

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

STATE OF OHIO,	:	APPEAL NO. C-160470
Plaintiff-Appellee,	:	TRIAL NO. C-16TRC-1477
vs.	:	<i>JUDGMENT ENTRY.</i>
SEAN STEWART, a.k.a. SHAWN STEWART,	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op. 3.1; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Defendant-appellant, Sean Stewart, was convicted of physical control of a vehicle while under the influence, a violation of R.C. 4511.194(B). Hamilton County Sheriff's Deputy Joshua Hawthorne responded to a report of an unconscious male in a vehicle. When he arrived, he found emergency services personnel tending to Stewart, who was regaining consciousness in the driver's seat. Deputy Hawthorne observed an ignition key in Stewart's lap. Deputy Hawthorne placed the key on the roof of the car and commenced field sobriety tests. Based on Stewart's poor performance on the field sobriety tests, Deputy Hawthorne arrested Stewart, and Stewart voluntarily submitted to a blood test. Stewart tested positive for diazepam, nordiazepam, a marijuana metabolite, Fentanyl, and morphine. After a bench trial, Stewart was found guilty and sentenced to a suspended 180-day jail term, nine months of community control with drug treatment, and a total of \$135 in costs and fees. He now challenges the weight and

sufficiency of the evidence against him and claims that he was denied the effective assistance of counsel.

Stewart argues his first two assignments of error together, so we address them together. In his first two assignments of error, Stewart challenges the weight and sufficiency of the evidence against him. Specifically, Stewart argues that the state failed to establish that he had possession of the vehicle's ignition key because Deputy Hawthorne never saw Stewart operate the vehicle, he never saw the key in the ignition, and the key went missing after Deputy Hawthorne placed it on top of the vehicle. In a challenge to the sufficiency of the evidence, the question is whether after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In reviewing a challenge to the weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). We must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and thereby created a manifest miscarriage of justice. *Id.*

R.C. 4511.194(B)(1) proscribes being in physical control of a vehicle while under the influence of alcohol, a drug of abuse, or a combination of them. The statute defines "physical control" as being in the driver's position of the front seat of a vehicle while in possession of the vehicle's ignition key. R.C. 4511.194(A)(2). Stewart admitted that he was sitting in the driver's seat of his car and had drugs in his system. He testified that he had given the key to his girlfriend, but Deputy Hawthorne observed an ignition key in Stewart's lap. Our review of the record reveals that the state presented sufficient, credible evidence from which the fact finder could have reasonably concluded that the

state had proven each element of the offense beyond a reasonable doubt. *See Jenks* at paragraph two of the syllabus. Specifically, the fact finder could have inferred from Deputy Hawthorne's testimony that the key in Stewart's lap operated Stewart's vehicle. Additionally, our review of the entire record fails to persuade us that the fact finder clearly lost its way and created such a manifest miscarriage of justice that we must reverse Stewart's conviction and order a new trial. *See Thompkins* at 386-387. We overrule Stewart's first two assignments of error.

In his third assignment of error, Stewart claims that he was denied the effective assistance of counsel because his trial counsel failed to make a Crim.R. 29 motion for an acquittal. To sustain a claim for ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373 (1989).

Our review of the record convinces us that any error Stewart's counsel committed by failing to make a Crim.R. 29 motion was not prejudicial. Deputy Hawthorne testified that Stewart was in the driver's seat of the car, with an ignition key, while under the influence of numerous drugs. Because this testimony was sufficient to establish each element of the offense beyond a reasonable doubt, any Crim.R. 29 motion would have been overruled. Accordingly, we overrule Stewart's third assignment of error and affirm the trial court's judgment.

Further, a certified copy of this judgment entry shall constitute 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., MYERS and MILLER, JJ.**

**OHIO FIRST DISTRICT COURT OF APPEALS**

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To the clerk:

Enter upon the journal of the court on July 7, 2017

per order of the court \_\_\_\_\_.

Presiding Judge