

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 10AP-1005
v.	:	(M.C. No. 2010 TRC 148547)
	:	
Richard M. Hunter,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 26, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Orly Ahroni*, for appellee.

Yeura R. Venters, Public Defender, and *John W. Keeling*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Defendant-appellant, Richard M. Hunter, appeals from the judgment of the Franklin County Municipal Court convicting him of operating a vehicle with a prohibited level of alcohol in the breath ("OVI per se"), in violation of R.C. 4511.19(A)(1)(d).

{¶2} On June 28, 2010, appellant was pulled over by Ohio Highway Patrol Trooper Himes for driving with his vehicle's high beam lights activated in violation of R.C. 4513.15. Because appellant's eyes appeared glassy, Himes requested that appellant exit his vehicle. Appellant then informed Himes that he had a license to carry a concealed weapon and that the weapon was on his right side. Himes removed the weapon from appellant, and proceeded to conduct field sobriety tests. After failing three of the four field sobriety tests, appellant was arrested and charged with OVI impaired in violation of R.C. 4511.19(A)(1)(a). Appellant was transported to jail, and according to Himes, appellant's breath alcohol level was measured in excess of Ohio's legal limit resulting in appellant being charged with OVI per se.

{¶3} Also out of this incident, appellant was charged with failing to dim his headlights, a minor misdemeanor, in violation of R.C. 4513.15(A)(1), and improper handling of a firearm in a motor vehicle, a felony, in violation of R.C. 2923.16. The charge related to the firearm was based on the allegation of appellant having a loaded firearm in a motor vehicle while under the influence. The three misdemeanor charges were prosecuted in the municipal court, and according to the parties, the felony charge was prosecuted in the court of common pleas.

{¶4} Trial on the OVI charges commenced on October 7, 2010, and the jury heard testimony from Himes and appellant. At the conclusion of the evidence, the jury rendered guilty verdicts on the OVI impaired and the OVI per se charges. The sentencing entry filed on October 14, 2010 indicates plaintiff-appellee, state of Ohio, elected to have appellant sentenced on the OVI per se charge, and, therefore, the court dismissed the charge of OVI impaired. For the OVI per se conviction, appellant was sentenced to a

180-day term of incarceration with 150 days suspended and two days awarded as jail-time credit. Additionally, the trial court imposed a period of community control for one year and ordered appellant to pay \$500 plus court costs. The sentencing entry also reflects that the court found appellant guilty of the minor misdemeanor charge and that for this charge appellant was fined \$50.

{¶5} Appellant timely appealed, and brings the following two assignments of error for our review:

ASSIGNMENT OF ERROR NUMBER ONE

PLAIN ERROR WAS COMMITTED WHEN THE STATE WAS ALLOWED TO PRESENT EVIDENCE THAT THE DEFENDANT HAD COMMITTED A FELONY WEAPONS OFFENSE WHEN SUCH EVIDENCE WAS NOT RELEVANT OR PROBATIVE OF THE CHARGES AT BAR BUT WAS PRESENTED SOLELY FOR THE PURPOSE OF CREATING PREJUDICE AGAINST THE DEFENDANT.

ASSIGNMENT OF ERROR NUMBER TWO

THE TRIAL COURT ERRED WHEN IT IMPOSED A FINE OF FIFTY DOLLARS FOR THE FAILURE TO DIM HEADLIGHTS IN THE JUDGMENT ENTRY WHEN THE COURT DID NOT IMPOSE A FINE UPON THE DEFENDANT FOR THIS OFFENSE DURING THE SENTENCING HEARING.

{¶6} Appellant was charged with OVI, in violation of R.C. 4511.19, which provides, in relevant part:

(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:

(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.

* * *

(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.

{¶7} Appellant contends the state introduced evidence that he committed a felony weapons offense, which was irrelevant to the OVI charges upon which he was being tried. According to appellant, the only purpose for this prejudicial testimony was to portray appellant as a "bad or perhaps dangerous person" and to inflame the jurors so that appellee could secure a conviction. (Appellant's brief at 5.)

{¶8} First, appellant challenges Himes's testimony on direct examination that "[t]he defendant then had informed me that he's a concealed carry permit holder. That means he has a CCW permit and he had a weapon on his right side." (Tr. 160.) Himes also testified, "like I said, prior to this, he stated that he was a CCW permit holder. I then had to remove the defendant's weapon from him. I had unloaded it, placed it back in his vehicle." (Tr. 162.) Additionally, appellant challenges state's exhibit 4 which is the video taken from Himes's cruiser that depicts Himes removing the weapon from appellant's person.

{¶9} The above-challenged portions of the record were not objected to at trial, thus, appellant has waived all but plain error. *State v. Bartolomeo*, 10th Dist. No. 08AP-969, 2009-Ohio-3086, ¶15. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." However, "[p]lain error does not exist unless, 'but for the error, the outcome of the trial clearly would have been otherwise.'" *Bartolomeo* at ¶15, quoting *State v. Long* (1978), 53 Ohio St.2d 91, 97. Courts are to notice plain error under Crim.R. 52(B) "with

the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Schmidt*, 10th Dist. No. 08AP-348, 2009-Ohio-1548, ¶8, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68.

{¶10} In support of his position that admission of this evidence requires reversal of his conviction, appellant relies primarily on *State v. Parrish* (1991), 71 Ohio App.3d 659, and *Columbus v. Hamilton* (1992), 78 Ohio App.3d 653. In *Parrish*, the defendant was convicted of aggravated murder with death specifications and two counts of aggravated robbery. On appeal, the defendant argued the prosecution's line of questioning during his cross-examination was an attempt to elicit "other acts" testimony that was inadmissible, unfairly prejudicial, and grounds for reversal. Specifically, the prosecution elicited testimony from the defendant regarding the confiscation of eight firearms by the police from a home in which the defendant was renting a room. This court noted the elicited testimony was not relevant because the questioning concerned the defendant's alleged possession of firearms two months *after* the death of the victim, and, furthermore, that the testimony was prejudicial to the defendant because "the jury had proof that the appellant had lied concerning whether or not he had ever possessed a gun." Therefore, this court reversed the defendant's convictions and remanded the matter for a new trial.

{¶11} *Parrish* is inapplicable to the matter at hand for two reasons. First, "the time frame in *Parrish* was critical to the determination of the relevancy of the evidence." *State v. Evans*, 10th Dist. No. 01AP-594, 2001-Ohio-8860. Here, timing was not at issue because appellant was alleged to have been in possession of a weapon at the time of the commission of the OVI offenses. Additionally, in the matter before us, neither appellant nor Himes were asked any specific questions regarding whether or not appellant

possessed a weapon. Rather, Himes's testimony regarding the weapon was the result of his description of events as they unfolded from the time appellant was pulled over to when he was transported to jail following his arrest. Thus, *Parrish* is distinguishable from this matter and renders little support for appellant's position.

{¶12} *Hamilton* is distinguishable as well. In *Hamilton*, the defendant was convicted of assault and disorderly conduct. During opening statements the prosecutor stated, "and we have been trying to locate witnesses for the first assault, the first assault in time, which happened at Raintree Cinema. We have been unable to locate the witness and so we'll not be presenting evidence on this charge." The prosecutor made a similar comment during voir dire. This court concluded these comments constituted prosecutorial misconduct that was prejudicial given the "marginal evidence" that the defendant possessed the culpable mental state required for the convictions of the charged offenses.

{¶13} Here, the prosecution made no comments to the jury that appellant committed another offense other than the offenses of OVI and failure to dim headlights. Additionally, no evidence, testimony or commentary was introduced to the jury indicating that appellant was charged with improper handling of a firearm. Thus, we conclude *Hamilton* is inapplicable to the matter sub judice.

{¶14} As indicated infra, because there was no objection to the challenged evidence, we review this matter for plain error. We find no plain error because even assuming arguendo that the admission of the challenged evidence constituted error, we cannot conclude that but for such error the outcome of the trial clearly would have been otherwise. *Bartolomeo* at ¶15. See also *Hamilton* (recognizing that there can be no

prejudice where the remaining evidence of guilt is so overwhelming that the outcome of the case would have been the same regardless of evidence admitted erroneously).

{¶15} Himes testified that he initiated a traffic stop of appellant because appellant was driving with his high beam lights activated. Himes testified that he informed appellant why he had stopped his vehicle and that appellant responded, "I didn't realize that. Sorry about that." (Tr. 161.) Himes testified that appellant's eyes were glassy and that he detected a strong odor of alcohol on appellant's breath. According to Himes, appellant told Himes that he was coming from a bar and had consumed five to six alcoholic drinks. Appellant failed three out of the four field sobriety tests that were administered, i.e., the HGN test, walk-and-turn test, and one-leg stand test.

{¶16} Regarding the HGN test, Himes testified "jerking of the eyes, the lack of smooth pursuit, distinct and sustained nystagmus, maximum deviation and nystagmus prior to 45 degrees" are the clues for which test administrators look. (Tr. 165.) According to Himes, the maximum number of clues to be observed with the HGN test is "six, three in each eye," and that he observed six clues in appellant. (Tr. 166.) Himes testified he then performed the vertical gaze nystagmus test, which typically indicates a very high level of intoxication, but that he did not detect the presence of vertical gaze nystagmus in appellant.

{¶17} Himes described to the jury that he next administered the "nine step walk-and-turn test," that measures coordination and balance. (Tr. 168.) According to Himes, appellant demonstrated six of the eight clues that can be observed to indicate intoxication. The last test Himes administered was the one-leg stand test that according to Himes needs two clues to demonstrate alcohol impairment. Himes testified that during

the one-leg stand test appellant "swayed, he put his foot down several times and had very poor balance before [Himes] stopped the test." (Tr. 173.)

{¶18} Because in Himes's opinion the field sobriety tests indicated appellant had a high level of impairment due to alcohol, Himes arrested appellant for OVI. After being transported to the Franklin County jail, Himes testified that he read to appellant the Bureau of Motor Vehicles 2255 form, which explains the consequences of consenting or refusing to take a breath test. According to Himes, appellant agreed to provide a breath sample by breathing into the BAC DataMaster machine, which resulted in a finding that appellant had 0.150 grams of alcohol per 210 liters of breath. Ohio's legal limit is 0.08 grams of alcohol per 210 liters of breath.

{¶19} We conclude that appellee provided overwhelming evidence to support appellant's conviction for OVI per se. Thus, even assuming it was error to admit the evidence of appellant having a permit to carry a concealed weapon and possessing a weapon at the time of these offenses, we fail to find that but for the error the outcome of the appellant's trial would clearly have been otherwise. *State v. Crosky*, 10th Dist. No. 06AP-816, 2007-Ohio-6533 (no plain error in admission of hearsay testimony because no showing that the trial outcome would have been otherwise but for that error); *State v. Lipsey*, 10th Dist. No. 08AP-822, 2009-Ohio-3956 (improperly admitted hearsay testimony did not amount to plain error where the record contained "ample" evidence to support convictions); *State v. Brown*, 10th Dist. No. 05AP-962, 2006-Ohio-4594 (no plain error with improper admission of testimony where remaining evidence supported the conviction).

{¶20} Finding no plain error in the admission of the challenged evidence, we overrule appellant's first assignment of error.

{¶21} In his second assignment of error, appellant contends it was error for the trial court to impose a \$50 fine for the failure to dim headlights offense in the judgment entry when the trial court did not impose such a sanction during the sentencing hearing. Appellee concedes this error by the trial court.

{¶22} As this court has previously held, "a trial court errs when it issues a judgment entry that imposes a sentence that differs from the sentence the trial court announced at a sentencing hearing in the defendant's presence." *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶48, citing *State v. Aliane*, 10th Dist. No. 03AP-840, 2004-Ohio-3730, ¶8; *State v. Jones* (Mar. 18, 1999), 10th Dist. No. 98AP-639. Such error requires a remand for resentencing. *Id.*

{¶23} Accordingly, appellant's second assignment of error is sustained.

{¶24} For the foregoing reasons, appellant's first assignment of error is overruled, appellant's second assignment of error is sustained, and the judgment of the Franklin County Municipal Court is affirmed in part and reversed in part, and this matter is remanded to that court for resentencing.

*Judgment affirmed in part and reversed in part;
cause remanded for resentencing.*

KLATT and CONNOR, JJ., concur.
