

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,
Appellee,

On Appeal from the Fairfield
County Court of Appeals,
Fifth Appellate District

v.

Case No. 14 - 2091

Anthony L. Kilbarger,
Appellant.

Court of Appeals
Case No. 2013 CA 00064

MEMORANDUM IN RESPONSE

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EXPLANATION OF WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case involves no substantial constitutional question. It is of no public or great general interest. Appellant's five propositions of law present no justification for why leave to appeal should be granted in this felony case or why this Court should assume jurisdiction.

Appellant urges this Court to abandon long-established precedent and adopt completely new standards of review for the admissibility of evidence. Specifically, he asks this Court to forego the harmless error standard which has been used by reviewing courts for decades, and to create a "grave doubt" or "equally balanced evidence" test.

Appellant proposes these changes because he believes, as he expressed in his brief and his argument before the Court of Appeals, that he was unduly and materially prejudiced at trial by both the exclusion of evidence he would have liked to have presented, and by the admission of evidence that was necessary to prove the State's case. Appellant apparently claims that had a different standard been applied by the trial court, and then by the Court of Appeals, virtually no evidence of his guilt would have been admitted at trial, and he would have sustained a different outcome.

But this claim ignores the fact that "All evidence is prejudicial to the opposing party in the sense that all evidence is unfavorable to the party against whom it is introduced." *State v. Kilbarger*, 5th Dist. Fairfield No.13-CA-64, *Opinion*, p. 11. Appellant's Propositions of Law also ignore the fact that Evid. R. 403(A) requires a showing of unfair prejudice. Evidence regarding a "party's own actions can rarely be considered *unfairly*

prejudicial so long as the evidence is relevant. *Vitti v. LTV Steel Co.*, 8th Dist. Cuyahoga No. 66686, 1995 WL 57195 (Feb. 9, 1995), citing *State v. Greasley*, 85 Ohio App. 3d 360 (1993).” *Id.* Because Appellant cannot demonstrate any unfair prejudice, there is no constitutional question that would require review by this Court.

In essence, Appellant wants this Court to abandon precedent and accept his appeal because he wants *his* felony convictions overturned. The Propositions of Law and the ideas therein are unique to his case, and do not affect the public at large or even any other defendant facing criminal charges. They affect only this particular Appellant, and are certainly not of great general interest.

The Appellant has not met the threshold necessary for this Court accept jurisdiction. Therefore, Appellee asks this Court to decline jurisdiction and dismiss this appeal.

ARGUMENT IN RESPONSE TO APPELLANT’S PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1: Since the standard of review for a harmless error analysis is beyond a reasonable doubt, it cannot be applied in a felony OVI case in which the adverse evidence is counterbalanced by favorable evidence, *State v. Morris*, S.Ct. No. 2013-0251, 2014 Ohio 5052 (11/20/14) applied.

PROPOSITION OF LAW NO. 2: In addressing equally balanced evidence where the record is so evenly balanced that a conscientious judge is in grave doubt as to the harmlessness of error, Appellant must win. Grave doubt is defined as “in the judge’s mind the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error”. *O’Neal v. McAninch*, 513 U.S. 432, 435, 115 S.Ct. 992, 130 L. Ed. 2d 947 (1995) adopted.

Appellant’s suggested Propositions of Law One and Two raise similar issues. Because the issues are similar, Appellee will address both Propositions of Law in this

section of its argument. However, none of the issues raised by Appellant is sufficient to merit the attention of this Court or for this Court to accept jurisdiction.

In his argument in support of his first Proposition of Law, the Appellant essentially asks this court to do two things: First, he asks this Court to adopt a “counterbalancing of evidence test” as the standard of review for determining whether a trial court committed harmless error with regard to the decision to admit or exclude evidence. Then, the Appellant asks that this Court reconsider its decision in *State v. Morris*, 2014-Ohio-5052 (11/20/2014) in light of his newly proposed “counterbalancing of evidence test.”

As in his argument before the Court of Appeals in this case, Appellant submits that he attempted to introduce evidence that was favorable to his defense and which was directly in opposition to and offset the evidence presented in the State’s case-in-chief. However, according to the Appellant, he was prohibited from presenting all of his “counterbalancing” evidence when the trial court disallowed the testimony of Dr. Staubus. Therefore, Appellant argues, the trial court should have excluded the evidence of the State’s expert. By failing to apply the appropriate standard of review, the trial court committed prejudicial and reversible error, according to the Appellant.

Appellee asserts that this argument is spurious at best. As the Court of Appeals indicated, the Appellant was not prohibited from presenting a defense as to either the felony operating a vehicle while impaired charge or the felony operating a vehicle with a prohibited BAC content charge. *State v. Kilbarger*, 5th Dist. Fairfield No.13-CA-64, *Opinion*, p. 16. Dr. Staubus was permitted to testify, and to expound on what he believed the Appellant’s BAC level at the time of driving might have been. The trial court admitted Appellant’s evidence, allowing him to present his case and to offer evidence that was seemingly contrary to that presented by the

State. The jury was afforded the opportunity to hear both sides equally, even though the Appellant may not have been able to present all of the opinions of Dr. Staubus that he might have wished.

The counterbalancing evidence test proposed by the Appellant has not heretofore been recognized by this Court in criminal cases. It may have a place in civil matters in which there is an issue of contributory negligence and the shifting of the burden of proof. *See, e.g. Valencic v. Akron & Barberton Belt R. Co.* 71 Ohio App. 18 (Ohio App 9 Dist. 1937), and *Smith v. Lopa*, 123 Ohio St. 213 (1931). But it is a completely inappropriate test for a trial court to employ in a criminal case. Appellant has presented no basis for this Court to adopt this balancing and weighing approach as the means by which a trial court should evaluate the admissibility of evidence.

Neither should this Court accept Appellant's argument that this Court should "tweak" its decision in *State v. Morris, supra*, in order to address the issue of equally balanced evidence. This Court was clear in its holding in *Morris* as presented in the Syllabus: "In determining whether to grant a new trial as a result of the erroneous admission of evidence under Evid. R. 404(B), an appellate court must consider both the impact of the offending evidence on the verdict and the strength of the remaining evidence after the tainted evidence is removed from the record."

Morris did not involve a question of error regarding the admissibility of evidence over which this Court had a "grave doubt." *See O'Neal v. McAninch*, 513 U.S. 432 (1995). Neither did it involve equally balanced evidence. The Appellant's suggestion that this Court should go one step further and add to the holding in *Morris* is inappropriate. This Court has adequately set

forth the standard by which the admission of evidence under Evid. R. 404 (B) must be evaluated, and this Court need not go any further.

Moreover, the holding in *Morris* sets out the standard which a reviewing court must apply in order to determine whether a trial court committed harmless error by erroneously admitting evidence. Because this Court did not issue an opinion in *Morris* regarding a trial court's *exclusion* of evidence as a basis for a new trial, Appellee submits that this Court should not create a new standard of evaluation, as Appellant suggests.

As this Court is well aware, the admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St. 3d 173, 180; 510 N.E. 2d 343 (1987). *See also Columbus v. Taylor*, 39 Ohio St. 3d 162, 164; 529 N.E. 2d 1382 (1988). A reviewing court will not "reject an exercise of this discretion unless it clearly has been abused and the criminal defendant thereby has suffered material prejudice." *State v. Long*, 53 Ohio St. 2d 91, 98 (1978). *See also State v. Noling*, 98 Ohio St. 3d 44, 2002-Ohio-7044; 781 N.E. 2d 88. In order to find that a court abused its discretion, the court must have made a decision, either to allow or disallow the admission of evidence that was unreasonable, arbitrary or unconscionable. *State v. Torres*, 66 Ohio St. 2d 340, 344; 421 N.E. 2d 1288 (1981).

Now, Appellant claims that he had a constitutional right to present all the evidence that he wanted. Further, Appellant claims that this Court should reject the long line of cases including *Sage and Taylor, supra*, and the abuse of discretion standard set forth in those cases. Instead, Appellant advocates that this Court should require the application of the "Grave Doubt" standard in order to determine whether the trial court abused its discretion by not allowing Appellate to adduce certain evidence.

Appellee contends that there is no reason to abandon precedent and establish a new -- and potentially controversial -- standard. Every case will not leave a reviewing court in the virtual dilemma of deciding whether the evidence presented by a defendant was so evenly balanced that the court was required to allow it in order to avoid prejudice. Trial courts must continue to have the ability to exercise discretion without the fear that every decision will result in a case being remanded for a new trial. These Propositions of Law do not warrant a grant of jurisdiction by this Court.

PROPOSITION OF LAW NO. 3: In a felony OVI trial wherein the state elects to try impaired OVI with per se OVI, it is reversible prejudicial error for the State's expert to opine that at 0.04 half of the people are impaired and 0.08 everyone is impaired.

Appellant once again claims that his due process rights were compromised by the trial court's evidentiary rulings. Appellant continues to argue in his third Proposition of Law that the trial court committed prejudicial error when it allowed Dr. Forney to "opine that at 0.04 half of the people are impaired and at 0.08 everyone is impaired [sic]." Appellant raised this question in the appellate court and now asks this Court to find that both the trial court and the reviewing court erred in their respective decisions.

As previously noted, the admission or exclusion of relevant evidence is a matter of discretion for the trial court. *Sage*, 31 Ohio St. 3d 173 at 180. Evid. R. 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Relevant evidence is generally presumed to be admissible. Evid. R. 402. However, the trial court can exclude that same evidence if the court finds that "its probative value is substantially outweighed by the danger of unfair prejudice." Evid. R. 403 (A). For

relevant evidence to be excluded on that basis, “the probative value must be minimal and the prejudice great.” *State v. Morales*, 32 Ohio St. 3d 252, 257; 513 N.E. 2d 267 (1987).

“Unfair prejudice is that quality of evidence which might result in an improper basis for a jury decision.” *Oberlin v. Akron Gen. Med. Ctr.*, 91 Ohio St. 3d 169, 172; 743 N. E. 2d 267 (2001). Evidence which is unfairly prejudicial is typically evidence that appeals to a jury’s emotions rather than to a jury’s intellect. *Id.*

The admission of Dr. Forney’s testimony was not unfairly prejudicial, and fell within the sound discretion of the trial court. The testimony constituted Dr. Forney’s scientific opinion about levels of impairment in the general population as well as in the Appellant’s individual case. The testimony was relevant in that it was probative of the issue of the Appellant’s impairment at the time he operated his vehicle while under the influence of alcohol. Absent some great showing of prejudice, the evidence was admissible. *See* Evid. R. 402 and Evid. R. 403 (A).

Indeed, the appellate court found that the admission of Dr. Forney’s testimony regarding impairment in the general population to be, at most, harmless error, when taken in the context of his entire testimony. *State v. Kilbarger*, 5th Dist. Fairfield No.13-CA-64, *Opinion*, p. 14. Specifically, the reviewing court determined that the error in admitting such evidence was non-constitutional and that there was other, substantial evidence of [Appellant’s] guilt. *Id.* at 14. In arriving at that determination, the court below relied on this Court’s decision in *State v. Webb*, 70 Ohio St. 3d 325, 335; 638 N.E. 2d 1023 (1994). *Id.*

It should be noted that Appellant suggests that the admission of Dr. Forney’s testimony was prejudicial because the State chose, or elected, to try both the impaired and the two per se OVI violations together. It is well established that the State need not elect to try only a per se

violation or only an impaired driving charge. R.C. 4511.19 (C) states that “In any proceeding arising out of one incident, a person may be charged with a violation of (A)(1)(a) or (A)(2) [“impaired “] or a violation of division (B)(1), (2), or (3) of this section [“per se”], but the person may not be convicted of more than one violation of these divisions.” And, “the state may present evidence on both offenses in a single trial, and cannot be forced to elect between the two charges unless the defendant affirmatively demonstrates the existence of prejudice.” *State v. Ryan*, 17 Ohio App. 3d 150, 152; 478 N.E. 2d 257(1st Dist. 1984). The counts are allied offenses of similar import which must merge for sentencing. *See Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, 933 N.E. 2d 317 (10th Dist.).

At the time of trial, Appellant made no mention of prejudice. In fact, the Appellant filed a motion to consolidate the counts of two different indictments for purposes of trial so that both the per se violations and the impaired violation would necessarily be tried together. In order to establish both types of violations of the OVI law, the State was entitled to produce relevant evidence as to each and every element of those offenses. The Appellant cannot continue to claim prejudice from something that is, in part, of his own making. Accordingly, this Proposition of Law does not support a grant of jurisdiction by this Court.

PROPOSITION OF LAW NO. 4: In a felony per se OVI trial, it is reversible prejudicial error for the Court to exclude the testimony of Defendant’s expert to extrapolate a breath test back to the time of driving.

In his Fourth Proposition of Law, Appellant claims, as he also did in his appeal below, that he was prejudiced by the trial court’s exclusion of Dr. Staubus’ testimony regarding retrograde extrapolation. Appellant contends that he was denied his right to

due process because the trial court excluded this portion of his expert's testimony. As such, Appellant proposes that this Court should accept his appeal for further review.

Due process is a fundamental element of the law. The Constitution guarantees criminal defendants a "meaningful opportunity to present a complete defense, but state ... lawmakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." *Nevada v. Jackson*, 133 S.Ct. 1990 (2013). The U.S. Supreme Court went on to say in *Nevada* that "Only rarely has the United States Supreme Court held that the right to present a complete defense was violated by the exclusion of defense evidence under a state rule of evidence." *Id.*

At his trial, Appellant sought to introduce opinion testimony from Dr. Staubus regarding Appellant's BAC level at the time he was operating his motor vehicle. Specifically, Appellant wanted to elicit testimony from his expert that the BAC level would have been lower than that recorded by the breath test machine. In addition, Appellant's expert intended to opine on his theory that dual testing of a driver's breath is necessary to arrive at a reliable BAC result.

The trial court ruled that the desired testimony was not admissible, relying in part on *State v. Vega*, 12 Ohio St. 3d 185, 465 N.E. 2d 1303 (1984) as the basis for its decision. The trial court arrived at its decision because state law makers have delegated the authority to determine which tests and procedures for determining BAC levels are generally reliable and, therefore, admissible to the Director of the Ohio Department of Health. *See, e.g. State v. Brandt*, 5th Dist. Tuscarawas No. 2002AP020008, 2002-Ohio-5474; *State v. Sommer*, 5th Dist. Fairfield No. 04-CA-36, 2005-Ohio-1707. And, because

the Director of the Ohio Department of Health has not approved dual testing, the testimony of Dr. Staubus was disallowed.

The Court of Appeals, on the other hand, applied the abuse of discretion test to the trial court's decision to exclude Dr. Staubus' testimony. That court, citing *Columbus v. Taylor*, 39 Ohio St. 3d 162, held that 'the admissibility of evidence, including expert testimony, is a matter within the sound discretion of the trial court.... "Although Evid. R. 702 expressly allows for the admission of scientific testimony, it does not mandate such admission." *Id.*' *State v. Kilbarger*, 5th Dist. Fairfield, No. 13-CA-64, *Opinion*, p. 14.

Consequently, this Fourth Proposition of Law is without merit. The Appellant was in no way deprived of his right to due process and his right to present a complete defense. This Court need not revisit the issue that was decided by both the trial court and the reviewing court in light of long-established state and federal precedent. Jurisdiction should not be granted in this case based upon this Proposition of Law.

PROPOSITION OF LAW NO. 5: Because the introduction into evidence of prior OVI convictions are reversible prejudicial error, in a felony OVI trial, the Court must allow a defendant to stipulate to his prior convictions and to waive the requirement of the State of Ohio to prove the prior convictions by further stipulation that if he is found guilty of the underlying OVI, the Court will find him guilty of the felony, thereby excluding the prior convictions from the jury at trial.

This Court held in *State v. Allen*, 29 Ohio St. 3d 53, 54; 506 N.E. 2d 199 (1987) that when a statute defining an offense uses a prior conviction to increase the degree of a subsequent offense, and does not use the prior conviction to merely enhance the penalty for a subsequent offense, the prior conviction is an essential element of the crime which

must be proven by the State beyond a reasonable doubt. (*See also State v. Day*, 99 Ohio App. 3d 514, 517 (12th Dist.1994), citing *State v. Henderson*, 58 Ohio St. 2d 171, 173 (1979): “[W]here the existence of a prior offense is an element of a subsequent crime, the State must prove the prior conviction beyond a reasonable doubt.... The jury must find that the previous conviction has been established in order to find the defendant guilty on the second offense.”)

In this case, the parties stipulated to the existence of Appellant’s five prior OVI convictions within twenty years. Because the State was still required to introduce evidence of those convictions in its case-in-chief in order to meet its burden of proof as to each and every element of the offense charged, that stipulation was read to the jury. As this Court stated in *State v. Gordon*, 28 Ohio St. 2d 45, 276 N.E. 2d 243 (1971), “The state must be put to its proof regarding the identity of the accused in the prior offense and must demonstrate the fact of such prior offense beyond a reasonable doubt.” *Id.* at 48. The jury received the evidence of Appellant’s prior convictions so that it might discharge its duty to reach a verdict as to the felony OVI offenses.

However, Appellant then wanted the State to enter into another, more convoluted stipulation or agreement. Particularly, Appellant wanted the trial court to be privy to the information regarding his prior convictions, but did not want the jury to receive any mention of his prior record, regardless of whether he had stipulated to the same. The Appellant then suggested that the jury could decide whether he was guilty of the OVI offenses, but the trial court would determine he was guilty of felony OVI charges, since only the trial court would know about the prior convictions. Appellant claims that any

mention of his priors was unfairly prejudicial. The State did not agree to any such arrangement or stipulation.

Appellee asserts that had the trial court and the State accepted his convoluted arrangement to waive the presentation of proof of an element of the offense, the jury would not have been able to discharge its duty and render a verdict. *See, e.g., State v. Holland*, 5th Dist. Guernsey No. 98-CA-15, 1999 WL 770229 (Sept. 1, 1999). There would have been no evidence of an essential element of the felony offense presented, and the jury could not determine whether each and every element had been proven beyond a reasonable doubt. A defendant should not be able to evade a guilty verdict by preventing the State from presenting relevant, necessary evidence in its case-in-chief.

Conceivably, if the trial court had accepted Appellant's proposition that *it* should determine whether Appellant was guilty of the felony offense, the trial court and even the prosecution would have assisted Appellant in committing a violation of his constitutional right to a trial by jury. *See* Amendments Six and Fourteen of the Constitution of the United States and Art. I § 5 and § 10 of the Ohio Constitution.

The evidence of Appellant's prior convictions was properly admitted. The trial court's decision to admit that evidence was neither an abuse of discretion nor a cause of material prejudice to the Appellant. Further, there is no conflict amongst the jurisdictions on this issue. The Appellant has not raised any question in this Proposition of Law that merits review by this Court.

CONCLUSION

For the reasons discussed above, this case does not involve any matters of public and great general interest. Neither does it present a substantial constitutional question. Leave to appeal should not be granted in this felony case, since the propositions of law presented by the Appellant do not rise to the threshold required by this court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Memorandum in Response was served by regular U.S. Mail upon James R. Kingsley, Attorney for Appellee, at Kingsley Law Office, 157 West Main Street, Circleville, Ohio 43113, this 5th day of January, 2015.



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