IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NOS. C-150490 C-150491 C-150492
Plaintiff-Appellee,	:	TRIAL NOS. C-14TRC-55759(A) C-14TRC-55759(E) C-14TRC-55759(D)
vs.	:	
DONTAE DORSEY,	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY.

We consider these appeals on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant Dontae Dorsey appeals his two convictions for OVI in violation of R.C. 4511.19(A)(1) and 4511.19(A)(2), and a marked lanes violation under R.C. 4511.33. He asserts two assignments of error. In Dorsey's first assignment of error, he argues that his convictions were based on insufficient evidence and against the manifest weight of the evidence. We disagree.

Dorsey was travelling on I-71 and I-275 around 3 a.m. on November 22, 2014. A State Highway Patrol trooper observed him speeding and committing several marked lane violations. When the trooper pulled him over, Dorsey exited from his vehicle and ran into a wooded area next to the highway. After Dorsey emerged from the wooded area, the trooper observed that Dorsey had bloodshot eyes, smelled of alcohol, and was slurring his words. Dorsey denied drinking anything that night, and

he refused the trooper's requests to perform field sobriety tests or complete the chemical tests.

Dorsey's OVI conviction under R.C. 4511.19(A)(1)(a) was based on his conduct and appreciable impairment. *See State v. Benton*, 1st Dist. Hamilton Nos. C-130556, C-130557 and C-130558, 2014-Ohio-2163, ¶ 18; *State v. Grizovic*, 177 Ohio App.3d 161, 2008-Ohio-3162, 894 N.E.2d 100, ¶ 7 (1st Dist.); *State v. Bakst*, 30 Ohio App.3d 141, 145, 506 N.E.2d 1208 (1st Dist.1986). The statute provides, "No person shall operate any vehicle * * * if, at the time of the operation, * * * [t]he person is under the influence of alcohol, a drug of abuse, or a combination of them." R.C. 4511.19(A)(1)(a).

The record demonstrates that the state presented evidence that Dorsey was appreciably impaired, as he had been speeding, committed several marked lanes violations, evaded the officer, smelled of a strong odor of alcohol, had bloodshot eyes, slurred his speech, refused to perform the field sobriety tests, and refused to take the chemical tests. Although any one of these standing alone may not have been enough to indicate impairment, the totality of the circumstances supports a finding of appreciable impairment. *See State v. May*, 2d Dist. Montgomery No. 25359, 2014-Ohio-1542, ¶ 49 (factfinder must determine, based on totality of the evidence, whether the defendant was driving under the influence of alcohol); *State v. Colyer*, 1st Dist. Hamilton Nos. C-120347, C-120348 and C-120349, 2013-Ohio-1316, ¶ 9; *Westerville v. Cunningham*, 15 Ohio St.2d 121, 122, 239 N.E.2d 40 (1968) (the defendant's refusal to take a chemical test would have probative value as to whether he was intoxicated).

Additionally, Dorsey was convicted of violating R.C. 4511.19(A)(2), which provides,

> No person who, within twenty years of the conduct described in division (A)(2)(a) of this section, previously has been convicted of or pleaded guilty to a violation of this division, a violation of division (A)(1) or (B) of this section, or any other equivalent offense shall * * * (a) Operate any vehicle, * * * within this state while under the influence of alcohol * * * [and] (b) Subsequent to being arrested for operating the vehicle * * * as described in division (A)(2)(a) of this section, being asked by a law enforcement officer to submit to a chemical test or tests under section 4511.191 of the Revised Code, and being advised by the officer in accordance with section 4511.192 of the Revised Code of the consequences of the person's refusal or submission to the test or tests, refuse to submit to the test or tests.

Here, Dorsey stipulated to an OVI conviction in 2012. The trooper testified that she requested Dorsey take a chemical test and advised him of the consequences of refusing the chemical test. Nevertheless, Dorsey refused to take the test.

As for the marked lanes violation, the trooper testified that she saw Dorsey commit several marked lanes violations. The video of the incident supports her observations. Dorsey argues that R.C. 4511.33(A)(1) does not require strict compliance with the requirement of driving within marked lanes because the statute states that "a vehicle * * * shall be driven, as nearly as practicable, within a single lane or line of traffic[.]" The Ohio Supreme Court has stated, however, "[t]he phrase 'as nearly as is practicable' does not give the driver the option to remain within the lane markings; rather, the phrase requires the driver to remain within the lane markings unless the driver cannot reasonably avoid straying." *State v. Mays*, 119 Ohio St.3d 406, 2008-Ohio-4539, 894 N.E.2d 1204, ¶ 18.

Reviewing the evidence in the light most favorable to the prosecution, we find that the record contains sufficient evidence for a reasonable trier of fact to conclude that the state had proven the elements of R.C. 4511.19(A)(1)(a), 4511.19(A)(2), and 4511.33 beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. Additionally, after reviewing the record, we do not find that the trial court lost its way and created such a manifest miscarriage of justice to require reversing Dorsey's convictions and ordering a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541, citing *State v. Martin,* 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983). We overrule Dorsey's first assignment of error.

In his second assignment of error, Dorsey contends that the trial court erred by failing to advise him about performing community service in lieu of paying court costs, as required by R.C. 2947.23(A). This argument has no merit. In 2012, Senate Bill 337 amended R.C. 2947.23 so that the trial court's failure to advise a defendant of the possibility of community service did not "negate or limit the authority of the court to order the defendant to perform community service if the defendant fails to pay the judgment * * * or to timely make payments toward that judgment under an approved payment plan." 2012 S.B. No. 337; *State v. Cauthen*, 1st Dist. Hamilton No. C-130475, 2015-Ohio-272, ¶ 8, quoting R.C. 2947.23(A)(1)(b). Therefore, "when the sentencing error involves the failure to notify a defendant of possible community service for neglecting to pay imposed court costs," there is no longer a need to reverse and remand for resentencing pursuant to R.C. 2947.23(A)(1)(b). *Cauthen* at ¶ 8. Therefore, Dorsey's second assignment of error is overruled. We 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.

FISCHER, P.J., CUNNINGHAM and **STAUTBERG, JJ.**

To the clerk:

Enter upon the court's journal on June 29, 2016
per order of the court _____.

Presiding Judge