

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

STATE OF OHIO,	:	APPEAL NO. C-170225
	:	TRIAL NO. B-1506413
Plaintiff-Appellee,	:	
vs.	:	<i>JUDGMENT ENTRY.</i>
PETER SMERIGLIO,	:	
Defendant-Appellant.	:	

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

Defendant-appellant, Peter Smeriglio, was convicted of two counts of failure to comply with an order of a police officer, in violation of R.C. 2921.331(B); one count of aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a); and one count of operating a motor vehicle while under the influence, in violation of R.C. 4511.19(A)(1)(a) and (A)(1)(j). After receiving reports of an impaired driver matching Smeriglio's license plate and vehicle description, a police officer attempted to pull him over by activating his lights and siren. Instead of complying, Smeriglio crossed a median into oncoming traffic, sideswiped a car, and crashed head-on into a school bus carrying elementary school students. An officer approached his wrecked vehicle and commanded him to get out, but Smeriglio did not respond. Because it appeared Smeriglio was still attempting to drive away, the officer tased him and pulled him out of the car. Smeriglio was in and out of consciousness and treated by paramedics with

Narcan for a suspected opioid overdose. He was transported to the hospital, where his blood was drawn. Smeriglio's blood tested positive for opiate morphine, a byproduct of heroin and fentanyl.

After a jury trial, Smeriglio was found guilty and the trial court imposed consecutive 9-month sentences on counts 1 and 2, which it ran consecutively to a 12-month sentence on count 3. Smeriglio was ordered to pay a fine on count 4. In aggregate, the trial court imposed a 30-month prison sentence. This appeal followed.

In his first two assignments of error, Smeriglio challenges the weight and sufficiency of the evidence against him on counts 1 and 2. Smeriglio argues these assignments together. Specifically, Smeriglio argues that the state failed to establish that Smeriglio willfully failed to comply with the order of an officer because the evidence showed that he had overdosed on heroin. In other words, Smeriglio contends that he did not have the requisite mental state to commit the crime alleged due to his intoxication. 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 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

R.C. 2921.331(B) provides that “[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a

police officer to bring the person's motor vehicle to a stop." Relevant to Smeriglio's defense that his conduct on counts 1 and 2 was not willful, R.C. 2901.21(E) states that

[v]oluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. Evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

The statute defines "intoxication" as including, but not limited to, "the ingestion of alcohol, a drug, or alcohol and a drug." R.C. 2901.21(F)(4). Smeriglio testified that he is addicted to opiates, and used heroin sporadically for five years prior to the accident. While he did not remember using heroin the morning of the accident, he admitted that there was no other explanation for his behavior or the lab report confirming the presence of the drugs in his system. The evidence established that Smeriglio was voluntarily intoxicated on heroin.

Our review of the record reveals that the state presented sufficient, credible evidence from which the jury could have reasonably concluded that the state had proven each element of each offense beyond a reasonable doubt. *See Jenks* at paragraph two of the syllabus. Specifically, the jury could have inferred from the video showing Smeriglio driving away from the police officer who signaled for him to pull over and the officer's testimony that Smeriglio was still attempting to drive following the accident that Smeriglio acted willfully. Additionally, our review fails to persuade us that the factfinder clearly lost its way and created such a manifest miscarriage of justice

that we must reverse Smeriglio's conviction and order a new trial. *See Thompkins* at 386-387. We overrule Smeriglio's first and second assignments of error.

In his third assignment of error, Smeriglio argues that the trial court erred in denying his motion to suppress his blood test results. Smeriglio contends that the results were invalid because the blood sample was not properly labeled with his name when first presented for testing and there was insufficient evidence presented that the sample was properly refrigerated. Appellate review of a motion to suppress presents a mixed question of law and fact. An appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. Accepting these facts as true, the appellate court must then independently determine whether the facts satisfy the applicable legal standard. *Id.*

The Ohio Administrative Code requires the collection and handling of blood as follows:

(E) Blood and urine containers shall be sealed in a manner such that tampering can be detected and have a label which contains at least the following information:

- (1) Name of suspect;
- (2) Date and time of collection;
- (3) Name or initials of person collecting the sample; and
- (4) Name or initials of person sealing the sample.

(F) While not in transit or under examination, all blood and urine specimens shall be refrigerated.

Ohio Adm.Code 3701-53-05. Testimony established that Smeriglio's blood sample was initially rejected by the toxicologist due to the absence of a suspect's name on the

label. The other required information was apparently present and is not being challenged. The sample was later accepted when it was properly labeled with Smeriglio's name. Evidence established that the sample was not tampered with. It was then analyzed and admitted into evidence. Testimony also established that once the sample was taken from Smeriglio at the hospital, a police officer transported it to the police station and placed it into a secure, refrigerated evidence locker. Later, another police officer removed the sample from the refrigerated evidence locker and transported it to the lab for analysis. The officer testified that the sample was indeed refrigerated. The toxicologist testified that the sample was refrigerated when it was not being tested. We find that this evidence is sufficient to demonstrate substantial compliance with the Ohio Administrative Code requirements regarding the labeling of blood containers and refrigeration. *See State v. Plummer*, 22 Ohio St.3d 292, 295, 490 N.E.2d 902 (1986). Therefore, we overrule Smeriglio's third assignment of error.

In his fourth assignment of error, Smeriglio argues that the record does not support the imposition of consecutive sentences, and the trial court failed to make the requisite findings pursuant to R.C. 2929.14(C)(4). Our standard of review of felony sentencing is set forth by statute:

The court hearing an appeal [of a felony sentence] shall review the record, including the findings underlying the sentence or modification given by the sentencing court.

The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate court's standard for review is not whether the sentencing

court abused its discretion. The appellate court may take any action authorized by this division if it clearly and convincingly finds either of the following: (a) That the record does not support the sentencing court's findings \* \* \*; (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2). *See, e.g., State v. White*, 2013-Ohio-4225, 997 N.E.2d 629 (1st Dist.).

“The consecutive-sentencing provisions of R.C. 2929.14(C)(4) are inapplicable when the trial court is required to impose consecutive sentences by operation of law under R.C. 2921.331(B).” *State v. Harper*, 1st Dist. Hamilton No. C-170084, 2017-Ohio-8963, ¶ 16, citing *State v. Burgin*, 1st Dist. Hamilton No. C-020755, 2003-Ohio-4963, ¶ 10. R.C. 2921.331(B) prohibits operating a motor vehicle so as to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the motor vehicle to a stop. Under section (C)(5)(a)(ii) of the statute, an offense is punishable as a third-degree felony if the operation of the motor vehicle by the offender “caused a substantial risk of serious physical harm to persons or property.” If an offender has caused that substantial risk of physical harm “and the offender is sentenced to a prison term for that violation, the offender *shall* serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.” R.C. 2921.331(D). Here, Smeriglio was convicted of two felony counts of failure to comply with an order of a police officer, in violation of R.C. 2921.331(B), and one count of aggravated vehicular assault, in violation of R.C. 2903.08(A)(1)(a). Smeriglio admitted to causing significant damage to property and serious physical harm to others. Pursuant to R.C. 2921.331(D), the prison terms imposed for the failure-to-comply offenses were required, by operation of law, to be

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served consecutively to the other prison term. Since the trial court had no discretion in imposing the consecutive sentences, it was not required to make consecutive-sentencing findings under R.C. 2929.14(C)(4). Therefore, we overrule Smeriglio's fourth assignment of error.

The judgment of the trial court is affirmed.

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.

**MOCK, P.J., MYERS and MILLER, JJ.**

To the clerk:

Enter upon the journal of the court on May 16, 2018

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