

IN THE COURT SUPREME COURT OF OHIO

STATE OF OHIO,)	
)	Appellate Case No. 2015-0629
<i>Plaintiff - Appellant</i>)	2015-1048
)	
vs.)	
)	ON APPEAL FROM THE
CLINTON RICHARDSON,)	MONTGOMERY COUNTY COURT OF
)	APPEALS, SECOND APPELLATE
<i>Defendant – Appellee.</i>)	DISTRICT COURT OF APPEALS

MERIT BRIEF OF CLINTON RICHARDSON, APPELLEE

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STATEMENT OF THE CASE

A statement of the case is omitted from the Merit Brief of Appellee as such information is included in the Merit Brief of The State of Ohio, filed November 9, 2015.

STATEMENT OF THE FACTS

A statement of the facts is omitted from the Merit Brief of The Appellee as such information is properly included in the Merit Brief of The State of Ohio, filed November 9, 2015.

PROPOSITION OF LAW

In order to meet a sufficiency of the evidence challenge when a drug of abuse is at issue in an OVI case pursuant to R.C. 4511.19(A)(1), the State must present 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.

ARUGMENT

In a case where a defendant has been charged with operating a vehicle while under the influence of a drug of abuse, pursuant to R.C. 4511.19(A)(1), the State is not required to prove specific blood concentration levels, yet the law requires the State “to do more than prove impairment in a vacuum.” *Cleveland v. Turner*, 8th Dist. Cuyahoga No. 99183, 2013-Ohio-3145, ¶ 13. If no specific blood level concentration levels are available, the State is left with circumstantial evidence to establish guilt beyond a reasonable doubt. Generally, circumstantial and direct evidence possess the same probative value. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus. However, in some cases the circumstantial evidence presented at trial does not provide a link between the drug of abuse and the impairment and thus the evidence is not sufficient to establish guilt beyond a reasonable doubt.

The concept of circumstantial evidence and proving guilt beyond a reasonable doubt is particularly important when dealing with a “drug of abuse” as it relates to R.C. 4511.19(A)(1). In the instant case, a prescription drug was at issue, specifically hydrocodone. “The United States Food and Drug Administration has approved more than one thousand prescription drugs, which are drugs of abuse under Ohio law, all of which may have any number of different side effects.” *State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, ¶ 46. The multitude of varying side effects of prescription drugs and how they affect a particular individual are outside the common knowledge of the vast majority of jurors and most likely many judges. *Id.* Simply

because an individual has ingested a prescription drug does not mean that their judgement and/or reflexes are impaired to an extent that would negatively influence their driving ability pursuant to R.C. 4511.19(A)(1).

The essence of R.C. 4511.19(A)(1) 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 the drug negatively influences the defendant's driving abilities. And in many situations, especially those involving prescription drugs, this can be 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. *Id.* at ¶ 47.

Based on this reasoning, the court in *May* concluded that:

In order to establish of R.C. 4511.19(A)(1) 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. *Id.* at ¶ 48.

The court in *Richardson* followed *May's* precedent and stated, "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.” *State v. Richardson*, 2d Dist. Montgomery No. 26191, 2015-Ohio-757 at ¶ 20. Based on the evidence presented by the State, the *Richardson* court concluded that although there was substantial evidence that Richardson was impaired, the State failed to provide sufficient evidence linking such impairment to any drug of abuse ingested by Richardson. This evidence may have been sufficient if the State had presented expert testimony that hydrocodone, the drug of abuse at issue in this case, could have impaired Richardson’s judgment or reflexes pursuant to R.C. 4511.19(A)(1). *Richardson* at ¶ 26.

The State’s Merit Brief discusses that a police officer’s testimony, “who is trained in narcotics and/or impaired drivers”, should be considered sufficient evidence to satisfactorily link the defendant’s impairment to the drug of abuse. Merit Brief Of The State Of Ohio, dated November 9, 2015, Pg. 10. This argument is baseless, as a police officer may only testify as to what the police officer witnessed during the incident in question. As stated above, there are a vast number of drugs of abuse pursuant to Ohio law. A police officer is absolutely not qualified to make a determination and testify as to how prescription drugs affect an individual. Especially since drugs of abuse could have different effects on different individuals. Conversely, based on police officers training and experience, they are qualified to determine that an individual is impaired based on their observations and the field sobriety tests conducted; this should not extend to a determination of the actual effects of specific drugs of abuse.

Because police officers are not qualified to testify as to how drugs of abuse affect an individual, their testimony is not adequate to link the defendant’s impairment to the specific drug of abuse. In order to establish the direct link between the defendant’s impairment and drug of abuse, the State could introduce expert testimony regarding the effect of the specific drug, or a

layperson who has witnessed the effect of the specific drug on the defendant. *Richardson* at ¶ 18. Without evidence establishing the direct link between the impairment and the specific drug of abuse, “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.

The State argues that the conflict case, *State v. Stephenson*, concluded that the fact finder could “support a reasonable inference” from evidence of defendant’s impairment along with defendant’s admission of taking prescription methadone and morphine the same day. *State v. Stephenson*, 4th Dist., Lawrence No. 05CA30, 2006-Ohio-2563 ¶ 23. As a result, the State argues that when there is evidence that a defendant ingested a drug of abuse, and it is coupled with substantial evidence of impairment, it negates the need for either an expert or lay witness to testify as to how the particular medication affects the defendant, and/or that the particular medication has the potential to impair a person’s judgment or reflexes. This argument does not carry weight, as drugs of abuse may have different effects on different individuals and a causal connection based in either an expert or lay witness’ testimony as to how the particular medication affects the particular defendant must be present. Based on the *Richardson* opinion, the court concluded that “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.” *Richardson* at ¶ 20. Thus, there was no link between Richardson’s impairment and a drug of abuse. Similarly, in *Turner*, the court concluded that the State clearly established that defendant was impaired but failed to prove that defendant’s impairment was linked to a drug of abuse. *Id.* at ¶ 14. In the *Turner* case, no drugs were found on defendant’s person or in the vehicle. *Id.* at ¶ 14. Defendant admitted to taking medication but did not specify which medication. *Id.* at ¶ 14. The court concluded that even though the defendant admitted to taking some sort of medication,

“it could have been aspirin.” *Turner* at ¶ 14. As a result, defendant’s admission of taking medication was not sufficient to establish a link between his impairment and a drug of abuse. *Id.* at ¶ 14. In the case at hand, Richardson admitted to taking “painkillers” but did not specify what type of painkiller to the police officer nor was there any “painkillers” found on his person or in his vehicle. As a result, it is appropriate to apply the same logic from the *Turner* court and state that because Richardson did not specify which painkiller he ingested, that a link was not established between his impairment and the drug of abuse. Accordingly, the case law cited by the State to support their position is not applicable and it is more appropriate to use case law where the defendant did not specifically identify the drug of abuse to the police officer.

Furthermore, the *Stephenson* case was decided in 2006 and the cases cited by the State to support their position are from 1998-2003. Recent case law appears to have shifted to requiring a nexus between the impaired condition and the specific drug of abuse. *See State v. Collins*, 9th Dist. Wayne, No. 11CA0027, 2012-Ohio-2236 (The State established that defendant was in an impaired condition yet the State did not create a nexus that defendant’s impaired condition resulted from a drug of abuse because defendant denied being under the influence of a drug of abuse and no evidence of drug paraphernalia was discovered on defendant’s person or in his vehicle); *State v. Samples*, 9th Dist. Medina, No. 12CA0051-M, 2013-Ohio-986 (The State did not present any testimony as to what type of drug of abuse cause the alleged impairment and thus the State did not meet its burden of proving each element of driving under the influence of a drug of abuse beyond a reasonable doubt); *Cleveland v. Turner*, *supra* (Although defendant admitted that he had taken some medication, defendant did not identify the medication by name and thus the court concluded there was insufficient evidence because the state failed to prove a nexus between defendant’s impairment and drug of abuse); *State v. May*, *supra* (“In order to establish a

violation of R.C. 4511.19(A)(1)(a) based on medication, the State must also present 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. Husted*, 4th Dist. Ross, No. 14CA3447, 2014-Ohio-4978 (The court concluded that the State failed to provide sufficient evidence because, based on precedent, the state did not provide any evidence that defendant had consumed any drug of abuse, how the unspecified drug of abuse actually affects a person, or that the unspecified drug had the potential to impair a person's judgment or reflexes.)

Furthermore, Richardson testified at trial that he had an active prescription for hydrocodone that he took daily for pain management. Trial Transcript Pgs. 62-68. Richardson claimed that he was opiate tolerant and denied having any side effects from this medication due to his daily use. Trial Transcript Pgs. 86-87. Richardson's explanation for his behavior the evening in question was that he had not taken any medication that day and his impairment was in fact caused by opiate withdrawal. Trial Transcript Pgs. 86-101. Accordingly, he testified that his "impairment" was not from ingesting a drug of abuse (but from the lack there of) and thus not a violation of R.C. 4511.(A)(1). An expert testified regarding whether Richardson's symptoms constituted symptoms of withdrawal. Trial Transcript Pgs. 143-189. However, the expert was never specifically asked about the actual effects of hydrocodone on Richardson. Thus, there was no expert testimony linking Richardson's impairment to ingesting a drug of abuse. The evidence presented from the expert's testimony was in regards to whether Richardson was in fact withdrawing from hydrocodone, not that hydrocodone could have caused the impairment Richardson portrayed.

Because the “essential concept of R.C. 4511.19(A)(1)(a) is a prohibition of the act of operating a vehicle while being negatively influenced by some substance (as opposed to, for example, a mental or physical condition)” then it makes sense that for the State to meet their burden that they must present sufficient evidence establishing that the defendant’s impairment is directly linked to a specific drug of abuse and such drug of abuse negatively affected defendant’s driving ability. *May* at ¶ 52. The State failed to meet that burden in the aforementioned case.

CONCLUSION

For these reasons, this Court should sustain.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Merit Brief was sent by regular U.S. mail the same day as filing to Tiffany C. Allen and Andrew T. French, Montgomery County Prosecutor's Office, P.O. Box 972, 301 W. Third Street, Suite 500, Dayton, Ohio 45422.



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