

[Cite as *State v. Althaus*, 2010-Ohio-1118.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 09-CA-01
Plaintiff-Appellee	:	
	:	Trial Court Case No. 07-TRC-1946
v.	:	
	:	(Criminal Appeal from Miami County
THERESA ALTHAUS	:	Municipal Court)
	:	
Defendant-Appellant	:	

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OPINION

Rendered on the 19th day of March, 2010.

JAMES D. BENNETT, by BRANDON A. COATE, Atty. Reg. #0081701, Miami County Municipal Prosecutor's Office, 201 West Main Street, Troy, Ohio 45373
Attorney for Plaintiff-Appellee

PAUL R. F. PRINCI, Atty. Reg. #0012149, Princi & King Co., LPA, 221 South Market Street, Troy, Ohio 45373
Attorney for Defendant-Appellant

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FAIN, J.

{¶ 1} Defendant-appellant Theresa Althaus appeals from her conviction and sentence, following a bench trial, for Operating a Motor Vehicle While Under the Influence of Alcohol, a Drug of Abuse, or a Combination of them, in violation of R.C. 4511.19(A)(1)(a). Althaus contends that the evidence in the record is insufficient to

support a finding, beyond reasonable doubt, that she committed the offense.

{¶ 2} Based upon our review of the record, we conclude that there is evidence in the record to support the conviction. Accordingly, the judgment of the trial court is Affirmed.

I

{¶ 3} Troy Police Patrolman Jared Cole noticed the car being driven by Althaus while he was on patrol during the early morning hours of February 28, 2007. He described his observations as follows:

{¶ 4} “A. Before I pulled her over I observed her vehicle parked or stopped at the exit to the Best Western, which is situated on South Dorset at West 55. It was stopped there for what seemed like a long moment of time [be]cause there was no traffic as to stop her from turning left or right onto Dorset, and she was right at the exit where the road meets South Dorset. The vehicle made a right turn. In making a right turn, it did not turn in the appropriate lane; it went wide into the inside lane, and then immediately came back to the curb lane at the intersection of West 55 and South Dorset. When it came to a stop, it was – didn’t come to a stop at the stop bar. It came to a stop when the whole vehicle was in front of the stop bar.

{¶ 5} “Q. At that point how would you describe her driving?

{¶ 6} “A. From there the driving continued in the same erratic pattern. She made a right turn and again did not turn into the most appropriate lane, went wide turning into the inside lane crossing the left lane marker, the white line, lane marker.

{¶ 7} “Q. Did you observe any other traffic violations before you made the stop?

{¶ 8} “A. Yes, sir, she also, as she was traveling westbound, she entered

southbound [Interstate] 75 on the exit ramp. When she made that left turn, she again turned wide crossing the fog line, or white line, to the right hand side of the road with both of her passenger side tires.”

{¶ 9} Cole stopped Althaus. When he made contact with her, he detected an odor of an alcoholic beverage, saw that her eyes were glassy, and noticed that her speech was slow and slurred. Althaus admitted that she had had been drinking.

{¶ 10} Cole had Althaus get out of her vehicle, and had her perform the horizontal gaze nystagmus, one-leg stand, and walk-and-turn field sobriety tests. Before these tests were performed, Cole was joined by another officer.

{¶ 11} Cole testified that he performed all the tests in accordance with the National Highway Transportation and Safety Administration standards. On the horizontal gaze nystagmus test, Cole observed six out of six possible positive clues for being under the influence. He testified that an observation of four out of six clues correlates to an eighty per cent chance that a person will be above 0.10 in blood alcohol content, according to the NHTSA manual.

{¶ 12} Cole next testified concerning the one-leg stand test:

{¶ 13} “A. After I had given instructions and a demonstration to Ms. Althaus, I told her to begin when she was ready. When she began the test, she raised one of her legs and her arms at the same time, but did not count out loud. She immediately dropped her foot and complained of the slope at the side of the road, repositioned herself, and again raised her leg and her arms at the same time. I believe I even offered her the assistance of telling her to count out loud and to keep her arms to her side. She put her foot down again. I think it was three times total that she put her foot down and

she became – asked me how long she had to count for and became argumentative.

{¶ 14} “Q. You say that the Defendant was complaining about the slope of the road?

{¶ 15} “A. Yes.

{¶ 16} “Q. What was the conditions like where you were conducting the test?

{¶ 17} “A. It was the right shoulder of Interstate I-75, and the road was relatively flat and level and free of debris. There was not any huge amount of grade or slope on the road.

{¶ 18} “Q. The problems that the Defendant had with taking the test, what were the significance of those clues?

{¶ 19} “A. Significance of the clues would have been of such that she would have failed the test and it would have counted as all four clues.”

{¶ 20} Parenthetically, the stop and field sobriety tests were recorded on a video recording made from the cruiser, with audio. This audiovisual recording was admitted in evidence, and we have reviewed it. With the possible exception of Althaus’s argumentativeness, which is a matter of opinion, the video recording corroborates Cole’s testimony concerning the one-leg stand test. (The video recording is not sufficient either to corroborate, or to rebut, Cole’s testimony concerning the horizontal gaze nystagmus test.)

{¶ 21} Cole then administered the walk-and-turn test:

{¶ 22} “A. The first part of the test is you place the subject in a starting position with their right foot in front of their left with their arms down to their side, and you give them instructions from that position. Part of the test is for them to maintain their balance

while listening to the instructions. Ms. Althaus failed to maintain her balance and removed her right foot from in front of her left. I explained to Ms. Althaus to resume the position, the starting position, and she again lost her balance and became highly agitated and started flailing her arms stating that there was no way that she could maintain her balance while I was giving the test, even though it was only approximately ten seconds maybe had elapsed. I hadn't even given any part of the instructions as far as the rest of the test yet."

{¶ 23} Again, the video recording corroborates Cole's testimony concerning the walk-and-turn test, with the only possible exception being his description of her becoming "highly agitated," which is, again, a matter of opinion.

{¶ 24} Cole offered Althaus an opportunity to take the portable breathalyzer test. She did not respond to this offer, instead offering her explanation of why she was driving the way she had been driving.

{¶ 25} Cole arrested Althaus, and took her to the police station for a breathalyzer test. Althaus either could not, or would not, blow into the machine long enough to produce a test result. She was recorded as having refused.

{¶ 26} Cole testified, without objection, that while Althaus was blowing into the breathalyzer machine, it registered up to a 0.114 blood alcohol content before the test was discontinued. Cole did not, however, testify concerning the significance of this fact. Without some evidence of the reliability of this "non-result," we give it no consideration in determining whether the evidence in the record supports Althaus's conviction.

{¶ 27} Althaus was cited for O.M.V.I., in violation of R.C. 4511.19(A)(1)(a); a red-light violation, in violation of R.C. 4511.12; and a marked-lanes violation, in violation

of R.C. 4511.33. Following a bench trial, Althaus was convicted of all three offenses. For the O.M.V.I. offense, Althaus was sentenced to thirty days in the Miami County Jail, with twenty of those days suspended on condition of no like offenses and completion of a drug and alcohol evaluation plus any recommended follow-up treatment, with a probationary period of two years. She was fined \$350 plus court costs. The trial court imposed a Class 4 driver's license suspension for a period of twelve months, effective February 28, 2007, the date of the offense. The sentencing entry provided that: "Jail may be arranged through probation Dept, but must be completed by 1-31-09." (Underlining in original.)

{¶ 28} No sanctions were imposed for the red-light and marked-lanes offenses. It does not appear that Althaus is appealing from those convictions.

{¶ 29} Althaus appeals from her conviction and sentence for O.M.V.I. Her jail sentence was stayed by the trial court pending this appeal.

II

{¶ 30} Althaus's sole assignment of error is as follows:

{¶ 31} "THE TRIAL COURT ERRED IN FINDING DEFENDANT GUILTY OF VIOLATING O.U.I. [sic] STATUTE WHEN THE TESTIMONY WAS SUCH THAT REASONABLE MINDS COULD HAVE CONCLUDED THAT THE DRIVING OF DEFENDANT WAS EQUALLY ATTRIBUTABLE TO POOR DRIVING CONDITIONS AS TO DEFENDANT'S DRIVING BEING IMPAIRED BY ALCOHOL OR DRUGS."

{¶ 32} R.C. 4511.19(A)(1)(a) provides as follows:

{¶ 33} "(A)(1) No person shall operate any vehicle, street car, or trackless trolley

within this state, if, at the time of the operation, any of the following apply:

{¶ 34} “(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.”

{¶ 35} Althaus testified in her own defense. She testified that she had only had one rum and coke before leaving to go home. She testified that she “may have hesitated for a second in the parking lot before leaving the parking lot,” because she may have been looking for her cell phone or to make sure that she had everything within reach. She testified that she “had to maneuver my car through the piles of snow and ice even to get to the exit lane to get onto the ramp,” at I-75.

{¶ 36} Althaus explained her poor performance on the one-leg stand and walk-and-turn tests as being on account of a back injury from several years earlier.

{¶ 37} Althaus testified that when she was offered the opportunity to take a breath test at the scene, “I said absolutely I will.” The video recording does not support this. The first time the offer was made, she said something that could have been, “Sure, sure,” but sounds more like: “Sir, I’m a nurse,” followed by a lengthy denial that she is a “hell-raiser,” etc. The final time the offer was made, on a “yes-or-no, do you want to take it or not,” basis, she was non-responsive, preferring instead to explain why she was driving the way she was driving, and accusing police officers of sometimes trying to make things more difficult.

{¶ 38} Althaus explained her inability to blow sufficiently into the breathalyzer machine at the police station as the result of asthma, diagnosed “a couple days before.” She testified that she could see the read-out numbers on the machine while she was blowing, and that they “were about the same,” in the sense that they were neither going

up nor down.

{¶ 39} Althaus had no explanation for the positive result of the horizontal gaze nystagmus test, although she did testify that she didn't initially understand that she was supposed to follow the pen with her eyes. But she did follow the pen with her eyes after Cole explained that to her.

{¶ 40} The trial court made certain findings in its decision finding Althaus guilty of O.M.V.I.:

{¶ 41} "Based upon the content of the testimony, the content of the in-cruiser videotape of the stop and field sobriety tests, the mode and manner of the witnesses' testimony, and the credibility of the witnesses, the court finds the following:

{¶ 42} " · Defendant turned onto S. Dorset Rd. from the Best Western motel/Avalanche bar and in so doing, her car traveled across the lane markings into the inside lane, then across the lane markings again to the outside, right-hand lane of S. Dorset.

{¶ 43} " · Defendant stopped her vehicle for the red traffic light at W. Market St., approximately one car length in front of the stop bar.

{¶ 44} " · Defendant turned from westbound Market St. onto the entrance ramp of southbound I-75, and in so doing her vehicle's left-side tires crossed the fog line.

{¶ 45} " · The traffic stop was made in Miami County, Ohio, at approximately 2:00 o'clock A.M. on February 28, 2007.

{¶ 46} " · Defendant's eyes were glassy.

{¶ 47} " · Defendant had an odor of an alcoholic beverage about her person; there was no evidence of the intensity or strength of the odor.

{¶ 48} “ . Defendant admitted to drinking one rum and coke that evening.

{¶ 49} “ . Defendant’s responses to the Horizontal Gaze Nystagmus test resulted in all six clues being detected by the officer.

{¶ 50} “ . Defendant completed the one leg stand test, but did not count aloud as she was instructed to do.

{¶ 51} “ . Defendant indicated a preference of putting her left foot in front of her right to perform the walk-and-turn test. The officer would not allow her to do so and marked her down as having failed the test.

{¶ 52} “ . Defendant refused to take the BAC test at the police station.”

{¶ 53} There is evidence in the record to support these findings. This is not the exceptional case where the finder of fact lost its way, creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. See, *State v. Martin* (1983), 20 Ohio App.3d 172.

{¶ 54} Althaus’s sole assignment of error is overruled.

III

{¶ 55} Althaus’s sole assignment of error having been overruled, the judgment of the trial court is Affirmed. This cause will be remanded to the trial court for the purpose of carrying Althaus’s sentence into execution, since the requirement that she complete all of her jail time before January 31, 2009, is now moot.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

James D. Bennett
Brandon A. Coate
Paul R. F. Princi
Hon. Mel Kemmer