[Cite as *State v. Newsom*, 2003-Ohio-3284.]

STATE OF OHIO, BELMONT COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 02-BE-28
VS.	)	
	)	OPINION
RICHARD E. NEWSOM,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from County Court, Western Division, Case Nos. 02TRC00756-01, 02, 03, 04; 02CRB00100-01, 02
JUDGMENT:	Affirmed
APPEARANCES:	
For Plaintiff-Appellee:	Frank Pierce Prosecuting Attorney Thomas M. Ryncarz Assistant Prosecuting Attorney 147-A West Main Street St. Clairsville, Ohio 43950
For Defendant-Appellant:	Attorney John A. Vavra 132 West Main Street P.O. Box 430 St. Clairsville, Ohio 43950

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 16, 2003

DONOFRIO, J.

{¶1} Defendant-appellant, Richard E. Newsom, appeals from a decision of the Belmont County Court, Western Division following a bench trial that convicted him of driving under the influence, driving under suspension, failure to comply, resisting arrest, traveling left of center, and failing to wear a safety belt.

{¶2} On February 19, 2002 at approximately 10:50 p.m., State Highway Patrol Trooper Dennis Wilcox was traveling on County Road 5 in Belmont County when an oncoming vehicle traveling left of center forced his cruiser off the road. Trooper Wilcox turned around and followed the vehicle for about two miles with his lights and siren activated. The vehicle went left of center several more times and the driver did not pull over. The driver was identified as appellant.

{¶3} Trooper Wilcox followed appellant to his house, where appellant parked his car and entered his house, all while Trooper Wilcox followed him telling him he was under arrest. Trooper Wilcox went to the door of the house. A woman answered the door. Trooper Wilcox requested that she tell appellant to come to the door as he was under arrest. While at the door, Trooper Wilcox noticed appellant exit the house through a back door and run into the woods. Trooper Wilcox chased after him.

{¶4} Appellant attempted to hide. Trooper Wilcox repeatedly told appellant he was under arrest and told him to lie on the ground. Appellant refused. Trooper Wilcox then sprayed appellant with mace and handcuffed him. Two additional officers arrived as backup, State Highway Patrol Sergeant Jeffrey LaRoche and Richland Township Police Constable Jeffrey Stephens. When the officers placed appellant in the cruiser, he kicked the doors and windows. Appellant was taken directly to a hospital due to his exposure to the mace.

{¶5} At the hospital, Trooper Wilcox explained to appellant his rights and asked him to submit to a urine test. Appellant refused. Trooper Wilcox subsequently

transported appellant to the Belmont County Jail, where he then learned appellant had a suspended driver's license.

{¶6} Trooper Wilcox issued appellant a citation for driving under the influence in violation of R.C. 4511.19(A)(1), driving while under suspension in violation of R.C. 4507.02(B), failing to wear a safety belt in violation of R.C. 4513.263, and traveling left of center in violation of R.C. 4511.25. Trooper Wilcox also charged appellant with failing to comply with a lawful order of a police officer in violation of R.C. 2921.331(A) and resisting arrest in violation of R.C. 2921.33(A). The case proceeded to a bench trial and the court found appellant guilty on all charges. The court sentenced appellant as follows: 30 days, 20 suspended, and $500 for D.U.I.; 90 days, 60 suspended, and $500 for driving under suspension; 90 days, 60 suspended, and $250 plus costs for failure to comply; 90 days, 60 suspended, and $250 for resisting arrest; $100 for traveling left of center; and $30 for failure to wear a safety belt. The court ordered the jail terms to run consecutively for a total of 300 days, 200 suspended. Appellant filed his timely notice of appeal on May 30, 2002.

{¶7} Appellant raises three assignments of error, the first of which states:

{¶8} "THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY OF VIOLATING O.R.C. §4511.19(A)(1), AS THERE WAS INSUFFICIENT EVIDENCE THAT THE ABILITY OF THE APPELLANT TO OPERATE HIS VEHICLE WAS APPRECIABLY IMPAIRED."

{¶9} Appellant argues that none of the officers' testimony proved that he was appreciably impaired. Appellant contends that Trooper Wilcox's testimony that he was under the influence of some form of alcohol and/or drug of abuse was not sufficient.

(Tr. 12-13). He next asserts that Sergeant LaRoche's testimony that appellant was impaired was also insufficient. (Tr. 35). Finally, he contends that Constable Stephens never answered the question posed to him regarding whether he was impaired. (Tr. 39-40).

{¶10} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶11} Appellant was convicted of violating R.C. 4511.19(A)(1), which provides:

{¶12} "(A) No person shall operate any vehicle, * * * within this state, if any of the following apply:

{¶13} "(1) The person is under the influence of alcohol, a drug of abuse, or alcohol and a drug of abuse."

{¶14} Sufficient evidence exists on the record to support appellant's D.U.I. conviction. Trooper Wilcox testified that appellant's vehicle came around a turn and crossed half to three-quarters of the way left of center, forcing his patrol car off the right side of the road. (Tr. 7). He stated he turned around and caught up with appellant then activated his pursuit lights and attempted to stop appellant's vehicle.

(Tr. 7). Trooper Wilcox testified appellant did not stop, so he activated his siren and positioned his spot light in appellant's back window. (Tr. 7). Still, appellant did not stop until he got to his residence. (Tr. 7). Trooper Wilcox observed appellant travel left of center a couple more times while following him. (Tr. 15). Trooper Wilcox testified that once appellant exited his car, he ordered him to stop several times, advising him he was under arrest, but appellant ignored him and entered his house. (Tr. 8). Appellant then attempted to hide from Trooper Wilcox in the woods behind his house. (Tr. 9). Appellant attempted to hide behind a tree that was smaller than he was. (Tr. 10). When Trooper Wilcox ordered him to lie on the ground, appellant began shouting profanities at him. (Tr. 10). Trooper Wilcox then sprayed appellant with mace and he fell to the ground. (Tr. 10).

{¶15} Trooper Wilcox testified appellant's voice was slurred. (Tr. 10). He also testified that when he followed appellant at the house he detected an odor of an alcoholic beverage about him. (Tr. 10-11). He further testified that when appellant was attempting to run from him, he was stumbling. (Tr. 18). Trooper Wilcox testified that when he put appellant in the patrol car, appellant was kicking the windows and doors. (Tr. 11). When asked his opinion about whether appellant was under the influence, Trooper Wilcox opined that appellant was under the influence of some form of alcohol and/or drug of abuse. (Tr. 13).

{¶16} Sergeant LaRoche testified that appellant was unsteady on his feet, screamed vulgarities at the officers, and that he detected an odor of an alcoholic beverage on appellant. (Tr. 26-27). He too testified he believed appellant was impaired. (Tr. 35).

{¶17} Constable Stephens testified that appellant's speech was slurred and that appellant was confused about whether he was in front of his house or behind it. (Tr. 39-40).

{¶18} Katherine Goddard, a waitress at Applebee's Restaurant, testified that appellant was in Applebee's around 9:00 or 9:30 that night. (Tr. 47). She noticed that appellant was "feeling pretty good" and told her repeatedly, "'I keep seeing you in my drink.'" (Tr. 48). She also testified that appellant was drunk. (Tr. 51).

{¶19} Viewing this evidence in the light most favorable to the prosecution, sufficient evidence exists to support appellant's D.U.I. conviction. Appellee produced evidence from which reasonable minds could conclude that appellant operated a vehicle while under the influence of alcohol, a drug of abuse, or both. Thus, appellant's first assignment of error is without merit.

{¶20} Appellant's second assignment of error states:

{¶21} "THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY OF VIOLATING O.R.C. §2921.331 AS THERE WAS INSUFFICIENT EVIDENCE THAT THE APPELLANT ACTED RECKLESSLY."

{¶22} Appellant, relying on *State v. Brewer* (1994), 96 Ohio App.3d 413, alleges that in order to prove someone has violated R.C. 2921.331(A), the state must prove recklessness. He contends that appellee failed to prove he acted recklessly. He points to Trooper Wilcox's testimony that while Trooper Wilcox followed appellant with his pursuit lights and siren, appellant was traveling at a safe speed and only crossed the center line a couple of times. (Tr. 15).

{¶23} Appellant was convicted of violating R.C. 2921.331(A), which provides:

{¶24} "No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic."

{¶25} While the Second District, in *Brewer*, held that the mens rea required for proving a violation of R.C. 2921.331(A) is recklessly, other appellate districts have been hesitant to adopt this holding. See *State v. Walton* (Feb. 11, 2000), 1st Dist. No. C-990374; *Cleveland v. Benjamin* (Aug. 12, 1999), 8th Dist. No. 74660. However, we need not determine this issue because appellant's actions were at the very least reckless. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶26} Courts have held that driving under the influence supports a finding of recklessness in vehicular homicide cases. *State v. Stinson* (1984), 21 Ohio App.3d 14; *State v. Dudock* (1983), 6 Ohio App.3d 64. Furthermore, the evidence indicated that appellant failed to comply with Trooper Wilcox's lawful direction to stop and pull over. First, Trooper Wilcox activated his pursuit lights and attempted to stop appellant's vehicle. (Tr. 7). When that did not work, Trooper Wilcox activated his siren and positioned his spotlight in appellant's back window and into his mirror. (Tr. 7). Instead of stopping, appellant turned the mirror down so the light would not reflect in it. (Tr. 7). During this pursuit, appellant crossed the centerline a couple of times, after he initially ran Trooper Wilcox off the road. (Tr. 15). Throughout the two-mile

pursuit, appellant ignored Trooper Wilcox's direction to pull over, most likely because he had been drinking.

{¶27} In viewing the evidence in the light most favorable to the prosecution, it is clear that appellant acted with heedless indifference to Trooper Wilcox's direction to pull over and to the consequences that could follow. Accordingly, appellant's second assignment of error is without merit.

{¶28} Appellant's third assignment of error states:

{¶29} "THE CONVICTIONS MUST BE REVERSED SINCE THE APPELLANT WAS DENIED A FAIR TRIAL AND SUBSTANTIAL JUSTICE DUE TO THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶30} Appellant argues his trial counsel was ineffective in three ways: (1) counsel failed to request a jury trial; (2) counsel failed to call the Applebee's bartender as a witness; and (3) counsel failed to raise the defense of involuntary intoxication.

{¶31} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, the appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus; *Strickland v. Washington* (1984), 466 U.S. 668, 687. Second, the appellant must demonstrate that he was prejudiced by counsel's performance. Id. To show that he has been prejudiced by counsel's deficient performance, the appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus.

{¶32} The appellant bears the burden of proof on the issue of counsel's effectiveness. *State v. Calhoun* (1999), 86 Ohio St.3d 279, 289. In Ohio, a licensed attorney is presumed competent. Id.

{¶33} Regardless of whether counsel's performance was or was not deficient, appellant cannot meet the second prong of the *Strickland* test. The evidence at trial clearly established appellant's guilt on all charges. Whether the case was tried to the bench or a jury, the evidence would have remained the same. Furthermore, appellant's other allegations of ineffective assistance lack any factual basis. Appellant's counsel had subpoenaed Dave Underwood, the Applebee's bartender. Underwood appeared for the first day of trial, but the trial was continued and Underwood left on vacation. Instead of continuing the trial again, the parties stipulated to Underwood's testimony. (Tr. 81-84). From the record, it is clear that before entering into the stipulation, appellant's counsel conferred with appellant and sought his approval of the stipulation. (Tr. 84). Additionally, appellant's counsel raised the defense of involuntary intoxication. Appellant took the stand in his own defense and testified that he believed someone drugged him. (Tr. 80). Consequently, appellant's third assignment of error is without merit.

{¶34} For the reasons stated above, the trial court's decision is hereby affirmed.

Judgment affirmed.

Waite and DeGenaro, JJ., concur.