[Cite as *State v. Love*, 2022-Ohio-1454.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

STACY R. LOVE,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 21 CO 0009

Criminal Appeal from the
Columbiana County Municipal Court of Columbiana County, Ohio
Case No. 2019 TR C 006160

BEFORE:
Cheryl L. Waite, Gene Donofrio, David A. D'Apolito, Judges.

JUDGMENT:
Reversed.
Conviction Vacated.

Atty. Vito Abruzzino, Columbiana County Prosecutor and *Atty. Danielle Menning*, Assistant Prosecuting Attorney, Columbiana County Prosecutor's Office, 38832 Saltwell Road, Lisbon, Ohio 44432, for Plaintiff-Appellee

Atty. Troy D. Barnett, 409 E. State Street, Suite 204, Salem, Ohio 44460, for Defendant-Appellant.

Dated: March 28, 2022

WAITE, J.

{¶1} Appellant Stacy R. Love appeals a March 31, 2019 Columbiana County Municipal Court judgment entry convicting her of operating a vehicle while under the influence of alcohol or drugs ("OVI"). Appellant argues that the state failed to present sufficient evidence that she was impaired by a drug of abuse at the time of the traffic stop. In addition, she argues that the trial court erroneously gave the jury a "drug of abuse" instruction even though there was no evidence to show that methamphetamine is a drug of abuse. For the reasons provided, Appellant's arguments have merit. The judgment of the trial court is reversed and Appellant's conviction is vacated.

Factual and Procedural History

{¶2} On July 8, 2019, Appellant parked at a gas station pump in Columbiana, Ohio. As she filled her tank, a station attendant called the police and informed dispatch that the person using pump number three, Appellant, appeared to be impaired. The attendant provided to dispatch the license plate number of the car Appellant was driving.

{¶3} Patrolman Bryan Granchie of the Columbiana Police Department arrived at the gas station shortly thereafter and saw Appellant pull out of the parking lot. He made eye contact with her, and saw that she was having what he described as uncontrollable body tremors. He followed Appellant's car in his vehicle and she quickly completed a right-hand turn without the use of a turn signal and then crossed the center line. He initiated a traffic stop of the vehicle. At that time, he noticed her speech was slurred, but

he did not attribute the slurring to the use of alcohol, based on his other observations. He also noticed that she continued to have uncontrollable body tremors, which he associated with drug use. She informed him that she was upset because she just learned from receiving a telephone call while at the gas station that her husband was having an extramarital affair.

{¶4} Patrolman Granchie conducted a field sobriety test which Appellant did not successfully complete. He offered to have her take a urine test, which she refused. She told him that she had a prescription for Suboxone but had taken something "not prescribed" the day before. (Trial Tr., p. 94.) Patrolman Granchie placed her under arrest and transported her to the police station. He searched Appellant's person and her vehicle, but did not find any contraband. He did not seek a warrant to have a blood test performed on Appellant.

{¶5} A video showing Appellant at the police station was offered and admitted at trial. This video has no audio component. Although Appellant is sitting with her back to the camera for most of the time, there are several points during the video where she stood. At those times, Appellant can be seen having some difficulty controlling her body movements.

{¶6} Ohio State Patrol Trooper Timothy Myers, a drug recognition expert ("DRE"), was called in to observe Appellant. Myers testified that a DRE analysis is conducted by reviewing the standards within the National Highway Traffic Safety Administration ("NHTSA") manual. Myers' findings are outlined within a report that was admitted into evidence as state's exhibit F.

{¶7} According to the report, Appellant had been taking Suboxone for the last twelve years and took the medication around ten o'clock that morning. Appellant's body temperature was 95.8 degrees Fahrenheit. According to the NHTSA manual, one sign that a person has used a CNS stimulant is an elevated body temperature. Trooper Myers admitted that Appellant's low body temperature did not support a conclusion that she had taken a CNS stimulant. Trooper Myers testified that Appellant had a "lack of convergence." (Trial Tr., p. 175.) Trooper Myers conceded that Appellant's lack of convergence did not a support a finding that she had taken a CNS stimulant. Trooper Myers also testified that Appellant's muscle tone was flaccid, and a CNS stimulant typically results in rigid muscle tone. Trooper Myers conceded that this did not support a finding that Appellant used a CNS stimulant.

{¶8} In Trooper Myers' report he indicated that Appellant had an elevated pulse, consisting of three readings taken at different times and registering at 90, 100, and 90. However, as pointed out on cross-examination, a pulse reading of 90 is at the higher end of the normal range, which includes pulse readings of 60 to 90 beats per minute. (Trial Tr., p. 174.) Thus, two of Appellant's readings were within the normal range. The report also noted Appellant's elevated blood pressure, which was 120 over 90. On cross-examination of Trooper Myers, he admitted the 120 reading is normal, but the 90 reading was slightly above normal. Trooper Myers testified that he observed "heat bumps" in Appellant's oral cavity. He explained that these bumps are caused "from smoking an unfiltered item. Anything without a filter can cause these bumps on the back on your tongue." (Trial Tr., p. 152)

{¶9} The remaining factors relied on by Trooper Myers included: slightly dilated pupils, slow pupil reactions to light, anxiety, eyelid tremors, restlessness, and exaggerated reflexes. (State's Exh. F.) According to the report, Trooper Myers asked Appellant if she had used methamphetamine but she did not respond. He asked if she had "slipped up" because of the fight with her husband and she began to cry. He again asked her if she used methamphetamine and she responded that "nobody wants to use meth." (State's Exh. G.) Although she had informed Trooper Myers that she did not want to speak to him and "pleads the fifth," he continued to ask her questions, as demonstrated by his description of their conversation in his report. (State's Exh. G.)

{¶10} Based on his evaluation, Trooper Myers believed Appellant had taken methamphetamine. He testified that methamphetamine would be expected to show its effects on a user for up to twelve hours after use. He testified that the traffic stop occurred at 8:25 p.m. The state introduced and heavily relied on Appellant's comment that she had "slipped up" and taken something "not prescribed" the previous day.

{¶11} After a one-day trial, a jury convicted Appellant on the OVI charge. After the jury's verdict, the trial court separately convicted Appellant on the turn signal violation. The court sentenced Appellant to ninety days in jail, with eighty-four days suspended. The court imposed a one-year driver's license suspension and two years of probation. The court also imposed an $875 fine for the OVI and a $30 fine for the turn signal violation. The court granted Appellant's motion to stay the sentence in its entirety pending appeal. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

THE COURT COMMITS PREJUDICIAL ERROR BY DENYING A MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE STATE FAILS TO PROVE THE DEFENDANT IS UNDER THE INFLUENCE OF A SPECIFIC DRUG OF ABUSE AND FAILS TO PRESENT ANY EVIDENCE AS TO WHAT CONSTITUTES A DRUG OF ABUSE.

{¶12} Appellant argues that the state failed to present any evidence that she was impaired by any specific drug, an element of R.C. 4511.19(A)(1)(a), at the time of the traffic stop. Appellant urges that law enforcement did not obtain a chemical test to determine what substance, if any, was in her system and affecting her at the time. Although Appellant admits that she declined a urine test, she argues that the statute specifically authorizes law enforcement to obtain a search warrant for a blood test if the person being held refuses a urine sample.

{¶13} Appellant was convicted of a violation of R.C. 4511.19(A)(1)(a) which provides that "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply: (a) The person is under the influence of alcohol, a drug of abuse, or a combination of them." The issue, here, involves "drug of abuse." Drug of abuse is defined within R.C. 4506.01(M) as "any controlled substance, dangerous drug as defined in section 4729.01 of the Revised Code, or over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes." Pursuant to R.C. 3719.01(C), " 'Controlled substance' means a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V."

{¶14} The leading case on this issue is *State v. Collins,* 9th Dist. Wayne No. 11CA0027, 2012-Ohio-2236. In *Collins,* law enforcement responded to a call that a vehicle had slid off the roadway. *Id.* at ¶ 5. The officers suspected that the driver was impaired by a drug of abuse, but did not find any contraband in the vehicle or on her person. The officers took a blood sample from the driver, however, the results were lost and unavailable for purposes of trial. Although the officers' observations of the driver at the scene indicated impairment by drug abuse and she failed a field sobriety test, the officers were unable to specify which drug the driver had taken. *Id.* at ¶ 20.

{¶15} On appeal, the *Collins* court reversed the conviction based on insufficient evidence. While the court acknowledged that the officers testified at length as to the driver's condition and their observations, the court held that this was insufficient to establish that she was impaired, specifically, by a drug of abuse. Thus, the state failed to establish a nexus between the driver's condition and a drug of abuse. The court emphasized that no drugs were found in the vehicle or on the driver's person and she did not otherwise admit to drug use.

{¶16} One year later, the Eighth District addressed the issue of what evidence must be presented to demonstrate a nexus between a drug of abuse and impairment for purposes of R.C. 4511.19(A) in *City of Cleveland v. Turner,* 8th Dist. Cuyahoga No. 99183, 2013-Ohio-3145. In *Turner,* law enforcement responded to a vehicle blocking the middle of a road. The driver exhibited signs of impairment and could not perform a field sobriety test. The driver did not smell strongly of alcohol, leaving the officers to suspect drug use. He declined a urine sample and the officers did not attempt to obtain a blood sample.

{¶17} On appeal, the *Turner* court explained that, in the absence of testing or other physical evidence, courts are limited to circumstantial evidence. The court noted that "[w]hile R.C. 4511.19(A)(1)(a) does not require the State to prove specific blood concentration levels, it does require the State to do more than prove impairment in a vacuum." *Id.* at ¶ 13. Thus, it is not enough for the state to prove impairment, alone. The state must establish the cause of the impairment, which must constitute a drug of abuse. While the state did establish the driver's impaired state, the court held that the state failed to prove that the impairment was caused by a drug of abuse. *Id.* at ¶ 14. Again, the *Turner* court emphasized that no drugs were found on his person or inside the vehicle. The court conceded that the driver informed the officers that he had taken some medication, however, he did not specify what substance he took. Thus, it held that the state failed to establish a nexus between the impairment and a drug of abuse.

{¶18} The Fourth District more recently addressed the issue in *State v. Husted,* 2014-Ohio-4978, 23 N.E.3d 253 (4th Dist.). In *Husted*, officers were called to check on a person sitting inside a vehicle parked in the front of a gas station. The woman exhibited signs of impairment and, when she exited the vehicle, a small straw commonly used to snort drugs fell off her lap. She admitted that she did take a drug, but did not specify which drug. She declined both a field sobriety test and a urine test, and the officers did not submit the straw for residue testing.

{¶19} On appeal, the *Husted* court reversed the woman's conviction based on insufficient evidence. The court acknowledged that the straw found on her lap was typically associated with drug use, however, there was no evidence to show what drug had been ingested and whether that drug was a drug of abuse. *Id.* at ¶ 21. The court

addressed the officers' failure to obtain chemical testing by citing the following: "[t]o assist police in obtaining direct evidence of drug abuse, the legislature enacted R.C. 4511.191(A)(5)(a), which authorizes law enforcement to 'employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma.' " *Id.* at ¶ 15. While the court noted that law enforcement was not required to obtain a chemical test, it is a mechanism made available by the statute to prove an essential element of the crime. The court reiterated that it is not enough to prove impairment under this subsection. The state must present sufficient evidence that the defendant was impaired by a drug of abuse. The court cautioned that an acquittal is likely in the scenario where there is no chemical testing and no specific admission by the defendant. *Id.* at ¶ 30.

{¶20} The state argues that unlike the cases cited by Appellant, this matter involves an admission of drug use. The state relies on Appellant's statement that she had "slipped up" the day before and apparently taken something "not prescribed." She did not specify what she had taken and did not enlarge her statement beyond saying that whatever she took was not prescribed. Similarly, in *Turner* and *Husted*, there were vague admissions to use of an unspecified drug. Both courts held that, in order to satisfy the requirements of the statute, any alleged admission must refer to a specific drug of abuse. Here, Appellant never admitted to using a specific drug except for Suboxone, which does not qualify as a drug of abuse. At best, the state proved that Appellant took some substance she was "not prescribed" the day before the incident. This could refer to a methamphetamine, or it could refer to cold medicine. Without more, Appellant's "admission" is wholly speculative. Her statement does not constitute evidence that she

took a drug of abuse or was under the influence of a drug of abuse, thus is irrelevant for purposes of this statute.

{¶21} The officers "guessed" that Appellant's behavior and lack of body control was the result of methamphetamine use because she allegedly demonstrated behavior consistent with use of that drug. While Appellant did fail her field sobriety test, this fact was insufficient for conviction in each of the above cited cases, as there can be many causes behind certain behaviors. For this reason also, testimony that a defendant's behavior was consistent with use of a drug is also insufficient to support conviction under this statute. There is no evidence in this case that Appellant's behavior could only be caused by methamphetamine, despite evidence of clear impairment. And similar to the above cited cases, a search of Appellant's vehicle and person did not reveal any contraband.

{¶22} The state contends that Trooper Myers' examination report provides circumstantial evidence that Appellant was under the influence of methamphetamine. However, this finding is contradicted by the report itself and by Trooper Myers' own testimony. Trooper Myers testified that methamphetamine would be expected to show its effects for up to twelve hours after use. Specifically, the state asked Trooper Myers if methamphetamine could cause a person to show its effects for several days, and he answered, "[m]ethamphetamines can show effects for up to 12 hours. The initial effect is quick, but overall effects can last for 12 hours." (Trial Tr., p. 153.)

{¶23} Appellant said she had ingested something "not prescribed" the day before. Based on Trooper Myers' testimony, the effects of methamphetamine would not be expected to be apparent after twelve o'clock noon even if Appellant took the drug as late

as midnight. The traffic stop did not occur until 8:25 p.m., more than eight hours after noon. Based on Trooper Myers' own testimony, Appellant would not be expected to show the effects of methamphetamine that long after using the drug. Again, the issue is not simply whether Appellant used methamphetamine or some other drug of abuse. The issue is twofold: whether she used a drug of abuse, and whether the effects of that drug caused her to be impaired at the time of the traffic stop. Based on this testimony, the cause of Appellant's impaired state at the time of the stop is not consistent with the use of methamphetamine the day before.

{¶24} In addition, Trooper Myers conceded both in his report and in his testimony that Appellant showed signs that were completely inconsistent with use of a CNS stimulant such as methamphetamine, and did not support a conclusion that she was under the influence of a CNS stimulant. For instance, Trooper Myers testified that a CNS stimulant would be expected to raise a person's body temperature. Appellant's body temperature was only 95.8 degrees Fahrenheit. While the state claims, without evidence, that the thermometer used is less than accurate, it is the thermometer that Trooper Myers, a DRE expert, chose to use during his evaluation. The state cannot now use the allegation of inaccuracy against Appellant, who had no choice in which instrument was used. Trooper Myers also testified that Appellant exhibited a "lack of convergence" which also did not support a finding that she used a CNS stimulant. Trooper Myers conceded that Appellant's muscle tone was flaccid and CNS stimulants cause rigid muscle tone.

{¶25} While Trooper Myers characterized Appellant's pulse rate as high, which may indicate use of a CNS stimulant, her pulse readings were: 90, 100, and 90. Two of these readings are within the normal range. Trooper Myers relied on his interpretation

that Appellant had an elevated blood pressure, but it was 120 over 90. According to his own testimony, the 120 reading is normal, and the reading of 90 was only slightly above normal. The borderline nature of the pulse and blood pressure readings do not conclusively indicate the use of a CNS stimulant.

{¶26} While the state urges that obtaining warrants for chemical testing is cumbersome in terms of both time and expense, the state's interests cannot come at the expense of nullifying a defendant's well-established rights. It is clear that this statute and all relevant caselaw place the burden on law enforcement to obtain a chemical test. If not, they face a substantial burden to convict under this statute absent a clear admission to use of a specific drug of abuse or the existence of physical evidence showing a specific drug of abuse.

{¶27} Because law enforcement did not obtain a chemical test result, no contraband was found in the vehicle or on Appellant's person, Appellant did not admit to use of a specific drug (a drug of abuse), and no other evidence was presented to demonstrate her impairment was caused by a specific drug of abuse, Appellant's first assignment of error has merit and is sustained.

ASSIGNMENT OF ERROR NO. 2

> THE COURT COMMITTED PREJUDICIAL ERROR BY GIVING JURY INSTRUCTIONS ON ISSUES THAT WERE NOT SUPPORTED BY EVIDENCE IN THE RECORD AND BY ALLOWING THE JURY TO DECIDE AN ISSUE OF LAW.

{¶28} Appellant argues that without proof of what was in her system at the time of the traffic stop, there is no proof that whatever she ingested was a drug of abuse. Appellant argues that the trial court defined the term "drug of abuse" and then improperly let the jury determine if whatever substance she is alleged to have taken falls within that definition. While Appellant appears to concede that the court could have taken judicial notice as to what substance constitutes a drug of abuse, she argues that there is nothing within the record demonstrating that it did so.

{¶29} In response, the state appears to argue that R.C. 4511.19 addresses alcohol and drugs of abuse. The state explains that there was testimony that alcohol use was not suspected, making this an issue regarding a drug of abuse. Further, the state cites to testimony from both officers who testified that they suspected Appellant used methamphetamine. The state asserts that, statutorily, methamphetamine fits within the definition of a drug of abuse.

{¶30} Because we are vacating Appellant's conviction for the reason that the state presented insufficient evidence to support a conviction pursuant to this statute, this assignment of error is moot.

Conclusion

{¶31} Appellant argues that the state failed to present sufficient evidence to prove that she was impaired by a drug of abuse at the time of a traffic stop. In addition, she argues that the trial court erroneously instructed the jury on drug of abuse without evidence to show that methamphetamine is a drug of abuse. For the reasons provided, Appellant's arguments have merit and the judgment of the trial court is reversed and Appellant's conviction is vacated.

Donofrio, P.J., concurs.

D’Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first assignment of error is sustained and her second assignment is moot. It is the final judgment and order of this Court that the judgment of the Columbiana County Municipal Court of Columbiana County, Ohio, is reversed and Appellant's conviction is hereby vacated. Costs to be taxed against the Appellee.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.