

[Cite as *State v. Caplan*, 2004-Ohio-4990.]

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

|                      |   |                   |
|----------------------|---|-------------------|
| STATE OF OHIO,       | ) |                   |
|                      | ) | CASE NO. 03 MA 91 |
| PLAINTIFF-APPELLEE,  | ) |                   |
|                      | ) |                   |
| - VS -               | ) | OPINION           |
|                      | ) |                   |
| CAROLYN CAPLAN,      | ) |                   |
|                      | ) |                   |
| DEFENDANT-APPELLANT. | ) |                   |

CHARACTER OF PROCEEDINGS: Criminal Appeal from County Court No. 4,  
Case No. 03TRD2917.

JUDGMENT: Reversed and Remanded.

APPEARANCES:  
For Plaintiff-Appellee:

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JUDGES:  
Hon. Joseph J. Vukovich  
Hon. Gene Donofrio  
Hon. Mary DeGenaro

Dated: September 17, 2004

[Cite as *State v. Caplan*, 2004-Ohio-4990.]  
VUKOVICH, J.

{¶1} Defendant-appellant Carolyn Caplan appeals the decision of the Mahoning County Court No. 4., finding her guilty of violating R.C. 4511.213, improper approach of an emergency vehicle. The issues presented in this appeal are whether R.C. 4511.213 is unconstitutionally vague and ambiguous and whether the judgment was against the manifest weight of the evidence. For the reasons provided below, the judgment of the trial court is reversed and this case is remanded for a new trial.

#### STATEMENT OF FACTS

{¶2} On April 10, 2003, Caplan was pulled over and ticketed for violating R.C. 4511.213, improper approach of an emergency vehicle. For the sake of clarity, each version of the facts presented at the May 1, 2003 bench trial by the two witnesses, the arresting officer and Caplan, will be presented separately.

{¶3} Trooper Zatvarnicky, the arresting officer, testified that prior to stopping Caplan, he had been backing up another officer making a traffic stop on I-80 westbound near the Ohio turnpike close to mile marker 221. (Tr. 4). He stated that his lights were activated and the other officer's lights were activated. (Tr. 5). In addition, Zatvarnicky testified that he had an additional light bar system, a LED strobe light system on top of the vehicle, and an arrow board in the back of the window. (Tr. 5). It was activated during that stop and was set for the direction of moving traffic towards the left. (Tr. 5).

{¶4} While helping with the prior stop, Zatvarnicky testified that he saw a '99 Dodge station wagon pass him in the right-hand lane. (Tr. 6). He pulled out and followed the vehicle over the Meander Bridge. (Tr. 6-7). Just west of the bridge and east of the Ohio Turnpike, Zatvarnicky pulled over Caplan's car. (Tr. 7). He explained to Caplan that he stopped her because she failed to merge over into the left-hand lane upon approaching a stopped emergency vehicle. (Tr. 7-8). Zatvarnicky testified that there was ample room for Caplan to move over and the left-hand lane was clear. (Tr. 9-10). Finally, he explained that he watched her drive past him in his rear view mirror as he was parked behind the truck that he initially pulled over. (Tr. 10).

{¶15} Caplan, on the other hand, testified she did not see the officer because he was parked in front of the stopped vehicle. (Tr. 16). She further explained that she did not have enough time to maneuver into the left-hand lane and return to the right-hand lane since she was going to exit to the right onto the turnpike ramp. (Tr. 16). She felt there was too much truck traffic and that it would not be a safe decision to move to the left lane. (Tr. 16). Therefore, she did not move to the left lane. (Tr. 16).

{¶16} After reviewing these facts, the trial court found Caplan guilty of violating R.C. 4511.213. Caplan timely appeals raising two assignments of error.

#### ASSIGNMENT OF ERROR NUMBER TWO

{¶17} We will address Caplan's two assignments of error in reverse order, the second of which asserts:

{¶18} "R.C. 5411.213 IS UNCONSTITUTIONALLY VAGUE AND AMBIGUOUS."

{¶19} The Supreme Court has held that the failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal. *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Caplan has raised this challenge for the first time on appeal, rather than with the trial court. Thus, this argument is waived and, as such, we will not address the merits of this assigned error.

#### ASSIGNMENT OF ERROR NUMBER ONE

{¶10} Caplan's first assignment of error contends:

{¶11} "THE JUDGMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶12} Caplan was convicted of violating R.C 4511.213, failure to yield for an emergency vehicle, which states in pertinent part:

{¶13} "(A) The driver of a motor vehicle, upon approaching a stationary public safety vehicle that is displaying a flashing red light, flashing combination red and white light, oscillating or rotating red light, oscillating or rotating combination red and white light, flashing blue light, flashing combination blue and white light, oscillating or rotating blue

light, or oscillating or rotating combination blue and white light, shall do either of the following:

{¶14} "(1) If the driver of the motor vehicle is traveling on a highway that consists of at least two lanes that carry traffic in the same direction of travel as that of the driver's motor vehicle, the driver shall proceed with due caution and, if possible and with due regard to the road, weather, and traffic conditions, shall change lanes into a lane that is not adjacent to that of the stationary public safety vehicle."

{¶15} A manifest weight argument, as opposed to one that addresses sufficiency, requires the reviewing court to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt and, thereby, to support the judgment of conviction. *State v. Brooks* (Sept. 25, 2001), 10th Dist. No. 00AP-1440, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those assessments is superior to that of the reviewing court. *State v. Bezak* (Feb. 18, 1998), 9th Dist. No. 18533, citing *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶16} "Nonetheless, the appellate court must review the entire record. With caution and deference to the role of the trier of fact, the reviewing court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way, creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction. *Bezak*, at 5-6; citing *Thompkins*, at 387, 678 N.E. 2d 541." *State v. Wyche*, 10th Dist. No. 01AP-361, 2002-Ohio-202.

{¶17} At the outset, it is important to note that R.C. 4511.213 requires a driver on a multi-lane highway to move a lane away from a stationary public safety vehicle, but only

upon application of very subjective criteria. That is: “the driver shall proceed with due caution and *if possible* and with due regard to the road, weather, and traffic conditions, shall change lanes into a lane that is not adjacent to that of the stationary public safety vehicle.” (Emphasis added.) R.C. 4511.213(A)(1).

{¶18} The only absolute mandatory duty in the statute is to “proceed with caution.” The duty to change lanes is a conditional duty that is dependent upon certain factors such as road conditions. Therefore, the key consideration here is whether or not it was possible for appellant-motorist to safely change lanes as contemplated by the aforementioned traffic provision. Appellant said she could not. (Tr. 16). The arresting officer said she could. (Tr. 9).

{¶19} While we recognize that it is up to the trier of fact to determine credibility, the unique facts in existence here necessitate a conclusion that differs from that of the trial court. In other words, there are certain road conditions that exist in the case before us that overwhelmingly favor the subjective impression of the driver of the motor vehicle over the subjective impression of the Highway Patrol Trooper.

{¶20} In the matter at hand, the following seven unique road conditions favor Caplan’s subjective impression. First, the public safety vehicle was on the right hand emergency berm about “three-tenths of a mile east of the Meander Bridge.” (Tr. 6). Second, Caplan was traveling in a westward direction toward the Meander Bridge and the Ohio Turnpike. (Tr. 13). Third, vehicles are prohibited from changing lanes while traveling over the Meander Bridge. (Tr. 9). Fourth, shortly past the Meander Bridge is the on-ramp for the Ohio Turnpike. Fifth, Caplan wanted to take the exit immediately past the Meander Bridge to enter the Ohio Turnpike. (Tr. 17). Sixth, there was traffic behind appellant in the left lane. (Tr. 12). Lastly, Caplan felt that she could not go from the right lane to the left lane, where she would be forced to stay for the length of the Meander Bridge, and then get safely back to the right lane to exit to the Ohio Turnpike. (Tr. 17).

{¶21} Under these facts unique to this case, it is inconceivable to this court that the subjective impressions of the officer who issued the citation should be given credence over the subjective impressions of the motorist where there are uncontroverted objective

considerations that support the motorist. Thus, the majority of this panel finds that the conviction is against the manifest weight of the evidence.

{¶22} The Ohio Constitution states: “No judgment resulting from a *trial by a jury* shall be reversed on the weight of the evidence except by concurrence of all three judges hearing the cause.” (Emphasis added.) Section 3(B)(3), Article IV, Ohio Constitution. The case before us was not a trial by a jury, rather it was bench trial. The Ohio Supreme Court has previously held that where a trial is not to a jury, a majority of the Court of Appeals may reverse a judgment on the weight of the evidence. *State v. Gilkerson* (1965), 1 Ohio St.2d 103. Thus, since the majority of this court finds that the bench trial’s decision was against the manifest weight of the evidence, we have the authority to reverse and remand the case for a new trial.

{¶23} For the foregoing reasons, the judgment of the trial court is hereby reversed and this case is remanded for a new trial.

Donofrio, J., concurs.

DeGenaro, J., dissents; see dissenting opinion.

DeGenaro, dissenting:

{¶24} I must dissent from the majority's decision since it has uncharacteristically abandoned the venerable rules of the manifest weight standard of review. My colleagues have exercised the appropriate deference to the role of the fact-finder, whether it be a jury or a judge, in the past. But because there is no basis, reason, or authority in the law for the majority's rationale reversing the trial court's decision as being against the manifest weight of the evidence, the only way I can reconcile past decisions with this one is, unfortunately, to conclude that their opinion is an outcome-oriented decision, the worst way in which a court can decide a case. I cannot ignore the rules governing our review of this case and cannot reward Caplan for being ignorant of the statute. Caplan's conviction for the improper approach of a motor vehicle should be affirmed because it is supported by competent, credible evidence.

{¶25} The statute at issue here requires that a motorist change lanes when approaching a stationary public safety vehicle if it is possible to do so. Caplan testified that she believed it was not possible to change lanes; the officer testified it was. As the majority correctly notes at ¶15, the weight of evidence and witness credibility are primarily to be determined by the finder of fact. *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-0171. The finder of fact is free to believe all, part, or none of the testimony of each witness who appears before it. *State v. Caldwell* (1992), 79 Ohio App.3d 667. An appellate court should not find that a fact-finder's decision is against the manifest weight of the evidence unless it determines that the fact-finder "clearly lost its way" and that this creates "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, 1997-Ohio-0052. These are long-standing rules which every appellate judge in the State of Ohio, including my colleagues by their own admission, are well-acquainted with, yet have chosen to disregard in this case.

{¶26} Despite the classic conflict we have seen countless times before in traffic cases between the driver's testimony and that of the officer, the majority deviates from this Court's typical discipline of deferring to the trial court's credibility determination in resolving that conflict. Because the majority disagrees with the trial court's decision, it has arbitrarily chosen to invade the province of the trier of fact and give greater weight to Caplan's "subjective impression" since certain "undisputed facts" support Caplan's "subjective impression", her story is internally consistent and the statute is "very subjective". As the majority itself states, "it is inconceivable to [the majority] that the subjective impressions of the officer who issued the citation should be given credence over the subjective impressions of the motorist where there are uncontroverted objective considerations that support the motorist." Opinion at ¶21. This highlights the majority's abandonment of the rules governing our review of manifest weight arguments and its usurpation of the trial court's prerogative to give the testimony of one witness more credence over another's.

{¶27} As the majority's holding is now precedent, it is to be applied to all future

cases. The unintended result is that now a fact-finder is obligated to believe any criminal defendant if that defendant's version of events is consistent with "undisputed facts", the defendant's version of events is internally consistent, especially regardless of the relevance of those "undisputed facts", and the statute does not explicitly define the prohibited conduct. The majority has now bound the trial courts of this district to accord more weight to defendant's testimony in most if not all traffic citation cases.

**{¶128}** I contend that the majority did not intend to create a new rule of law with regard to manifest weight analysis, which unfortunately it has, because the majority characterizes the facts in this case as "unique". Opinion at ¶19. This is clearly an effort to limit the scope of its holding. But a brief examination of the facts demonstrates that they are not unique.

**{¶129}** Caplan was driving her car westbound on an interstate in the right-hand lane. She approached some police cars parked along the right side of the road affecting a traffic stop. Their lights were flashing and an arrow board on the back of one of the vehicles was directing traffic toward the left. Caplan did not change lanes when approaching the parked cars and passed them in the right-hand lane. When Caplan passed the police cars, they were stopped approximately three-tenths of a mile east of a bridge. Vehicles are prohibited from changing lanes on that bridge. There is an exit from the interstate to the Ohio Turnpike some distance after the bridge which Caplan testified that she intended to take. The officer stopped Caplan between the bridge and that exit.

**{¶130}** These facts are not unique. Caplan passed a parked police car with its lights on when, she claims, she had a limited distance to change lanes back and forth before an exit from the interstate. The officer, in essence, testified otherwise. But, is it "inconceivable" to conclude, as the trial court obviously did, that the distance was not so limited that it was possible for Caplan to change from the right-hand lane to the left-hand lane and back? Caplan had three-tenths of a mile to change back into the right-hand lane after passing the officer before she reached the bridge. And although the transcript does not indicate how far the exit is after the bridge, the officer had time to catch up to Caplan and effectuate the stop between the bridge and the exit. For manifest weight purposes,

isn't this some competent credible evidence that Caplan could safely get back into the right hand lane to exit the interstate? Given the facts involved in this case, the majority cannot conclude without straining well settled manifest weight analysis that the trial court clearly lost its way by finding it was possible for Caplan to change back into the right hand lane before the exit.

{¶31} Next, the majority describes as "uncontradicted" facts which support Caplan's "subjective impression" that it was not possible for her to change lanes. First, it cites facts regarding the distances involved and Caplan's intent to take the exit onto the Ohio Turnpike. But as explained above, these facts do not demonstrate that it was impossible for Caplan to change back from the left-hand lane to the right-hand lane after passing the officers. If we were just given these facts, i.e. a map of the area, the majority would be forced to speculate about whether it was possible for a driver to change from the right-hand to the left-hand lane and back. Second, the majority cites the officer's testimony that there was vehicle traffic in the left-hand lane behind Caplan. But this does not support Caplan's "subjective impression" that it was impossible to change lanes since the officer further testified that it was possible to do so. Finally, the majority cites Caplan's belief that she could not safely change back into the right-hand lane to exit the interstate. But this is her *subjective impression*, not a *fact supporting* her subjective impression. Quite the contrary, the fact that the officer passed traffic in the left lane and was able to pull her over before the exit contradicts her "subjective impression". Thus, in the end the majority's reasoning is circular: we must give the defendant's belief greater weight since it is her belief.

{¶32} At this point, I must note that the majority gives the impression that Caplan testified that she did not think it was possible for her to change lanes before passing the police cars. But this was not her testimony. In fact, she expressed no opinion regarding whether it was possible for her to safely move to the left-hand lane before passing the stopped vehicles. Rather, she testified that she did not believe she could safely change back to the right-hand lane from the left-hand lane after passing those vehicles. That testimony is irrelevant to whether or not she could safely move into the left-hand lane to

avoid placing the officer's life in danger. Moreover, Caplan's testimony is mere conjecture as to whether or not she would be able to return to the right-hand lane on the other side of the bridge and rather bad conjecture at that. If all the vehicles had properly moved to the left-hand lane before passing the stopped cars, then there would have been no vehicles in the right-hand lane to impede Caplan's exit from the interstate. Only one witness testified about the relevant issue, whether it would be safe for Caplan to move into the left hand lane when taking into account solely the things listed in the statute, road, weather, and traffic conditions, and that witness opined that it was possible to do so.

{¶33} Finally, the majority supports its reversal by noting the "important" fact that R.C. 4511.213 is a "very subjective" statute. Opinion at ¶17. This, of course, is the basis of Caplan's arguments that the statute was unconstitutional in her first assignment of error. But as the majority properly recognized, Caplan waived this argument by not raising it at the trial court level. However, the majority gives no reason for and cites no authority explaining why its determination that a statute contains subjective criteria should factor into a manifest weight analysis. Why, if the statute is subjective, should we generally favor the defendant's judgment as to whether an action is possible over the officer's judgment? These kinds of credibility determinations should be made by the trier of fact on a case-by-case basis. The majority eradicates case-by-case credibility determinations when the facts support a defendant's "subjective impression" of events over a police officer's. Again, this is why I contend that despite its efforts to limit the holding to this case, this case will support future challenges to other "subjective" traffic statutes.

{¶34} It is particularly noteworthy that this Court recently rejected arguments concerning the validity of so called subjective statutes in *State v. Quinones*, 7th Dist. No. 02 CA 243, 2003-Ohio-6727. (Waite, J., Vukovich, and DeGenaro, concur). In that case, the defendant claimed the statute prohibiting a vehicle from following too closely behind another vehicle was unconstitutionally vague.

{¶35} More specifically, the defendant's three-fold argument claimed that the language in R.C. 4511.34, which prohibits following another vehicle "more closely than is

reasonable and prudent," does not provide a workable standard for an ordinary person to follow. Moreover, the defendant argued the statute allowed law enforcement officers too much discretion in the day-to-day enforcement of the statute. Finally, she criticized the fact that drivers are left to simply guess when their legal driving turns into tailgating. The defendant elaborated on this point explaining that the tailgating law necessarily applies differently to everyone, because everyone has different reflexes, driving experience, and opinions about what is a reasonable distance to keep between automobiles.

{¶36} This Court rejected these arguments by explaining:

{¶37} "The Constitution requires only that the challenged statute or ordinance " \* \* \* conveys [a] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States v. Petrillo* (1947), 332 U.S. 1, 8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877.

{¶38} " ' "Absolute or mathematical certainty is not required in the framing of a statute. Reasonable certainty of the nature and cause of the offense is all that is required. Some offenses admit of much greater precision and definiteness than others, but it is quite obvious that in the case at bar the statute must be sufficiently elastic and adaptable to meet all the dangerous situations presented, in order to adequately safeguard the travelling public \* \* \* ." *State v. Schaeffer* (1917), 96 Ohio St. 215, 236, 117 N.E. 220, 226.

{¶39} " ' " \* \* \* the statute is merely a traffic regulation which has for its standard the rule of reason. Traffic circumstances vary greatly. A more specific regulation would not adequately safeguard the public." [quoting *State v. Hinson* (Feb. 5, 1982), 4th Dist. No. 385].' Id. at 60-61, 117 N.E. 220, 43 Ohio App.3d 59, 539 N.E.2d 641." *Quinones* at ¶18-20.

{¶40} Today, the majority accepts, under the guise of a manifest weight argument, the concerns this Court unanimously rejected when dealing with a constitutional argument in *Quinones*. Its characterization of the statute at issue here as "very subjective" implicitly accepts the argument that the statute does not provide a workable standard for an ordinary person to follow. The majority opinion addresses and validates the defendant's

argument in *Quinones* that the statute allows law enforcement officers too much discretion in the day-to-day enforcement of the statute. Because trial courts must now give greater weight to a defendant's "subjective impression", defendants no longer need to worry that they will simply have to guess whether they are engaging in proscribed conduct. Now criminal defendants can use a manifest weight analysis to challenge the vagueness of a statute and prevail, whereas they would fail if it were raised in a constitutional argument.

{¶41} Although I have addressed the merits of the majority's opinion, it has been a frustrating task, because it is unfortunately very apparent that the majority has massaged both the facts of this case and the standard of review to reach its conclusion. I can surmise no other reason than that this is because of the sympathy it has for this particular defendant. This is the only way I can reconcile the majority's decision in this case with every other manifest weight case where we affirmed a trial court's decision that was supported by competent credible evidence.

{¶42} At trial, Caplan expressed her ignorance of the fact that the law required her to change lanes in this situation if it was possible to do so and her counsel echoed this at oral argument before this Court by expressing that he was also unaware that the statute existed. It appears the majority was persuaded by this argument. But a defendant's ignorance of the law is no excuse. *Einhord v. Ford Motor Co.* (1990), 48 Ohio St.3d 27, 30. While we may have sympathy for defendants who are convicted of breaking laws that they are unaware of, this is not an affirmative defense upon which to base a judgment.

{¶43} It is unfortunate that I am forced to conclude that the majority's decision is nothing more than an outcome-oriented decision. A review of the evidence adduced at trial in this case clearly demonstrates that the prosecution presented substantial, competent and credible evidence upon which a rational trier of fact could have reasonably concluded that all elements of the offense had been proven beyond a reasonable doubt to support Caplan's conviction. Because I cannot say that the trial court clearly lost its way in its resolution of these issues of fact and credibility, Caplan's conviction should be affirmed.

