[Cite as *State v. Urso*, 2010-Ohio-2151.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2010-T-0042
- vs -	:	
KEITH J. URSO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 2010 CR 00107.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *LuWayne Annos*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481-1092 (For Plaintiff-Appellee).

Michael A. Partlow, Morganstern, MacAdams & DeVito CO., L.P.A., 623 West St. Clair Avenue, Cleveland, OH 44113-1204 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Keith J. Urso, appeals the judgment of the Trumbull County Court of Common Pleas granting the state's motion to deny him pretrial bail, pursuant to R.C. 2937.222. At issue is whether the trial court erred in finding that no release conditions will reasonably assure the safety of any person and the community. For the reasons that follow, we affirm.

{¶2} Appellant was indicted for two counts of operating a motor vehicle under the influence of alcohol (OVI). In count one, he was charged with operating a motor

vehicle under the influence of alcohol having previously been convicted for a felony OVI, with a specification that he had previously been convicted of ten prior OVI offenses, and with a forfeiture specification, in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(e) and 2941.1413, 2941.1417(A) and 2981.02(A)(2)(3)(a), a felony of the third degree. In count two, he was charged with operating a motor vehicle with a blood-alcohol concentration of .286, having previously been convicted for a felony OVI, with a specification that he had previously been convicted of ten prior OVI offenses, and with a forfeiture specification, in violation of R.C. 4511.19(A)(1)(h) and (G)(1)(e) and 2941.1413 and 2941.1417(A) and 2981.02(A)(2)(3)(a), a felony of the third degree. Appellant pled not guilty at his arraignment in the Trumbull County Central District Court, and posted a bond in the amount of $20,000.

{¶3} After appellant was indicted, the state filed a motion to deny bail, pursuant to Article I, Section 9 of the Ohio Constitution and R.C. 2937.222. The trial court withheld bond pursuant to the state's motion. The court subsequently held a hearing on the motion.

{¶4} Gary Hetzel, investigator with the Trumbull County Prosecutor's Office, a 25-year veteran Ohio State Highway Patrol trooper, and a certified LEADS operator, testified regarding the instant case and appellant's criminal history. Mr. Hetzel was the only witness who testified and his testimony was, therefore, undisputed. Appellant stipulated that the records on which Mr. Hetzel based his testimony, and which were included in State's Exhibit 1, a 400-page notebook, are correct, and that appellant has not had a valid driver's license since 1979. In that year, appellant was convicted for OVI

in the Newton Falls Municipal Court, as a result of which his license was suspended. It has never been reinstated.

{¶5} Mr. Hetzel testified that when he was with the Ohio State Highway Patrol, he was involved in appellant's arrest on October 2, 1982 for a traffic fatality. On that date at about 11:30 p.m., after a baseball tournament, several people were on a hay ride. The hay wagon was being pulled by a tractor on State Route 88 eastbound toward the traffic light on State Route 45. A series of three vehicles approached the hay wagon from the rear. A passenger on the haywagon used a light to wave approaching traffic around the wagon. The first two vehicles went around the hay wagon without incident, but the third car, which was driven by appellant, whose license was still suspended, never even slowed down. Appellant plowed into the rear of the hay wagon and demolished it. Several passengers were thrown off the wagon and into the road. One of these was a young girl, Nadine Foster, who was killed in that crash. So many people were hurt that ambulances from all over Trumbull County were called to take them to nearby hospitals.

{¶6} When approached by the police, appellant had a strong odor of alcohol emanating from his person. He had a blood-alcohol concentration in excess of the legal limit and he also had marihuana in his system. On April 21, 1983, appellant was found guilty of vehicular homicide and sentenced to six months in jail. He was released after ten days.

{¶7} In August 1983, just four months after he killed Ms. Foster, appellant was charged with OVI in the Warren Municipal Court. His breathalyzer test result was .24. In November 1983, he was charged with OVI in the Warren Municipal Court. On April

19, 1984, he was found guilty of both of these offenses, and sentenced to 58 days in jail for the August case and 88 days for the November case, the terms to be served consecutively. The court suspended appellant's driver's license for 180 days. After four months in jail, on August 23, 1984, the court suspended the balance of the jail sentence and released appellant.

{¶8} In June 1985, appellant was charged with OVI in the Ashtabula Eastern County Court. He was subsequently found guilty of the charge and sentenced to two days in the county jail. His license was suspended for three years.

{¶9} In June 1989, he was charged and convicted of OVI in the Warren Municipal court. He refused to submit to a breathalyzer test. During the course of the proceedings, three capiases were issued for him. He was sentenced to one year in the county jail, but was released early.

{¶10} In February 1990, appellant was charged and convicted of OVI in the Warren Municipal Court. At the time of his arrest, his breathalyzer test result was .37. A capias was issued for him. He was found guilty and sentenced to one year in jail, but released early. His driving privileges were suspended for two years.

{¶11} In December 1990, appellant was charged and convicted of OVI in the Newton Falls Municipal Court. He was sentenced to nine months in the county jail, which was to be served concurrently with the February 1990 case.

{¶12} In March 1996, appellant was charged and convicted of OVI in the Newton Falls Municipal Court. Appellant's intoxication resulted in a car crash. He was sentenced to 180 days in jail, and his license was suspended for two years.

{¶13} In October 1996, appellant was charged and convicted of OVI in the Warren Municipal Court. On arrest he refused to submit to a breathalyzer test. A capias was issued for him. He was found guilty and sentenced to 30 days in jail. His driver's license was suspended for five years.

{¶14} In August 1997, appellant was charged and convicted of OVI in the Newton Falls Municipal Court. He was sentenced to eight months in the county jail to be served concurrently with the October 1996 case in the Warren Municipal Court.

{¶15} Mr. Hetzel testified concerning appellant's acts of domestic violence committed against women, which, he testified, involved his abuse of alcohol and drugs. Referring to court records of appellant's conviction included in Exhibit 1, Mr. Hetzel testified that in August 1998, appellant was arrested for domestic violence against his then live-in girlfriend Denise Thorne. He posted bond, but failed to appear in court. As a result, a capias was issued on which he was arrested in April 1999. He was subsequently found guilty of domestic violence and sentenced to 30 days in jail.

{¶16} In May 1999, appellant was charged with felony domestic violence against Ms. Thorne in the Warren Municipal Court. Appellant had been drinking alcohol when he assaulted her. This time he broke Ms. Thorne's wrist and ankle. The case was bound over to the Trumbull County Common Pleas Court. A capias was issued for appellant. Appellant was found guilty and sentenced to three years community control.

{¶17} When appellant was arrested in the instant case on January 31, 2010, there was an outstanding warrant for his arrest due to a $23,000 arrearage in child support.

{¶18} In May 1999, appellant was charged and convicted for a violation of the assured clear distance statute and leaving the scene of an accident in the Warren Municipal Court. He was sentenced to two months in the county jail.

{¶19} In October 2000, appellant was charged and convicted of OVI in the Newton Falls Municipal Court. Once again, appellant's intoxication resulted in a car crash. He was sentenced to two months in the county jail and put on probation. In November 2001, he was sentenced for a probation violation to 13 months in the county jail.

{¶20} In February 2003, appellant was charged and convicted of OVI in the Newton Falls Municipal Court. Again, his intoxication resulted in a car crash. He was sentenced to 30 days in jail. His license was suspended for five years.

{¶21} In March 2003, appellant was charged and convicted of OVI in the Warren Municipal Court. This case, likewise, involved a car crash. He was sentenced to 18 months in the county jail, to be served concurrently with the sentence imposed in the February 2003 case in the Newton Falls Municipal Court, but released early.

{¶22} In October 2003, appellant was charged and convicted of OVI and failure to control in the Warren Municipal Court. Appellant failed to appear for his arraignment and the court issued a capias for him. He was subsequently found guilty of both offenses and sentenced to six months in jail on both counts, the terms to be served consecutively. The court also suspended appellant's driver's license for five years.

{¶23} In May 2006, appellant was speeding on State Route 88 near Bristol Township at 78 miles per hour. The trooper saw appellant throw beer cans out the window of his car and stopped him. Appellant refused to submit to field sobriety tests.

He admitted to the trooper that he did not have a valid driver's license. The trooper smelled a strong odor of alcohol on appellant's breath. The trooper arrested appellant for OVI and operating a vehicle without a valid driver's license. He took appellant to the highway patrol post to administer a breathalyzer test, but appellant refused to submit to it. State's Exhibit 1 included a DVD of appellant's arrest by the trooper. Appellant was sentenced to one year in prison. His driver's license was suspended for ten years. As part of his sentence, the court ordered appellant to attend an alcohol and drug addiction program, but he failed to do so.

{¶24} In the instant matter, on January 31, 2010, appellant drove his live-in girlfriend Karen Cross' vehicle at about 1:00 in the afternoon. Ms. Cross later told police that she knew appellant did not have a valid driver's license, and she had told him that he was not permitted to drive her car. However, when she left the house to run some errands that day, he took her spare set of keys without her permission and drove away in her car. Thus, although appellant had just been released from prison in 2007 and his driver's license was once again suspended, he drove Ms. Cross' car without her permission and while he was drunk. Ms. Cross' statement to the police was included in State's Exhibit 1.

{¶25} Appellant was seen driving erratically northbound on Bazetta Road about one-half mile south of Route 88 by Jack Beil, who was driving behind him. Mr. Beil was so concerned about appellant's erratic driving, he called 911 and said there was a driver in front of him on Bazetta Road, who must be drunk because he was driving "all over both sides of the road." At one point Mr. Beil told the 911 operator that the driver went so far off the road, he could not believe he got back on the road. Mr. Beil said there

were cars driving on the opposite side of the road, and he hoped the driver was "not going to hit them head-on." Mr. Beil said the driver of the car had long hair so he thought the driver was a woman. Appellant stopped at a stop sign at the intersection of Bazetta Road and Route 88 near Monty's restaurant. Appellant continued on Route 88 and turned into Monty's parking lot and stayed in the car. Mr. Beil told the 911 operator he was going to stay at the stop sign northbound on Bazetta Road at Route 88 and see if the driver stayed in the car. Mr. Beil said, "She, whatever it is [whether it was a man or woman] was sitting there with her head back sleeping, clunked out. So, I'll just sit here at Monty's and see *** when [the sheriff's deputies] come." In describing the driver of the car, Mr. Beil said, "I thought for sure, whoever it is, I don't know if it is a guy or lady, *** was going to have [a] head-on right up the road." The state included a transcript of the tape recording of Mr. Beil's call in State's Exhibit 1. Photographs of appellant included in State's Exhibit 1 show he has long hair.

{¶26} The responding officer approached appellant and found him sitting in the driver's seat with the car running and with an open container of beer next to him. The officer reported appellant was highly intoxicated. The officer detected a strong odor of an alcoholic beverage coming from his person. His speech was slurred and he had difficulty maintaining his balance. When the officer asked appellant to exit the vehicle, he stood up and fell forward. Due to appellant's inability to stand and the extent of his intoxication, no field sobriety tests were administered. After the officer arrested appellant for OVI, the officer located one open can of beer in the front passenger seat that was half empty. He also located several empty cans of beer throughout the car. A sheriff's deputy took appellant to the Sheriff's Office for a breathalyzer test. Appellant

submitted to the test and the result was .286, more than three times the legal limit. The state included the police report regarding appellant's arrest and photographs of the interior of the car and the beer cans in State's Exhibit 1.

{¶27} Based on the foregoing, to date appellant has been convicted of OVI fourteen times. The instant case represents his fifteenth OVI case. The present case is appellant's third felony case and his second OVI felony case. Based on records provided by the Ohio Attorney General, between 1979 and 2006, appellant has had his license suspended 29 times, and he has been convicted of 31 moving violations. Despite these license suspensions, appellant has continued to drive vehicles and to do so while intoxicated for thirty years.

{¶28} In granting the state's motion to deny bail, the trial court noted appellant's long history of OVI offenses; the high result of appellant's breathalyzer test; the eyewitness testimony concerning appellant's reckless driving on January 31, 2010; appellant's history of repeatedly driving vehicles while under suspension; and the fact that appellant took the vehicle in the instant matter and drove it without permission of its owner. The court further found that appellant's reckless operation of this vehicle while intoxicated is a danger to the citizens of the community. The court found that the proof is evident or the presumption great that appellant committed the offenses charged; that appellant poses a substantial risk of serious physical harm to any person or the community; and that no release conditions will reasonably assure the safety of any person and the community. The court's order is a final appealable order under R.C. 2937.222(D)(1), and this appeal is being considered on an expedited basis pursuant to R.C. 2937.222(D)(1) (a)-(d).

{¶29} Appellant appeals the trial court's judgment, asserting two assignments of error. For his first assigned error, appellant contends:

{¶30} "The trial court abused its discretion by granting appellee's motion to deny bail."

{¶31} Appellant states that the issue presented under this assigned error is whether the trial court abused its discretion in granting the state's motion to deny him bail where, he argues, the state failed to prove, by clear and convincing evidence, that no release conditions will reasonably assure the safety of any person and the community.

{¶32} A criminal defendant's right to bail during the pendency of a criminal proceeding is governed by Section 9, Article I of the Ohio Constitution. In January 1998, this provision was amended to provide, in pertinent part, as follows:

{¶33} "All persons shall be bailable by sufficient sureties,*** except for a person who is charged with a felony where the proof is evident or the presumption great and where the person poses a substantial risk of serious physical harm to any person or to the community. ***

{¶34} "The General Assembly shall fix by law standards to determine whether a person who is charged with a felony where the proof is evident or the presumption great poses a substantial risk of serious physical harm to any person or to the community."

{¶35} Pursuant to the express authorization set forth in the latter part of the foregoing provision, the Ohio General Assembly passed R.C. 2937.222 in 1999. That section provides in pertinent part:

{¶36} "(A) On the motion of the prosecuting attorney or on the judge's own motion, the judge shall hold a hearing to determine whether an accused person charged with aggravated murder when it is not a capital offense, murder, a felony of the first or second degree, a violation of section 2903.06 of the Revised Code, a violation of section 2903.211 of the Revised Code that is a felony, or a felony OVI offense shall be denied bail. The judge shall order that the accused be detained until the conclusion of the hearing. ***.

{¶37} "At the hearing, the accused has the right to be represented by counsel and, if the accused is indigent, to have counsel appointed. The judge shall afford the accused an opportunity to testify, to present witnesses and other information, and to cross-examine witnesses who appear at the hearing. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. Regardless of whether the hearing is being held on the motion of the prosecuting attorney or on the court's own motion, the state has the burden of proving that the proof is evident or the presumption great that the accused committed the offense with which the accused is charged, of proving that the accused poses a substantial risk of serious physical harm to any person or to the community, and of proving that no release conditions will reasonably assure the safety of that person and the community.

{¶38} "***

{¶39} "(B) No accused person shall be denied bail pursuant to this section unless the judge finds by clear and convincing evidence that the proof is evident or the presumption great that the accused committed the offense described in division (A) of

this section with which the accused is charged, finds by clear and convincing evidence that the accused poses a substantial risk of serious physical harm to any person or to the community, and finds by clear and convincing evidence that no release conditions will reasonably assure the safety of that person and the community."

{¶40} This court has held that the standard of clear and convincing evidence is "that measure of proof which is more than a preponderance of the evidence but less than the extent of such certainty as is required beyond a reasonable doubt in criminal cases, and which would provide in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established." *State v. Anderson*, 11th Dist. No. 2000-G-2316, 2001-Ohio-7069, 2001 Ohio App. LEXIS 5644, *8.

{¶41} First, we consider the appropriate standard of appellate review of a trial court's denial of bail. Appellant argues the abuse of discretion standard applies in ruling on a motion to deny bail. In support he cites, inter alia, *Hardy v. McFaul*, 8th Dist. No. 84495, 2004-Ohio-2694. However, *Hardy* did not address the denial of bail under R.C. 2937.222. Instead, it addressed whether the amount of the bond set was reasonable. The Eighth District held: "In a habeas corpus action to contest the reasonableness of bond, this court must determine whether the trial court abused its discretion." Id. at ¶5. As a result, appellant's reliance on *Hardy* and similar cases is misplaced. The state cites *State v. Foster*, 10th Dist. No. 08AP-523, 2008-Ohio-3525 for the proposition that the abuse of discretion standard applies in reviewing an order denying pretrial bail. Id. at ¶6. In arriving at its conclusion, the Tenth District relied solely on dicta to such effect in *Smith v. Leis*, 106 Ohio St.3d 309, 323, 2005-Ohio-5125. However, the Tenth District did not offer any analysis for its conclusion, which we view to be incorrect. As a side

note, we observe that if we were to adopt the standard urged by appellant, our review would be limited to a determination of whether the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶42} Since no Ohio Appellate District has analyzed the issue, we consider the standard of review employed by federal circuit courts in considering decisions of district courts regarding pretrial detention pursuant to the Bail Reform Act of 1984, at 18 U.S.C.S. Sec. 3145. In *United States v. Hazime* (C.A. 6, 1985), 762 F.2d 34, the Sixth Circuit held:

{¶43} "*** Regardless of the wisdom of independent determination by this court of release applications after conviction, we are not convinced that such a de novo standard of review is appropriate in appeals from pretrial detention orders which are issued on the basis of hearings specifically authorized by section 3142(f). This court does not conduct evidentiary hearings and hear witnesses, and we will not disturb the factual findings of the District Court and magistrate in pretrial detention hearings unless we determine those findings to be clearly erroneous. Our standard in reviewing mixed questions of law and fact and the legal conclusions of the District Court, however, remains that of de novo consideration." (Emphasis removed.) Id. at 37.

{¶44} Further, in *United States v. Maull* (C.A. 8, 1985), 773 F.2d 1479, the Eighth Circuit held:

{¶45} "*** We believe that in review under section 3145 the clearly erroneous standard should be applied to factual findings made by the district court. Many of the issues in such cases will involve issues of credibility best determined by the trier of fact.

However, conclusions and reasoning relating to the ultimate questions flowing from such factual considerations -- issues such as the reasonable likelihood of success on appeal *** -- should be the subject of independent review. *** As further illustration of the distinction, we observe that the factors of section 3142(g)(3) and (4) relating to the individual characteristics of the defendant and the nature and seriousness of the danger to any person or the community that would be posed by the person's release involve primarily factual issues. On the other hand, the factors of section 3142(g) (1) and (2) involving the nature and circumstances of the offense and the weight of the evidence against the person *** particularly involve legal or judgmental assessments which are based on factual findings. We need not draw the issue more finely here as our study of a district court's order in any particular case should adequately reveal what are findings of fact that must be reviewed under the clearly erroneous rule and what are conclusions of law or articulations of reasoning that must be independently reviewed." (Citation omitted.) Id. at 1487-1488.

{¶46} We note that this federal standard is roughly equivalent to the standard of review followed by Ohio Appellate Districts in ruling on trial court decisions granting or denying pretrial motions to suppress. Appellate review of such rulings presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 154, 2003-Ohio-5372. During a hearing on a motion to suppress evidence, the trial judge acts as the trier of fact and, as such, is in the best position to resolve factual questions and assess the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. An appellate court reviewing a motion to suppress is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. *State v. Guysinger* (1993),

86 Ohio App.3d 592, 594. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo. *State v. Djisheff*, 11th Dist. No. 2005-T-0001, 2006-Ohio-6201, at ¶19.

{¶47} We therefore reject appellant's contention that, in reviewing a trial court's ruling on a motion to deny bail, we are to follow the abuse of discretion standard. Instead, we hold that in reviewing factual determinations of the trial court, an appellate court reviewing a motion to deny bail is bound to accept the trial court's findings of fact where they are supported by competent, credible evidence. Accepting these facts as true, the appellate court independently reviews the trial court's legal determinations de novo.

{¶48} First, appellant argues the state failed to present any evidence that he might fail to appear at future proceedings. However, R.C. 2937.222 does not require such proof. In order to justify denial of pretrial bail, the state must prove: (1) that the proof is evident or the presumption great that the defendant committed the crimes charged; (2) that the defendant poses a substantial risk of serious physical harm to any person or to the community; and (3) that no release conditions will reasonably assure the safety of that person or the community. In any event, while R.C. 2937.222 does not require the state to present evidence that the defendant might not appear at future proceedings, we note the state did present such evidence. Capiases had to be issued for appellant in both of his domestic violence cases and in several of his OVI cases due to his failure to appear.

{¶49} Appellant argues that the trial court erred in finding that no conditions of release would protect the public because the state presented no such evidence. We do

not agree. First, the state presented evidence that appellant has had his driver's license suspended 29 times since it was originally suspended in 1979. It has never been reinstated. Yet, he has repeatedly flaunted the law by driving vehicles without a valid driver's license. Second, appellant has been convicted 14 times for OVI, thus repeatedly exposing the public to the substantial risk of serious physical injury, including death. Third, appellant's drunk driving resulted in five car crashes, one of which resulted in the death of Nadine Foster. In the instant case, he was seen by Mr. Beil driving all over both sides of the road. Mr. Beil was afraid appellant was going to hit drivers on the other side of the road head-on. Fourth, in connection with three of his OVI cases, appellant refused to submit to breathalyzer tests. On one occasion, his breathalyzer test result was .24; on another, it was .37; and, in connection with his arrest on January 31, 2010, his test result was .286. Fifth, in appellant's OVI cases, he has typically been found to be driving vehicles belonging to others. In connection with the instant case, appellant was driving a vehicle owned by his girlfriend Karen Cross. He took the keys to her vehicle and drove it without permission while he was drunk. Ms. Cross told police that she keeps a second set of car keys in the couple's house so appellant has access to them at all times.

{¶50} Thus, contrary to appellant's argument that the state failed to present any evidence that there were no conditions that would reasonably assure the safety of any person and the community, we find the state presented overwhelming evidence on this issue. Despite appellant's 29 driver's license suspensions, 14 OVI convictions, and 31 moving violations, appellant continues to travel on the roads of this county, subjecting its citizens to the very real risk of serious physical harm and death. That he has not

killed anyone other than Nadine Foster is nothing short of a miracle. The trial court was obviously convinced that nothing can stop appellant from drunk driving other than incarceration.

{¶51} In view of the forgoing, we hold the trial court did not err in finding that there are no release conditions that will reasonably assure the safety of any person and the community.

{¶52} For his second assignment of error, appellant alleges:

{¶53} "The trial court abused its discretion by denying bail to appellant."

{¶54} Appellant argues the trial court abused its discretion in granting the state's motion to deny bail because the court failed to consider the factors outlined in R.C. 2937.222(C). We do not agree. This section provides in pertinent part:

{¶55} "The judge, in determining whether the accused person described in division (A) of this section poses a substantial risk of serious physical harm to any person or to the community and whether there are conditions of release that will reasonably assure the safety of that person and the community, shall consider all available information regarding all of the following:

{¶56} "(1) The nature and circumstances of the offense charged, including whether the offense is an offense of violence or involves alcohol or a drug of abuse;

{¶57} "(2) The weight of the evidence against the accused;

{¶58} "(3) The history and characteristics of the accused, including, but not limited to, both of the following:

{¶59} “(a) The character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, and criminal history of the accused;

{¶60} “(b) Whether, at the time of the current alleged offense or at the time of the arrest of the accused, the accused was on probation, parole, post-release control, or other release pending trial, sentencing, appeal, or completion of sentence for the commission of an offense under the laws of this state, another state, or the United States or under a municipal ordinance.

{¶61} “(4) The nature and seriousness of the danger to any person or the community that would be posed by the person’s release.”

{¶62} Contrary to appellant’s argument, the state presented evidence addressing every factor in R.C.2937.222. While we agree with appellant that the trial court should have made findings regarding all of the listed factors, because the court stated in its judgment that it considered the evidence in making its ruling; because the record evidence addresses each factor; and because our review of the court’s legal determinations is de novo, we shall determine whether the evidence would have supported findings on each of these factors.

{¶63} First, appellant does not dispute that the state presented information concerning “[t]he nature and circumstances of the offense charged, including whether the offense *** involves alcohol” under (C)(1). Further, he does not dispute that the state presented evidence under (C)(4), i.e., “the nature and seriousness of the danger to any person or the community that would be posed by the person’s release.”

{¶64} Appellant confines his argument to some of the factors under (C)(3), arguing the state failed to present evidence concerning appellant's physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties or whether at the time of the instant offense, appellant was on probation, parole, post-release control or other release pending trial, sentencing, appeal, or completion of sentence for the commission of another offense at the time of his arrest in the present case.

{¶65} However, with respect to appellant's physical and mental condition, the record reveals that, for the last 30 years, appellant has repeatedly been charged and convicted with OVI. At the hearing on the state's motion to deny bail, appellant's trial counsel advised the trial court that appellant has a problem with drugs and a more serious problem with alcohol. When he was arrested for killing Nadine Foster, appellant had alcohol and marihuana in his system. As part of his sentence for his 2006 OVI conviction, the court ordered him to attend an alcohol and drug addiction program, but he failed to do so. With respect to the instant case, appellant's girlfriend Karen Cross said she went out with appellant the night before and he was drinking heavily. This evidence would support the finding that for 30 years appellant has abused alcohol and drugs.

{¶66} With respect to appellant's family and community ties, Exhibit 1 contains a statement from Ms. Cross with respect to the instant case in which she states she has been appellant's live-in girlfriend for three years. They currently reside at 198 Vermont St. in Warren. Ms. Cross also stated that appellant has a sister and niece who live in nearby West Farmington and with whom he spends time. Exhibit 1 contains records

showing that as of January 31, 2010, appellant was delinquent in his child support obligation so he obviously has at least one minor child. Such evidence would support the finding that appellant has family ties in the community.

{¶67} With regard to appellant's employment and financial resources, we note that appellant was appointed a public defender to represent him. Such evidence supports the finding that appellant is indigent. Further, in her interview with police taken in connection with the instant case, Ms. Cross told Detective Yannucci that appellant was not currently employed. The evidence would, therefore, support such finding.

{¶68} With respect to the length of time appellant has resided in the community, traffic citations issued to appellant from as early as 1983 to date show that appellant has consistently resided in West Farmington or in Warren. This evidence would support a finding that appellant has resided in Trumbull County for some 30 years.

{¶69} With respect to whether appellant was on probation, parole or other release pending trial in another case at the time of his arrest in this case, the evidence shows that he was in prison for one year for his 2006 OVI conviction and that he was released in 2007. The state concedes on appeal that appellant was not on any such form of release when he was arrested in the instant case. The evidence would thus support a finding that at the time of his current arrest, appellant was not on any form of release in another case.

{¶70} In addressing the factor concerning the weight of the evidence at (C)(2), appellant argues the state's evidence of appellant's guilt was "weak." However, as noted above, we find the evidence was not weak, but rather was overwhelming. It is important to note that appellant did not testify at the hearing, nor did he present any

witnesses or evidence in his behalf. As a result, the state's evidence at this preliminary stage was undisputed.

{¶71} Appellant argues that, because the car he was driving when arrested for the instant offense was not his, this somehow militates against the strength of the evidence against him. However, it makes no difference whatsoever that the car he was driving on January 31, 2010 belonged to his girlfriend and not to him. Ms. Cross told police that, despite the fact she told him he could not drive her car because his license was suspended, he took her spare set of keys and drove her car without her permission.

{¶72} Further, contrary to appellant's argument, appellant was not only seen driving, but seen in the car after he was unconscious and not operating the vehicle. In fact, Mr. Beil reported to 911 that, moments before appellant drove into the parking lot, he had seen appellant driving the vehicle all over the road. Mr. Beil saw appellant drive into Monty's restaurant and park in the parking lot. He then saw appellant was sitting there with his "head back sleeping, clunked out."

{¶73} Appellant's argument that Mr. Beil said the driver was a woman is, to put it euphemistically, a mischaracterization of the evidence. While speaking to the 911 operator, Mr. Beil said that because the driver had long hair, he thought the driver was a woman, but he was not sure if the driver was a man or a woman. He said, "I thought for sure, whoever it is, *I don't know if it is a guy or lady*, *** was going to have [a] head-on right up the road." (Emphasis added.) Finally, photographs of appellant admitted at the hearing show that he has long hair.

{¶74} Next, appellant argues that because a pick-up truck next to him was leaving, Mr. Beil momentarily lost sight of him, suggesting that, perhaps someone else took appellant's place behind the wheel. However, Mr. Beil testified that as soon as the pick-up truck moved, he saw the driver was "still sitting in the car." Mr. Beil told the 911 operator that he was watching to see if the driver gets out of his car. Mr. Beil said the driver "didn't get out." Instead, appellant put his head back and fell asleep in his car. Thus, there was evidence in the record from which the trial court could infer that the person found by police drunk behind the wheel was the same person Mr. Beil had seen driving all over the road.

{¶75} Next, appellant argues that when the police found him sleeping in his car, there was no way they could know whether appellant had just come out of the restaurant and passed out in a car that someone else had driven. Without a witness, this might have been true. However, unfortunately for appellant, there was a witness who saw and contemporaneously reported to 911 appellant's actions.

{¶76} We therefore hold the trial court did not err by failing to consider the R.C. 2937.222(C) factors.

{¶77} For the reasons stated in the Opinion of this court, the assignments of error are without merit. It is the judgment and order of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.