

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

State of Ohio

Court of Appeals No. F-11-012

Appellee

Trial Court No. 11TRD00906W

v.

Ricky W. Giffin, Jr.

DECISION AND JUDGMENT

Appellant

Decided: December 31, 2012

* * * * *

Eric K. Nagel, Wauseon City Prosecutor, for appellee.

Jeffrey P. Nunnari, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for excessive window tinting entered following a bench trial in the Fulton County Court, Western Division. Because we conclude that there was insufficient evidence introduced to establish the amount of light transmittance through appellant's window, we reverse.

{¶ 2} Appellant, Ricky Giffin, Jr., owns Giffin Motor Sports, an automobile dealership in Wauseon, Ohio, apparently located in close proximity to the Wauseon police station. Officers at the station had seen, and discussed, a certain green Chevrolet Impala parked at the dealership. It appeared to be equipped with side window tint darker than the legal limit.

{¶ 3} On May 20, 2011, an officer noticed that the green Impala was no longer on appellant's lot and radioed that information to Officer Brian Courtney. A short time later, Courtney observed the green Impala being driven with both front windows rolled down. Officer Courtney stopped the car. Its driver was appellant.

{¶ 4} Using a device called a Pocket Detective 2.1, the officer measured the tint in the side window and concluded that it was darker than that permitted by law. The officer cited appellant for a violation of Wauseon Municipal Code 337.28, a minor misdemeanor. Appellant pled not guilty and the matter proceeded to a bench trial at which appellant represented himself.

{¶ 5} At trial, Officer Courtney testified to viewing the windows of the car on appellant's car lot and believing that the tint was too dark. When the officer attempted to testify to the results of the Pocket Detective, appellant objected. The court permitted appellant to, in essence, voir dire the officer on his expertise with the device.

{¶ 6} Officer Courtney testified that, beyond his basic police training, he had no specific instruction on the Pocket Detective. Nonetheless, the device, which had been borrowed from the Archbold police, came with an instruction manual which the officer

said he had read. Moreover, the officer testified that he had written 27 warnings and citations for window tint in the preceding months. The instruction manual was introduced into evidence along with pictures of the Chevrolet Impala.

{¶ 7} Appellant, referring to the Pocket Detective manual, asked the officer if he had cleaned the exemplar glass, as instructed, when he calibrated the device. The officer testified that he had not, because the exemplar glass did not appear dirty. Appellant asked the officer if before conducting his measurement he had cleaned the subject glass in the Impala as instructed by the manual. The officer testified that he had not, because the glass in the Impala windows did not appear dirty.

{¶ 8} On the officer's testimony that he had failed to comply with the instruction for operation in the Pocket Detective manual, the court refused to admit the results of the test into evidence. Nevertheless, the court found appellant guilty solely on the officer's testimony that the Impala window tint appeared too dark. The court fined appellant \$25 and costs. From this judgment of conviction, appellant now brings this appeal.

Appellant sets forth a single assignment of error:

Appellant's conviction is not supported by sufficient evidence.

{¶ 9} Appellant asserts that the sole evidence that remained after exclusion of the Pocket Detective results was Officer Courtney's testimony that he believed the tint was too dark. This testimony was based on the officer's training and experience, yet the officer failed to testify as to what his training—beyond basic police training—and experience—beyond writing 27 warnings and citations for tint violations—was. Absent

some evidence of the officer's competence in estimating degrees of window tint, appellant insists, his singular testimony does not establish the offense.

{¶ 10} A verdict or finding may be overturned on appeal if it is either against the manifest weight of the evidence or because there is an insufficiency of evidence. In the former, the appeals court acts as a "thirteenth juror" to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In the latter, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Id.* at 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at 390 (Cook, J., concurring); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. *See also State v. Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978); *State v. Barnes*, 25 Ohio St.3d 203, 495 N.E.2d 922 (1986). Appellant's asserted error relates solely to the sufficiency of the evidence.

{¶ 11} Wauseon Municipal Code 337.28(a) provides, in material part:

(1) No person shall operate, on any highway or other public or private property open to the public for vehicular travel or parking, lease, or

rent any motor vehicle that is required to be registered in this State with any sunscreening material, or other product or material which has the effect of making the windshield or windows nontransparent or would alter the windows' color, increase its reflectivity, or reduce its light transmittance, unless the product or material satisfies one of the following exceptions:

* * *

C. Any suncreening material or other product or material applied to the side windows to the immediate right or left the driver, so long as such material, when used in conjunction with the safety glazing materials of such windows, has a light transmittance of not less than fifty per cent plus or minus three per cent and is not red or yellow in color.

{¶ 12} The ordinance references and tracks the language of Ohio Adm.Code 5401-41-03, which is the rule promulgated by the Director of the Department of Public Safety in response to the legislative directive contained in R.C. 4513.241. That directive provided that the director:

adopt rules governing the use of tinted glass, and the use of transparent, nontransparent, translucent, and reflectorized materials in or on motor vehicle windshields, side windows, sidewings, and rear windows that prevent a person of normal vision looking into the motor vehicle from seeing or identifying persons or objects inside the motor vehicle.

{¶ 13} The rule the director promulgated, as found in the administrative rule and in the ordinance, is light transmittance of not less than 50 percent, plus or minus three percent. An element of the offense then is proof of the percentage of light transmittance of the defendant's window. This burden of proof may be met by the introduction of a properly performed test using the Pocket Detective. *State v. Baker*, 2d Dist. No. 2009 CA 62, 2010-Ohio-2633; *State v. Bailey*, 6th Dist. No. H-07-023, 2008-Ohio-1290. We are unaware of any instances wherein an offender was convicted for the offense without objective measurement.

{¶ 14} The rule of thumb, provided in the enabling statute is that the windows be not so tinted as to prevent one with normal vision from looking in the vehicle and being able to see or identify persons and objects inside. This is the measure sufficient to establish probable cause to stop and investigate. *See Baker* at ¶ 6. In this matter, however, even this testimony is missing. It is undisputed that when Officer Courtney stopped appellant's vehicle his windows were down. There was no testimony that the citing officer had examined the vehicle on the lot and was unable to see a person or object inside. The pictures admitted are inconclusive.

{¶ 15} Absent objective measurement or testimonial equivalent by one expressly trained, a violation of the ordinance cannot be found. Since, in this matter, no such evidence was introduced, there was insufficient evidence to support conviction. Accordingly, appellant's sole assignment of error is well-taken.

{¶ 16} On consideration whereof, the judgment of the Fulton County Court, Western Division, is reversed. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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