

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO/CITY OF HAMILTON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-04-105
	:	<u>OPINION</u>
- vs -	:	4/12/2010
	:	
ALFRED J. BARRON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 08TRC05812

Mary K. Dudley, City of Hamilton Prosecuting Attorney, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Samuel D. Borst, 246 High Street, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Alfred J. Barron, appeals his convictions and sentence in the Hamilton Municipal Court for operating a vehicle under the influence of alcohol and failure to control his vehicle.

{¶2} On August 26, 2008, David Rogers was driving a semi-tractor trailer on Dixie Highway in Hamilton, Ohio. Rogers made a left turn into a parking lot, and when his semi-tractor trailer was about 95% inside the lot, he felt the trailer shake. Rogers got out and saw that a vehicle, driven by Barron, had struck the rear wheel of

his trailer. Hamilton Police Officer Michael Coleman arrived at the scene and saw that about four to five feet of the back end of Roger's trailer was extending onto the roadway and outside of the parking lot into which the trailer had pulled. Officer Coleman spoke with Barron and performed a Horizontal Gaze Nystagmus test on him. After observing that Barron exhibited six of six clues on the HGN test that signal impairment, Officer Coleman concluded Barron was intoxicated and placed him under arrest. Barron refused to take a breathalyzer test.

{¶3} Barron was charged with operating a vehicle under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a misdemeanor and his third such offense within the past six years, and failure to control his vehicle in violation of Hamilton Municipal Ordinance 331.34(A), a minor misdemeanor. He was tried on the charges in the Hamilton Municipal Court. A jury convicted Barron on the OVI charge, while the trial court found him guilty on the FTC charge. The trial court sentenced Barron for his OVI conviction to 185 days in jail, with 135 days of the sentence suspended; fined him \$1,930; suspended his drivers' license for 1,095 days; and placed him on community control for two years. The trial court fined Barron an additional \$50 for his FTC conviction.

{¶4} Barron now appeals, assigning the following as error:

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT-APPELLANT'S CRIM.R. 29 MOTION, AND THE TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO CHALLENGE THE STATE'S EVIDENCE PRESENTED THROUGH FIELD SOBRIETY TESTS AND OTHERWISE BY WAY OF A PRETRIAL MOTION TO SUPPRESS, BY OBJECTION AT TRIAL, AND BY FAILING TO RENEW HIS CRIM.R. 29 MOTION AT THE END OF ALL OF THE

EVIDENCE."

{¶7} Barron argues his defense counsel provided him with ineffective assistance by failing to file a pretrial motion to suppress the HGN test results on the ground that the test was not conducted in substantial compliance with National Highway Traffic Safety Administration (NHTSA) standards. Alternatively, he argues his defense counsel was ineffective for not objecting at trial to the state's failure to lay an adequate foundation for the admission of the HGN test results. He also argues that, since the HGN test results should have been excluded from evidence, the state failed to present sufficient evidence to convict him on the OVI and FTC charges, and therefore the trial court erred by overruling his Crim.R. 29 motion for acquittal at the close of the state's case, and his defense counsel was ineffective for failing to renew that motion at the close of evidence. We disagree with these arguments.

{¶8} To prevail on an ineffective assistance claim, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness and that appellant was prejudiced as a result. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052. Prejudice exists where there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Id.* at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of appellant's trial. *Id.*

{¶9} In order for the results of a HGN test to be admissible, the state must prove by clear and convincing evidence that the test was administered in substantial compliance with accepted testing standards. R.C. 4511.19(D)(4)(b). The standards most often employed are those enumerated in the NHTSA manual. *State v. Henry*, Preble App. No. CA2008-05-008, 2009-Ohio-10, ¶10.

{¶10} In this case, Officer Coleman testified at trial that he has 14 years of

experience as a police officer, during which time he has observed intoxicated people daily. He testified that he became "NHTSA certified" to perform field sobriety tests in 1999 and took a refresher course on the subject in 2007. He also testified that he performed the HGN test on Barron in conformity with his NHTSA training, and that, in his opinion, Barron was intoxicated at the time of the collision.

{¶11} Barron contends that a pretrial motion to suppress the HGN test results or a "lack of foundation" objection at trial to that evidence likely would have succeeded, because, at the time of their encounter, Officer Coleman failed to ask him if he was on any medications, offer him an opportunity to undergo preliminary breath testing, determine whether he was physically able to perform a field sobriety test, or indicate how far the "stimulus" the officer used to perform the test was held from his face. He also asserts that the state failed to define the terms "HGN," "Nystagmus," or "NHTSA," and failed to provide testimony as to the evidentiary significance of six of six clues being present on the HGN test, including how that evidence pertains to whether or not the person being tested is under the influence.

{¶12} However, Officer Coleman testified that the "stimulus" he used in performing the test, which is usually a pen, penlight, or the tip of the officer's finger, was held 12 to 15 inches from Barron's face. Moreover, the state was not required to define the terms listed by Barron in order for the jury to convict him on the OVI charge, or present expert testimony as to the evidentiary significance of the presence of six of six clues that signal impairment on a HGN test. Indeed, the state's failure to define these terms or present such expert testimony may have actually worked in Barron's favor by leaving the jury confused as to these matters and thus unwilling to convict him. In light of the foregoing, Barron has failed to show that his defense counsel's decision not to file a pretrial motion to suppress the HGN test results or

challenge the admissibility of those results at trial amounted to objectively unreasonable performance. *Strickland*, 466 U.S. 668, 687-688,

{¶13} In addition to the HGN test results, Officer Coleman testified that Barron tried to put the wrong key in his automobile's ignition; that he kept insisting he needed to get his groceries out of his vehicle even though he had no perishable groceries in his automobile that required prompt removal; that he left his vehicle only after the officer asked him five or six times to do so; that there was an odor of alcoholic beverage on his breath; and that he admitted to having had one and a half beers prior to the accident. Officer Coleman also testified that, at the time of the incident, Barron's eyes were red and watery, his speech was slurred and slow, and he was confused, argumentative, and difficult.

{¶14} In light of the foregoing, the state presented overwhelming proof of all elements of the offenses of which Barron was charged and convicted, and therefore Barron cannot demonstrate the existence of a reasonable probability that, but for his defense counsel's alleged errors, the result of his trial would have been different. *Strickland*, 466 U.S. at 694.

{¶15} Consequently, Barron's first assignment of error is overruled.

{¶16} Assignment of Error No. 2:

{¶17} "THE DEFENDANT-APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶18} Barron argues his convictions for OVI and FTC were against the manifest weight of the evidence. However, even when the evidence is *not* looked at in the light most favorable to the state and the credibility of the witnesses *is* considered, Barron's convictions for OVI and FTC were supported by overwhelming evidence, and thus were not against the manifest weight of the evidence. See *State*

v. Moshos, Clinton App. No. CA2009-06-008, 2010-Ohio-735, ¶28.

{¶19} Accordingly, Barron's second assignment of error is overruled.

{¶20} Judgment affirmed.

BRESSLER, P.J., and POWELL, J., concur.