[Cite as *Cleveland v. English*, 2009-Ohio-5011.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92591

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

BRENT L. ENGLISH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2008 TRD 069843

BEFORE: Rocco, J., Gallagher, P.J., and Jones, J.

RELEASED: September 24, 2009

JOURNALIZED:

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KENNETH A. ROCCO, J.:

{¶ 1} Defendant-appellant, attorney Brent L. English, appeals from his conviction after the municipal court found him guilty of violating Cleveland Codified Ordinance ("CCO") Section 431.34(c), viz., operating a motor vehicle without giving full time and attention to such operation.

{¶ 2} English presents two assignments of error, asserting his conviction is unsupported by either sufficient evidence or the manifest weight of the evidence. Upon a review of the record, this court cannot agree with his assertions. Consequently, his conviction is affirmed.

{¶ 3} English's conviction results from an incident that occurred on the late morning of October 20, 2008. According to Cleveland police officer John Cotner, he was on traffic duty on Interstate 90, located "between Alger and [the] West 159th Street overpass running laser."[1] Cotner testified he had been thoroughly trained in the use of the laser and had just tested its accuracy.

{¶ 4} At approximately 11:50 a.m., Cotner observed English's car traveling toward him "exceeding the posted 60 mile per hour speed limit." Cotner "clocked" the car at 76 m.p.h. Cotner stopped English. He stated that as he "was flagging [English] over, [he] noticed [English] was talking on his cell phone at the time."

[1]Quotes indicate testimony given at trial.

{¶ 5} Cotner cited English with three traffic offenses, charging violations of CCO 433.03, speeding, CCO 434.27(b)(1), unfastened seat belt, and CCO 431.34(c), failure to give full time and attention to driving.

{¶ 6} The case proceeded to a trial to the bench. After the city presented Cotner's testimony, the municipal court granted English's motion for acquittal only as to the speeding charge.

{¶ 7} Cotner testified that he had been performing traffic duty for over twenty years and "knew by looking at" English's car that it was exceeding the posted speed limit; nevertheless, the municipal court based its decision to dismiss the speeding charge upon a determination that the city had failed to provide expert testimony concerning the accuracy of the laser unit.[2]

{¶ 8} English then testified on his own behalf. He acknowledged driving on the interstate at the time he was observed by Cotner. English stated he was on his way to a hearing scheduled "at noon" in the Rocky River Municipal Court. However, English denied he was using his cell phone, denied he was inattentive to his driving, and denied he was exceeding the speed limit.

{¶ 9} English testified he was "going exactly with the rest of traffic" at an estimated "60, 61, something like that, going straight to" court without passing "any traffic." He acknowledged seeing Cotner; English testified he pulled over

[2]But see, *Cleveland v. Tisdale*, Cuyahoga App. No. 89877, 2008-Ohio-2807, ¶18.

and unlocked his seat belt in order to extract his "information" from his glove compartment. English claimed his "blackberry" was in his "right front seat."

{¶ 10} At the conclusion of the evidence, the municipal court found English not guilty of the unfastened seat belt charge, but guilty of failure to give full time and attention to driving. The court stayed execution of English's sentence pending the outcome of this appeal.

{¶ 11} English presents the following two assignments of error.

"I. The Trial Court committed reversible error when it convicted Appellant of violating Section 434.34(c) [sic] of the Codified Ordinances of Cleveland when insufficient evidence supported that conviction.

"II. The Trial Court committed reversible error by convicting Appellant of failing to give full time and attention to the operation of a motor vehicle when that conclusion was against the manifest weight of the evidence."

{¶ 12} English argues his conviction is supported by neither sufficient evidence nor the manifest weight of the evidence. He contends the testimony failed to establish all the elements of the offense.

{¶ 13} This court is required to view the evidence adduced at trial, both direct and circumstantial, in a light most favorable to the prosecution to determine if a rational trier of fact could find the essential elements of the

offense were proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372; *State v. Jenks* (1991), 61 Ohio St.3d 259. Viewing the evidence adduced at English's trial in a light most favorable to the city leads to the conclusion the offense was supported by sufficient evidence.

{¶ 14} English was convicted of violating CCO 431.34, Failure to control; Weaving; Full Time and Attention. Subsection (c) states: "No person shall operate a motor vehicle without giving his full time and attention to the operation of such vehicle."

{¶ 15} This court held in *Seven Hills v. Gossick* (Nov. 15, 1988), Cuyahoga App. No. 48088 that this offense is a "specific instance of failure to control" a vehicle. The offense may be established by proof that the offender's "driving behavior" was either erratic or posed a danger to persons or property. *Cleveland v. Isaacs* (1993), 91 Ohio App.3d 360; *Lakewood v. Komaromy*, Cuyahoga App. No. 80258, 2002-Ohio-4076, ¶18-23.

{¶ 16} Thus, in *State v. Roberson* (Oct. 28, 1996), Stark App. No. 1996CA00001, the court held that "the offense * * * does not require, as an element * * * , that the offender actually be involved in an accident * * * . It is the reckless manner in which the driver operates his vehicle that establishes a violation of this offense * * * ." The "ordinary standard of negligence" provides "the requisite proof of culpability within * * * [the]

ordinance." *State v. Lett*, Ashland App. No. 02COA049, 2002-Ohio-3366, 12, citing *State v. Jones* (Apr. 25, 1989), Franklin App. No. 88AP-920.

{¶ 17} Therefore, in order to overcome a motion for acquittal, the city need not prove precisely "which of [the defendant's] driving actions caused him not to give his full time and attention to his driving." *Komaromy*, supra. Rather, it is sufficient that the direct or circumstantial evidence, which is, in turn, gathered through first or secondhand observation, demonstrates the offender's "full time and attention" was not directed at his driving. Id.

{¶ 18} In this case, Cotner testified that, as he observed English driving past his location, English appeared to be talking on his cell phone, and his car appeared to be traveling at a higher rate of speed than the posted speed limit. This constituted sufficient evidence that English's full time and attention was not on his driving, and that he was in violation of CCO 431.34(c).

{¶ 19} Consequently, English's first assignment of error is overruled.

{¶ 20} English further claims his conviction is against the manifest weight of the evidence. The test to be applied when reviewing a claim that a conviction is against the manifest weight of the evidence was set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, citing *State v. Martin*, supra. The test is "much broader" than the test for sufficiency; i.e., this court reviews the entire record to determine whether in resolving any conflicts in the

evidence, the factfinder "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id., at 175.

{¶ 21} Moreover, this court must remain mindful that the weight of the evidence and the credibility of the witnesses are matters primarily for the factfinder to assess. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶ 22} In this case, the municipal court determined that Cotner provided a more credible version of the incident. Cotner testified English was exceeding the speed limit and talking on his cell phone as he drove on the Cleveland portion of the interstate.

{¶ 23} Since English acknowledged he was due in court in Rocky River at noon, and since the time of the citation shows it was given to him at 11:50 a.m., Cotner's version was corroborated by the other evidence produced at trial.

{¶ 24} Therefore, the municipal court's judgment found support in the manifest weight of the evidence.

{¶ 25} Accordingly, English's second assignment of error also is overruled.

{¶ 26} English's conviction is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the municipal court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE

LARRY A. JONES, J., CONCURS;
SEAN C. GALLAGHER, P.J., DISSENTS
(SEE ATTACHED DISSENT)

SEAN C. GALLAGHER, P.J., DISSENTING:

{¶ 27} I respectfully dissent and would reverse the conviction for failure to give full time and attention and would discharge the defendant.

{¶ 28} This district does not recognize visual estimates of speed to establish speeding violations. See *Cleveland v. English,* Cuyahoga App. No. 84945*,* 2005-Ohio-1662; *Middleburg Hts. v. Campbell*, Cuyahoga App. No. 87593*,* 2006-Ohio-6582. Since the speed violation itself cannot be legally supported, the officer's visual observation that appellant was speeding should not be used to support the charge of violating the full time and attention ordinance under CCO 431.34(c).

{¶ 29} Further, talking on a cell phone is not a violation of any Cleveland ordinance. It may well be that many, if not most, cell phone users are "distracted," but some evidence that the driver's cell phone use was distracting him from driving safely must be set forth. No such evidence was offered in this case.