[Cite as *Cleveland v. McCane*, 2016-Ohio-3459.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103457

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

MIRANDA L. McCANE

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2014-TRC-063485

BEFORE: Kilbane, P.J., E.T. Gallagher, J., and S. Gallagher, J.

RELEASED AND JOURNALIZED: June 16, 2016

ATTORNEY FOR APPELLANT

Kenneth J. Lewis
1220 West Sixth Street
Suite 502
Cleveland, Ohio 44113

ATTORNEYS FOR APPELLEE

Barbara Langhenry
Director of Law - City of Cleveland
Karyn Lynn
Kimberly G. Barnett-Mills
Assistant City Prosecutors
1200 Ontario Street - 8th Floor
Cleveland, Ohio 44113

MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Miranda McCane ("McCane"), appeals from her convictions for operating a vehicle under the influence of alcohol or drugs ("OVI"), and OVI refusal with a prior OVI conviction. For the reasons set forth below, we affirm.

{¶2} On November 27, 2014, at approximately 2:00 a.m., McCane was charged with OVI, in violation of R.C. 4511.19(A)(1); OVI refusal with a prior OVI conviction, in violation of R.C. 4511.19(A)(2); operating a vehicle without wearing a safety belt, in violation of R.C. 4513.263(B)(1); and failing to use a turn signal, in violation of R.C. 4511.39. On April 14, 2015, McCane filed a motion to suppress the evidence. The trial court denied the motion following a hearing. The alcohol-related offenses proceeded to a jury trial on June 29, 2015, and the other offenses were tried to the court. At the start of the trial, the parties stipulated that McCane has a 2009 OVI conviction in Parma Municipal Court.

{¶3} Ohio State Trooper Patrick Reagan ("Trooper Reagan") testified that on November 27, 2014, at approximately 1:45 a.m., while he was conducting routine patrol on Interstate 490, near the merge to Interstate 90 westbound, he observed a sedan merge onto Interstate 90 at a high rate of speed. Trooper Reagan activated his cruiser's recording system and followed the sedan, which was driven by McCane. He testified that McCane was traveling between 70 and 90 miles per hour. Trooper Reagan observed, and the video system recorded, McCane traveling to the left lane, the far left lane, to the right and two lanes to the right, without signaling. Trooper Reagan activated

his overhead lights to stop McCane's vehicle. At that point, McCane slowed and proceeded to the right, but then continued to drive on. Trooper Reagan activated his siren and followed her, and McCane came to a stop on the berm of Interstate 90.

{¶4} Trooper Reagan further testified that when he approached McCane's vehicle and asked for her license, registration, and proof of insurance, he observed her fumbling with various papers. In the video recording, he is heard explaining to McCane that what she has handed him was her bank card and not her driver's license. During the discussion, Trooper Reagan detected the odor of alcohol. He noticed that she seemed dazed, and her eyes were bloodshot and glassy. He asked her if she had been drinking, but she did not reply. Based upon all of his observations, Trooper Reagan had McCane exit her car in order to perform field sobriety tests.

{¶5} Trooper Reagan led McCane to the side of his cruiser to perform the horizontal gaze nystagmus test ("HGN test"). The video does not capture her performance of the test, but McCane can be heard repeatedly stating that Trooper Reagan did not ask her to step out of her vehicle. Trooper Reagan can be also be heard instructing McCane on how to perform the HGN test, advising her that she needed to keep her head still, follow the object with her eyes, and not to talk during the test. Trooper Reagan repeated the instructions multiple times, but he could not get McCane to comply. She repeatedly interrupted him and also closed her eyes for extended periods of time during the HGN test.

{¶6} Trooper Reagan next brought McCane toward her vehicle and instructed her on the walk-and-turn test. On the video, he is seen and heard instructing McCane on performing the steps in a heel-to-toe fashion with her hands at her side. She continues to talk during the instructions and repeatedly interrupts him and complains that she has been outside of her vehicle for 20 minutes. Despite being given multiple instructions on how to complete the walk-and-turn test, at no point does McCane begin or attempt to perform the test. Trooper Reagan then testified:

> After multiple attempts to try to get her to start the test and complete the test, I determined[,] based on all the observations I've seen in her behavior, her confused speech, the odor of an alcoholic beverage coming from her breath and her car, also her driving, I determined that she was impaired and unsafe to operate a motor -- to continue to operate a motor vehicle down the road, and I placed her under arrest.

{¶7} Trooper Reagan further testified that another officer arrived after he had placed McCane under arrest. She continued to argue and dispute the arrest, but Trooper Reagan retrieved her personal items from the vehicle, secured it and brought her to the Linndale Police Station.[1]

{¶8} Trooper Reagan further testified that at the police station, he read McCane the provisions of Bureau of Motor Vehicles Form 2255 ("Form 2255"), the automatic

[1]In obtaining McCane's purse, he observed a clear plastic box containing suspected marijuana. She was also later cited for drug possession, but this is not part of the instant appeal.

license suspension form for refusal to take a breath test. This form advises of the consequences of a refusal, including that the driver's license would be immediately suspended and that if he or she had a prior OVI offense within the past 20 years and is convicted of OVI in the instant matter, he or she would face "additional penalties." Trooper Reagan then asked McCane to complete a breath test, but she refused to do so, and she also refused to sign Form 2255.

{¶9} On cross-examination, Trooper Reagan admitted that, although he had initially began following McCane for speeding, she was never cited for speeding. He also admitted that he spoke with her for approximately two minutes at her driver's side window before asking her to step out of the vehicle. A total of seven minutes elapsed from the traffic stop to the administration of the HGN test. A total of twelve minutes elapsed from the initial stop to the point when Trooper Reagan places McCane under arrest.

{¶10} McCane moved for acquittal of the charges at the close of the city's evidence. The trial court denied McCane's motion, and she elected to present evidence.

{¶11} McCane testified that she was not driving while intoxicated. She stated that on November 26, 2014, the day before Thanksgiving, at approximately 7:30 p.m., she went to the home of her friend, Alexandria Waldron ("Waldron"), in North Royalton to help her cook and clean. McCane testified that she did not consume any alcohol at all, and she did not use any drugs. She left Waldron's home at approximately 1:10 a.m. McCane admitted that she had marijuana in her purse, but she testified that she did not

smoke it. She also admitted that she was speeding on her way home and was on the phone with her spouse who was angry that she had stayed out so late.

{¶12} McCane further testified that she did not immediately know that Trooper Reagan was trying to pull her over. She explained that she saw the flashing lights but thought that the officer was trying to stop another driver. However, once she heard his siren, she stopped her vehicle.

{¶13} McCane admitted that she mistakenly gave Trooper Reagan her bank card, rather than her driver's license. She also admitted that she was argumentative during the stop. However, she stated that she was extremely upset by the disagreement with her spouse and also very upset that she had been pulled over. McCane acknowledged that she had closed her eyes during the HGN test. She explained that she complied to the best of her ability but that snowflakes were falling in her eyes. McCane also stated that she had difficulty keeping still prior to the walk-and-turn test because she was very cold. Finally, McCane testified that she refused to sign Form 2255 that explained the consequences of refusing to submit to a breath test, but consented to giving a urine sample instead. She stated that Trooper Reagan rejected her offer to provide the urine sample and determined that she had refused the breath test.

{¶14} Waldron testified that McCane arrived at her home in North Royalton on November 26, 2014, around 7:00 p.m., and helped her prepare for Thanksgiving. According to Waldron, McCane did not consume any alcohol and left at approximately 1:00 a.m.

{¶15} The jury convicted McCane of OVI and OVI refusal with a prior OVI, and the court convicted her of failing to use a turn signal, but acquitted her of the seat belt violation. McCane was sentenced to: 180 days in jail, with 170 days suspended, and fined $1,000 for the OVI conviction; sentenced to 180 days in jail, with 170 days suspended for the OVI refusal conviction; and fined $575, with $500 suspended, on the turn signal violation. McCane now appeals and assigns the following errors for our review.

Assignment of Error One

> The Defendant's conviction is not supported by sufficient evidence. The Trial Court erred to the prejudice of the Defendant because the verdict was against the manifest weight of the evidence.

Assignment of Error Two

> The Trial Court erred in denying the Defendant's Motion to Suppress.

Sufficiency and Manifest Weight

{¶16} In the first assignment of error, McCane argues that the alcohol-related convictions are not supported by sufficient evidence and are against the manifest weight of the evidence.

{¶17} When reviewing sufficiency of the evidence, an appellate court must determine "'whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574

N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the state's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *Jenks* at paragraph two of the syllabus.

{¶18} The standard for reviewing a challenge to the manifest weight of the evidence was set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, as follows:

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) Black's [Law Dictionary (6 Ed.1990)] at 1594.
>
> 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. *Tibbs* [*v. Florida*], 457 U.S. 31, 45, 102 S.Ct. 2211, 2220, 72 L.Ed.2d 652 (1982)]. *See also State v. Martin* (1983), 20 Ohio App.3d 172, 175, * * *, 485 N.E.2d 717, 720-721 ("The court, reviewing

> the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.").

Id. at 387.

OVI

{¶19} Under the OVI statute, R.C. 4511.19, no person shall operate any vehicle if, at the time of the operation, the person is under the influence of alcohol, a drug of abuse, or a combination of them. R.C. 4511.19(A)(1). This court has recognized that field sobriety tests are not required for an OVI conviction. *Parma v. Benedict*, 8th Dist. Cuyahoga No. 101480, 2015-Ohio-3340, ¶ 43; *Solon v. Hrivnak*, 8th Dist. Cuyahoga No. 100411, 2014-Ohio-3135, ¶ 17. Instead, the violation may be established by evidence of "physiological factors such as slurred speech, bloodshot eyes, and the odor of alcohol." *Id*. at ¶ 18, citing *State v. Clark*, 8th Dist. Cuyahoga No. 88731, 2007-Ohio-3777, ¶ 13; *State v. Simms*, 9th Dist. Summit No. 23957, 2008-Ohio-4848, ¶ 6; *State v. Holland*, 11th Dist. Portage No. 98-P-0066, 1999 Ohio App. LEXIS 6143 (Dec. 17, 1999).

{¶20} In this case, Trooper Reagan testified that he observed McCane speeding as she entered the interstate. She continued to travel from 70 miles per hour up to 90 miles

per hour as Trooper Reagan followed her. He next observed her repeatedly changing lanes from the left to the far left lanes, and back to the right lane. She did not stop when he activated the overhead lights, but only slowed and changed lanes before continuing on. Trooper Reagan had to activate his siren in order to stop McCane's vehicle. When McCane finally did stop, she gave Trooper Reagan her bank card instead of her driver's license. Trooper Reagan also testified that he detected the odor of alcohol and that McCane seemed dazed. Her eyes were bloodshot and glassy. He asked her if she had been drinking and she did not reply. Based upon all of Trooper Reagan's observations, he had her exit her car in order to perform field sobriety tests. The evidence indicates that he had to repeatedly instruct her on how to perform the HGN test, that she moved her head rather than follow the stimulus with her eyes and that she closed her eyes several times during the test. The evidence also indicates that when Trooper Reagan attempted to administer the walk-and-turn test, McCane repeatedly argued with him and interrupted him. Despite being instructed on the test multiple times, McCane never complied with the instructions or performed the walk-and-turn test.

From the foregoing, a rational trier of fact could have found the essential elements of OVI proven beyond a reasonable doubt. Therefore, we conclude that the OVI conviction is supported by sufficient evidence.

{¶21} Further, the OVI conviction is not against the manifest weight of the evidence. The testimony presented and the video evidence clearly portray McCane speeding, repeatedly changing lanes, and failing to stop even after Trooper Reagan

activated his overhead lights. Trooper Reagan testified that she seemed dazed and her eyes were bloodshot and glassy. The evidence also clearly demonstrates that McCane gave him her bank card rather than her license. She failed to properly complete the HGN test and did not perform the walk-and-turn test despite repeated instructions. Therefore, we cannot conclude that the jury lost its way in convicting McCane of OVI. The conviction is not against the manifest weight of the evidence.

OVI Refusal With A Prior OVI Conviction

{¶22} OVI refusal with a prior OVI conviction is governed by R.C. 4511.19(A)(2), which provides in pertinent part:

> No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:
>
> (a) Operate any vehicle * * * within this state while under the influence of alcohol, a drug of abuse, or a combination of them;
>
> (b) Subsequent to being arrested for operating the vehicle * * * as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

{¶23} In *State v. Hoover*, 123 Ohio St.3d 418, 2009-Ohio-4993, 916 N.E.2d 1056, the Ohio Supreme Court held that the refusal to submit to chemical testing when arrested on probable cause for OVI is not, itself, a criminal offense. *Id.* at ¶ 21. Rather, "[t]he activity prohibited under R.C. 4511.19(A)(2) is operating a motor vehicle under the influence of drugs or alcohol," and a suspect's "refusal to take a chemical test is simply

an additional element that must be proven beyond a reasonable doubt along with the person's previous * * * [OVI] conviction to distinguish the offense from a violation of R.C. 4511.19(A)(1)(a)." *Id.*

{¶24} Further, as to what constitutes a refusal, this court in *State v. Schultz*, 8th Dist. Cuyahoga No. 90412, 2008-Ohio-4448, stated as follows:

> The case law addressing "refusal" has been well-settled for decades. *State v. Owen* (Oct. 19, 1998) Butler App. No. CA97-12-229, 1998 Ohio App. LEXIS 4900. Specifically, in *Hoban v. Rice* (1971), 25 Ohio St.2d 111, 267 N.E.2d 311, paragraph three of the syllabus, the supreme court stated as follows:
>
> "[A] refusal to submit to a chemical test of the blood, breath or urine will occur where a person, by his acts, words or general conduct, manifests an unwillingness to submit to the test. Such refusal need not have been knowingly and intentionally made."
>
> Whether a driver refused a test is a factual determination that is to be made by the trial court based upon all of the evidence before it. *Owen, supra*; *see, also, State v. Basye* (Feb. 4, 1997), Ross App. No. 96CA2211, 1997 Ohio App. LEXIS 421. "Such a refusal may be established when the evidence shows that the person who was given the request and advice * * * had thereafter conducted himself in such a way as to justify a reasonable person in the position of the requesting officer to believe that such requested person was capable of refusal and manifested unwillingness to take the test." *Andrews v. Turner* (1977), 52 Ohio St.2d 31, 368 N.E.2d 1253, paragraph one of the syllabus.

Id. at ¶ 37-38.

{¶25} The finding of a "refusal" has been upheld where, as here, the defendant refuses to take the requested test, such as a breath test, and instead offers to take a different test. *State v. Daniels*, 10th Dist. Franklin No. 13AP-969, 2014-Ohio-3697. The *Daniels* court stated:

> Appellant did not have the right to choose which test to take. *State v. Caldwell*, 10th Dist. [Franklin] No. 02AP-576, 2003-Ohio-271, ¶ 8-12 (provision of *Maumee* [*v. Anistik*, 69 Ohio St.3d 339, 344, 1994 Ohio 157, 632 N.E.2d 497 (1994) refusal] instruction not plain error where defendant refused to take urine test despite his repeated requests to take different test). *Mt. Vernon v. Seng*, 5th Dist. [Knox] No. 04CA000012, 2005-Ohio-2915, ¶ 46 (refusal where defendant offered to take blood test but officer only offered breath test and defendant refused that test).

Id. at ¶ 20.

{¶26} In this matter, the parties stipulated that in 2009, McCane was convicted of OVI in Parma Municipal Court. In addition, the evidence demonstrates that, while at the Linndale Police Station, Trooper Reagan instructed McCane on the breath test and the consequences of a refusal, but she refused to take the breath test. Although McCane testified that she offered to instead take a urine test, it was not her option to decide which test would be administered. From the foregoing, a rational finder of fact could have properly concluded that McCane was guilty of OVI refusal with a prior OVI conviction. There was sufficient evidence to support this conviction.

{¶27} In addition, this conviction is not against the manifest weight of the evidence because it is undisputed that McCane was informed of the consequences of the refusal, and that she refused the breath test.

{¶28} The first assignment of error is overruled.

Suppression

{¶29} In the second assignment of error, McCane argues that the trial court erred in denying her motion to suppress.

{¶30} In *Strongsville v. Vavrus*, 8th Dist. Cuyahoga No. 100477, 2014-Ohio-1843, this court set forth the standard of review as follows:

> We note that appellate review of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. In deciding a motion to suppress, the trial court assumes the role of trier of fact and is in the best position to resolve factual questions and evaluate the credibility of witnesses. *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992). The reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id*., citing *State v. Fanning*, 1 Ohio St.3d 19, 1 Ohio B. 57, 437 N.E.2d 583 (1982). With respect to the trial court's conclusion of law, the reviewing court applies a de novo standard of review and decides whether the facts satisfy the applicable legal standard. *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

Id. at ¶ 8.

{¶31} However, McCane has not included a transcript of the suppression hearing for our review. As this court explained in *Lakewood v. Collins*, 8th Dist. Cuyahoga No. 102953, 2015-Ohio-4389:

> The appellant has the duty to file the transcript or such parts of the transcript that are necessary for evaluating the trial court's decision. App.R. 9(B); *State v. Peterson*, 8th Dist. Cuyahoga No. 96958, 2012-Ohio-87, ¶ 7. Failure to file the transcript prevents an appellate

> court from reviewing an appellant's assigned errors. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648, ¶ 13. Thus, absent a transcript or alternative record under App.R. 9(C) or (D), we must presume regularity in the proceedings below. *State v. Lababidi*, 8th Dist. Cuyahoga No. 96755, 2012-Ohio-267, ¶ 13, 969 N.E.2d 335; *State v. Rice*, 8th Dist. Cuyahoga No. 95100, 2011-Ohio-1929.

Id. at ¶ 9.

{¶32} Without the transcript, we must presume regularity. Therefore, we conclude that there was a reasonable articulable, suspicion to stop the defendant's motor vehicle. *Accord Collins* at ¶ 10. In any event, the transcript from the trial clearly demonstrates that McCane was traveling between 70-90 miles per hour on Interstate 90, changing lanes from the far right to the far left, and she did not immediately stop her vehicle after the officer activated his overhead lights. This evidence sufficiently supports the stop of her vehicle.

{¶33} The second assignment of error is overruled.

{¶34} Judgment is affirmed.

It is ordered that appellee recover of 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 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

EILEEN T. GALLAGHER, J., and
SEAN C. GALLAGHER, J., CONCUR