

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-090726
		C-090727
Plaintiff-Appellee,	:	TRIAL NOS. C-08TRC-6214(A)
		C-08TRC-6214(C)
vs.	:	
		<i>JUDGMENT ENTRY.</i>
REBECCA BOERGER,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.¹

Defendant-appellant Rebecca Boerger appeals her convictions for operating a motor vehicle while under the influence (OVI),² and for refusing a chemical test while having a prior OVI conviction.³ We affirm.

Boerger was stopped by Cincinnati Police Specialist Barbara Ruff on Martin Luther King Drive for traveling 58 miles per hour in a 35-mile-per-hour speed zone. Upon approaching Boerger's vehicle, Specialist Ruff found that she was talking on her cellular phone, and that she was very distracted and confused. At one point, she exclaimed, "There is the meatloaf!" Based upon Boerger's behavior, Specialist Ruff believed Boerger was under the influence. Boerger denied drinking anything but water. Specialist Ruff called for a second officer to help assess the situation. That officer also witnessed Boerger's strange behavior, but could not detect an odor of alcohol.

¹ See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

² R.C. 4511.19(A)(1)(a).

³ R.C. 4511.19(A)(2).

Specialist Ruff then conducted three field sobriety tests: the one-leg stand, reciting the alphabet, and the finger-counting test. Boerger failed to follow directions, repeatedly interrupted Specialist Ruff, and could complete neither the alphabet nor the finger-counting tests. At one point during the testing, Specialist Ruff detected an odor of alcohol. Based on Boerger's inability to follow directions, her lack of balance, her bloodshot eyes, the odor of alcohol, her general disorientation and confusion, and her poor performance on the tests, Specialist Ruff arrested Boerger for OVI. Since she had a prior OVI conviction, she was also cited when she refused a breathalyzer test.

At trial, Boerger's boyfriend testified that she only had one glass of wine several hours before she was stopped, which was different than what Boerger had told the officers. He further testified that she had been acting confused and disoriented because of her Attention Deficit Hyperactivity Disorder and that she could not control her behavior. The trial court found Boerger guilty of both charges and sentenced her accordingly.

Both Boerger's assignments of error assert that her convictions were against the manifest weight of the evidence. The standard for determining whether a conviction is against the manifest weight of the evidence is well established. When reviewing whether a criminal conviction is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.⁴

In this case, the convictions for operating a motor vehicle while under the influence and for refusing a chemical test with a prior conviction were not against the manifest weight of the evidence. The trial court had more than enough evidence, given the testimony of the witnesses and the video recording of the traffic stop, to

⁴ See *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

conclude that Boerger had committed those offenses. Based on this record, we cannot conclude that the trial court lost its way or created a manifest miscarriage of justice.

While Boerger presented testimony that attempted to explain her behavior, matters as to the credibility of evidence are for the trier of fact to decide.⁵ This is particularly true regarding the evaluation of witness testimony.⁶ We will not reverse a conviction, on the manifest weight of the evidence, when the trial court has chosen one credible version of events over another.

Since Boerger's convictions were not against the manifest weight of the evidence, we overrule her two assignments of error and affirm the judgment of the trial court.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., HILDEBRANDT and DINKELACKER, JJ.

To the Clerk:

Enter upon the court's journal on June 30, 2010

per order of the Court _____
Presiding Judge

⁵ *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, 804 N.E.2d 433, ¶116.

⁶ *State v. Williams*, 1st Dist. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶45, citing *Bryan*, supra, and *State v. Russ*, 1st Dist. No. C-050797, 2006-Ohio-6824, ¶23.