[Cite as *State v. Bennett*, 2009-Ohio-4898.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MARK BENNETT Defendant-Appellant	JUDGES: Hon. W. Scott Gwin, P.J. Hon. William B. Hoffman, J. Hon. Julie A. Edwards, J. Case No. 09-CA-35 <u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Licking County Municipal Court, Case No. 08TRC02679

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 16, 2009

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
AMY S. WEEKS Assistant Law Director 40 West Main Street, 4th Floor Newark, Ohio 43055	DAVID B. STOKES 21 W. Church St., Suite 206 Newark, Ohio 43055

Hoffman, J.

{¶1} Defendant-appellant Mark J. Bennett appeals his conviction and sentence entered by the Licking County Municipal Court on the charge of OVI. Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} On April 7, 2008, Ohio State Highway Patrol Trooper Bowman observed Appellant operating his motorcycle while at a gas station. Trooper Bowman witnessed Appellant having problems getting the motorcycle into gear, and noticed Appellant was unsteady on the bike, almost losing control when dismounting.

{¶3} Prior to initiating a stop, Appellant ran the motorcycle registration through LEADS, and dispatch informed him the owner of the motorcycle had a suspended license[1]. Trooper Bowman then approached Appellant who appeared lethargic and non-coherent. Trooper Bowman noticed a moderate odor of alcohol on Appellant's person, in addition to bloodshot, glassy eyes, and slurred speech.

{¶4} Prior to Trooper Bowman's administration of field sobriety tests, Appellant admitted to consuming alcohol; specifically, a few beers. Following the field sobriety tests, Appellant was arrested and charged with operating a vehicle while under the influence of alcohol ("OVI"). Appellant refused to submit to a breath test.

{¶5} Subsequent to the arrest, the police cruiser videotape of the incident was inadvertently taped over or lost.

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[1] The owner of the motorcycle was later determined to be Appellant's son by the same name.

{¶6} On September 3, 2008, the matter proceeded to a bench trial. The trial court convicted Appellant on the charge of OVI, and sentenced Appellant accordingly. The trial court's August 3, 2008 Judgment Entry found Appellant guilty of OVI. This Court remanded the case to the trial court on February 4, 2009 for failure to comply with Ohio Criminal Rule 32. The trial court resentenced Appellant on February 28, 2009. On March 6, 2009, this Court again remanded the case for resentencing. On March 24, 2009, the trial court resentenced Appellant.

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

{¶8} "I. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S PRE-PLEA MOTION TO DISMISS.

{¶9} "II. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S APPEAL OF THE ALS.

{¶10} "III. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S RULE 29(A) MOTION.

{¶11} "IV. THE TRIAL COURT ERRED IN FINDING APPELLANT GUILTY OF OVI, R.C. 4511.19(A)(1)(a).

{¶12} "V. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO SUPPRESS AND/OR DISMISS.

{¶13} "VI. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO DISMISS DUE TO THE UNAVAILABILITY OF THE TROOPER'S IN-CAR CAMERA VIDEO.

{¶14} "VII. THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION TO DISMISS FILED MARCH 24, 2009."

I.

{¶15} In his first assignment of error, Appellant maintains the trial court erred in denying his motion to dismiss due to noncompliance with local rules. Specifically, Appellant argues the Licking County Municipal Court Ticket Schedule for 2008 provides an OVI ticket issued on Monday, April 7, 2008 must be filed on Tuesday, April 8, 2008. In the case sub judice, the OVI citation was issued on Monday, April 7, 2008, and the ticket was not filed until Wednesday, April 9, 2008.

{¶16} At his April 9, 2008 arraignment, Appellant made an oral motion to the trial court to dismiss the citation based upon a violation of the ticket schedule. The trial court took the matter under advisement and instructed Appellant's counsel to file a brief on the issue. Counsel did not file a brief, and the issue was not pursued further. Assuming arguendo Appellant has not waived the issue by failing to file a brief with the trial court as instructed, Appellant has failed to demonstrate prejudice as a result of the State's alleged violation of the ticket schedule. Therefore, we find any alleged error to be harmless error.

{¶17} The first assignment of error is overruled.

II.

{¶18} In the second assignment of error Appellant argues the trial court erred in denying his appeal of the administrative license suspension.

{¶19} At the April 9, 2008 arraignment, Appellant made an oral motion to the trial court challenging his Administrative License Suspension ("ALS") based on Trooper Bowman's lack of reasonable grounds to arrest. The trial court denied the oral motion, and instructed Appellant's counsel to file a brief on the issue with the court. Appellant's

counsel again failed to file a brief on the issue, and did not renew the motion in various pretrial motions made to the trial court.

{¶20} O.R.C. 4511.197 provides Appellant must file an appeal of the ALS in the municipal court. Therefore, absent a written request for an ALS appeal at arraignment or within thirty days thereof, the suspension remains in effect pending the disposition of the case.

{¶21} The second assignment of error is overruled.

III, IV.

{¶22} Appellant's third and fourth assignments of error raise common and interrelated issues; therefore, we will address the arguments together.

{¶23} Appellant argues the trial court improperly rejected his Crim.R. 29 motion for acquittal. The "relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Williams* (1996), 74 Ohio St.3d 569, citing *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. Even if reasonable minds could differ as to the essential elements being proven beyond a reasonable doubt, the motion should still be denied. Id.

{¶24} Appellant was charged with operating a motor vehicle while intoxicated, in violation of R.C. 4511.19(A)(1)(a):

{¶25} "(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:

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

{¶27} Trooper Bowman testified at the close of the State's case relative to his training, employment and personal experience in detecting a person under the influence of alcohol. He testified he observed Appellant on April 7, 2008 operating a motorcycle improperly and having difficulty steadying himself on the bike.[2] Upon contacting Appellant, Trooper Bowman observed an odor of alcohol on Appellant, bloodshot, glassy eyes, and slurred speech. Appellant then admitted to Trooper Bowman he had consumed a few beers. Following the administration of field sobriety tests, Appellant was placed under arrest. Trooper Bowman testified at all times he complied with his training in conducting the tests. Appellant refused to submit to a breath test or chemical test.

{¶28} Upon review of the evidence presented at trial, viewed in a light most favorable to the prosecution, a rational trier of fact could have found each and every element of the offense charged proven beyond a reasonable doubt. Therefore, the trial court did not err in denying Appellant's Rule 29 motion for acquittal.

{¶29} Appellant further maintains his conviction is against the manifest weight and sufficiency of the evidence.

{¶30} Our standard of reviewing a claim the verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence

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[2] A motorcycle is a motor vehicle as defined in R.C. 4511.01(C).

in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259.

{¶31} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶32} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice. *State v. Thompkins* (1997), 78 Ohio St.3d 387, citations deleted. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶33} Based upon the evidence set forth above, Appellant's conviction is not against the manifest weight or sufficiency of the evidence. The trier of fact did not lose its weigh in finding the essential elements of the crime charged proven beyond a reasonable doubt.

{¶34} Appellant's third and fourth assignments of error are overruled.

V.

{¶35} In the fifth assignment of error, Appellant asserts the trial court erred in denying his motion to suppress, and or dismiss statements made to the investigating officer.

{¶36} There are three methods of challenging on appeal a trial court's ruling on a motion to suppress. First, an appellant may challenge the trial court's findings of fact. In reviewing a challenge of this nature, an appellate court must determine whether said findings of fact are against the manifest weight of the evidence. *State v. Fanning* (1982), 1 Ohio St.3d 19; *State v. Klein* (1991), 73 Ohio App.3d 485; *State v. Guysinger* (1993), 86 Ohio App.3d 592. Second, an appellant may argue the trial court failed to apply the appropriate test or correct law to the findings of fact. In that case, an appellate court can reverse the trial court for committing an error of law. *State v. Williams* (1993), 86 Ohio App.3d 37. Finally, assuming the trial court's findings of fact are not against the manifest weight of the evidence and it has properly identified the law to be applied, an appellant may argue the trial court has incorrectly decided the ultimate or final issue raised in the motion to suppress. When reviewing this type of claim, an appellate court must independently determine, without deference to the trial court's conclusion, whether the facts meet the appropriate legal standard in any given case. *State v. Curry* (1994), 95

Ohio App.3d 93; *State v. Claytor* (1993), 85 Ohio App.3d 623; *Guysinger.* As the United States Supreme Court held in *Ornelas v. U.S.* (1996), 116 S.Ct. 1657, 1663, "... as a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal."

{¶37} On June 24, 2008, Appellant moved the trial court to suppress his statement to Trooper Bowman relative to his having consumed a few beers. Specifically, Appellant maintains the statements were made during custodial interrogation. The trial court denied the motion via Judgment Entry of August 21, 2008.

{¶38} In *Berkemer v. McCarthy* (1984), 468 U.S. 420, the United States Supreme Court held the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of Miranda."

{¶39} Upon review of the record, Appellant was not under arrest at the time the statements were made. Rather, Trooper Bowman conducted a field interview of the Appellant on the side of the road where the traffic stop was initiated. Appellant admitted to having consumed a few beers. Accordingly, we find the trial court did not err in denying Appellant's motion to suppress, and/or dismiss.

{¶40} The fifth assignment of error is overruled.

VI.

{¶41} Herein, Appellant maintains the trial court erred in denying his motion to dismiss as the State destroyed the videotape of the events before and during the stop, including Appellant's performance on the field sobriety test.

{¶42} In *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281, the United States Supreme Court addressed the issue of whether a criminal defendant is denied due process of law by the State's failure to preserve evidence. The United States Supreme Court stated:

{¶43} "The Due Process Clause of the Fourteenth Amendment, as interpreted in [Maryland *v. Brady* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215], makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. * * * We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e ., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 57-58.

{¶44} Thus, the distinction is drawn between materially exculpatory evidence and potentially exculpatory evidence. If the evidence is only potentially useful, the defendant must show bad faith on the part of the State in order to demonstrate a due process violation. The burden of proof is on the defendant to show the exculpatory nature of the destroyed evidence. See, *State v. Birkhold,* Licking App. No. 01 CA104,

2002-Ohio-2464; *State v. Hill* (March 8, 1999), Stark App. No.1998CA00083, unreported; *State v. Blackshear* (June 19, 1989), Stark App. No. CA-7638, unreported. Absent the showing of bad faith, the State's failure to preserve the evidence at issue is not a denial of due process of law. *State v. Groce* (1991), 72 Ohio App.3d 399, 402, 594 N.E.2d 997.

{¶45} The term “bad faith” generally implies something more than bad judgment or negligence. “It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.” *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272, 276, 452 N.E.2d 1315 (Citation omitted).

{¶46} On July 18, 2008, Appellant moved the trial court to dismiss the complaint due to the unavailability of the cruiser videotape. Appellant requested the tape during discovery, and the State could not produce the same.

{¶47} The record does not affirmatively demonstrate the State acted in bad faith by not preserving the videotape at issue. Further, Appellant has not demonstrated the evidence was exculpatory in nature. Accordingly, the trial court did not error in denying Appellant’s motion to dismiss the complaint.

{¶48} The sixth assignment of error is overruled.

VII.

{¶49} Appellant’s seventh assignment of error asserts the trial court erred in denying his motion to dismiss due to unnecessary delay between his conviction and sentencing.

{¶50} As stated in the statement of the facts and case, supra, the trial court's August 3, 2008 Judgment Entry found Appellant guilty of OVI. This Court remanded the case to the trial court on February 4, 2009 for failure to comply with Ohio Criminal Rule 32. The trial court resentenced Appellant on February 28, 2009. On March 6, 2009, this Court again remanded the case for resentencing. On March 24, 2009, the trial court resentenced Appellant.

{¶51} After each remand, the trial court resentenced Appellant within the thirty day time period set forth in the rule. Further, Appellant has not demonstrated prejudice as a result of the multiple judgment entries as his sentence was stayed by the trial court during the pendency of the appeals. Accordingly, the trial court did not error in denying Appellant's motion to dismiss.

{¶52} Appellant's seventh assignment of error is overruled.

By: Hoffman, J.

Gwin, P.J. and

Edwards, J. concur

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

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

s/ Julie A. Edwards
HON. JULIE A. EDWARDS

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MARK BENNETT	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-35

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Municipal Court is affirmed. Costs assessed to Appellant.

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

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

s/ Julie A. Edwards____________________
HON. JULIE A. EDWARDS