

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO, :
 :
 Plaintiff-Appellee, : Case No. 03CA16
 :
 vs. :
 :
 JESSICA DAVIS, : DECISION AND JUDGMENT ENTRY
 :
 Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: James T. Boulger, 2 West Fourth Street,
Chillicothe, Ohio, 45601
COUNSEL FOR APPELLEE: John L. Detty, 145 Broadway Street, P.O.
Box 642, Jackson, Ohio 45640

CRIMINAL APPEAL FROM JACKSON COUNTY MUNICIPAL COURT
DATE JOURNALIZED: 3-9-04

ABELE, J.

{¶1} This is an appeal from a Jackson County Municipal Court judgment of conviction and sentence. The jury found Jessica Davis, defendant below and appellant herein, guilty of operating a motor vehicle with a prohibited breath alcohol content in violation of R.C. 4511.19(A)(3). The following errors are assigned for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FAILING TO INQUIRE FULLY INTO THE DEFENDANT'S CLAIMED INABILITY TO OBTAIN COUNSEL. THE COURT'S FAILURE TO MAKE SUCH INQUIRY DEPRIVED THE DEFENDANT [OF] TIMELY AND EFFECTIVE ASSISTANCE OF COUNSEL."

SECOND ASSIGNMENT OF ERROR:

THE TRAIL [sic] COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN DENYING THE DEFENDANT'S MOTION FOR LEAVE TO FILE A MOTION TO SUPPRESS. THE COURT'S DENIAL CONSTITUTED AN ABUSE OF DISCRETION DEPRIVING THE DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN PREVENTING HER COUNSEL FROM CROSS EXAMINING AT TRIAL THE STATE'S SOLE WITNESS ON MATTERS RELATING TO THE TESTING OF HER BREATH SPECIMEN. THIS COURSE OF CONDUCT UPON THE PART [OF THE] TRIAL COURT DENIED TO THE DEFENDANT DUE PROCESS OF LAW, SECURED TO HER UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION, AND HER RIGHT TO CONFRONT WITNESSES SECURED TO HER UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION."

FOURTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN FAILING TO GRANT THE DEFENDANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF THE STATE'S CASE AND THE CLOSE OF ALL EVIDENCE."

{¶2} On January 26, 2003, Ohio State Highway Patrol Trooper Aaron Crawford observed appellant drive a vehicle with a "rear license plate violation." During the traffic stop, Trooper Crawford apparently observed some indications of alcohol consumption. The officer transported appellant to the Wellston Police Department where the breath-alcohol test revealed .118 grams of alcohol per two hundred ten liters of breath. Subsequently, the officer charged appellant with various violations including driving under the influence of alcohol and driving with a prohibited breath alcohol content in violation of R.C. 4511.19 (A)(1) & (A)(3), respectively.

{¶3} Appellant pled not guilty to the charges and the matter came on for jury trial on May 16, 2003. At trial, the prosecution elected to proceed solely on the (A)(3) violation and to dismiss

the (A) (1) violation. Trooper Crawford testified to the events of the evening, as well as the breath-alcohol test results.

{¶4} At the conclusion of the trial the jury returned a guilty verdict and the court sentenced appellant to a partially suspended jail sentence, a \$500 fine and a two year operator's license suspension. Appellant filed a timely notice of appeal.

I

{¶5} Appellant's first assignment of error concerns to the trial court's refusal to appoint counsel to represent her. The transcript of the arraignment reveals the following colloquy between appellant, who appeared pro se, and the trial court:

"[COURT] * * * How do you plea?

"[APPELLANT] Not guilty.

"[COURT] Will you be getting your own attorney in this matter?

"[APPELLANT] I would like to request court appointed counsel.

"[COURT] Would you raise your right hand? Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?

"[APPELLANT] Yes, I do.

"[COURT] Put your hand down. Are you presently employed?

"[APPELLANT] Yes.

"[COURT] Where are you employed?

"[APPELLANT] Hometown Improvements in Columbus, Ohio.

"[COURT] And how much do you get paid an hour?

"[APPELLANT] Ten dollars.

"[COURT] And how many hours a week do you work?

" [APPELLANT] Thirty.

" [COURT] And how many people, by law, do you have to support on that?

" [APPELLANT] Two.

" [COURT] I'm sorry, I couldn't hear you.

" [APPELLANT] Two.

" [COURT] And the ages of the two children.

" [APPELLANT] Just one child and myself. She's four.

" [COURT] So there's two of you that you support on that?

" [APPELLANT] Correct.

" [COURT] Ma'am, your income is greater than I'm allowed to give you a court appointed attorney on, so I will find that you are not indigent."

{¶6} Appellant subsequently retained private counsel. Later during the proceedings, appellant filed an affidavit to indicate that she "considered providing the Judge with information about [her] finances . . . since [she] had no savings and lived from paycheck to paycheck as a single parent" but did not do so, and apparently did not seek a redetermination of her eligibility status. Appellant does not argue on appeal that the trial court erred in determining she was non-indigent. Rather, appellant contends that the trial court did not "fully" inquire about her financial status in order to make that determination.

{¶7} First, we note appellant does not specify what additional questions the trial court should have asked when determining eligibility for appointed counsel. Second, appellant does not claim that she is indigent and does not argue that the trial court

would have found her indigent, and appointed counsel, if it had conducted a more detailed inquiry. Finally, appellant cites no evidence that her financial status was such that the court would have been required to appoint counsel. In short, even if the trial court had conducted a more detailed inquiry, we find no indication that the court would have reached a different conclusion. Thus, based upon our review of the record we discern no definitive showing of prejudice to appellant.

{¶8} In addition, we note that R.C. 120.03(B)(1) mandates that the Public Defender promulgate standards of indigency and minimum qualifications for appointed counsel representation. The trial court found that appellant did not meet these standards. Appellant does not argue that this is error, nor does she cite any particular standard that the trial court overlooked. Thus, we cannot determine if the trial court erred in its determination.

{¶9} Finally, we believe that appellant's inaction subsequent to arraignment amounted to a waiver of this issue. Specifically, in a Motion for Leave to File Motion to Suppress, appellant conceded that she "considered renewing her application to the Court for court appointed counsel and readied materials for that purpose, but abandoned the effort and instead scheduled a conference with an attorney on March 12th, 2003." In State v. Tymcio (1975), 42 Ohio St.2d 39, 325 N.E.2d 556, the Ohio Supreme Court wrote:

"The right to the assistance of court-appointed counsel in a criminal case turns upon the inability to obtain counsel. The entitlement depends, not upon whether the accused ought to be able to employ counsel, but whether he is in fact 'unable to employ counsel.

A preliminary determination of indigency does not foreclose a redetermination of eligibility for assigned counsel when, at a subsequent stage of a criminal proceeding, new information concerning the ability or inability of the accused to obtain counsel becomes available." Id. at paragraphs 1-2 of the syllabus.

{¶10} While a court has the duty to inquire fully into a defendant's circumstances, it is incumbent on the accused to bring those circumstances to the court's attention. In the case sub judice, appellant concedes that she did not raise this issue. Thus, we find that appellant waived the issue. We further point out that, even after she retained private counsel, appellant did not ask the court for a redetermination of her appointed counsel eligibility. Again, appellant could have raised this issue in the trial court when, if necessary, it could have been corrected. Appellant, however, failed to do so and we are not inclined to review the matter on appeal.

{¶11} Our conclusion is further buttressed by the fact that Tymcio and its progeny all involve cases in which courts forced defendants to proceed to trial without counsel. See e.g. Jackson v. Wickline, 153 Ohio App.3d 743, 795 N.E.2d 1248, 2003-Ohio-4354, at ¶ 14; State v. Nxumalo, Licking App. No. 01-CA-00120, 2002-Ohio-2546, at ¶ 23. In cases in which a criminal defendant was actually represented by an attorney, as is the case here, courts have been less inclined to find error. See e.g. State v. Baisden (May 28, 1991), Jackson App. No. 612. As our colleagues on the Eleventh District Court of Appeals have aptly noted, the gist of Tymcio is that assistance of counsel must be provided at a criminal trial if the defendant desires assistance, but is unable to afford to

privately provide for such assistance. See State v. Dwelle (Sep. 27, 1985), Geauga App. No. 1201. Appellant did have the benefit of assistance of counsel during the trial court proceeding, even though she privately retained counsel. Thus, the spirit of Tymcio has been satisfied.

{¶12} Appellant also asserts that the trial court's refusal to appoint counsel set in motion a chain of events that deprived her of effective assistance of counsel. Specifically, appellant points to a motion to suppress evidence that was overruled because it was untimely filed and a motion for leave to file a subsequent motion to suppress that was likewise overruled. We will discuss those motions in more detail when we review her second assignment of error. Nevertheless, with no clear indication appellant was indigent, and in light of the fact that appellant eventually retained counsel, any failure to timely file a motion to suppress appears to be more related to appellant's own dilatory conduct in retaining counsel rather than any error by the trial court.

{¶13} For these reasons, we find no merit in appellant's first assignment of error and it is accordingly overruled.

II

{¶14} Appellant asserts in her second assignment of error that the trial court erred by denying her motion for leave to file a motion to suppress. By way of background, on March 14, 2003, appellant, through counsel, filed a motion to suppress evidence. Several days later, the trial court overruled the motion and noted

that it was not timely filed pursuant to Crim.R. 12(D).¹ On April 16, 2003, appellant, again through counsel, requested leave of court to file a motion to suppress evidence. The court also denied this request.

{¶15} Appellant argues on appeal that the trial court should have granted her request for leave and that its failure to do so constituted reversible error. We disagree with appellant.

{¶16} A failure to timely file a motion to suppress evidence amounts to a waiver of any such issues for purposes of trial. State v. Wade (1973), 53 Ohio St.2d 182, 373 N.E.2d 1244, at paragraph three of the syllabus. In the interests of justice, however, a court may set aside that waiver and allow the motion to be considered out of rule. See Crim.R. 12(D)&(H).

{¶17} A decision to grant leave to file a motion to suppress evidence beyond the specified time limit is left to a trial court's sound discretion and that decision will not be reversed absent an abuse of that discretion. State v. Karns (1992), 80 Ohio App.3d 199, 204, 608 N.E.2d 1145; State v. Hoover, Wayne App. No. 02CA0056, 2003-Ohio-2344, at ¶ 7; Columbus v. Koczka, Franklin App. No. 02AP-953, 2003-Ohio-1660, at ¶ 9. We note that an abuse of discretion is more than an error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. State v. Clark (1994), 71 Ohio St.3d 466, 470, 644

¹ Crim.R. 12(D) requires that all pretrial motions be filed within thirty five (35) days after arraignment. The trial court conducted the arraignment in this case on January 28, 2003. Thus appellant's March 14th motion was filed beyond the specified time limit.

N.E.2d 331, 335; State v. Moreland (1990), 50 Ohio St.3d 58, 61, 552 N.E.2d 894, 898; State v. Adams (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, 149. With these principles in mind, we turn our attention to the proceedings in the instant case.

{¶18} Appellant's arraignment occurred on January 28, 2003. At that time the trial court informed her that she did not qualify for appointed counsel. According to an affidavit appellant later filed, appellant waited nearly a month to contact her present attorney. Appellant attested that "[s]ometime in the latter part of February [she] made an appointment at an attorney's office and kept [her] scheduled appointment on March 12, 2003." Appellant provided no explanation why she waited approximately one month to secure counsel. We further note that appellant's motion to suppress evidence was filed only two (2) days after she retained counsel but, by that point, the period for filing motions had expired. Counsel should have sought leave to file the motion but, instead, filed the motion out of rule on March 14th. After the motion was denied for being untimely, appellant waited almost one month before filing a motion for leave of court.

{¶19} Moreover, when denying her motion for leave, the trial court noted that appellant did not discuss why the interests of justice required her motion to be considered. We find no error in the court's conclusion. The only reason set out in appellant's motion is a short recitation of the facts and law concerning the appointment of counsel. If appellant intended to argue that her motion to suppress was untimely because she did not obtain

appointed counsel, and that the trial court erroneously failed to appoint counsel, appellant's motion fell short of that goal. Appellant also failed to account for why she did not (1) immediately seek leave of court to file a motion to suppress rather than simply filing the motion, and (2) waited nearly a month after the court overruled her first motion to seek leave of court to file the second motion.

{¶20} After our review of the record, we find nothing arbitrary, unreasonable or unconscionable in the trial court's refusal to grant appellant leave to file a motion to suppress evidence. Accordingly, we hereby overrule appellant's second assignment of error.

III

{¶21} Appellant argues in her third assignment of error that the trial court erred by prohibiting her from following various lines of inquiry during Trooper Crawford's cross-examination. We find no merit in her arguments.

{¶22} First, appellant points to a portion of the transcript in which she questioned Trooper Crawford about his status as a "senior operator." The prosecution objected but, before the court ruled on the objection, counsel volunteered to "stop this line of questioning." Because the trial court did not rule on this issue, there is obviously no error.

{¶23} Elsewhere, appellant attempted to question Trooper Crawford as to (1) whether he entered appellant's gender into the breath testing device, (2) whether he was familiar with the

warranty on the machine and (3) whether he knew the "range of error" on the machine. We note at the outset that, with respect to the first two sets of questions, the court sustained the objection on grounds of relevancy. We agree that such evidence was irrelevant and inadmissible. See Evid.R. 402. Appellant did not explain below, and does not explain on appeal, how her gender or the device's warranty is relevant. Thus, we find no error with the trial court's decision to end those lines of questioning.

{¶24} As for the inquiry concerning "range of error" on the breath testing device, it is unclear exactly what information appellant sought for that particular question. We point out that a defendant may not attack the general reliability of that machine, see Columbus v. Taylor (1988), 39 Ohio St.3d 162, 167, 529 N.E.2d 1382; State v. Vega (1984), 12 Ohio St.3d 185, 186, 465 N.E.2d 1303, and any challenge to the machine's calibration must be raised in a motion to suppress evidence, or the issue will be deemed to be waived. See State v. French (1995), 72 Ohio St.3d 446, 451, 650 N.E.2d 887. Accordingly, because appellant (1) cannot challenge the general reliability of the device; (2) failed to file a timely motion to suppress on grounds of inadequate testing (thereby waiving the issue), and (3) has not delineated any other purpose for the evidence, we find no error in the trial court's ruling. For these reasons, we hereby overrule appellant's third assignment of error.

{¶25} Appellant asserts in her fourth assignment of error that the trial court erred by denying a motion for judgment of acquittal. We disagree with appellant.

{¶26} Our analysis begins from the premise that Crim.R. 29(A) judgment of acquittal should be granted if the evidence is insufficient to sustain a conviction for the charged offense. See State v. Daugherty (Jun. 28, 2001), Ross App. No. 00CA2572, unreported; State v. Meadows (Feb. 12, 2001), Scioto App. No. 99CA2651, unreported. Trial courts should not enter judgments of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether the prosecution has proven each essential element of the offense beyond a reasonable doubt. See State v. Bridgeman (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, at the syllabus.

{¶27} When determining whether a trial court erred by overruling a motion for acquittal, reviewing courts must focus on the sufficiency of the evidence. See e.g. State v. Carter (1995), 72 Ohio St.3d 545, 553, 651 N.E.2d 965; State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. When we review the sufficiency of the evidence, our inquiry is directed to the adequacy of evidence; that is, whether the evidence, if believed, reasonably supports a finding of guilt beyond a reasonable doubt. Jenks, supra at 273; State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. The standard of review for sufficiency of the evidence is whether, after viewing the evidence and inferences reasonably drawn therefrom in the light most favorable to the

prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. See Jenks, supra at 273; State v. Jones (2000), 90 Ohio St.3d 403, 417, 739 N.E.2d 300; State v. Dennis (1997), 79 Ohio St.3d 421, 430, 683 N.E.2d 1096; also see Jackson v. Virginia (1979), 443 U.S. 307, 319, 61 L.E.2d 560, 99 S.Ct. 2781, 2789. Further, a reviewing court must not assess whether the prosecution's evidence is credible, but whether if credible, the evidence supports a conviction. Thompkins, supra at 390 (Cook, J. Concurring); also see Daugherty, supra. In the case sub judice, we find that sufficient evidence supports appellant's conviction.

{¶28} Appellant, citing State v. Phillips (1993), 97 Ohio App.3d 1, 646 N.E.2d 181, asserts that Trooper Crawford's testimony did not explain precisely what the breath test results mean (i.e. explain that appellant's test reflected .118 grams of alcohol per 210 liters of appellant's breath). In the case at bar, Trooper Crawford testified that the .118 result indicated that the breath testing device detected "that amount of alcohol in [appellant's] breath." We note that many appellate courts have concluded that if the evidentiary correlation between the test results and the statutory prohibited levels is not adequately developed, the evidence is insufficient to support a conviction for operating a vehicle with a prohibited alcohol concentration. See, e.g., Toledo v. Raider (1983), 14 Ohio App.3d 198, 470 N.E.2d 418 (officer testified that the test results were .231, but when asked to explain those results the officer testified "I really don't

know..."); State v. Ulrich (1984), 17 Ohio App.3d 182, 478 N.E.2d 812; State v. Teresko (Mar. 18, 1991), Butler App. No. (A90-05-089).

{¶29} In the case sub judice, however, we believe that the prosecution's evidence adequately established the breath alcohol test's evidentiary foundation. During the trial, the prosecution introduced, and the trial court admitted, state's exhibit number one. This exhibit: (1) is titled "BAC Datamaster Evidence Ticket"; (2) is signed by a machine operator; (3) reveals a subject sample of .118 and (4) reveals that "alcohol readings are expressed as grams of alcohol per 210 liters of breath." We agree with our colleagues in the Fifth Appellate District who wrote in State v. Mayer (Oct. 5, 2000), Ashland App. No. 00COA01352:

"Appellant primarily relies upon the syllabus in Toledo v. Raider (1983), 14 Ohio App.3d 198, for the proposition, in order for the results of the intoxilizer test to be admissible in evidence, the prosecution must elicit from the officer who administered the test, in addition to other foundational proof, testimony indicating or explaining what the result means. Without such testimony, evidence of the test result is rendered meaningless and inadmissible. We have reviewed Raider, and the other cases cited by appellant in support of his argument: State v. Phillips (1993), 97 Ohio App.3d 1, and State v. Teresko (Mar. 18, 1991), Butler County App. No. CA90-05-089, unreported. We find no mention of evidence comparable to appellee's Exhibit 2 being admitted in any of those cases. Both Raider and Phillips cite Mentor v. Giordano (1967), 9 Ohio St.2d 140, for the proposition at least some evidence is necessary to explain what a given reading or result of a test for intoxication indicates. Id. at 146. (Emphasis Added). Unlike Raider, Phillips and Teresko, in the case sub judice Exhibit 2 expressly showed appellant's test result 'was .191 GRAMS OF ALCOHOL PER 210 LITERS OF BREATH.' When coupled with the trial court's instruction noted supra, we find there was sufficient, competent, credible evidence to support the jury's verdict. Appellant's sole assignment of error is overruled. The judgment of the Ashland Municipal Court is affirmed."

Thus, we believe that the prosecution's exhibit contains the information necessary to explain the meaning of the breath alcohol test result and we find no error with the trial court's refusal to grant appellant's motion for judgment of acquittal.

{¶30} Accordingly, based upon the foregoing reasons we hereby overrule appellant's assignments of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:

Peter B. Abele, Judge