

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-08-058
- vs -	:	<u>OPINION</u> 5/14/2012
TIMOTHY W. SELVAGE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2010 CR 0909

Donald W. White, Clermont County Prosecuting Attorney, David H. Hoffmann, 123 North Third Street, Batavia, Ohio 45103-3033, for plaintiff-appellee

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PIPER, J.

{¶ 1} Defendant-appellant, Timothy Selvage, appeals his conviction and sentence in the Clermont County Court of Common Pleas for single counts of Driving Under the Influence with priors and Driving Under the Influence with priors and with Refusal to Submit to a Chemical Test, both felonies of the third degree.

{¶ 2} Trooper James Taylor with the Ohio State Highway Patrol was on duty on October 31, 2010, and was patrolling traffic on Interstate 275 in Union Township, Clermont County. He was checking the speed of northbound traffic with a laser, and clocked a vehicle going 89 m.p.h. in a zone with a marked speed limit of 65 m.p.h. Taylor continued to monitor the speed of the car, which decreased to 78 m.p.h. then 68 m.p.h. As the vehicle passed Taylor's location, it moved from the center lane into the right lane. Taylor began to follow the car, and immediately initiated a traffic stop.

{¶ 3} Taylor approached the passenger side of the vehicle and made contact with the driver, later identified as Selvage. Taylor asked for Selvage's license, registration, and proof of insurance, and Selvage presented Taylor with "driving privileges papers." Selvage had a passenger in his vehicle, his nephew, and Taylor noted a distinct odor of alcoholic beverage coming from the passenger compartment of the vehicle, and observed an unopened six-pack of beer on the passenger floor. Taylor also observed that Selvage's eyes were bloodshot and glassy. Selvage denied consuming any alcohol. Taylor went back to his cruiser in order to write out the speeding citation.

{¶ 4} Upon Taylor's next approach, he went to the vehicle's driver side, and noticed an odor of alcoholic beverage on the driver side that was stronger than it had been on the passenger side. Taylor asked Selvage to follow his finger with his eyes in order to do a "quick check of horizontal gaze nystagmus." Taylor observed Selvage's eyes jerk noticeably and that there "was an involuntary jerking of the eyes," which is a sign of impairment. At that point, Taylor asked Selvage to exit his vehicle, and he took him back to the cruiser, and instructed Selvage to sit on the front bumper of the cruiser. Taylor shut off the flashing lights on his police cruiser and began to converse with Selvage. Taylor smelled a strong odor of alcoholic beverage on Selvage's breath during the exchange.

{¶ 5} Taylor administered several field sobriety tests, including horizontal gaze

nystagmus (HGN), walk-and-turn, and one-leg stand. During the HGN, Selvage told Taylor that there was a glare bouncing off of his pen, so Taylor moved Selvage to the back of his cruiser. Selvage did not complain of any inability to perform the HGN once at the rear of Taylor's cruiser, and Taylor observed involuntary jerking of Selvage's eyes. Out of a possible six clues for nystagmus, Taylor observed all six during Selvage's test. During the administration of the HGN, Taylor also observed that Selvage's speech was becoming "more and more slurred." Taylor observed three out of eight possible clues on the walk-and-turn, and Selvage exhibited two out of four clues on the one-leg stand.

{¶ 6} Based on Taylor's observations of Selvage's bloodshot and glassy eyes, the odor of alcoholic beverages coming from Selvage, and the clues from the field sobriety tests, Taylor arrested Selvage for driving while intoxicated. Taylor explained the consequences of taking a breath test, or refusing it, and also gave Selvage his *Miranda* warnings. Selvage indicated his desire to speak with his attorney, and after doing so, refused to take the chemical breath test. Selvage was charged with (1) operating a vehicle while under the influence of alcohol (OVI) with priors; (2) OVI with priors with refusal to submit to a chemical breath test; (3) and driving under suspension.

{¶ 7} Selvage pled not guilty to the charges, and filed a motion to suppress, claiming that the field sobriety tests were not performed correctly. The trial court held a hearing, and afterwards, denied Selvage's motion. The matter proceeded to a two-day jury trial. The trial court dismissed the driving under suspension charge, and a jury found Selvage guilty of OVI with priors and OVI with priors with refusal to submit to a chemical test. The trial court merged the counts for sentencing purposes, and sentenced Selvage to four years in prison, as well as a 30-year license suspension. Selvage now appeals his convictions and sentence, raising the following assignments of error. We will combine Selvage's second and third assignments of error for ease of discussion.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS THE ADMINISTRATION AND RESULTS OF THE HORIZONTAL GAZE NYSTAGUM [SIC] TEST.

{¶ 10} Selvage argues in his first assignment of error that the trial court erred in denying his motion to suppress based on the improper administration of the HGN test.

{¶ 11} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 12} In order for field sobriety testing evidence to be admissible, the state is not required to show strict compliance with testing standards, but must instead demonstrate that the officer substantially complied with NHTSA standards. R.C. 4511.19(D)(4)(b); and *State v. Clark*, 12th Dist. No. CA2009-10-039, 2010-Ohio-4567. "A determination of whether the facts satisfy the substantial compliance standard is made on a case-by-case basis." *State v. Fink*, 12th Dist. Nos. CA2008-10-118, CA2008-10-119, 2009-Ohio-3538, ¶ 26.

{¶ 13} Selvage asserts that the state failed to demonstrate substantial compliance because Trooper Taylor administered the HGN test while Selvage was facing on-coming traffic in contravention of the NHTSA standards. According to Selvage, his position on

Taylor's rear cruiser bumper caused him to face oncoming traffic, some of which had headlights turned on. Selvage claims that the sun was setting, which cast a shadow on him, and that lights from the oncoming traffic caused a strobe-light effect because of the shadows.

{¶ 14} According to the NHTSA manual in effect at the time of Selvage's OVI arrest, conditions that *may* interfere with the administration of the test include rotating lights, strobe lights, and traffic passing in close proximity. For that reason, the manual suggests that officers turn suspects away from lights and traffic passing in close proximity, and instructs officers to make note of any conditions that may impact the suspect's test performance on the officer's written field notes. However, there is no specific procedure requiring an officer to face a suspect away from oncoming traffic, and the section on HGN in the NHTSA manual does not contain a subsection on "test conditions" as it does for the walk-and-turn, and one-leg stand. Moreover, there is no indication from the record that Selvage's test was impacted by his position facing traffic.

{¶ 15} The record is clear that Taylor positioned Selvage away from traffic and that Selvage complained of a glare coming from Taylor's pen, which he instructed Selvage to follow with his eyes. Once Selvage complained, Taylor moved Selvage to the back of his cruiser so that there would not be a glare, and continued to administer the test as indicated in the NHTSA manual regarding timing, movement, and tracking. Selvage did not complain of any other distraction during the test, and never once made mention of the oncoming traffic. Given that Salvage complained once, wherein the trooper responded appropriately, we can only reasonably assume that Selvage felt free to voice any problem with situational circumstances distracting or interfering with his performance of the test. However, he failed to voice any further complaint.

{¶ 16} Selvage now argues that the oncoming traffic caused him to exhibit signs of optokinetic nystagmus, caused when the eye fixates on an object that suddenly moves out of

sight, or when the eyes watch sharply contrasting moving images. However, the NHTSA manual specifically states that the HGN test "will not be influenced by optokinetic nystagmus when administered properly." There is no indication from the record that Taylor failed to administer the test properly, and instead adhered to NHTSA requirements regarding timing, movement, and tracking.

{¶ 17} Regarding the strobe-effect claimed by Selvage, Trooper Taylor testified at the hearing on the motion to suppress that he was trained and experienced in administering HGN tests, that he had administered between 100-150 tests, and that based on his training and experience, the traffic had "no impact at all" on the way in which the HGN test was administered. Further, the trial court viewed the recording of the stop and the field sobriety tests, which reveals that traffic was not heavy and that only a limited amount of vehicles had their headlights on, as it was only dusk.

{¶ 18} Based on the facts of this case, the state carried its burden to demonstrate substantial compliance with the NHTSA requirements regarding HGN. Selvage's first assignment of error is overruled.

{¶ 19} Assignment of Error No. 2:

{¶ 20} THE TRIAL COURT ERRED TO THE PREJUDICE OF THE DEFENDANT BY FAILING TO GRANT DEFENDANT'S CRIMINAL RULE 29 MOTION FOR ACQUITTAL BECAUSE THE STATE FAILED TO ESTABLISH EACH MATERIAL ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT.

{¶ 21} Assignment of Error No. 3:

{¶ 22} THE TRIAL COURT ERRED IN ENTERING A FINDING OF GUILTY ON THE JURY'S VERDICT BECAUSE SUCH VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 23} Selvage argues in his second and third assignments of error that his conviction

was against the manifest weight of the evidence and was not supported by sufficient evidence so that the trial court should have granted his Crim.R. 29 motion for acquittal.

{¶ 24} Pursuant to Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged * * *, if the evidence is insufficient to sustain a conviction of such offense or offenses." On review, "an appellate court 'will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all elements of the crime beyond a reasonable doubt.'" *State v. Adams*, 12th Dist. No. CA2006-07-160, 2007-Ohio-2583, ¶ 19, quoting *State v. Miley*, 114 Ohio App.3d 738, 742 (4th Dist.1996). In order to affirm the denial of a Crim.R. 29 motion, we need only find that there was legally sufficient evidence to sustain the guilty verdict. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶ 25} Regarding Selvage's claim that his conviction is against the manifest weight of the evidence, manifest weight and sufficiency of the evidence are quantitatively and qualitatively different legal concepts. *Id.* When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, 12th Dist. No. CA2006-01-007, 2007-Ohio-2298. "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. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 26} While the test for sufficiency requires an appellate court to determine whether the state has met its burden of production at trial, a manifest weight challenge examines the inclination of the greater amount of credible evidence, offered at a trial, to support one side of

the issue rather than the other. *Wilson*, 2007-Ohio-2298.

In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the tier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

State v. Cummings, 12th Dist. No. 2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 27} While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, "these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence." *State v. Walker*, 12th Dist. No. CA2006-04-085, 2007-Ohio-911, ¶ 26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. *Thompkins*, 78 Ohio St.3d at 387.

{¶ 28} After reviewing the record, we conclude that Selvage's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. Selvage was convicted of OVI in violation of R.C. 4511.19(A)(1)(a), which states, "no person shall operate any vehicle * * * 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." Selvage was also convicted of a violation of R.C. 4511.19(A)(2), which states,

No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall do both of the following:

(a) Operate any vehicle, streetcar, or trackless trolley within this state while under the influence of alcohol, a drug of abuse, or a combination of them;

(b) Subsequent to being arrested for operating the vehicle, * * *, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

{¶ 29} The state presented evidence that Selvage had previous convictions for OVI. Further, Taylor explained to Selvage the repercussions for refusing a breath test. It is undisputed in the record that Selvage refused to take the breath test, thus violating R.C. 4511.19(A)(2)(a) and (b). Selvage argues that the state failed to offer sufficient evidence to prove that he had been impaired when driving his car. Selvage points to the video taken by Trooper Taylor's cruiser camera to demonstrate that he showed no signs of impairment.

{¶ 30} However, the jury heard testimony regarding various factors that led Taylor to determine that Selvage was driving while impaired. Specifically, the jury heard testimony that Selvage's eyes were bloodshot and glassy, his speech was slurred, there was a strong odor of an alcoholic beverage on Selvage's person, and he was speeding at 89 m.p.h. Based on this evidence, the jury could have easily determined that Selvage was operating his motor vehicle while under the influence of alcohol. See *State v. Arnold*, 12th Dist. No. CA99-02-026, 1999 WL 699866 (Sept. 7, 1999) (affirming appellant's conviction where officer determined that appellant was driving while impaired where appellant performed poorly on the HGN test, refused to take any other field sobriety tests, had an odor of alcohol, and was driving at an excessive speed over the posted limit).

{¶ 31} Taylor also testified that the field sobriety tests, both together and separately, indicated that Selvage was impaired. Specifically, the HGN test indicated six clues of impairment out of a possible six clues. During the walk-and turn, Selvage moved his feet for balance, took an incorrect number of steps, and lost his balance during the turn. During the

one-leg stand, Selvage leaned against Taylor's cruiser for balance, and had to start the test over again. During the second test, Selvage put his feet down, swayed while balancing, and skipped numbers while trying to count according to Taylor's directions. Trooper Taylor testified that based on his training and experience, Selvage was driving while impaired.

{¶ 32} The jury was given the opportunity to watch the video of the traffic stop, and to determine whether the state met its burden of proof. The jury concluded that, despite Selvage's arguments otherwise, he drove while impaired. These issues are primarily matters for the trier of fact to decide because the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence. Therefore, we cannot say that the jury clearly lost its way or committed a manifest miscarriage of justice. After reviewing the record, we find that there was legally sufficient evidence to sustain the guilty verdict, and that the conviction was not against the manifest weight of the evidence. Accordingly, Selvage's second and third assignments of error are overruled.

{¶ 33} Assignment of Error No. 4:

{¶ 34} THE TRIAL COURT ABUSED ITS DISCRETION IN SENTENCING APPELLANT TO A FOUR YEAR TERM OF IMPRISONMENT.

{¶ 35} Selvage argues in his final assignment of error that the trial court erred in sentencing him to four years in prison.

{¶ 36} The trial court's sentence comports with sentencing principles set forth in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 4, that require an appellate court to review a sentence to "determine whether the sentence is clearly and convincingly contrary to law." Should the sentence satisfy the first prong, "the trial court's decision shall be reviewed under an abuse-of-discretion standard." *Id.* An abuse of discretion "connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶ 181.

{¶ 37} "A sentence is not clearly and convincingly contrary to law, where the trial court considers the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly applies postrelease control, and sentences appellant within the permissible range." *State v. Elliott*, 12th Dist. No. CA2009-03-020, 2009-Ohio-5926, ¶ 10, citing *Kalish* at ¶ 18.

{¶ 38} The record clearly demonstrates that the trial court's sentence is not contrary to law. The trial court indicated that its decision was based on what it learned from the pre-sentencing investigation, and "the purposes and principles of felony sentencing of 2929.11 and all the other conditions that it's gone over under 2929.12, .13 * * *." Further, the trial court's sentencing entry expressly states that the trial court considered "the principles and purposes of sentencing under Ohio Revised Code section 2929.11, and has balanced the seriousness and recidivism factors pursuant to Ohio Revised Code section 2929.12." See *Elliot* at ¶ 11 (finding trial court's sentence in compliance where "in its judgment entry, the trial court expressly stated that it "considered * * * the principles and purposes of sentencing under Ohio Revised Code Section 2929.11, and has balanced the seriousness and recidivism factors under Ohio Revised Code Section 2929.12").

{¶ 39} The trial court merged the counts for purposes of sentencing, and sentenced Selvage for Count Two of the indictment, a violation of R.C. 4511.19(A)(2)(b),¹ which is felony of the third degree because of Selvage's prior OVI convictions. According to the version of R.C. 2929.14(A)(3)² that was in place at the time of Selvage's conviction and sentence, "for a felony of the third degree, the prison term shall be one, two, three, four, or

1. We note that the trial court's judgment entry contains a typographical error in which it listed Count Two as a violation of R.C. 4511.19(A)(1)(b). However, the indictment, jury instructions, and verdict forms correctly listed County Two as being specific to R.C. 4511.19(A)(2)(b).

2. A new version of R.C. 2929.14(A)(3) went into effect on September 30, 2011.

five years." The trial court's four-year term is therefore within the statutory range for a felony of the third degree. Based on the foregoing, the trial court's sentence is not contrary to law.

{¶ 40} We also find that the trial court did not abuse its discretion in sentencing Selvage to four years. After reviewing the pre-sentence investigation report, and a letter to the trial court written by Selvage, the trial court noted that it had considered that Selvage had seven previous convictions for OVI, his first going back to when Selvage was a juvenile. Selvage also had a record of approximately 17 prior misdemeanor offenses or convictions including disorderly assaults, underage purchase, as well as theft. The court also considered that Selvage was an alcoholic who had been through several treatment programs, and had been sanctioned with fines, license suspension, and incarceration. The court concluded that further treatment would not benefit Selvage and ordered a four-year sentence. Based on the seriousness of Selvage's repeated OVI offenses, his past criminal history, as well as his inability to maintain sobriety after having been given multiple opportunities, we cannot say that the trial court's decision was arbitrary, capricious, or unreasonable.

{¶ 41} Having found that Selvage's sentence is not contrary to law and was not an abuse of discretion, Selvage's final assignment of error is overruled.

{¶ 42} Judgment affirmed.

POWELL, P.J., and HUTZEL, J., concur.