Supreme Court of Ohio Clerk of Court - Filed April 20, 2015 - Case No. 2015-0629

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

CLINTON RICHARDSON

Appellee,

Case No.

On Appeal From The Montgomery County Court Of Appeals, Second Appellate District

Court of Appeals Case No. 26191

MEMORANDUM IN SUPPORT OF JURISDICTION, STATE OF OHIO

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an issue of public or great general interest. It involves whether a rational trier of fact should be able to draw a reasonable inference that a driver operated a motor vehicle while under the influence of a drug of abuse ("OVI"), in violation of R.C. 4511.19(A)(1), when the State presents evidence that the driver was impaired at the time of the offense and that the driver took a specific drug of abuse. Specifically, the question to be answered here is whether expert or lay witness testimony addressing how a particular drug of abuse affects an individual or whether the particular drug has the potential to impair a person's judgment or reflexes is necessary to find sufficiency of the evidence in an OVI case involving narcotics. The Second District Court of Appeals found that it was required to prove OVI involving narcotics. The State submits that evidence of a driver's impairment, coupled with evidence that the driver took a particular drug of abuse is sufficient to support a conviction for OVI.

In its decision below, the Second District Court of Appeals concluded that, in order to establish a violation of R.C. 4511.19(A)(1)(a) based on a drug of abuse, the State must not only prove that the defendant ingested a drug of abuse and showed signs of impairment, but must also present evidence (1) of how the particular drug actually affects the defendant, and/or (2) that the particular medication has the potential to impair a person's judgment or reflexes. *State v. Richardson*, 2nd Dist. Montgomery No. 26191, 2015-Ohio-757, ¶ 18. In *Richardson*, the court of appeals determined that the State should have introduced expert testimony about the effect of the specific drug, testimony of a lay witness who observed the effects of the drug on the defendant, or obtained a warrant for a blood sample, to link the defendant's impairment to a specific "drug of abuse." *Id.* at 10 The court of appeals concluded that, "without the above information, the

jury has no means to evaluate whether the defendant's apparent impairment was due to his or her being under the influence of that medication." *Id.*

Evidence that the defendant was clearly impaired at the time of the offense, coupled with evidence that the defendant ingested a drug of abuse is enough to meet a sufficiency of the evidence challenge. Such evidence adequately equips the jury to use its reasonable inferences to evaluate whether the defendant's apparent impairment was due to his or her being under the influence of that drug. Applying the court of appeals' standard interferes with the fact finder's ability to draw permissible, reasonable inferences based on the direct and circumstantial evidence presented at trial to arrive at its conclusion of law. Therefore, it is of public or great general interest that such a result be avoided in this and future cases.

Additionally, the Second District Court of Appeals' decision in *Richardson* conflicts with the decision from the Lawrence County Court of Appeals in *State v. Stephenson*, which held:

> Appellant's erratic driving, strange and at times incoherent behavior, coupled with his admissions of taking drugs of abuse support a reasonable inference that he was, in fact, driving under the influence. This is true despite the lack of evidence regarding blood or urine tests and field sobriety testing results.

4th Dist. Lawrence No. 05CA30, 2006-Ohio-2563 at ¶23. Thus, it is of general or great public interest that this conflict be resolved.

For the reasons stated above, the State of Ohio respectfully requests that leave to appeal the decision of the Second District Court of Appeals for Montgomery County be granted.

STATEMENT OF THE CASE AND FACTS

On January 28, 2013, Appellant Clinton Richardson was indicted for operating a vehicle while under the influence (prior felony for same offense within twenty years and test refusal), in violation of R.C. 4511.19, R.C. 4511.191, and R.C. 4511.192, a felony of the third degree. The events giving rise to Richardson's indictment occurred on October 31, 2012, around 4:20 P.M. when Deborah Leopold was rear ended by a red Dodge truck after she pulled up to a stop light on Third Street in Dayton, Ohio to make a left turn onto Wayne Avenue. Richardson was the driver of the red truck.

When Ms. Leopold exited her vehicle to speak with Richardson, she observed that Richardson was fumbling with his things trying to find his insurance card. She also noticed that Richardson's speech was very slurred and pretty much incomprehensible, and that she could hardly understand him. She further observed that Richardson wasn't making eye contact, never found his information in his wallet, and dropped all of his cards on the street. Upon learning that Richardson had his son sitting in the back of his vehicle in a car seat, Ms. Leopold decided to call the police because she didn't feel like Richardson was in shape to drive.

Officer Jonathan Miniard of the Dayton Police Department was dispatched to the scene of the accident. Ofc. Miniard has sixteen years of law enforcement experience and was a part of the motor unit that responds to calls for priority traffic enforcement, OVI's, and accidents for the Central Business District in the heart of downtown Dayton. Ofc. Miniard indicated that he has received extensive training in narcotics and the detection of impaired drivers.

When Ofc. Miniard arrived at the scene of the accident, he saw Ms. Leopold standing outside of her car. Ofc. Miniard made contact with her and talked to her about what happened. Ms. Leopold reported her observations of Richardson to him. Thereafter, Ofc. Miniard

approached Richardson's vehicle to gather his information. Upon approaching the vehicle, Ofc. Miniard smelled something burning. He looked inside of Richardson's vehicle, and saw that Richardson had tried to light a cigarette and it singed the side of his hair. Richardson was still sitting behind the wheel of the truck, with both hands on the steering wheel, staring straight ahead, with the engine still running, and the truck in drive. Ofc. Miniard noticed that it took Richardson a while to notice that he was trying to get his attention.

Once Ofc. Miniard got Richardson's attention, he requested that Richardson turn the car off. Richardson could not figure out how to put the car back into park, so Ofc. Miniard reached inside of Richardson's vehicle to put Richardson's truck in park and turned off the engine. Ofc. Miniard asked Richardson for his license and registration, but Richardson couldn't locate those items. Ofc. Miniard then asked Richardson to exit his truck. When Richardson exited his truck, Ofc. Miniard noticed that Richardson slid out of the driver's seat. Ofc. Miniard indicated that Richardson was unsteady, so he had to escort Richardson back to the rear of his truck.

Then, Ofc. Miniard asked Richardson to walk to the front of the police cruiser. While Richardson walked to the front of the cruiser, Ofc. Miniard observed that Richardson was still unsteady. Ofc. Miniard indicated that he had to assist Richardson further so that he didn't fall into traffic and get run over. Ofc. Miniard asked Richardson if he had anything to drink on the way there, or had taken any medication. Richardson stated, "Yes." Ofc. Miniard asked Richardson what he had taken and Richardson replied, "painkillers." When Ofc. Miniard asked Richardson if he had taken any painkillers that day, Richardson responded, "yes." Then, Ofc. Minaird asked Richardson what he had taken and Richardson replied "Codone."

Based on Ofc. Miniard's training in the detection of impaired drivers, he recognized that Richardson displayed signs of impairment like slurred speech, failure to understand a question or

give a coherent answer, delayed recognition of his presence, unsteadiness, and fumbling around. Upon observing these signs, Ofc. Miniard decided to administer field sobriety tests on Mr. Richardson.

First, Ofc. Miniard administered the horizontal gaze nystagmus (HGN) test with a pen, and observed that Richardson was not able to adequately track the movement of the pen with his eyes and that his eyes jerked at about a forty-five degree angle, which he explained was a sign of impairment. Second, Ofc. Miniard administered the walk and turn test. Ofc. Miniard noticed that prior to beginning this test, Richardson continued to lose his balance and took an additional eight steps than what was instructed. Ofc. Miniard noted that Richardson had seven out of eight total clues put out by the National Traffic Safety Association to determine the degree to which a person is under the influence. Lastly, Ofc. Miniard administered the one legged stand test. During this test, Richardson hopped on one foot, while swaying and raising his arms for balance. Ofc. Miniard indicated that for this test, Richardson exhibited three out of four of the clues of impairment.

Ofc. Miniard placed Richardson under arrest. Richardson refused to submit to a breathalyzer or blood OVI test and was transported to jail. This encounter was captured on Ofc. Miniard's cruiser video and a portion of it was played in open court at trial.

Richardson testified at trial. He asserted that he did not use any alcohol on the date of the incident. He indicated that he suffers from a broken wrist and pelvis, as well as two broken femurs, which causes pain and a great deal of discomfort. He stated that he has consulted with a doctor for his pain since 2010, who treated his pain with narcotic pain killers.

At trial Richardson testified that he had an active thirty day prescription for hydrocodone, but ran out a couple days prior to the incident. He claimed that he did not know what happened

to the remainder of the pills. Richardson testified that in his opinion, he was suffering from symptoms of withdrawal of the hydrocodone and he thinks that he fell asleep behind the wheel of his truck.

Charles Russell, M.D. was tendered as an expert in chemical dependency and testified for the defense. Dr. Russell testified to a reasonable degree of scientific certainty about the common symptoms associated with opiate withdrawal like: sweats, chills, vomiting, diarrhea, nausea, insomnia, anxiety, agitation, and tremors. According to Dr. Russell, memory loss, confusion, and a lack of alertness were not primary symptoms of opiate withdrawal. Dr. Russell testified that while the information provided to him led him to believe that it was probable that Richardson was suffering from opiate withdrawal on the date of the incident, he could not make that conclusion to a reasonable degree of scientific certainty.

Following a bench trial, the trial court found Richardson guilty. The trial court sentenced Richardson to a concurrent one year prison term in the Ohio Department of Rehabilitation and Corrections, imposed a lifetime suspension of Richardson's driving privileges, and ordered a mandatory forfeiture of his Dodge truck.

Richardson filed a timely notice of appeal, wherein he argued that his conviction was against the sufficiency and manifest weight of the evidence. Specifically, Richardson argued that the State failed to present sufficient evidence through expert testimony to rebut the testimony offered by the defense's expert witness, Dr. Russell, that Richardson was not under the influence of drugs or alcohol, but instead, suffering from opiate withdrawal when the accident occurred. The Second District Court of Appeals agreed and vacated Richardson's conviction finding that although Richardson admitted that he was on hydrocodone at the time of the incident and there was substantial evidence of Richardson's impairment, the State failed to present

evidence linking that impairment to any specific "drug of abuse", and therefore, Richardson's OVI conviction pursuant to R.C. 4511.19 (A)(1)(a) was against the sufficiency of the evidence. *Richardson* at 10.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law: When a drug of abuse is at issue in an OVI case, evidence that a defendant was driving impaired, combined with evidence that a defendant took a specific drug of abuse at the time of the offense, is enough to meet a sufficiency of the evidence challenge, pursuant to R.C. 4511.19(A)(1).

The court of appeals concluded that in order to establish a violation of R.C. 4511.19(A)(1)(a) based on a drug of abuse, the State must also present some evidence (1) of how the particular medication actually affects the defendant, and/or (2) that the particular medication has the potential to impair a person's judgment or reflexes. *State v. Richardson*, 2nd Dist. Montgomery No. 26191, 2015-Ohio-757, ¶ 18.R.C. 4511.19(A)(1). The State asserts that such evidence was not necessary to find sufficiency of the evidence because the State presented substantial evidence of Richardson's impairment and Richardson admitted to taking hydrocodone at the time of the offense. The State contends that this evidence alone, if believed and viewed in a light most favorable to the state, was sufficient to convince the average mind that Richardson was operating a motor vehicle while under the influence of drugs and/or alcohol, beyond a reasonable doubt.

Pursuant to R.C. 4511.19(A)(1):

No person shall do any 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.

The court of appeals found that the State failed to present sufficient evidence as to Richardson's guilt. A sufficiency of the evidence challenge tests whether the state's case is legally adequate to go to a jury in that it contains prima facie evidence of all of the elements of the charged offense. State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. 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. *Id.*, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed 2d 560 (1979).

This Court has held that, " * * * [P]roof of guilt may be made by circumstantial evidence as well as by real evidence and direct or testimonial evidence, or any combination of these three classes of evidence. All three classes have equal probative value, and circumstantial evidence has no less value than the others. *State v. Nicely*, 39 Ohio St.3d 147, 151, 529 N.E.2d 1236, (1988), citing *State v. Griffin* (1979), 13 Ohio App.3d 376, 377, 469 N.E.2d 1329 (1st Dist. 1979).

At trial, the State introduced evidence of a lay witness, Ms. Leopold, who testified about her observations of Richardson's behavior at the time of the incident. Thereafter, the State presented testimony from a trained narcotics police officer, who testified that Richardson was substantially impaired. Specifically, Ofc. Miniard testified that based on his training and experience, Richardson was exhibiting signs of an impaired individual such as slurred speech,

failure to understand a question or give a coherent answer, delayed recognition of his presence, unsteadiness, and fumbling around. He further testified that Richardson performed poorly on all of the field sobriety tests, which indicated that he was impaired. The officer stated that Richardson lost his balance, lacked the ability to focus, and lacked the ability to follow directions during the sobriety tests. Upon speaking with Richardson, the officer testified that he asked Richardson if he had taken any medication or drank anything and Richardson stated that he had taken painkillers. When the officer asked Richardson what he took, Richardson stated "Codone." The State asked Ofc. Miniard if based on his training and experience, Richardson appeared to be under the influence of drugs or alcohol, and Ofc. Miniard answered, "Yes, he appeared to be under the influence of some drug, narcotics."

During the presentation of the defense's case, Richardson testified that when he told Ofc. Miniard "Codone," he was referring to hydrocodone and that he told the officer that he had taken thirty milligrams of the drug. Richardson further testified that at the time of the incident, he had an active thirty day prescription for hydrocodone, but ran out of the pills. At trial, Richardson claimed that he did not know what happened to the remaining pills. The encounter between Richardson and Ofc. Miniard was captured on the cruiser video and played for the court.

On appeal, the question was whether the State met its burden of sufficiency of the evidence, without presenting an expert or lay witness to testify about the side effects of hydrocodone or its effects on Richardson. The court of appeals found that although the State presented substantial evidence of Richardson's impairment and that Richardson admitted to taking hydrocodone at the time of the incident, the State failed to present evidence linking Richardson's behavior to the effects of the hydrocodone, and therefore, his conviction was against the sufficiency of the evidence. The State contends that the trier of fact had sufficient

evidence to reach a legal conclusion based on the direct and circumstantial evidence presented at trial.

In addressing the same question in *State v. Stephenson,* 4th Dist. Lawrence No. 05CA30, 2006-Ohio-2563, at ¶23., the Fourth District Court of Appeals reached the opposite conclusion finding that: "The trier of fact may draw permissible inferences from the evidence." *Id.* citing *State v. Seiber*, 56 Ohio St.3d 4, 15, 564 N.E.2d 408 (1990). In drawing such inferences, a trier of fact could determine that, "Appellant's erratic driving, strange and at times incoherent behavior, coupled with his admissions of taking drugs of abuse support a reasonable inference that he was, in fact, driving under the influence." The court in *Stephenson* reasoned that the State's evidence of Appellant's slurred speech, glassy eyes, inability to walk on his own, statement that he took morphine and methadone that day, and the trooper's concern that Appellant had overdosed supported Stephenson's conviction. According to the court in *Stephenson*, "such evidence revealed Appellant's ability to act and react were altered from normal because he was under the influence of a drug of abuse, namely the prescription methadone and morphine Appellant admitted having taken that day." *Id.*

The court of appeals' holding in *Richardson* should not be applicable to instances where the State has presented evidence that the defendant took a specific drug of abuse at the time of the offense. (i.e. Richardson and Stephenson's admissions that they each took specific drugs of abuse at the time of the incident, or blood and chemical tests that certain drugs of abuse are in a defendant's system at the time of the offense). Such evidence, coupled with substantial evidence of impairment, negates the need for either an expert or lay witness to testify as to how the particular medication actually affects the defendant, and/or that the particular medication has the potential to impair a person's judgment or reflexes. The trier of fact would have sufficient

evidence to reach a legal conclusion beyond a reasonable doubt based on the direct and circumstantial evidence presented at trial. Therefore, the Second District Court of Appeals' error in its analysis of R.C. 4511.19(A)(1) necessitates this Court's review.

CONCLUSION

Because the issues raised in this case involve a substantial constitutional question and are of public or great general interest, the State of Ohio respectfully requests that leave to appeal the decision of the Court of Appeals of Montgomery County be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Memorandum in Support of Jurisdiction was sent by regular U.S. mail this 20th day of April, 2015, to: Kristin L. Arnold, 1502 Liberty Tower, 120 W. Second Street, Dayton, OH 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215

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