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

STATE OF OHIO,	:	APPEAL NO. C-240186 TRIAL NOS. C-23TRC-28820 A,B
Plaintiff-Appellee,	:	
vs.	:	*JUDGMENT ENTRY.*
JULIE TUCKER,	:	
DEFENDANT-APPELLANT.	:	

This court sua sponte removes this cause from the regular calendar and places it on the court's accelerated calender, Loc.R. 11.1(C)(1), and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 3.1; App.R. 11.1(E); Loc.R. 11.1.

Defendant-appellant Julie Tucker appeals the Hamilton County Municipal Court's judgments convicting her of having physical control of a vehicle while under the influence and refusal of a chemical test. In view of the fact that the state concedes the assigned errors, we reverse Tucker's convictions and discharge her from further prosecution.

In the late morning hours of November 5, 2023, Hamilton County Park Ranger Sean Earl was patrolling Triple Creek Park in Colerain Township when he observed a Nissan with darkly-tinted windows parked in a lot. Earl ran the Nissan's license plate and learned there was a capias attached to the vehicle.

Earl approached the Nissan and observed two occupants inside who appeared to be asleep or unconscious. He knocked on the door twice, but the individuals did not awaken. Earl knocked harder a third time, and the occupants roused. The woman seated in the driver's seat, later identified as Julie Tucker, opened her door. Earl asked her to roll down the windows instead so he could attain a better view of the back seat.

Tucker initially only rolled down the Nissan's rear windows. Earl testified he reminded Tucker to roll down her front window and she fumbled with the buttons while attempting to comply. Though he did not detect the odor of alcohol, Earl began to suspect Tucker might be under the influence of something. He also noticed she had scabs on her face, which he testified

was a potential indicator of drug abuse. Earl conceded he did not see any drug paraphernalia inside the car once Tucker rolled the windows down, however.

Earl procured personal information from Tucker and the passenger. He ran the names, verified the capias for Tucker, and issued a "re-cite." He then asked Tucker to submit to field-sobriety testing. Tucker complied. According to Earl, she exhibited zero clues on the horizontal-gaze-nystagmus test. However, Tucker exhibited numerous clues on the walk-and-turn and one-leg stand tests. Based on those clues and his other observations, Earl placed Tucker under arrest for operation of a vehicle while intoxicated ("OVI").

Tucker was transported to the Colerain Police Department where she submitted to—and passed—a breathalyzer test. Earl found this unsurprising as he suspected this was a drug-related OVI. Tucker refused to submit to a urine test.

Tucker was issued a citation levying one charge of having physical control of a vehicle while under the influence of alcohol or a drug of abuse in violation of R.C. 4511.194(B)(1) ("physical control") and one charge of refusal of a chemical test in violation of R.C. 4511.19(A)(2)(b) ("OVI refusal"). Following a bench trial, Tucker was found guilty of both charges. Though both charges are misdemeanors of the first degree, the trial court treated the physical-control offense as a misdemeanor of the fourth degree. On the physical-control charge, the court imposed a $200 fine plus court costs. On the OVI-refusal charge, the court imposed 180 days with 177 days suspended and three days to be served in the driver's intervention program or jail. The court additionally imposed a $375 fine, remitted costs, and ordered Tucker to serve six months "MDO" probation. The sentence was stayed pending appeal.

In a single assignment of error, Tucker challenges the sufficiency and weight of the evidence supporting her convictions. While assessing a challenge to the sufficiency of the evidence, this court asks "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. Finding the sufficiency issue dispositive of the appeal, we need not address the manifest-weight standard or arguments. *See State v. Parrish*, 2020-Ohio-4807, ¶ 16 (1st Dist.), citing App.R. 12(A)(1)(c).

We first address Tucker's conviction for refusing to submit to chemical testing. Of note, "the refusal to consent to testing is not, itself, a criminal offense." *State v. Hoover*, 2009-Ohio-4993, ¶ 21. The essential elements for a conviction under R.C. 4511.19(A)(2) include (1) operation of a vehicle while under the influence of alcohol or drugs, (2) a prior OVI conviction

within 20 years of the current violation, and (3) a refusal to submit to chemical testing. *State v. Cunningham*, 2018-Ohio-912, ¶ 16 (12th Dist.), citing *Hoover* at ¶ 13.

On the traffic citation, Earl handwrote "0" in the blank underneath "# of Prior OVIs." The state concedes in its appellate brief that it presented no evidence at trial demonstrating Tucker indeed had a prior OVI conviction or its equivalent. This essential element lacking, Tucker's OVI-refusal conviction was not supported by sufficient evidence.

The state equally concedes that the evidence does not support Tucker's physical-control conviction under R.C. 4511.194(B)(1). At trial, the state proceeded upon a theory of impairment via ingestion of a drug of abuse because there was no indication Tucker had consumed any alcohol. As the Ohio Supreme Court determined,

> [w]hen a drug of abuse is at issue in an OVI case, evidence that a defendant was driving impaired, combined with evidence that a defendant took a specific drug of abuse at the time of the offense, is enough to meet a sufficiency of the evidence challenge pursuant to R.C. 4511.19(A)(1).

State v. Richardson, 2016-Ohio-8448, ¶ 12. While OVI under R.C. 4511.19(A)(1) contemplates different elements than physical control under R.C. 4511.194(B)(1), the *Richardson* case informs an analysis of the requisite quantum of proof for drug impairment in vehicular-offense cases.

In this vein, the parties direct this court to a line of cases holding that, in a suspected drug-related OVI, the state must present sufficient evidence linking the accused's impairment to an identified drug of abuse. *See, e.g., State v. May*, 2014-Ohio-1542, ¶ 46-48 (2d Dist.); *State v. Husted*, 2014-Ohio-4978, ¶ 12-23 (4th Dist.); *State v. Love*, 2022-Ohio-1454, ¶ 13-27 (7th Dist.); *Cleveland v. Kuhlman*, 2020-Ohio-3452, ¶ 27-30 (8th Dist.); *State v. Samples*, 2023-Ohio-1186, ¶ 12-15 (9th Dist.). *See also* R.C. 4506.01(M) (defining "drug of abuse"). Circumstantial evidence of the accused's impairment is not enough. Nor is a law enforcement officer's suspicion that the accused is under the influence of a drug of abuse enough. Rather, in order to avoid an acquittal, the state must establish a nexus between the driver's impairment and a particular drug of abuse. *Cleveland v. Turner*, 2013-Ohio-3145, ¶ 12-14 (8th Dist.); *State v. Collins*, 2012-Ohio-2236, ¶ 19-20 (9th Dist.).

In the case at bar, Earl testified he suspected this was a drug-related OVI. However, he did not find any drugs or paraphernalia in the Nissan or on Tucker's person. Tucker did not admit to consuming a drug of abuse, nor was the state able to procure a chemical test showing she ingested illegal drugs. While there was evidence of impairment, the state failed

to establish a nexus between Tucker's condition and a particular drug of abuse. *Compare State v. Fritsch*, 2023-Ohio-2676, ¶ 16-18 (1st Dist.) (state provided sufficient evidence that defendant consumed a combination of alcohol and drugs of abuse to support OVI conviction including defendant's admission to drinking, discovery of marijuana pipe and sticky note with methamphetamine residue in defendant's car, and defendant's outlandish behavior and erratic driving). Tucker's physical-control conviction was thus not supported by sufficient evidence.

For the foregoing reasons, we sustain Tucker's sole assignment of error on sufficiency grounds, reverse the trial court's judgments, and discharge Tucker from further prosecution.

The court further orders that 1) a copy of this Judgment constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App.R. 27. Costs shall be taxed under App.R. 24.

BOCK, P.J., ZAYAS and **KINSLEY, JJ.**

To the clerk:

Enter upon the Journal of the Court on 8/9/2024 per Order of the Court.

By:____________________________

Administrative Judge