

Clinton Richardson was convicted after a bench trial of operating a vehicle while under the influence of drugs or alcohol (prior felony OVI within 20 years/test refusal), a third-degree felony, and endangering children, a first-degree misdemeanor. According to the testimony of the arresting officer, Richardson had informed the officer that he had taken pain medication and, after Richardson failed field sobriety tests, the officer concluded that Richardson was under the influence of "some type of possibly narcotics." Testifying on his own behalf, Richardson stated that had taken hydrocodone acetaminophen for several years and that he was suffering withdrawal symptoms when the alleged OVI occurred. A physician testified on Richardson's behalf that "there's a decent possibility that he was withdrawing from opiates, but I wouldn't call that a reasonable degree of medical certainty." Upon consideration of the evidence, the trial court found Richardson guilty of both offenses.

In vacating Richardson's convictions, we quoted our recent decision in *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, in which we stated that, "in order to establish a violation of R.C. 4511.19(A)(1)(a) based on medication, 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. Without that 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." *Richardson* at ¶ 18, quoting *May* at ¶ 48.

We concluded that the State had produced evidence that Richardson's driving was impaired, that he acknowledged that he was on "painkillers" and that he had "taken" some, but the State produced no evidence as to what particular drug, medicine, or substance

he had taken, when it was taken, or what its potential effects were. *Richardson* at ¶ 20. Although the State presented substantial evidence of impairment, there was no evidence linking that impairment to any "drug of abuse." *Id.*

We noted that sufficient evidence could be introduced in the defendant's case-in-chief and that Richardson had testified that he had been prescribed and had taken 325 mg of acetaminophen/ 10 mg of hydrocodone. Richardson testified that he had run out of the medication and was suffering from withdrawal symptoms. We concluded:

Considering all of the evidence presented at trial, there was insufficient evidence to establish that Richardson's impairment was caused by the ingestion of hydrocodone/acetaminophen. There was substantial evidence that Richardson was driving while impaired and there was conflicting evidence as to whether Richardson's poor performance on the field sobriety tests could be explained by opiate withdrawal. But there was no testimony that Richardson's medication caused him to have any side effects (he denied that they did), and there was no evidence as to what those side effects typically might be. Richardson testified that he was opiate tolerant and denied having any side effects from his medication; he stated that hydrocodone simply provided pain relief. There was no expert testimony that hydrocodone could impair a person's judgment or reflexes. Richardson asserted that his impairment could have been caused by opiate withdrawal. This evidence, whether believed or not, was not sufficient to establish a nexus between Richardson's impairment and any painkiller he was or was not taking.

In summary, based on the evidence at trial, the trial court could have reasonably rejected Richardson's claims that he did not ingest hydrocodone/acetaminophen on October 31, 2012, and that his impairment was due to withdrawal. However, in the absence of evidence that Richardson's medication could have caused the impairment he displayed, there was insufficient evidence to convict him.

Richardson at ¶ 26-27.

The State asserts that our opinion and judgment are in conflict with *State v. Stephenson*, 4th Dist. Lawrence No. 05CA30, 2006-Ohio-2563. In *Stephenson*, the defendant was stopped for erratic driving after picking up multiple prescription medications from a store. Stephenson appeared to be impaired – his speech was slurred, he was mumbling, he had glassy eyes, he could barely stand, and he was unable to perform field sobriety tests; there were additional indicia that Stephenson was severely impaired. Stephenson told the deputy that he had taken methadone and morphine that day, but had not had any alcohol. At trial, Stephenson testified that he had several medical problems, that his medical conditions caused the symptoms described by the officers, and that he was not under the influence of prescription drugs to the point where he could not drive. Stephenson was convicted of OVI, in violation of R.C. 4511.19(A)(1)(a).

On appeal, Stephenson argued that his conviction was against the manifest weight of the evidence, because that the State did not present evidence that his impairment was caused by his taking prescription medication. The Fourth District rejected his argument, stating:

Here, although there were no field sobriety test results or urine or blood tests to consider, we are not persuaded by Appellant's argument that his symptoms were caused solely as a result of his medical condition, rather than the prescription methadone and morphine that he admitted he had taken. Nor are we persuaded by Appellant's argument that there was not a requisite showing of any impairment caused by the medications. "[F]ield sobriety tests are not even a necessary factor in order to arrest or convict for OMVI. Otherwise, those with certain medical conditions would have a free pass to drive drunk [or under the influence of a drug of abuse]."

The trier of fact may draw permissible inferences from the evidence. Further, it is well settled under Ohio law that a defendant may be convicted solely on the basis of circumstantial evidence. " * * * [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. "Circumstantial evidence is not less probative than direct evidence, and, in some instances, is even more reliable."

In order to find Appellant guilty of Driving Under the Influence as charged, the trial court would have to find Appellant operated any vehicle, streetcar, or trackless trolley within this state, and that at the time of the operation, Appellant was (a) under the influence of alcohol; (b) a drug of abuse; or (c) a combination of them. We have previously held that "[a]

driver of a motor vehicle is considered 'under the influence' of alcohol when his 'physical and mental ability to act and react are altered from the normal because of the consumption of alcohol.'" Although our reasoning in that case applied to the issue of being under the influence of alcohol, we believe that the reasoning is equally applicable to the issue of being under the influence of a drug of abuse.

In the case sub judice, Appellant was stopped for erratic driving consisting of driving on the grassy shoulder and crossing the center line, driving westbound in an eastbound lane. Upon approaching Appellant, the deputy noticed slurred speech, glassy eyes, inability to communicate at times, and Appellant's apparent effort to talk to people who were not there. When the state trooper arrived, he noted the same things. Additionally, the officers noticed multiple prescription medications in Appellant's seat. When asked if he had taken drugs or alcohol, Appellant responded that he [had] not had any alcohol but that he had taken prescription methadone and morphine. Based upon Appellant's condition, coupled with Appellant's statement, as well as the number of medications in Appellant's possession, the officers not only reasonably concluded that Appellant was severely impaired, but feared that he may have overdosed.

We find that this set of facts constitutes substantial evidence upon which the trial court could conclude that the State had proved its case beyond a reasonable doubt. Specifically, 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. As such, we cannot conclude that the trial court clearly lost its way, thereby creating a manifest miscarriage of justice. 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. Consequently, we find that Appellant's conviction is not against the manifest weight of the evidence. Accordingly, we overrule Appellant's sole assignment of error and affirm the decision of the trial court.

(Citations and footnote omitted.) *Stephenson* at ¶¶ 19-23.

We agree with the State that our judgment in Richardson's case conflicts with the Fourth District's judgment in *Stephenson*. In *Stephenson*, the Fourth District concluded that evidence of impairment coupled with the defendant's admission that he had taken a particular drug was sufficient to support Stephenson's conviction. In contrast, we concluded that additional evidence was required, namely some evidence of how the particular medication actually affected Richardson and/or that the particular medication had the potential to impair his judgment or reflexes. The State's motion to certify a conflict is SUSTAINED.

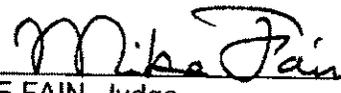
Accordingly, we certify the following question to the Supreme Court of Ohio for review:

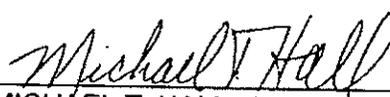
Once the State presents evidence that a person is impaired and has taken

a specific prescription medication, is the trier of fact able to draw a reasonable inference that the driver has violated R.C. 4511.19(A)(1)(a) or R.C. 4511.19(A)(2), without evidence (lay or expert) as to how the medication actually affects the driver and/or expert testimony about whether the particular medication has the potential to impair a person's judgment or reflexes?

IT IS SO ORDERED.


JEFFREY E. FROELICH, Presiding Judge


MIKE FAIN, Judge


MICHAEL T. HALL, Judge

Copies mailed to:

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