

**COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO**

**STATE OF OHIO** :  
Plaintiff : **CASE NO. 2012 CR 00224**  
vs. : **Judge McBride**  
**BRYAN STEPHEN RITTER** : **DECISION/ENTRY**  
Defendant :

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

Gary Rosenhoffer, attorney for the defendant Bryan Stephen Ritter, 313 East Main Street, Batavia, Ohio 45103.

This cause came before the court for trial on July 11, 2012. At the conclusion of the trial, the court took the matters raised at 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 two-count indictment with (1) operating a vehicle while under the influence of alcohol and/or and drug of abuse in violation of R.C.

4511.19(A)(1)(a), a felony of the fourth degree and (2) driving under suspension in violation of R.C. 4510.11(A), a misdemeanor of the first degree.

## **FINDINGS OF FACT**

On March 10, 2012, off-duty Clermont County Sheriff's deputy Donald Haun was driving eastbound on State Route 125 in Clermont County, Ohio, when he saw a white Jeep driven by the defendant stop at a green light for a brief period of time. The defendant then proceeded through the green light and swerved his vehicle, nearly hitting Haun's car.

Haun testified that the defendant did not appear to be in control of the vehicle and, when driving next to him for a short period of time, he observed that the defendant's reflexes appeared to be slow. The defendant's car continued swerving between the two eastbound lanes and also hit the curb several times and crossed the double-yellow center line almost hitting oncoming traffic. Haun placed a call to 911 and gave a vehicle description and license plate number for the defendant's car.

Deputy Brett Buelterman responded to the dispatch and located the vehicle matching the description and having the license plate number provided by Haun. Deputy Buelterman followed the defendant's vehicle for approximately 300 yards and saw the defendant attempt to move from the left lane into the right lane, jerk the car back into the left lane when he was approximately three-quarters of the way into the right lane, and then overcorrect the vehicle, swerving it into oncoming traffic, at which point Deputy Buelterman initiated a traffic stop. The defendant slowed his vehicle while

still traveling in the high-speed lane and made an abrupt left-hand stop at a ninety-degree angle, blocking oncoming traffic which was forced to come to a stop. Deputy Buelterman was about to exit his vehicle when the defendant then drove his car into a nearby parking lot, and Deputy Buelterman pulled his patrol vehicle into the parking lot as well.

Deputy Buelterman approached the defendant's vehicle and asked the defendant, who was in the driver's seat, if he had any medical issues and he said he did not, although he did indicate that he was tired. Deputy Buelterman asked the defendant for his license and he indicated that he did not have a driver's license. When Deputy Buelterman asked the defendant if he simply forgot his license or if he did not actually have a valid driver's license, the defendant admitted that he did not have a valid driver's license and also that he had no form of identification with him.

During this exchange, Deputy Buelterman noticed that the defendant's speech was slurred and slow and that he was having difficulty speaking and putting coherent sentences together. The defendant denied having any alcohol or drugs and instead claimed to have taken Tylenol PM at midnight the prior evening. Deputy Buelterman did not smell any alcohol on or about the defendant's person nor did he find any alcoholic beverages, drugs or abuse, or evidence of consumption thereof in the defendant's vehicle or on his person.

Deputy Buelterman asked the defendant to exit the vehicle and accompany him to his police cruiser. As the defendant walked to the cruiser, Deputy Buelterman observed that the defendant was very unsteady on his feet and that he had to use the car door and side of the cars to steady himself as he walked from one car to the other.

Deputy Buelterman spoke briefly with the female passenger in the defendant's vehicle, who exhibited the same behavior as the defendant, such as slurred speech and loss of balance. Deputy Matthew Wurtz then arrived on the scene and took over questioning the passenger.

When Deputy Buelterman returned to his police cruiser, he asked the defendant if he would be willing to submit to a field sobriety test, and the defendant indicated that he would not. Deputy Buelterman then asked if the defendant would be willing to submit to a urine test and the defendant said he would not and he also said he had prior OVI convictions. Deputy Buelterman, in the presence of Deputy Wurtz, then read the defendant the portion of the BMV 2255 form dealing with the consequences of refusing to submit to testing, again asked the defendant if he would submit to a urine test, and the defendant again refused. Deputy Buelterman questioned him further to ensure that the defendant understood the consequences of refusal and, when he was satisfied the defendant understood the situation and the consequences, he asked the defendant to sign the 2255 form, which the defendant eventually did sign.<sup>1</sup> Deputy Buelterman then handcuffed the defendant and eventually transported the defendant to the Clermont County jail for booking.

Both Deputy Buelterman and Deputy Wurtz have received ADAP certification and have extensive experience dealing with persons under the influence of alcohol and drugs. Both deputies observed that the defendant's speech was slurred and that he had difficulty speaking and putting coherent, complete sentences together. Deputy Buelterman, who observed the defendant walking from his vehicle to the police cruiser, also noted that the defendant was very unsteady on his feet to the extent that Deputy

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<sup>1</sup> State's Exhibit 2.

Buelterman requested assistance to help the defendant walk in the booking area of the jail. Both deputies believed that the defendant was under the influence of some substance and that he was too impaired to operate a motor vehicle.

After dropping the defendant off at the booking area, Deputy Buelterman ran the defendant's driving record and also checked to see if he had prior OVI convictions. The defendant's driving record confirmed that the defendant did not have a valid Ohio driver's license on the date in question and, specifically, that the defendant was under a twelve-point license suspension as of November 1, 2011.<sup>2</sup> Furthermore, the defendant's criminal record revealed three prior OVI convictions on November 9, 2006, April 9, 2007, and November 5, 2007.<sup>3</sup>

Corrections Officer Gregory Fields processed the defendant for his intake at the Clermont County Jail, where he mainly works booking and intake and also as a medical officer. Officer Fields began processing the defendant sometime around 11:00 a.m. or 12:00 noon on March 10, 2012. He noticed that the defendant's speech was slurred and that the defendant was unstable when walking and kept dozing off. When Officer Fields asked the defendant if he had taken anything, the defendant again claimed that he only took two Tylenol PM around midnight. Officer Fields later overheard the defendant on the phone ask someone about Xanax and then say "there's only one left? Where'd they go?"

Corrections Officer Aaron Wollard also observed the defendant during his booking process and noted that the defendant was sluggish, appeared to be nodding off, was staggering when he walked, and had slurred speech and trouble putting

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<sup>2</sup> State's Exhibit 6.

<sup>3</sup> State's Exhibits 3-5.

sentences together. Officer Wollard saw the defendant the next day and he no longer appeared to be under the influence; at that time, the defendant spoke clearly and walked normally and without assistance.

## **STANDARD OF REVIEW**

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.<sup>4</sup> 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."

## **LEGAL ANALYSIS**

### **(A) OPERATION OF A MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF ALCOHOL OR A DRUG OF ABUSE**

In Count 1 of the indictment, the defendant is charged under R.C. 4511.19(A)(1)(a), which states as follows: "(A)(1) No person shall operate any vehicle,

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<sup>4</sup> R.C. 2901.05(A).

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.”

The defendant argues that the state has not met its burden of proving that he was under the influence of alcohol or a drug of abuse.

In most of the cases in Ohio dealing with charges under R.C. 4511.19(A)(1)(a), the defendant was convicted of or alleged to have been under the influence of alcohol at the time of the offense. This fact is proven by the state by presenting testimony of various observations of the defendant by the officers including the odor of alcohol on or about the defendant’s person or vehicle.<sup>5</sup> In the case at bar, there is clearly no evidence that the defendant was under the influence of alcohol on the date in question. There was no odor of alcohol on or about the defendant’s person, nor any other evidence of alcohol consumption, such as empty bottles or other similar evidence. Therefore, the state proceeded on the basis of attempting to establish that the defendant was under the influence of a drug of abuse.

The state asks the court to make an inference that the defendant was under the influence of Xanax based on the defendant’s conversation in the jail overheard by Officer Fields. However, this is not a reasonable inference that the court may make.

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<sup>5</sup> See, e.g., *State v. Robertson* (June 27, 2012), 5<sup>th</sup> Dist. No. 11CA0046, 2012-Ohio-2955; *State v. Huelsman* (May 11, 2012), 2<sup>nd</sup> Dist. No. 2011CA20, 2012-Ohio-2104; and, *State v. Selvage* (May 14, 2012), 12<sup>th</sup> Dist. No. CA2011-08-058, 2012-Ohio-2149.

The conversation overheard by Officer Fields does not indicate in any way that the defendant ingested or was under the influence of Xanax at the time of the offense.

In the cases found by this court discussing charges under R.C. 4511.19(A)(1)(a) where the allegation was that the defendant was under the influence of a drug of abuse, there was some evidence, either direct or circumstantial, as to what drug(s) of abuse caused the defendant's impairment. For example, in the case of *State v. Dixon* (Oct. 1, 2007), 12<sup>th</sup> Dist. No. CA2007-01-012, 2007-Ohio-5189, the arresting officer discovered a canister of marijuana on the defendant's person during a pat down search and the defendant's urine sample tested positive for marijuana.<sup>6</sup> The appellate court found that the marijuana found on the defendant, in addition to his urine screen results and the defendant exhibiting several clues on field sobriety tests, constituted sufficient evidence to find that the defendant was under the influence of marijuana while operating a vehicle.<sup>7</sup>

In *State v. Strebler* (Nov. 1, 2006), 9<sup>th</sup> Dist. No. 23003, 2006-Ohio-5711, the defendant admitted to the officer that he was using prescription methadone and the defendant's urine tested positive for that substance.<sup>8</sup> The defendant was observed by the officer to have mumbled speech, cloudy and bloodshot eyes, and difficulty walking.<sup>9</sup> The defendant was also unable to successfully complete several field sobriety tests.<sup>10</sup> When discussing the case, the appellate court noted as follows:

“ [I]n DUI prosecutions, the state is not required to establish that a defendant was actually impaired while driving, but rather, need only show an impaired driving ability. *State v.*

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<sup>6</sup> *Dixon* at ¶¶ 2 and 4.

<sup>7</sup> *Id.* at ¶ 16.

<sup>8</sup> *Strebler* at ¶¶ 12 and 14.

<sup>9</sup> *Id.* at ¶¶ 10-11.

<sup>10</sup> *Id.* at ¶ 13.

*Zentner*, 9th Dist. No. 02CA0040, 2003-Ohio-2352, at ¶ 19, citing *State v. Holland* (Dec. 17, 1999), 11th Dist. No. 98-P-0066. ‘To prove impaired driving ability, the state can rely on physiological factors (e.g., odor of alcohol, glossy or bloodshot eyes, slurred speech, confused appearance) to demonstrate that a person’s physical and mental ability to drive was impaired.’ *Holland*, [supra], citing *State v. Richards* (Oct. 15, 1999), 11th Dist. No. 98-P-0069[.] Furthermore, ‘[v]irtually any lay witness, without special qualifications, may testify as to whether or not an individual is intoxicated.’ *Zentner* at ¶ 19, quoting *State v. DeLong*, 5th Dist. No. 02CA35, 2002-Ohio-5289, at ¶ 60.” *State v. Stone*, 9th Dist. No. 04CA0103-M, 2005-Ohio-3325, at ¶ 9.

While the above reasoning is typically applied to alcohol consumption, we find it equally applicable to determining whether an individual is under the influence of a drug of abuse. See *State v. Stephenson*, 4th Dist. No. 05CA30, 2006-Ohio-2563, at ¶ 21.”<sup>11</sup>

The *Streblor* court, when examining the evidence, found that the weight of the evidence supported the jury’s conviction of the defendant.<sup>12</sup>

Similarly, in *State v. Peters* (Dec. 31, 2008), 9<sup>th</sup> Dist. No. 08CA0009, 2008-Ohio-6940, the defendant appeared to be under the influence of a substance, admitted to the officer that she took methadone, and tested positive for four different drugs of abuse after submitting to a urine sample.<sup>13</sup> In *State v. Anderson* (Oct. 13, 2006), 11<sup>th</sup> Dist. No. 2005-L-179, 2006-Ohio-5371, the court upheld the defendant’s conviction based on physiological evidence of impairment, including slurred speech and the inability to stand, combined with evidence that the defendant was taking several prescription drugs and testimony that her physiological symptoms were consistent with someone under the influence of those particular prescription drugs.<sup>14</sup> Finally, in *State v. Stephenson* (May

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<sup>11</sup> Id. at ¶ 7.

<sup>12</sup> Id. at ¶¶ 16-19.

<sup>13</sup> *Peters* at ¶¶ 8-10.

<sup>14</sup> *Anderson* at ¶¶ 31-32.

12, 2006), 4<sup>th</sup> Dist. No. 05CA30, 2006-Ohio-2563, the defendant was stopped for erratic driving, was found to have slurred speech, glassy eyes, and an intermittent inability to communicate, and was found to be in possession of methadone and morphine.<sup>15</sup> The court concluded that this evidence was sufficient to establish that the defendant's "inability 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 [the defendant] admitted having taken that day."<sup>16</sup>

In the recent case of *State v. Collins* (May 21, 2012), 9<sup>th</sup> Dist. No. 11CA0027, 2012-Ohio-2236, the defendant's speech was very slurred and slow and the defendant was unsteady on his feet.<sup>17</sup> Both officers also noticed that the defendant's pupils were extremely small.<sup>18</sup> Both officers testified that they believed the defendant was under the influence of some type of drug of abuse.<sup>19</sup> The defendant failed two field sobriety tests and submitted to a blood draw, but the sample was lost in the mail so results were never obtained.<sup>20</sup>

The appellate court concluded that the state failed to present evidence that the defendant operated his vehicle while under the influence of a drug of abuse.<sup>21</sup> The court noted that R.C. 4511.19(A)(1)(a) requires that the state demonstrate that the source of the defendant's impairment was "alcohol, a drug of abuse, or a combination of them."<sup>22</sup> Since neither officer detected that the defendant was under the influence of alcohol, the court reasoned that it was necessary for the state to demonstrate that the defendant

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<sup>15</sup> *Stephenson* at ¶ 22.

<sup>16</sup> *Id.* at ¶ 23.

<sup>17</sup> *Collins* at ¶ 12.

<sup>18</sup> *Id.* at ¶¶ 13 and 16.

<sup>19</sup> *Id.* at ¶¶ 12-13 and 18.

<sup>20</sup> *Id.* at ¶ 14.

<sup>21</sup> *Id.* at ¶ 19.

<sup>22</sup> *Id.*

was under the influence of a “drug of abuse” as defined by the Ohio Revised Code.<sup>23</sup> The court distinguished the *Strebler* case discussed above, noting that “perhaps most significantly, the defendant in *Strebler* admitted to the arresting officer that he was using Methadone, a Schedule II controlled substance.”<sup>24</sup> Since the state failed to establish a nexus between the defendant’s impaired condition and any type of drug of abuse, the *Collins* court reversed the defendant’s conviction.<sup>25</sup>

While refusal to submit to chemical testing may have probative value on the question as to whether the defendant was intoxicated at the time of such refusal<sup>26</sup>, this does not relieve the state of its burden to prove that the defendant was under the influence of a drug of abuse during the incident in question. Pursuant to R.C. 4511.191(A)(2), any person who is arrested for a violation of R.C. 4511.19(A) or (B) is deemed to have given consent to chemical testing of his or her whole blood, blood serum or plasma, breath or urine. If the suspect refuses to submit to testing, the law enforcement officer may employ “whatever reasonable means are necessary to ensure that the person submits to a chemical test \* \* \*.”<sup>27</sup> R.C. 4511.19(D)(1)(b) allows for the admission of evidence of the results of a chemical test taken within three hours of the time of the alleged violation without expert testimony. If a sample is taken after that time, the results may still be admissible with expert testimony to calculate the concentration at the time of the operation of the vehicle and the effect of this concentration on the person’s ability to operate a motor vehicle.<sup>28</sup>

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<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Id. at ¶ 20.

<sup>26</sup> See, e.g., *Westerville v. Cunningham* (1968), 15 Ohio St.2d 121, paragraph one of the syllabus.

<sup>27</sup> R.C. 4511.191(A)(5)(b).

<sup>28</sup> See *State v. Morris* (July 12, 2012), 5<sup>th</sup> Dist. No. 11CA106, 2012-Ohio-3210, ¶ 29, citing *Newark v. Lucas* (1988), 40 Ohio St.3d 100, 532 N.E.2d 130; and *State v. Hassler* (2007), 115 Ohio St.3d 322, 875 N.E.2d 46.

In a rare case such as this where there is no evidence of what substance, if any, caused the defendant's impairment (i.e., no odor of alcohol, no drugs of abuse on or about the defendant's person or vehicle, and no admission by the defendant to ingesting a drug of abuse), it would appear that the only evidence that could create a nexus between the defendant's impairment and a drug of abuse would be a chemical test. Unfortunately, in the case at bar, there was no effort to require the defendant to submit to a chemical test after his refusal, either without a warrant pursuant to R.C. 4511.191(A)(5)(b) or pursuant to a court order. Therefore, there is no evidence, direct or circumstantial, on which this court can reasonably rely to conclude that the defendant was under the influence of a drug of abuse as defined by the Ohio Revised Code on the date in question.

It should be noted that any suggestion that the defendant must have been under the influence of "something" is insufficient to sustain an OVI conviction. To find otherwise would essentially require the defendant in a case of this type to disprove that he had any alcohol or drug of abuse in his system, and it is not the defendant's burden to prove the state's case.

As a result, the state has failed to prove beyond a reasonable doubt that the defendant operated his vehicle while under the influence of a drug of abuse.

## **(B) DRIVING UNDER SUSPENSION**

Pursuant to R.C. 4510.11(A):

"Except as provided in division (B) of this section, no person whose driver's or commercial driver's license or permit or

nonresident operating privilege has been suspended under any provision of the Revised Code, other than Chapter 4509. of the Revised Code, or under any applicable law in any other jurisdiction in which the person's license or permit was issued shall operate any motor vehicle upon the public roads and highways or upon any public or private property used by the public for purposes of vehicular travel or parking within this state during the period of suspension unless the person is granted limited driving privileges and is operating the vehicle in accordance with the terms of the limited driving privileges.”

This court found in its findings of fact that the defendant’s driving record demonstrates that his driver’s license was currently under a twelve-point suspension on March 10, 2012. On that date, he was observed by Donald Haun and Deputy Buelterman to be driving eastbound on State Route 125 in Clermont County, Ohio. There is no suggestion that the defendant had limited driving privileges on the date in question.

As a result, the court finds that the state has proven the defendant’s guilt of the offense of driving under suspension beyond a reasonable doubt.

## **CONCLUSION**

The defendant is hereby acquitted of the offense of operating a vehicle while under the influence of alcohol or a drug of abuse as set forth in Count 1 of the indictment.

The defendant is hereby found guilty of the offense of driving under suspension in violation of R.C. 4510.11(A), a misdemeanor of the first degree, as set forth in Count 2 of the indictment. The defendant shall report to the Probation Department for a pre-

sentence interview no later than Tuesday, August 28, 2012. The Probation Department shall prepare a pre-sentence investigation report, and counsel in this matter shall conference and call the Assignment Commissioner (732-7108) within five days of the date of this decision to obtain a date for sentencing. The sentencing date shall be set approximately four weeks from the date of this decision.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_

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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 24th day of August 2012 to all counsel of record and unrepresented parties.

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Administrative Assistant to Judge McBride