

[Cite as *State v. Picha*, 2015-Ohio-4380.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102506

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**ANDREW PICHA**

DEFENDANT-APPELLANT

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**JUDGMENT:  
AFFIRMED**

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-14-582442-A

**BEFORE:** S. Gallagher, J., McCormack, P.J., and E.T. Gallagher, J.

**RELEASED AND JOURNALIZED:** October 22, 2015

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SEAN C. GALLAGHER, J.:

{¶1} Andrew Picha appeals the denial of his motion to suppress the results of a blood test. Picha was convicted of aggravated vehicular homicide and failure to stop after an accident, following a no contest plea and the trial court's finding of guilt. The trial court sentenced Picha to an aggregate sentence of seven years in prison. For the following reasons, we affirm.

{¶2} On Super Bowl Sunday in February 2014, Picha struck and killed another motorist who was helping his wife change a tire on the grassy median off I-480 near Warrensville Road. The black box of Picha's vehicle recorded him driving over 100 m.p.h. before he struck and killed the victim. When police officers responded to the scene, the victim was surrounded by family members and was being cradled by his wife. The victim's legs were both severed, and he was gasping for air. Officers then found Picha sitting in his vehicle farther down the highway, where Picha had driven into the guardrail. Picha was sitting in the driver's seat with the vehicle facing the wrong direction. Pieces of flesh were visible on the passenger side of the car.

{¶3} Picha was visibly intoxicated. All responding officers noted that Picha was disorientated and mumbling, and reeked of alcohol. As Picha attempted to walk away from his wrecked car, he was staggering and swaying to the point that the officers sat him on the side of the road for his own safety. Picha was not given a field sobriety test because he claimed to have injured his leg. The officers arrested Picha and took him to

the nearby South Pointe Hospital's emergency department for a blood draw to confirm the intoxication. A hospital employee imperfectly marked the blood samples.

{¶4} Picha, therefore, moved to suppress the results of the blood analysis. The trial court denied the motion after Picha pleaded no contest to the charges, finding that the state substantially complied with statutory requirements. Picha timely appealed, claiming the trial court erred in denying the motion to suppress and, in addition, in sentencing him to a seven-year prison term. We find no merit to either of Picha's arguments.

{¶5} We need not reach the merits of the suppression issue. Even if we assumed the trial court erred in admitting the results of the blood analysis, any such error is harmless. Pursuant to Crim.R. 52(A), any error, defect, irregularity, or variance that does not affect a substantial right shall be disregarded. *State v. Johnstone*, 8th Dist. Cuyahoga No. 92885, 2010-Ohio-1854, ¶ 30; *State v. Hollis*, 8th Dist. Cuyahoga No. 70781, 1997 Ohio App. LEXIS 2119, \*18 (May 15, 1997). In this case, Picha was convicted of aggravated vehicular manslaughter in violation of R.C. 2903.06(A)(1)(a), which provides that

[n]o person, while operating or participating in the operation of a motor vehicle, \* \* \* shall cause the death of another \* \* \* [a]s the proximate result of committing a violation of division (A) of section 4511.19 of the Revised Code or of a substantially equivalent municipal ordinance.

R.C. 4511.19(A)(1)(a), the operating a vehicle while intoxicated ("OVI") section, as charged in Count 3 and merged with the aggravated vehicular homicide charge, provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state,

if, at the time of the operation, \* \* \* [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them.”<sup>1</sup> And finally, Picha was also convicted of failure to stop after an accident in violation of R.C. 4549.02(A). The result of the blood alcohol concentration (“BAC”) analysis bolstered Picha’s conviction; it was not necessary to prove the underlying crimes.

{¶6} As this court has recognized, even if a trial court erroneously admits the results of field sobriety tests in proving intoxication, if other evidence exists to support the arrest and conviction, the failure to suppress is harmless. *Gates Mills v. Mace*, 8th Dist. Cuyahoga No. 84826, 2005-Ohio-2191, ¶ 29. There is no reason to distinguish the BAC analysis from field sobriety tests — both are used as evidence to prove the OVI following the arresting officer’s probable cause determination, which is typically based on witnessing the defendant’s drunken behavior. *State v. Evans*, 127 Ohio App.3d 56, 64, 711 N.E.2d 761 (11th Dist.1998) (listing factors upon which police officers may rely in concluding that field sobriety tests are necessary). Generally in Ohio, “erratic driving, driving left of center at least three times, stopping at an intersection for a prolonged period of time, smell of alcoholic beverage on the person or breath, failure to notice police car flashers, slurred speech, bloodshot eyes, and impairment of physical abilities” are evidence of intoxication. *State v. Calder*, 7th Dist. Monroe No. 08 MO 5,

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<sup>1</sup>This should be distinguished from R.C. 4911.19(A)(1)(b)-(c) and (f)-(g), which define the violation in terms of the BAC in the offender’s blood. Although Count 4 of the indictment included a violation of R.C. 4511.19(A)(1)(f), the misdemeanor was not part of Picha’s conviction because it merged with the vehicular homicide charge.

2009-Ohio-3329, ¶ 44, citing *State v. Flowers*, 7th Dist. Mahoning No. 07-MA-68, 2007-Ohio-6920.

{¶7} Picha’s arrest and conviction, especially with respect to the OVI, was supported with ample evidence. The responding police officers observed that Picha was mumbling, disorientated, and smelled of alcohol. After exiting from the driver’s seat, Picha staggered around his vehicle, the black box of which recorded his speed prior to impact at over 100 m.p.h. Picha’s speech was slurred, and his eyes were glassy. In short, there was ample evidence that Picha was intoxicated, and any error in admitting the result of the blood analysis is harmless. Picha does not challenge any of the other evidence otherwise proving his intoxication. The underlying conviction was not predicated on the blood alcohol concentration, but rather upon evidence that Picha was intoxicated. The result of the blood test, although confirming the officer’s testimony, merely bolstered his ultimate conviction. The first assignment of error is overruled.<sup>2</sup>

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<sup>2</sup>We recognize that in *State v. Dukes*, 2015-Ohio-676, 29 N.E.3d 299 (8th Dist.), a divided panel of this court held that the introduction of the BAC analysis was prejudicial to the defendant’s conviction for causing someone’s death by recklessly operating a motor vehicle (R.C. 2903.06(A)(2)(a)). In that case, the jury acquitted the defendant of the charge under R.C. 2903.06(A)(1)(a) (causing the death of someone as a proximate result of driving under the influence of alcohol), the count impacted by the BAC analysis. The *Dukes* decision is limited because of the lack of harmless error analysis. Although the panel found that admission of the BAC evidence was prejudicial, such a finding is not the same as determining that the admission of evidence was not harmless error pursuant to Crim.R. 52(A). “A reported decision, although a case where the question might have been raised, is entitled to no consideration whatever as settling \* \* \* a question not passed upon or raised at the time of the adjudication.” *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, 873 N.E.2d 306, ¶ 11, quoting *State ex rel. Gordon v. Rhodes*, 158 Ohio St. 129, 107 N.E.2d 206 (1952), paragraph one of the syllabus. The *Dukes* panel did not determine whether the error was harmless or not pursuant to Crim.R. 52(A). Our disposition of the first assignment of error using the harmless error analysis, therefore, is not in conflict with the disparate outcome reached in *Dukes*.

{¶8} In his second assignment of error, Picha claims his seven-year term of prison is not consistent with the sentences imposed upon other similarly situated offenders. Picha cites to three cases from Cuyahoga County in which offenders received lesser sentences for similar charges. There are a myriad of factors pursuant to R.C. 2929.11 and 2929.12 informing the final sentence. Simply providing three final sentences involving similar charges does not demonstrate the offenders were similarly situated, only that they were similarly charged.

{¶9} Nevertheless, Picha failed to raise this issue with the trial court at sentencing and the trial court considered all the R.C. 2929.11 factors, including consistency. As courts have concluded, a “defendant must raise [the consistency in sentencing] issue before the trial court and present some evidence, however minimal, in order to provide a starting point for analysis and to preserve the issue for appeal.” *State v. Spock*, 8th Dist. Cuyahoga No. 99950, 2014-Ohio-606, ¶ 37, citing *State v. Lang*, 8th Dist. Cuyahoga No. 92099, 2010-Ohio-433. Picha’s second assignment of error is overruled.

{¶10} Picha’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 common pleas 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.

SEAN C. GALLAGHER, JUDGE

TIM McCORMACK, P.J., CONCURS;

EILEEN T. GALLAGHER, J., CONCURS IN JUDGMENT ONLY