

**{¶9}** The municipal court denied Crawford's motions for acquittal as to the OVI charges, but granted them as to the CCO 431.34(a) and 435.09(e) charges. Ultimately, the court found Crawford guilty of violating OVI/BC.

**{¶10}** Crawford appeals from his conviction with the following two assignments of error.

> I. The trial court erred in denying Defendant's Criminal Rule 29 motion for acquittal where the prosecution failed to establish the element of operation in an OVI offense, finding instead that the Defendant had physical control of the vehicle, when the Defendant was not charged with violating the physical control ordinance and the physical control ordinance is not a lesser included offense.
>
> II. The trial court erred when it convicted the Defendant of operating a vehicle while under the influence of alcohol when the verdict was against the sufficiency of the evidence beyond a reasonable doubt.

**{¶11}** In his first assignment of error, Crawford asserts that the municipal court's comments demonstrate it actually, and improperly, found him guilty of violating CCO 433.011, physical control. On this basis, he argues that the court should have granted his motions for acquittal as to the charge of violating CCO 433.01(a)(8). Crawford, however, takes the municipal court's comments out of context.

**{¶12}** At the conclusion of trial, the municipal court addressed the prosecutor with respect to her burden of proof on the charge against Crawford of violating CCO 433.01(a)(8); the following exchange occurred:

> THE COURT: And there's no question that the defendant is guilty of Physical Control. So the additional question is, whether or not there's case law that can support [a conviction for violating CCO 433.01(a)] because that's why they drafted Physical Control because of the inability [at] times to actually prove the operation.

[THE PROSECUTOR] Right.

THE COURT: So this Court is interested in [that].

* * *

THE COURT: And the question is, just so there's no issue[,] clearly the keys were in [Crawford's] hand from the officer's testimony. The car was not moving. * * * So is that sufficient because it seems like you're making an argument of circumstantial evidence to support operation as opposed to the actual physical operation * * * .

* * *

THE COURT: Because his car was stopped. So my question is the narrow issue of whether or not the officer's testimony is sufficient to prove operation.

Especially in light of the fact that you now have a statute that clearly gives you the out to say, okay this is not operation. * * * I would find him guilty of Physical Control at a drop of a hat. There is no question that the element of Physical Control has been met.

So now this Court has to determine whether or not the element of operation [is met]. * * *

**{¶13}** Subsequently, the municipal court found Crawford guilty of violating CCO 433.01(a)(8) because the circumstantial evidence demonstrated that "the car was moved, there was an accident, * * * and no one else * * * was operating it * * * ." Clearly, the municipal court understood that the city was required to prove the element of "operation" rather than simple "control," and determined the city's evidence was sufficient to meet this requirement. Because the municipal court applied the appropriate legal standard in considering the evidence, Crawford's first assignment of error is overruled. *State v.*

*Schultz*, 8th Dist. Cuyahoga No. 90412, 2008-Ohio-4448; *compare Cleveland v. Schlegel*, 8th Dist. Cuyahoga No. 91500, 2009-Ohio-2484.

**{¶14}** Crawford argues in his second assignment of error that the city failed to meet its burden of proof as to the element of "operation" and, therefore, on this basis, too, the municipal court wrongly denied his motions for acquittal. This argument remains unpersuasive.

**{¶15}** 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, 683 N.E.2d 1096 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Viewing the evidence adduced at Crawford's trial in a light most favorable to the city leads to the conclusion Crawford's conviction for violating OVI/BC was supported by sufficient evidence.

**{¶16}** The relevant portion of CCO 433.01 states:

> (a) No person shall operate any vehicle * * * within this City, if, at the time of the operation, any of the following apply:
>
> * * *
>
> (8) The person has a concentration of seventeen-hundredths of one (0.17) gram or more by weight of alcohol per two hundred ten (210) liters of the person's breath * * * .

**{¶17}** This ordinance tracks the language in R.C. 4511.19(A)(1)(h). In addressing the necessity to prove the element of "operation" in order to sustain a conviction for violation of this statute, this court stated, "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)." *Schultz*, 8th Dist. Cuyahoga No. 90412, 2008-Ohio-4448, at ¶ 19.

**{¶18}** The court in *State v. Barnard*, 5th Dist. Stark No. 2010-CA-00082, 2010-Ohio-5345, ¶ 29, adopted the analysis set forth in *Schultz*, and also quoted the Second District's decision in *State v. Halpin*, 2d Dist. Clark No. 07CA78, 2008-Ohio-4136, ¶ 24, for the following observation:

> "Notably, and in relation to movement of a vehicle, R.C. 4511.01(HHH) employs both the present tense ('to cause') and, alternatively, the past tense (to 'have caused'), in defining the conduct to which that section applies. The past tense indicates action already completed. For purposes of R.C. 4511.19, to 'have caused' movement of a vehicle is a fact that may be proved by circumstantial evidence, which inherently possesses the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492."

**{¶19}** Similarly to the situation presented in *Barnard*, the circumstantial evidence in this case proved the element of "operation." The manner in which Crawford parked his vehicle, his act of being in the process of exiting his vehicle when the officers arrived, the timing of the officer's arrival after the report of a car being "sideswiped" by a vehicle that matched the description of Crawford's, and Crawford's condition, all indicate Crawford "was intoxicated when he parked." *Independence v. Clark*, 8th Dist. Cuyahoga No. 76869, 2001-Ohio-4127. The municipal court thus correctly concluded that the city's evidence sufficiently proved Crawford had "operated" his vehicle within the meaning of the ordinance. *Id.; compare Cleveland v. Perez*, 8th Dist. Cuyahoga No. 95641, 2011-Ohio-3466.

**{¶20}** Crawford's second assignment of error also is overruled.

**{¶21}** Crawford's conviction, therefore, 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.

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

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ANITA LASTER MAYS, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN T. GALLAGHER, J., CONCUR