COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2012 CR 00341**
vs.	**:**	**Judge McBride**
DANIEL LEE KATTWINKEL	**:**	**DECISION/ENTRY**
Defendant	**:**	

Lara A. Molnar, assistant prosecuting attorney for the state of Ohio, 123 North Third Street, Batavia, Ohio 45103.

Marshall McCachran, assistant public defender for the defendant Daniel Lee Kattwinkel, 10 South Third Street, Batavia, Ohio 45103.

This cause came before the court for trial on August 21-22, 2012. At the conclusion of the trial, the court took the issues raised at the trial under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

The defendant is charged in a one-count indictment with operating a vehicle while under the influence of alcohol and/or a drug of abuse in violation of R.C. 4511.19(A)(1)(a), a felony of the third degree.

FINDINGS OF FACT

On March 21, 2012, at approximately 7:30 in the morning, the defendant Daniel Lee Kattwinkel took the first dosage of his prescribed daily medications. Those morning medications consisted of the following: 60mg of morphine, 5mg of diazepam (valium), 500mg of depakote, 40mg of prilosec, 20mg of crestor, and a baby aspirin. The defendant then went to his father's home in Lebanon, where he helped his father with some outside chores.

From his father's house, the defendant traveled to Aurora, Indiana to visit one of his close friends. After arriving at his friend's home, the defendant took his second dosage of prescribed medications at approximately 1:30 p.m., which consisted of the following: 30mg of morphine and 5mg of diazepam. The defendant remained at his friend's home until around 6:00 p.m., at which time he took his third dosage of prescribed medications, which consisted of 5mg of diazepam, as well as prilosec and crestor.

The defendant then went to Riverview Cemetery to visit his wife's grave. The defendant left the cemetery, went to Kroger's to purchase some flowers, and returned to the cemetery again. Sometime around 9:00 or 10:00 p.m., as the defendant was leaving Indiana, he noticed that one of his headlights had burned out. The defendant drove to a nearby Auto Zone store where he purchased and installed a new headlight. The defendant was past the time he usually took his fourth and final dosage of daily medications but decided to wait to take them until he got home because he was

supposed to take them before going to bed. The defendant then decided to take the longer, southern route home and travelled onto I-275. While he was on I-275, the defendant saw his headlight go off and on a few times.

Sometime between 11:00 and 11:30 p.m., Trooper Mike Shimko of the Ohio State Highway Patrol, who was stationary on I-275 just south of S.R. 125 in Clermont County, Ohio, saw the headlights of the vehicle being driven by the defendant flash on and off several times. Trooper Shimko then initiated a stop of the vehicle due to the flashing headlights.

A review of the cruiser video demonstrates that the defendant did not appear to have any difficulty driving the vehicle; the defendant's vehicle remained within the marked lanes and there is no evidence of any reckless driving. Once the vehicles came to a stop, Trooper Shimko approached the defendant and asked for his driver's license. It took the defendant approximately one minute to produce his license because he had to get his wallet from his back pocket, which had a button on it, and he also had to undo his seatbelt.

Trooper Shimko inquired about the headlight issue and the defendant explained that he had just installed a new headlight and had perhaps installed it incorrectly. The defendant exited out of the passenger side of the vehicle because the highway shoulder was narrow and he was afraid of being hit by oncoming traffic. The defendant and Trooper Shimko examined the headlight and the defendant found that it was not tightly secured, so the defendant snapped the headlight into place which remedied the problem.

Trooper Shimko saw the defendant's pill caddy, which contained his medications, on the passenger seat and inquired about it. The defendant told him several of the medications he was taking and later provided a list of his medications.[1]

The defendant admits that the list is incorrect as to both the morphine and the valium (diazepam) – the correct dosage for the morphine is 60mg in the morning and 30mg at night and the correct dosage for the valium is 5mg four times a day. The defendant explained that he was rushed and got somewhat confused when he wrote the list the day prior to his stop. While the defendant's self-produced list of medications contains incorrect dosages, the court finds the defendant's statement that he never took more than the prescribed amount of his medications on the day in question to be credible.

Trooper Shimko felt that the defendant's speech was slow and slurred; however, the court notes, based on listening to almost an hour of his testimony, that the defendant generally speaks slowly, that his speech is admittedly somewhat slurred due to an ill-fitting lower denture, and that his speech in the courtroom was consistent with his speech on the cruiser video of the stop.[2] Trooper Shimko did not detect an odor of alcohol but believed, due to the slow, slurred speech, the defendant's slow response to producing his license, the fact that the defendant was somewhat unsteady on his feet, and the fact that he had to repeat his questions to the defendant several times, that the defendant may be impaired.

At Trooper Shimko's request, the defendant submitted to several field sobriety tests. The horizontal gaze nystagmus test did not indicate impairment, as the defendant

[1] State's Exhibit 3.
[2] State's Exhibits 1 and 2.

exhibited only two out of a possible six clues and there was no vertical nystagmus. On the walk and turn test, the defendant exhibited five clues according to Trooper Shimko, and only two clues are needed to indicate impairment. Those clues included moving his feet while receiving the test instructions, not walking going heel to toe on each step, stepping off the line, and raising his hands for balance. However, the court finds that these results are not indicative of impairment in the present case as the defendant has had several surgeries on his left knee due to an industrial accident, and the current condition of his knees, as well as problems with his hips and back, prevent him from being able to walk a completely straight line or to pivot on his left leg. Trooper Shimko also administered the one-leg stand test which the defendant could not complete. However, the defendant told Trooper Shimko before he began the test that he likely would not be able to do a one-leg stand due to his physical condition, and the court finds that it was this physical condition and not any impairment due to drugs or alcohol that led to his poor performance on the one-leg stand test.

Trooper Shimko and Trooper Joseph Westhoven, who arrived on the scene to assist, believed the defendant was impaired. Trooper Shimko placed the defendant under arrest and asked the defendant if he would be willing to submit to a urine test, and the defendant agreed to do so.

Trooper Shimko collected the urine sample and sent the sample to the Ohio State Highway Patrol Crime Laboratory in Columbus, Ohio, where it was ultimately tested by Deanna Nielsen, the Laboratory Director of Toxicology. The results of the testing revealed three drugs that are likely metabolic breakdown products of valium, and Nielsen testified that there was a good indication that valium was ingested by the

defendant.[3] However, while Nielsen testified that the levels of these metabolic breakdown products are higher than what she generally sees, she was not able to testify as to any certain amount of valium that was consumed based on the levels she found, nor could she opine as to potential impairment based on the discovered levels.

Dr. Michael Miller, the defendant's psychiatrist, testified that he does prescribe valium for the defendant in a dosage of 5mg to be taken four times a day, plus an extra 10mg for further acute anxiety.[4]

The defendant has a prior felony OVI conviction from Butler County, Ohio which was entered on May 7, 1998.[5]

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.[6] R.C. 2901.05(E) states that " 'reasonable doubt' is present when the [trier of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

[3] State's Exhibit 6.
[4] Deposition of Michael E. Miller, M.D. at pgs. 7 and 21.
[5] State's Exhibit 4.
[6] R.C. 2901.05(A).

LEGAL ANALYSIS

Pursuant to R.C. 4511.19(A)(1)(a), "[n]o person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation * * * (a) [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them."

R.C. 3719.011(A) defines "drug of abuse" as "any controlled substance as defined in section 3719.01 of the Revised Code, any harmful intoxicant as defined in section 2925.01 of the Revised Code, and any dangerous drug as defined in section 4729.01 of the Revised Code."

Diazepam (valium) is a schedule IV controlled substance pursuant to R.C. 3719.41(B)(14). The defendant had a valid prescription for valium from Dr. Miller on the date in question, and the court finds that he was taking the correct dosage of valium as prescribed.

The simple fact that a controlled substance is prescribed for a defendant does not mean that such a defendant cannot be convicted of OVI. Many convictions in Ohio have been affirmed for " 'driving under the influence of a legal prescription, even in the prescribed dose, if it impairs [the defendant's] ability to operate the vehicle.' "[7] As one court explained, "[a] doctor may prescribe a few shots of bourbon for some patients;

[7] *State v. Anderson* (Oct. 13, 2006), 11th Dist. No. 2005-L-179, 2006-Ohio-5371, ¶ 32, quoting *State v. Vingino* (June 5, 2006) 7th Dist. No. 05-BE-28, 2006-Ohio-3484, ¶ 15; and citing *State v. Stephenson* (May 12, 2006), 4th Dist. No. 05CA30, 2006-Ohio-2563; and *State v. Rizzo* (Sept. 5, 2003), 11th Dist. No. 2002-T-0121, 2003-Ohio-4724.

and, although the consumption is legal and even prescribed by a physician, there is no absolute right to drive after such consumption."[8]

"Being 'under the influence' of a drug of abuse includes not only the easily recognized conditions of intoxication but any abnormal mental or physical condition which is the result of indulging in any degree in the consumption of a drug of abuse and which tends to deprive the one using it of the clearness of intellect and control of himself which he would otherwise possess."[9] "So, if one's physical or mental ability to act and react are altered from normal due to the ingestion of the drug of abuse, the person can be considered to be unlawfully driving under the influence of the drug."[10]

However, in the case at bar, the court finds that there is no evidence of impairment. The defendant was in control of his vehicle and was not driving erratically or recklessly. The defendant's speech was slow and somewhat slurred; however, as the court noted above, this is how the defendant speaks due to an ill-fitting lower denture. The defendant was able to have a coherent conversation with Trooper Shimko and was even able to repair the problem with the headlight. The defendant performed as well as could be expected on the walk-and-turn and one-leg stand tests given his relevant physical impairments, namely the problems with his knees, hips, and back. The defendant took his prescribed medications in their prescribed dosages throughout the day and he was not impaired by any of those medications.

The court finds that the defendant was not driving under the influence of any drug of abuse on the evening in question. As such, the state has failed to prove its case beyond a reasonable doubt.

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[8] *Vingino* at ¶ 15, citing *South Euclid v. Heil* (1991), 62 Ohio Misc.2d. 540, 541.
[9] Id. at ¶ 16, citing *State v. Hardy* (1971), 28 Ohio St.2d 89, 90, 276 N.E.2d 247.
[10] Id., citing *Hardy* at 91.

CONCLUSION

Based on the above analysis, the defendant is hereby acquitted of the charge against him of operating a vehicle while under the influence of alcohol and/or a drug of abuse.

The court further orders that the defendant's bond shall be hereby released.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 12th day of September 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride