Supreme Court of Ohio Clerk of Court - Filed November 09, 2015 - Case No. 2015-1048

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff-Appellant

vs.

CLINTON RICHARDSON

Defendant-Appellee

CASE NO. 2015-0629
2015-1048

ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT COURT OF APPEALS

CASE NO: 26191

MERIT BRIEF OF THE STATE OF OHIO, APPELLANT

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STATEMENT OF THE CASE

A. Indictment and trial: On January 28, 2013, Appellant Clinton Richardson was charged by indictment in Common Pleas Court in Montgomery County with operating a vehicle while under the influence of alcohol or a drug of abuse, a felony of the third degree due to his refusal to submit to a test and a prior OVI conviction within the past 20 years. (R.C. 4511.19, R.C. 4511.191, and R.C. 4511.192). The indictment also charged him with endangering children in violation of R.C. 2919.22(C)(1), a misdemeanor of the first degree. Richardson waived his right to a jury trial. At the conclusion of the trial, the court found him guilty of both charges and sentenced him accordingly.

B. The decision of the Court of Appeals: On appeal, Richardson argued that his convictions should be reversed because they were not supported by the weight of the evidence. The court of appeals vacated the convictions, finding instead that they were not supported by sufficient evidence. Noting that Richardson never made a motion for acquittal, the court considered all of the evidence introduced at trial and determined that the State's failure to introduce either expert testimony on the potential side-effects of the drug in question or lay testimony as to how it actually affected Richardson, the State had fallen short of its obligation to prove he was under its influence:

> We therefore conclude 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. *State v. Richardson*, 2d Dist. Montgomery No 26191, 2015-Ohio-757, 29 N.E.3d 354, ¶ 18

C. The jurisdictional appeal: This Court allowed the State's jurisdictional appeal on the following 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).

D. The conflict certification: On a conflict certification from the court of appeals, this Court determined that decision was in conflict with the decision of the Fourth District on the same issue in *State v. Stephenson*, 4th Dist., Lawrence No. 05CA30, 2006-Ohio-2563, and ordered briefing on the following issue:

> Once the State presents evidence that a person is impaired and has taken a specific prescription medication, the trier of fact is 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.

The appeals have been consolidated.

STATEMENT OF FACTS

A. The State's case: On the afternoon of October 31, 2012, Deborah Leopold was stopped at a red light, waiting to turn left from Third Street onto Wayne Avenue in downtown Dayton, when Clinton Richardson drove his pickup truck into the back end of her car. (Tr. 8-9)

When she walked back to his truck to speak to him, his speech was so slurred that she couldn't understand much of what he was trying to say. (Tr. 10-11) He fumbled for his insurance card, dropped the cards from his wallet into the street, and wasn't making any eye contact with her. (Tr. 12-14) In the back seat of the truck was a small child in a car seat. (Tr. 11-12) There was no damage to either vehicle and Richardson asked her not to call police, she did because she didn't believe he was in any shape to drive. (Tr. 15) While waiting for officers his truck bumped her car a couple more times.

Officer Jonathan Miniard responded to the call. (Tr. 16-17) Officer Miniard was a fourteen-year veteran of the Dayton Police Department, and he was attached to a special traffic enforcement unit that responded to calls involving OVIs, crashes, and other priority traffic matters in the downtown area. (Tr. 17) He is a certified EMT and he has had extensive training in the detection of impaired drivers. He has also been certified to participate in high-visibility OVI programs in which he is called in by officers who suspect an impaired driver after responding to a crash or making a traffic stop. (*Id.*) As an example of how frequently he dealt with suspected impaired drivers, he testified that in his 12 days on duty in December 2012, he had 16 OVIs.

Officer Miniard spoke to Ms. Leonard, and then walked back to talk to Richardson, who was sitting in his truck, with his hands on the steering wheel, staring straight ahead. (Tr. 19-20) Richardson's engine was running, his truck was in drive, and he appeared oblivious to the officer's presence. (Tr. 19) Officer Miniard tapped on the window of the truck and eventually got Richardson's attention. (Tr. 20) There was a burnt odor in the air; Richardson had singed the side of his hair trying to light a cigarette. (*Id.*). Richardson could not manage to put the car in park or turn off the engine, so Officer Miniard had to reach inside and do it for him.

Richardson couldn't find his license and registration, slid rather than stepped out of the vehicle, and was unsteady on his feet. (Tr. 21) The officer escorted Richardson to the cruiser, making sure to stay between Richardson and traffic for fear he would fall or step out into oncoming traffic. Richardson told the officer that he had to get his son home. (Tr. 21, 56)

Officer Miniard asked Richardson if he had anything to drink on the way there, or if he had taken any medication. Richardson stated, "Yes." (Tr. 22) Officer Miniard asked Richardson what he had taken and Richardson replied, "painkillers." (*Id.*) When Officer Miniard asked Richardson if he had taken any painkillers that day, Richardson responded, "yes." The officer testified that from his interactions with Richardson, Richardson appeared to be on pain medication. (*Id.*)

Based on Officer Miniard's training and experience, he recognized that Richardson displayed the following signs of impairment: slurred speech, inability to understand or answer simple questions, lack of recognition of the officer's presence, unsteadiness, and fumbling for his cards. (Tr. 23) He decided to administer field sobriety tests. (Tr. 25) Richardson's performance on the horizontal gaze nystagmus (HGN) indicated impairment – he was unable to track the pen smoothly with either eye, both eyes showed characteristic jerking or twitching at extension, and he had difficulty focusing during the exercise. (Tr. 30-32) He could not keep his balance during the instruction portion of the walk-and turn test. During the test itself, he was unable to walk in a straight line, took too many steps, and raised his hands for balance. That test lists eight indicators of impairment; Richardson displayed seven of them. (Tr. 39) Richardson swayed and hopped and could not keep either foot in the air for more than a few seconds when he attempted the one-legged stand test. (Tr. 35, 39) There are four indicators of impairment for

this test and Richardson displayed three. (Tr. 41) Officer Miniard noticed that there was no odor of alcohol on or about Richardson. (Tr. 39)

Based on Richardson's conduct and demeanor, his admission to have taken a painkiller, and his performance on the field sobriety tests, Officer Miniard arrested him for OVI. (Tr. 42-43) Richardson refused to take a blood test, and he was taken to the jail. (*Id.*)

B. The defense case: Richardson testified at trial that he was in withdrawal from hydrocodone, not under its influence, on October 31, 2012, when he hit Ms. Leonard's car with his pickup truck. (Tr. 69) He said he'd been taking hydrocodone for chronic pain for so long that he had become opiate tolerant and suffered no side-effects from the drug at all on the day of the crash. He admitted that he had an active prescription for hydrocodone, but denied taking any hydrocodone on the date of the incident. He said that he'd taken the last of his 90 pill monthly allotment two days before, on Monday, October 29. (Tr. 68) By the 31st, he was in withdrawal. (*Id.*) He thought he would be able to tough it out, but at around 3:00 that afternoon, he knew he had to get to the hospital for more. He intended to drop his son off at a babysitter's house, but she was not home, so he was headed to Miami Valley Hospital with the child when he collided with Ms. Leonard. (Tr. 96) He said he no longer drank at all, and he asserted that he appeared confused, disoriented, and unsteady that day because he was in withdrawal. (Tr. 63) Dr. Charles Russell, M.D., who has been treating chemically dependent individuals since 1990, told the court that common symptoms associated with opiate withdrawal included chills, excessive perspiration, vomiting, diarrhea, nausea, insomnia, anxiety, agitation, and tremors. (Tr. 104, 144) According to Dr. Russell, memory loss, confusion, and a lack of alertness were not commonly primary symptoms of opiate withdrawal, but could be secondary to e.g., insomnia or the dehydration that can follow gastric problems. (Tr. 145) He reviewed medical records

supplied to him by the defense and testified that while he believed 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. (Tr. 150)

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).

A. The question for the fact-finder: Clinton Richardson was charged with OVI in violation of R.C. 4511.19(A)(1)(a), and child endangering in violation of 2919.22(C)(1). He did not dispute that he was driving, or that his son was with him, or that he refused to take a test to detect the presence of drugs or alcohol in his system, and he stipulated to a prior OVI conviction. The State introduced overwhelming evidence from the other motorist and the officer on the scene that he was impaired. There was no evidence that he had used alcohol that day. Thus, the only question for the fact-finder was whether the State had proved that Richardson was under the influence of a drug of abuse. The judge at his bench trial found him guilty of both crimes, but a majority of the court of appeals vacated the judgment, finding insufficient evidence linking his impairment to the painkiller he told the officer he had taken. The dissent found the State's evidence sufficient.

B. The evidence that Richardson was "under the influence' of a drug of abuse: A "drug of abuse" includes any controlled substance, dangerous drug, or over the counter medication. R.C. 4506.01(L). Hydrocodone is a prescription drug. Prescription drugs are a part of dangerous drugs, thereby making hydrocodone a "drug of abuse". *See* R.C. 4511.18(E), R.C. 4506.01(L), and R.C. 4729.01.

The judge who found Clinton Richardson guilty of OVI and endangering children had before him the following evidence: Richardson drove his pickup truck into the rear end of a car that had stopped to make a left turn at a traffic light. His toddler son was with him, strapped into a car seat. The driver he hit testified that he fumbled for his insurance card and dropped the contents of his wallet on the street, that he didn't make eye contact with her when he spoke, and that his speech was so slurred that at times he was "pretty much" incomprehensible. He did manage to make her understand that he did not want her to call the police. She didn't heed his request; instead she reported the collision because she thought he was in no condition to drive and she didn't want him to leave with the child. Richardson's truck bumped or nudged her car a couple more times while she waited for the police to arrive.

Officer Jonathan Miniard, a 14-year veteran of the Dayton Police Department, whose assignment at the time included OVI enforcement in the downtown area, and who was trained in detecting impairment in drivers, found Richardson slumped forward behind the steering wheel, oblivious to the officer's presence. Once roused, he was unable to shut off the engine or put the truck in park, and the officer had to reach inside the cab and do it himself. There was a noticeable odor of something burnt; Richardson had singed his hair trying to light a cigarette. Once out of his truck, he was very unsteady on his feet. He was given the HGN, walk-and-turn, and one-legged stand field sobriety tests, and his performance was abysmal.

Not only was there ample proof that Richardson was impaired when he collided with another vehicle, there was evidence that he was under the influence of a drug of abuse: he admitted to the officer that he had taken pain medication, and the officer, based on his training, experience, and direct observations, testified that Richardson was, in fact, acting like a person who had taken pain medication. The officer testified that he appeared to be under the effect of

narcotics rather than alcohol. In his view, Richardson was under the influence of "some type of possible narcotics". Richardson himself testified that he had taken hydrocodone, a prescription drug, for pain for several years and was on his way to the hospital to obtain a new prescription when he collided with the other car, although he asserted he was in withdrawal from it, not under its influence at the time.

C. The decision of the Court of Appeals: Relying on dicta in *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, the court of appeals found this evidence insufficient to support the verdict, holding that:

> " [I]n 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*, 2d Dist. Montgomery No 26191, 2015-Ohio-757, 29 N.E.3d 354, ¶ 18.

Thus, according to the Court of Appeals, to obtain a conviction of OVI in violation of R.C. 4511.19(A)(1)(a) based on medication, the State must always introduce expert testimony on the potential of that medication to impair a person's judgment and reflexes, and/or lay testimony as to how the particular medication affects the particular person on trial to show that the person was under the influence of the medication. The testimony of a police officer who testifies, based on training, experience, and personal observations of the defendant, that the defendant appeared to be under the influence of the particular medication, will never be sufficient to withstand a motion for a directed verdict on that element.

D. Insufficient Evidence: A claim of insufficient evidence invokes a due process concern and raises the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law. *State v. Roberts*, 110 Ohio St.3d 71, 2006 Ohio 3665, ¶123, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997 Ohio 52, 678 N.E.2d 541 (1997). In reviewing such a challenge, "[t]he 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,* quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. *Jenks*, at syllabus one.

E. The link between impairment and the influence of a drug of abuse. To satisfy the State's burden of proof to demonstrate a violation of R.C. 4511.19(A)(1), the State must prove that the defendant's "faculties were appreciably impaired" by the consumption of alcohol [or a drug of abuse]." *State v. Lowman*, 82 Ohio App.3d 831, 836, (1992). It is true that to obtain a conviction of OVI in violation of R.C. 4511.19(A)(1)(a), the State must "do more than prove impairment in a vacuum." *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, ¶ 45; citing *Cleveland v. Turner,* 8th Dist. Cuyahoga No. 99183, 2013–Ohio–3145, ¶ 13. It is not enough to prove impairment; the State must provide a link between the drug of abuse and the impairment to establish that the defendant was under the influence of the drug.

Here Officer Miniard's testimony did just that. He told the court that in response to his question, Richardson told him that he had taken pain medication. The officer's testimony, based on training, experience, and his own observations, was that Richardson was acting at that

moment like someone who was on pain medication. In his view, his impairment suggested narcotics rather than alcohol. Based on his training and experience, he believed that Richardson was under the influence of some type of "possible" narcotic. The evidence of Richardson's admission to having taken pain medication and the officer's testimony that he appeared to be "on pain medication" at the time was sufficient to survive a motion for a directed verdict had one been made. But there was more. The officer also testified that he believed that the impairment was due "more so" to drugs than alcohol, and noted again that he thought, based on training and experience, that Richardson was "under the influence of some type of possibly narcotics." Richardson himself provided the name of the drug: hydrocodone, an opiate available by prescription only, that he said he was on his way to obtain from a hospital when the collision occurred.

Here, in light of the direct and circumstantial evidence presented at trial, a reasonable mind can conclude that Richardson was operating his vehicle, while impaired because of an ingestion of a "drug of abuse", that being hydrocodone. Given Richardson's admissions on the scene and at trial regarding what he had taken, the State presented sufficient evidence to convict Richardson under R.C. 4511.19(A)(1). The Court of Appeals erred in ruling that a conviction of OVI in violation of R.C. 4511.10(A)(1)(a) based on a drug of abuse cannot stand unless an expert witness has testified as to the potential side effects of the drug of abuse or a lay witness has testified as to how the drug affects the defendant.

An expert and/or lay witness is not essential to establish a causal link between the drug of abuse in question and the defendant's impairment. If this link is necessary to support a conviction of OVI under R.C. 4511.19(A), it can sufficiently be established through the testimony of a police officer who is trained in narcotics detection and/or impaired drivers.

ARGUMENT IN SUPPORT OF CERTIFIED CONFLICT

ISSUE CERTIFIED FOR REVIEW

Once the State presents evidence that a person is impaired and has taken a specific prescription medication, the trier of fact is 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.

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. *Richardson*, at ¶ 18. 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.*

In contrast, the court held in *State .v. Stephenson, supra.,* the conflict case, that the fact-finder could draw a reasonable inference that a driver was under the influence of a drug of abuse on evidence that the driver was impaired coupled with the driver's admission of ingesting such a drug:

"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.

The court in *Stephenson* reasoned that the State's evidence of appellant's slurred speech, glassy eyes, inability to walk on his own, his statement that he took morphine and methadone that day, and the trooper's concern that he had overdosed, supported the 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.*

In fact, the Fourth, Fifth, Ninth and Eleventh District courts have all held that the State need not show a direct nexus between the drug taken and the signs of impairment, but rather, must show that a driver was "under the influence." See *State v. Stephenson, supra.*, at ¶ 21; *Cleveland v. Carter*, 4th Dist. Washington, No. 97CA13, 1998 WL 352588; *State v. Zentner,* 9th Dist. No. 02CA0040, 2003-Ohio-2352, at ¶ 19, citing *State v. Holland*, 11th Dist. No. 98-P-0066 (1999); *State v. DeLong,* 5th Dist. No. 02CA35, 2002-Ohio-5289, at ¶ 60. These districts note 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.'" *State v. Stephenson, supra.*, at ¶ 21, quoting *State v. Carter*, 4th Dist. Washington, No. 97CA13, 1998 WL 352588. The Fourth and Ninth District courts extended the test for intoxication due to alcohol to a "drug of abuse" in *Stephenson* and *State v. Strebler,* 9th Dist. No. 23003, 2006-Ohio-5711, at ¶ 19. Specifically, in *State .v. Stephenson* court stated that, while the above reasoning is traditionally applicable to the issue of being under the influence of alcohol, "[w]e believe that the reasoning is equally applicable to the issue of being under the influence of a drug of abuse." *Stephenson* at ¶ 21. "[P]hysiological factors, such as blood shot

eyes and mumbled speech, constitute evidence of a defendant's impairment which overcomes a manifest weight challenge and supports a conviction for operating a vehicle under the influence of a drug of abuse." *Strebler*, at ¶ 19.

In *Strebler*, the defendant "appeared very disoriented when [the officer] approached him and [ ] his eyes were bloodshot. When the officer asked for Strebler's driver's license, Strebler fumbled through his wallet and produced a credit card. * * *" *Strebler* at ¶¶ 11-12. Further, when the officer asked Strebler if he had been drinking or using drugs, Strebler replied that he was using prescription Methadone. *Id.* Strebler then produced the prescription bottle from his pocket. * * *." *Id.* Thereafter, the officer administered field sobriety tests to Strebler and he could not pass them. Strebler presented testimony on his behalf from his doctor from the Methadone clinic, who stated that his methadone attributed to his confusion and poor performance on the field sobriety tests; however, Strebler's doctor could not account for Strebler's "mumbled speech, bloodshot eyes, or cloudy eyes to Appellant's medical condition" *Id.* at ¶ 19. The *Strebler* court found that the jury did not lose its way in convicting Strebler for OVI. In both *Strebler* and this case, the evidence presented to the fact-finder was sufficient to support a determination of guilt because the state presented evidence that the defendant ingested a specific drug.

In contrast, courts have found insufficient evidence of R.C. 4511.19(A)(1) when the State merely relied on strong physiological indicia of impairment for an OVI conviction. For example, in *Cleveland v. Turner,* the Eighth District reversed a defendant's conviction for driving under the influence where there was evidence that the driver was impaired, but there was no evidence that the driver had ingested alcohol or a drug of abuse. *Turner*, supra at ¶ 13. The *Turner* court specifically noted that "insufficient evidence that defendant ingested drug of abuse where no

drugs were found and defendant did not identify the medication he may have taken". *Id.* The *Turner* court arrived at this conclusion of law because the State presented no evidence of a specific medication or drug of abuse. However, when the State presents evidence of the specific drug ingested by the defendant, along with evidence that the defendant was substantially impaired, the court should find that the state's evidence is sufficient.

In *Strebler*, the State's evidence that Strebler appeared very disoriented, had bloodshot eyes, mumbled speech, fumbled through his wallet for his license, failed the field sobriety tests, coupled with his admissions that he had taken prescription Methadone, was enough evidence to support the fact finder's determination of guilt; and therefore, the fact finder did not lose its way in finding Strebler guilty of OVI. The same conclusion of law should be reached in Richardson. *Strebler, supra*, at ¶11-12, ¶ 19.

In light of the above, evidence that a defendant ingested a drug of abuse, 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.

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.

CONCLUSION

For these reasons, this Court should reverse.

Respectfully submitted,

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I hereby certify that a copy of this Merit Brief was sent by regular U.S. mail this 9th day of November, 2015, to: Adam 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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Supreme Court of Ohio Clerk of Court - Filed April 20, 2015 - Case No. 2

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	**Case No.**
Plaintiff-Appellant,	**On Appeal from the Montgomery County Court of Appeals, Second Appellate District**
vs.	
CLINTON RICHARDSON	**Court of Appeals Case No. CA 26191**
Defendant-Appellee.	

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

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CLINTON RICHARDSON

NOTICE OF APPEAL OF APPELLANT, THE STATE OF OHIO

The State of Ohio, gives notice of appeal to the Supreme Court of Ohio from the judgment of the Montgomery County Court of Appeals, Second Appellate District, entered in *State of Ohio v. Clinton Richardson,* Case No. 26191. The Court of Appeals issued an opinion and entered a final entry on March 4, 2015.

This felony case presents a question of public or great general interest.

Respectfully submitted,

MATHIAS H. HECK, JR.
PROSECUTING ATTORNEY

By: _____
TIFFANY C. ALLEN
REG NO. 0089369
Assistant Prosecuting Attorney
Appellate Division

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was sent by first class mail on this 20th day of April, 2015, to the following: Kristin L. Arnold, 1502 Liberty Tower, 120 West Second Street, Dayton, OH 45402 and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215.

By: _____

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Supreme Court of Ohio Clerk of Court - Filed June 23, 2015 - Case No. 2015-1048

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	:	**Case No.**
Appellant,	:	
vs.	:	**On appeal from the Montgomery County Court of Appeals, Second Appellate District**
CLINTON RICHARDSON	:	
Appellee.	:	**Court of Appeals Case No. 26191**

NOTICE OF CERTIFIED CONFLICT

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NOTICE OF CERTIFIED CONFLICT

Appellant the State of Ohio, by and through the Office of the Prosecuting Attorney of Montgomery County, hereby gives notice to this Court, pursuant to S.Ct. Prac. R. 8.01, of a certified conflict of the judgment of the Second District Court of Appeals for Montgomery County entered in *State v. Clinton Richardson,* Case No. 26191. The court of appeals' order certifying a conflict was filed on May 27, 2015 pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution. The issue certified by the court of appeals is:

> 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?

Respectfully submitted,

MATHIAS H. HECK, JR.
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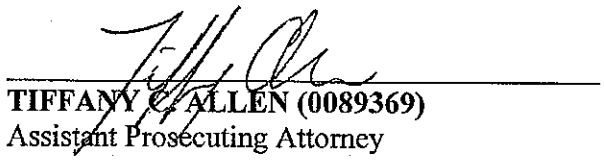
COUNSEL FOR APPELLANT,
THE STATE OF OHIO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Certified Conflict was sent by regular U.S. mail to counsel for Appellee: Kristin Arnold, 1502 Liberty Tower, 120 W. Second Street, Dayton, Ohio 45402, and Timothy Young, Ohio Public Defender Commission, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, on the 23rd day of June 2015.



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Case: CR 026191
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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO Plaintiff-Appellee	C.A. CASE NO. 26191
v.	T.C. NO. 12CR3299
CLINTON RICHARDSON Defendant-Appellant	(Criminal Appeal from Common Pleas Court)

. . . . . .

OPINION

Rendered on the 4th day of March, 2015.

. . . . . .

TIFFANY ALLEN, Atty. Reg. No. 0089369, Assistant Prosecuting Attorney, 301 W. Third Street, 5th Floor, Dayton, Ohio 45422
Attorney for Plaintiff-Appellee

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. . . . . .

FROELICH, P.J.

{¶ 1} Clinton Richardson was convicted after a bench trial in the Montgomery County Court of Common Pleas 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. Richardson claims that his

convictions were based on insufficient evidence and were against the manifest weight of the evidence. For the following reasons, the trial court's judgment will be vacated.

I. Factual and Procedural History

{¶ 2} According to the State's evidence, at approximately 4:30 p.m. on October 31, 2012, Richardson rear-ended Deborah Leopold's vehicle as she waited at a traffic light to turn left from Third Street onto Wayne Avenue in Dayton. Richardson had not been driving fast, and there was no damage to Leopold's vehicle. When Leopold got out of her vehicle to talk with Richardson, she noticed that Richardson's speech was "very slurred and pretty much incomprehensible" and that he did not make eye contact. He also "fumbled" with his wallet and dropped all of his cards on the street while looking for his insurance information. Leopold did not notice any odors of an alcoholic beverage or see any open containers or drugs in Richardson's truck. She did notice that Richardson had a small child in the back seat, and she was concerned about Richardson's ability to drive. She called the police.

{¶ 3} Dayton Police Officer Jonathan Miniard and his partner responded to the accident. Miniard approached Richardson in his vehicle and observed Richardson with "both hands on the steering wheel kind of slumped forward staring ahead." It took Richardson a moment to register the officer's presence. Miniard noticed a burnt smell, and he learned that Richardson had tried to light a cigarette and it singed the side of his hair. Richardson's truck was still running, so Officer Miniard asked Richardson to turn it off. Richardson "couldn't figure out how to put it back into park;" Officer Miniard did that for him and turned off the vehicle.

{¶ 4} Officer Miniard asked Richardson to exit his vehicle. When he got out, he

slid out of the driver's seat and was unsteady. The officer escorted Richardson to the front of his cruiser. Miniard asked Richardson if he had drunk anything or taken any medication. Richardson denied that he had consumed any alcohol, but stated that he was on pain medication. When asked if he had taken any, Richardson responded, "Yeah." Miniard noticed that Richardson had slurred speech, seemed to have difficulty understanding questions, and gave incoherent answers. Richardson told Miniard that he had to get his son home.

{¶ 5} Officer Miniard testified that he had been involved in numerous OVI investigations in his 14 years as a Dayton police officer and that he had taken training and refresher courses on OVI detection. Miniard decided to administer field sobriety tests on Richardson, and he conducted the horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one-leg stand test. Miniard noticed a 45 degree angle of nystagmus and slight jerking in Richardson's eyes during the HGN test, which indicated impairment. Richardson also had difficulty paying attention during the test. On the walk and turn test, Richardson exhibited seven out of eight "clues" indicating possible impairment. Officer Miniard marked three out of a possible four clues for impairment on the one-leg stand test. Miniard concluded that Richardson was under the influence of "some type of possibly narcotics," and he placed Richardson under arrest.

{¶ 6} Officer Miniard read Richardson BMV 2255 and asked him (Richardson) if he would submit to a blood test. Richardson refused. No chemical tests were performed. Richardson never indicated to Officer Miniard that he was having a medical emergency, and he did not ask for medical treatment; Richardson had reported to the officer that he had a bad back and problems with his neck prior to the accident. Miniard

transported Richardson to jail.

{¶ 7} The parties stipulated at trial that Richardson was previously convicted of felony OVI in *State v. Richardson*, Warren C.P. No. 2006 CR 23305.

{¶ 8} On January 28, 2013, Richardson was indicted for OVI, in violation of R.C. 4511.19(A)(2), and endangering children, in violation of R.C. 2919.22(C)(1). R.C. 4511.19(A)(2) provides:

> 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, streetcar, or trackless trolley as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under [R.C. 4511.191], and being advised by the officer in accordance with [R.C. 4511.192] of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

Because Richardson had a prior felony OVI conviction, the OVI was charged as a third-degree felony. R.C. 2919.22(C)(1) prohibits operating a vehicle in violation of R.C. 4511.19 with a child in the vehicle.

{¶ 9} Richardson subsequently moved to suppress the statements he made to

the police. After a hearing, the trial court ruled that the statements Richardson made after exiting his car and prior to being placed in the cruiser were admissible. However, the trial court suppressed the statements Richardson made in the cruiser prior to being given *Miranda* warnings and, because he did not voluntarily waive his *Miranda* rights, all statements made afterward.

{¶ 10} Richardson waived a jury trial, and the matter was tried to the court. The State offered the testimony of Ms. Leopold and Officer Miniard, as summarized above. Richardson did not make a Crim.R. 29(A) motion at the end of the State's case. Richardson then testified on his own behalf, and presented the testimony of Dr. Charles Russell; after questioning regarding his qualifications, the trial court found Dr. Russell to be an expert in chemical dependency.

{¶ 11} Richardson stated at trial that he has suffered numerous broken bones (including both femurs, hip, elbow, vertebrae, and wrist) and other injuries and had been to two different pain clinics in the past three years; for several years, he received a prescription for hydrocodone acetaminophen. In October 2012, he generally took three pills per day. He testified that he had run out of medication on October 29, 2012 (two days before the accident), was suffering from hydrocodone withdrawal at the time of the accident, and that he had not consumed alcohol or drugs. He testified that he was trying to go to the hospital at the time of the accident.

{¶ 12} Dr. Russell testified that Richardson was opiate tolerant on October 31, 2012, and that he was taking medication with 325 mg of acetaminophen and 10 mg of hydrocodone, three times a day. Dr. Russell described the symptoms of opiate withdrawal, and stated that the symptoms Richardson described were consistent with

withdrawal. Dr. Russell concluded that "there's a decent possibility that he was withdrawing from opiates, but I wouldn't call that a reasonable degree of medical certainty."

{¶ 13} Upon consideration of the evidence, the trial court found Richardson guilty of both offenses. The trial court sentenced Richardson to one year in prison for OVI, of which 120 days were mandatory, and to six months in jail for endangering children, to be served concurrently. Richardson was required to attend and complete mandatory drug and alcohol treatment. The trial court further ordered a lifetime suspension of Richardson's driver's license and that his 1998 Dodge Ram truck be forfeited to the Dayton Police Department.

{¶ 14} Richardson appeals from his convictions, claiming that his convictions were against the manifest weight of the evidence and based on insufficient evidence. Although Richardson did not request a judgment of acquittal at trial, his failure to file a timely Crim.R. 29(A) motion does not waive his argument on appeal concerning the sufficiency of the evidence. *State v. Jones*, 91 Ohio St.3d 335, 346, 744 N.E.2d 1163 (2001); *State v. Stoner*, 2d Dist. Clark No. 2008 CA 83, 2009-Ohio-2073, ¶ 22.

{¶ 15} "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential

elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id.*

{¶ 16} In contrast, "a weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." *Wilson* at ¶ 12; *see Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 19 ("'manifest weight of the evidence' refers to a greater amount of credible evidence and relates to persuasion"). When evaluating whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, and determine whether, in resolving conflicts in the evidence, the trier 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." *Thompkins*, 78 Ohio St.3d at 387, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 17} Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175.

{¶ 18} In *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, we discussed in detail the evidence that is required to prove a violation of R.C. 4511.19 based on medication. We stated:

> [W]hen a prosecution under R.C. 4511.19(A)(1)(a) is based on driving under the influence of medication, the State must do more than simply present evidence that the defendant has taken the medication and shows signs of impairment. The United States Food and Drug Administration has approved more than a thousand prescription drugs (which are "drugs of abuse" under Ohio law), all of which may have any number of different side effects. Not all side effects involve the impairment of judgment or reflexes. Although some medications may be familiar to some jurors, the various physiological effects of different medications [are] outside the common knowledge of most jurors and many trial judges.
>
> The essence of R.C. 4511.19(A)(1)(a) is to prohibit impaired driving while under the influence. It is certainly not intended to criminalize the operation of a vehicle by a person taking a cholesterol or blood pressure medication, let alone an anti-narcoleptic or ADHD prescription, unless that drug negatively influences the defendant's driving abilities. And in many situations, especially those involving prescription drugs, this can only be proved by direct testimony linking the influence of the drug to the driving. This could be established through the testimony of an expert who is familiar with the potential side effects of the medication, or perhaps of a layperson (such as a friend or family member) who witnessed the effect of the

particular drug on the defendant-driver.

We therefore conclude 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.[1]

We emphasize that the State is not required to support its case under R.C. 4511.19(A)(1)(a) with evidence of the exact amount of alcohol or the drug of abuse that was consumed or ingested by the defendant. It is often the case that, upon initiating a traffic stop, a police officer detects an odor of an alcoholic beverage on the driver and there is no available evidence as to the exact amount that the defendant consumed. However, as noted by the Ohio Supreme Court, "almost any lay witness, without having any special qualifications, can testify as to whether a person was intoxicated." *Columbus v. Mullins*, 162 Ohio St. 419, 421, 123 N.E.2d 422 (1954). In all cases, a jury must determine, based on totality of the evidence, whether the defendant was driving under the influence of alcohol and/or a drug of abuse.

(Additional citations omitted.) *May* at ¶ 46-49. *See also, e.g., State v. Husted*, 2014-Ohio-4978, 23 N.E.3d 253 (4th Dist.) (State failed to identify drug that was consumed, nor

[1]This requirement does not extend to violations of R.C. 4511.19(A)(1)(b)-(j), since these are per se violations based on the legislature's implicit determinations that specific concentrations of specific drugs negatively influence driving.

was there evidence of how the unspecified drug affected the defendant or had the potential to impair a person's judgment or reflexes).

{¶ 19} At trial, Officer Miniard and Leopold testified about Richardson's behavior, which reflected that Richardson was impaired at the time of the accident. Miniard testified in detail about the field sobriety tests that he conducted and that Richardson performed poorly on each of those tests. The State also played a small portion of the video from the police cruiser, which reflected that Richardson was slow to respond to questions, inattentive, and needed assistance walking. When asked what was wrong with him, Richardson said that he was "exhausted." Officer Miniard asked Richardson if he were taking any medication; Richardson responded that he was taking "painkillers." Miniard asked if Richardson "was on any painkillers now." Richardson said, "Yeah." Miniard asked how many, but Richardson's response, if any, is not discernible.

{¶ 20} The State thus produced evidence that Richardson's driving was impaired, that he acknowledged that he was on "painkillers," and that he had "taken" some. There was no evidence in the State's case as to what particular drug, medicine, or substance he had taken, when it was taken, or what its potential effects were. Although there was substantial evidence of impairment, there was no evidence linking that impairment to any "drug of abuse."

{¶ 21} The State, knowing Richardson's statements regarding what "painkillers" he had allegedly taken, could have introduced expert testimony on their effect or lay testimony of individuals who had observed the effects on Richardson. Further, even when Richardson refused a blood test, the State could have sought to obtain a blood sample. *See State v. Rawnsley*, 2d Dist. Montgomery No. 24594, 2011-Ohio-5696, ¶ 15

("Without consent, a blood draw requires probable cause and either a warrant, or exigent circumstances justifying a search without a warrant."); R.C. 4511.191 (permitting blood draw, under implied consent, after arrest for OVI and required notices). However, in the absence of evidence of the effects of the painkiller on Richardson specifically or the possible effects on people generally, a Crim.R. 29 motion should have been made by defense counsel and sustained by the trial court.

{¶ 22} It is possible for sufficient evidence to be introduced in the defense case. As stated above, when determining whether there is sufficient evidence to support a conviction, an appellate court considers all of the evidence admitted against the defendant at trial. *See State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 80; *State v. Manso*, 9th Dist. Summit No. 26727, 2014-Ohio-1388, ¶ 40, fn. 1 ("when reviewing a Crim.R. 29 motion, this Court examines the sufficiency of only the State's evidence. * * * In contrast, when this Court reviews challenges to the sufficiency of the evidence, it considers all of the evidence admitted at trial.").

{¶ 23} Richardson testified that he sought treatment for severe pain in June 2010 and was prescribed a variety of strong pain medications, including hydrocodone. In March 2012, Richardson saw Dr. Saleh, who prescribed 10 mg hydrocodone and 325 mg acetaminophen; Richardson took six tablets per day. When asked how the medication affected him, Richardson responded, "By this point in time, I had been taking the painkiller medication for so long they no longer had any real side effects, you know, that I felt any kind of drowsiness, dizziness, feelings of euphoria, if you will, anything of that nature that would cloud your judgment. Long ago, I stopped having these side effects. The narcotic painkiller basically just did its job and numbed the pain." Defense counsel asked

Richardson if he suffered from confusion, disorientation, or problems with balancing, walking, or focus while on hydrocodone; Richardson responded that he did not. Richardson continued taking acetaminophen/hydrocodone until October 2012, at which time he was taking three per day. He stated, "[B]y this time, I had been taking narcotic painkillers for, every day for two-and-a-half years so I felt no side effects from those, whatsoever."

{¶ 24} Richardson should have had a supply of medication to last until November 9, but he did not. Richardson could not explain why he ran out of medication early. He denied taking more than prescribed. During his testimony, Richardson described his symptoms of hydrocodone withdrawal. He stated that he had insomnia and had not slept for two nights, he was disoriented, fatigued, weak, sweating, had cold chills, vomiting, and diarrhea. Richardson testified that he suffered from all of those symptoms at the time of the accident. Richardson further testified that he had suffered from withdrawal one prior time in 2010, and he had similar symptoms.

{¶ 25} Dr. Russell's testimony focused on whether Richardson's symptoms constituted symptoms of withdrawal. On cross-examination, the State asked Dr. Russell several questions related to whether Richardson's medical records provided an explanation for Richardson's poor performance on the field sobriety tests. Richardson's medical records generally did not indicate that he suffered from conditions that would affect his performance on the tests. Dr. Russell was not asked about the actual or potential effects of 10 mg of hydrocodone.

{¶ 26} 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.

{¶ 27} 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.

{¶ 28} Richardson's assignment of error based on sufficiency of the evidence is sustained. His assignment of error based on manifest weight is moot.

{¶ 29} The trial court's judgment will be vacated.

. . . . . .

FAIN, J. concurs.

HALL, J., dissenting:

{¶ 30} The majority cites, and quotes, *State v. May*, 2d Dist. Montgomery No.

25359, 2014-Ohio-1542, for the proposition that to prove driving under the influence of drugs the State must introduce evidence of how the particular drug affects the defendant and that the particular medication has the ability to impair one's judgment. I strongly disagree.

{¶ 31} I concurred in *May* because there was overwhelming evidence that the defendant was under the influence of alcohol, regardless of consideration of any drugs she had taken. I wrote then, and reiterate now:

> * * * I write separately to express my disagreement with the following sentence: "We agree with [appellant] that, when a prosecution under R.C. 4511.19(A)(1)(a) is based on driving under the influence of medication, the State must do more than simply present evidence that the defendant has taken the medication and shows signs of impairment." (supra ¶ 46). And I disagree with the determination 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." (supra ¶ 48). Neither comment is necessary to our disposition of this case because we conclude that "[t]he State presented overwhelming evidence that May drove her vehicle while under the influence of alcohol." (supra ¶ 54). With that conclusion, discussion of the evidence required to show impairment by medicine or drugs is dicta. Moreover, I don't agree with either quoted statement. It just depends.
>
> For purposes of this discussion, I recognize that the term

"medication" is used in ¶ 46 and ¶ 48, but the legal standard for sufficiency applies to any "drug of abuse," which includes "any controlled substance, dangerous drug * * *, or over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes." R.C. 4506.01(L). In my view, all that is necessary is evidence that the offender consumed a drug and that his or her faculties were appreciably impaired:

> In order to prove that appellant was under the influence of a drug of abuse, appellee was required to prove that appellant's "faculties were appreciably impaired" by the consumption of a drug of abuse. *State v. Lowman* (1992), 82 Ohio App.3d 831, 836. In the prosecution of an offense under this provision, the amount of a substance in the appellant's body is only of secondary interest. *See City of Newark v. Lewis* (1988), 40 Ohio St.3d 100, 104. "It is the behavior of the defendant which is the crucial issue. * * * The test results [of presence of a drug in blood], if probative, are merely considered in addition to all other evidence of impaired driving in a prosecution for this offense."

State v. Dixon, 12th Dist. Clermont No. CA2001-01-012, 2007-Ohio-5189, ¶ 15.

In *Dixon,* the evidence was found to be sufficient where the defendant exhibited clues of impairment on two admissible field-sobriety

tests, he had bloodshot eyes, an officer discovered marijuana on the defendant's person, and laboratory results of a urine sample indicated that the defendant had consumed marijuana. The evidence was sufficient even though no expert evidence was submitted by the State to correlate the amount of metabolite with timing of ingestion or a level of impairment. Other cases supporting this notion include *State v. Dearth*, 4th Dist. Ross No. 09CA3122, 2010–Ohio–1847 (finding that evidence was sufficient where trooper observed defendant drive off the roadway, his eyes were glassy and bloodshot, trooper detected strong odor of burnt marijuana from the vehicle and defendant, and defendant performed badly on various physical-coordination tests) and *State v. Strebler,* 9th Dist Summit No. 23003, 2006–Ohio–5711 (finding sufficient evidence where a lay witness observed the defendant with difficulty walking, fumbling with his keys, mumbled speech and cloudy eyes; deputy encountered the defendant at a local store appearing disoriented with bloodshot eyes and difficulty producing his license; the defendant indicated he was using prescription methadone, produced a prescription bottle, performed badly on field-sobriety tests, and urine tested positive for methadone although there was no determination of what level). We also previously addressed the issue in *State v. Gilleland,* 2d Dist. Champaign No.2004 CA 1, 2005–Ohio–0659. There an officer observed the defendant driving erratically. Gilleland was described as "disoriented and having glassy eyes and a demeanor which indicated he was under the influence of drugs." *Id.* at ¶ 19. "[N]umerous empty or near

empty bottles of prescription drugs" that had been filled that day were found in his car. *Id.* at ¶ 2. Gilleland argued that without a blood test or the performance of field-sobriety tests there was insufficient evidence offered from which a jury could conclude he was guilty. We disagreed. We did not adopt a rule that evidence of the drugs' ability to impair was necessary.

A different result is appropriate where there is no evidence about what, if any, drug, medicine, or substance the defendant consumed no matter how impaired. In *State v. Collins*, 9th Dist. Wayne No. 11CA0027, 2012–Ohio–2236, officers testified at length regarding Collins' impaired condition and gave their respective opinions that he was under the influence of *some* sort of illegal narcotic or drug. But there was no evidence that he had ingested any particular drug, medicine, or substance. Accordingly, the court found the evidence insufficient.

May at ¶ 57-60 (footnote omitted).

{¶ 32} Here, there is no reasonable question that the defendant was substantially impaired. The question is whether it was because he had taken drugs. On direct examination, the officer testified:

[I]asked him had he taken any medication. He advised that he was on pain medication. I asked him if he had taken any. He said yeah.

* * *

Q. And he said he had taken pain medication.

A. Yeah, he was on pain medication.

Q. Okay. And from your conversation with him, the back and forth that you

guys were engaged in, did it seem like he was currently on pain medication?

A. Yes.

(T. at 22).

{¶ 33} In my view, that testimony alone is sufficient for the court to have found Richardson guilty, but it is much more than sufficient to find that a prima facie case has been presented. (The defense did not make a Crim.R. 29 motion for acquittal after the State rested.) But there is more. The defendant testified:

Q. But the two pain medications that you were taking at that point were ibuprofen, about 800 milligram, and hydrocodone, 10-325.

A. Correct.

Q. Okay. So when you said to him, and regardless if you remember it or not, when you said to Officer Miniard you had taken pain medications, would you have been referring to one of 2 those two medications?

A. Yes.

(T. 122-123).

{¶ 34} After a portion of the police video was played, the following exchange occurred:

Q. And you would agree with me that Officer Miniard asked you what you had taken. You mouthed something. We can't really hear it. But his response is did you say Oxycodone and you shook your head yes.

A. He said codone. That's all I heard --

Q: I apologize. Codone. When you shook --

A. He said codone.

Q. -- your head yes to that question.

A. Sure. Hydrocodone.

Q. And he followed that up with how much did you take and you mouthed something and he says 3 milligrams and you shake your head no, correct?

A. Right.

Q. And then you mouth what appears to be the word thirty. And he says 30 milligrams and you shake your head yes.

A. I -- yes. Can I elaborate?

Q. No.

(T. 130).

{¶ 35} Upon redirect the defendant then claimed that he was so disoriented that he could not clearly understand the officer's questions. (T. 132-133). All of this evidence was more than sufficient for the trial court to have found the defendant guilty. I would further note that the defendant's evidence—that he was incoherent because he was suffering from hydrocodone withdrawal rather than current ingestion—was not only contradictory to his own statements but, in my view, was not worthy of belief. It was, therefore, well within the discretion of the trial court to disregard that excuse.

{¶ 36} On this record, where it is undeniably apparent that the defendant was substantially impaired because he had taken pain killers, more specifically hydrocodone, I do not believe it was necessary to introduce evidence of the pharmaceutical properties of what he ingested to find him guilty of driving under the influence. I would affirm the judgment of the trial court.

. . . . . .

Copies mailed to:

Tiffany Allen
Kristin L. Arnold
Hon. Barbara P. Gorman

Case: CA 026191
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Dkt: CAOAFE

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IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26191
v.	:	T.C. NO. 12CR3299
CLINTON RICHARDSON	:	**FINAL ENTRY**
Defendant-Appellant	:	

. . . . . .

Pursuant to the opinion of this court rendered on the 4th day of March, 2015, the judgment of the trial court is vacated.

Costs to be paid as stated in App.R. 24.

Pursuant to Ohio App.R. 30(A), it is hereby ordered that the Clerk of the Montgomery County Court of Appeals shall immediately serve notice of this judgment upon all parties and make a note in the docket of the mailing.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MICHAEL T. HALL, Judge

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