

[Cite as *State v. Wolfe*, 2009-Ohio-5918.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO | : | JUDGES: |
| | : | W. Scott Gwin, P.J. |
| Plaintiff-Appellee | : | William B. Hoffman, J. |
| | : | Julie A. Edwards, J. |
| -vs- | : | Case No. 2009 CA 00034 |
| | : | |
| ANITA WOLFE | : | <u>OPINION</u> |
| Defendant-Appellant | : | |

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| CHARACTER OF PROCEEDING: | Criminal Appeal from Licking County Municipal Court Case No. 07 TRC 12104 |
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| JUDGMENT: | Affirmed |
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| DATE OF JUDGMENT ENTRY: | November 5, 2009 |
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APPEARANCES:

For Plaintiff-Appellee

For Defendant-Appellant

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Edwards, J.

{¶1} Appellant, Anita Wolfe, appeals a judgment of the Licking County Municipal Court convicting her of one count of Operating a Vehicle Under the Influence (OVI) in violation of R.C. 4511.19(A)(1)(a) and Driving Under Suspension in violation of R.C. 4510.11. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On November 23, 2007, appellant was working as a bartender at the Triangle Bar in Newark, Ohio. Her shift ended at 7:30 p.m. However, she stayed in the bar shooting pool until the bar closed at 2:30 a.m.

{¶3} As appellant was pulling her vehicle out of the parking lot attempting to travel north on Mt. Vernon Road, she pulled into the southbound lane, striking the driver's side corner of a police cruiser driven by Deputy Michael Tankersley of the Licking County Sheriff's Department. Dep. Tankersley had been involved in an accident earlier the same evening when his car was sideswiped on the passenger side.

{¶4} Appellant backed her car into the Triangle Bar parking lot almost immediately after she hit the cruiser. Deputy Tankersley asked her if she was injured and asked for her driver's license. He noticed a strong odor of alcohol about her, and her eyes were glassy. She responded that she didn't have a driver's license. He placed her in the backseat of his cruiser, which was still in the same position it was in when struck by appellant's car, and waited on the Newark Police to respond to his report of the accident.

{¶5} Newark Police Patrolman Bobby Hartless responded to the accident scene. He noted that the damage to the driver's side front bumper and front tire of the

cruiser matched the deputy's description of how the accident occurred. Appellant's car was located in the parking lot of the Triangle Bar.

{¶6} Ptl. Hartless asked appellant for her name. She refused to tell him her name or any other information about her. Her face was flushed, and he detected a strong odor of alcohol which became more noticeable when she talked. She was unsteady on her feet when she attempted to stand still. She was belligerent with the officer and told him she didn't know why she had to give him information about who she was because she did not do anything wrong. She claimed the deputy traveled left of center, striking her vehicle. She then asked the patrolman to call Sgt. Brnjic.

{¶7} Sgt. Brnjic arrived on the scene and talked to appellant. While he was talking to appellant, Ptl. Hartless received a call from Ptl. Earl Roe, who was off duty. Ptl. Roe told Hartless that the woman in the cruiser was Anita Wolfe. After Hartless called her by name, appellant calmed down and provided him with her social security number and birth date.

{¶8} Ptl. Hartless wanted to administer field sobriety tests but appellant refused to cooperate, claiming she had not been drinking. He came to the conclusion that appellant had too much to drink based on her attitude, the strong odor of alcohol that became more pronounced when she talked and her flushed face. He took her to the police station where she refused a BAC test. Appellant admitted to having a couple drinks but maintained that she was not drunk.

{¶9} Appellant was charged with OVI and driving under suspension. The case proceeded to bench trial in the Licking County Municipal Court.

{¶10} At trial, appellant testified that on the night in question, she drank two Bud Lights and a few sips of a third beer and stopped drinking around 9:00 p.m. Her license was suspended and she was driving her boyfriend's car. She saw the traffic light at the intersection of W. Shields and Mt. Vernon Road turn from yellow to red. She noticed a car coming fast through the intersection and, because she thought it wasn't going to stop, she stopped. The car crossed into her lane and hit her. She claimed that Dep. Tankersley told her to back her car into the Triangle Bar parking lot, and he then placed her under arrest. She heard him report on his radio that he had been in a second accident. She testified that she was later placed in Hartless's cruiser, and that Hartless never asked for her name before telling her she was under arrest for OVI and DUS. She claimed she never asked to speak to Sgt. Brnjic, but he appeared at the scene and yelled at her, asking why she did not call him to give her a ride home from the bar.

{¶11} Hope Baker, the bartender who worked the 7:30 p.m. - 2:30 a.m. shift at the bar after appellant, testified that appellant had a bad cold on November 23, 2007. She testified that appellant drank 2 ½ beers. Barbara McCualsky, a member of appellant's pool league who practiced pool with her that night, testified that appellant had nothing to drink from the time McCualsky arrived at the bar around 9:30-10:00 p.m. through when she left at 12:30 a.m. - 1:00 a.m.

{¶12} The court stated at the close of the trial, "Well Ms. Wolfe, clearly, you know, there are a couple versions of what happened that evening, and I chose not to accept your version, for what that's worth." Tr. 122. The court found appellant guilty of both charges. On the OVI conviction she was fined \$400.00 plus costs and sentenced to 90 days incarceration with 70 days suspended. Her operator's license was

suspended for 2 years, and she was placed on probation for two years. As conditions of her probation she was ordered to attend alcohol counseling, attend a victim impact meeting and use no alcohol or illegal drugs. For driving under suspension she was fined \$200.00 and her license was suspended for 30 days. The sentence was stayed pending appeal.

{¶13} Appellant assigns a single error:

{¶14} “THE CONVICTION OF THE DEFENDANT-APPELLANT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED BELOW.”

{¶15} Appellant argues that her OVI conviction is against the manifest weight of the evidence.

{¶16} In determining whether a verdict is against the manifest weight of the evidence, the appellate court reviews the entire record, “weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the [trier of fact] ‘clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.’” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶17} Appellant was convicted of OVI in violation of R.C. 4511.19(A)(1)(a):

{¶18} “(A)(1) No person shall operate any vehicle, streetcar, or trackless trolley within this state, if, at the time of the operation, any of the following apply:

{¶19} “(a) The person is under the influence of alcohol, a drug of abuse, or a combination of them.”

{¶20} Appellant argues that Dep. Tankersley's testimony was not credible. She argues that he had motivation to lie because he had been involved in another accident earlier that evening and would not want to be found at fault in two accidents in one evening. She further argues that his testimony is not credible because he could not recall a traffic light that regulates traffic in the area of the accident, and his testimony was "vague" and "inconsistent." Brief of appellant, page 7. She argues that she presented the testimony of two witnesses in addition to her own to demonstrate that she had little to drink the night in question, often spilled alcohol on her clothing while working in the bar which would produce an odor of alcohol and was ill on the night in question which could manifest symptoms similar to a person under the influence of alcohol.

{¶21} While the deputy did not recall the traffic light in the area of the accident, he testified that he did not patrol in that area often. Ptl. Hartless testified that while he was somewhat surprised that the deputy did not recall the traffic light, deputies are generally not in the city often so they are not as familiar with the streets. Tr. 50. In addition, Ptl. Hartless testified that the damage to the vehicles was consistent with Dep. Tankersley's version of how the accident occurred.

{¶22} Ptl. Hartless testified that he knows the difference between a person who is sick and a person who is drunk and appellant was not sick. Tr. 51. She did not tell Pt. Hartless she was sick on the night of the accident, and she was not coughing, sneezing or throwing up. Tr. 57-58. He further observed that the odor of alcohol about appellant was stronger when she was talking, which would indicate that the alcohol odor was not emanating solely from her clothing. He based his conclusion that she had too

much to drink on several factors, including her belligerent attitude, strong odor of alcohol when talking and her flushed face.

{¶23} The trial judge, who was in a better position to judge credibility than the appellate court, stated clearly in the record that he did not believe appellant's version of what occurred that night. We cannot conclude from the testimony that the trier of fact clearly lost his way in determining that appellant was guilty of OVI beyond a reasonable doubt.

{¶24} The assignment of error is overruled.

{¶25} The judgment of the Licking County Municipal Court is affirmed.

By: Edwards, J.

Gwin, P.J. and

Hoffman, J. concur

s/Julie A. Edwards

s/W. Scott Gwin

s/William B. Hoffman

JUDGES

JAE/r0814

