

[Cite as *State v. Yinger*, 2010-Ohio-1068.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

NATHAN YINGER

Defendant-Appellant

JUDGES:

Hon. W. Scott Gwin, P.J.

Hon. William B. Hoffman, J.

Hon. Patricia A. Delaney, J.

Case No. 09-CA-87

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Municipal
Court, Case No. 09TRC05369

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

March 17, 2010

APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Hoffman, J.

{¶1} Defendant-appellant Nathan Yinger appeals his conviction in the Licking County Municipal Court. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On May 19, 2009, Appellant was charged with operating a vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(a) and (d), and failure to illuminate his license plate.

{¶3} On May 26, 2009, Appellant, without the representation of counsel, appeared at arraignment and entered a plea of guilty to the charges set forth in the citation. The trial court sentenced Appellant to 90 days in prison, with 75 days suspended, merging the two OVI charges into one charge for the purpose of sentencing.

{¶4} Subsequent to his guilty plea, Appellant retained counsel who discovered the BAC DatatMaster breath test used on Appellant did not produce a valid test, and the police department knew the machine had been taken out of service but did not provide the information to Appellant prior to the arraignment. As a result of this newly acquired information, Appellant filed a motion to withdraw his guilty plea. At a hearing on the motion, the trial court granted Appellant's motion to withdraw his plea as to the violation of R.C. 4511.19(A)(1)(d), but not as to the violation of R.C. 4511.19(A)(1)(a) or the license plate illumination charge.

{¶5} Appellant now appeals, assigning as error:

{¶6} “I. THE TRIAL COURT’S ERROR IN REFUSING TO ALLOW APPELLANT TO WITHDRAW HIS PLEA TO ALL CHARGES CAUSED MANIFEST INJUSTICE.”

{¶7} In the sole assignment of error, Appellant maintains the trial court erred in allowing his motion to withdraw his guilty plea as to violating R.C. 4511.19(A)(1)(d) only, resulting in a manifest injustice.

{¶8} Ohio Criminal Rule 32.1 governs the withdraw of a plea of guilty, and reads:

{¶9} “A motion to withdraw a plea of guilty or no contest may be made only before sentence is imposed; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his or her plea.”

{¶10} A Criminal Rule 32.1 motion is “addressed to the sound discretion of the trial court, and the good faith, credibility, and weight of the movant’s assertions in support of the motion are matters to be resolved by the trial court.” *State v. Reed*, 7th Dist. No. 04 MA 236, 2005-Ohio-2925, ¶ 7, citing *State v. Smith* (1977), 49 Ohio St.2d 261, 361 N.E.2d 1324, paragraph two of the syllabus. Notably, a post-sentence withdrawal of a guilty plea is only available in “extraordinary cases.” *Smith*, 49 Ohio St.2d at 264, 361 N.E.2d 1324. An abuse of discretion implies the trial court’s judgment was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶11} In this case, Appellant entered a plea of guilty to operating a vehicle intoxicated in violation of both R.C. 4511.19(A)(1)(a) and (d), which read:

{¶12} “(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

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

{¶14} “***

{¶15} “(d) The person has a concentration of eight-hundredths of one gram or more but less than seventeen-hundredths of one gram by weight of alcohol per two hundred ten liters of the person's breath.”

{¶16} Appellant cites this Court's opinion in *State v. Raleigh* (December 23, 2008), Licking App. No. 08-CA-67 in support of the assigned error. In *Raleigh*, the defendant was arrested and charged with OVI in violation of R.C. 4511.19(A)(1)(a) and (d), as well as failure to dim headlights. Raleigh filed a motion to suppress the DataMaster test results. At the hearing, the officer who conducted the test testified all the past calibration results are recorded and kept in a file adjacent to the machine for three years. The trial court overruled the motion to suppress, and Raleigh entered a plea of no contest to the violation of R.C. 4511.19(A)(1) and to failing to dim headlights.

{¶17} Subsequent to his plea and sentence Raleigh filed a motion to withdraw the plea based upon the testimony of the same officer at a suppression hearing in an unrelated case relative to the proper working condition of the breath alcohol instrument upon which Appellant was tested and the retention of test results as required by the Ohio Administrative Code. The trial court denied the motion to withdraw his plea, without conducting an evidentiary hearing.

{¶18} On appeal, this Court held,

{¶19} “We believe the foregoing established a manifest injustice occurred with respect to Appellant’s suppression hearing. Because Appellant’s no contest plea was the result of that decision we believe justice manifestly requires Appellant’s plea be permitted to be withdrawn.”

{¶20} In the case sub judice, the DataMaster was discovered to have been taken out of service on May 19, 2009, after failing simulator checks on May 3, 2009, and being rechecked with the same bottle of solution. As a result, Appellant maintains he could not have made a knowing, intelligent, and voluntary waiver of his rights at the arraignment, and his plea to all of the charges should be withdrawn.

{¶21} Appellant entered a plea of guilty to all three charges at arraignment after waiving representation of counsel. He did not request discovery nor move to suppress the test results. This distinguishes the case sub judice from *Raleigh*. We do not find the trial court abused its discretion in denying Appellant’s motion to withdraw his plea as to violation of R.C. 4511.19(A)(1)(a), or the headlight illumination charge.

{¶22} Appellant's sole assignment of error is overruled, and his conviction in the Licking County Municipal Court is affirmed.

By: Hoffman, J.

Gwin, P.J. and

Delaney, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ Patricia A. Delaney
HON. PATRICIA A. DELANEY

