

Not Reported in N.E.2d, 1992 WL 158471 (Ohio App. 10 Dist.)

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CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, **Tenth** District, Franklin County.

STATE of **Ohio**, Plaintiff-Appellee,  
v.  
Michael **MERCHANT**, Defendant-Appellant.

No. 91AP-1435.  
June 30, 1992.

Appeal from the Franklin County Court of Common Pleas.  
[Michael Miller](#), Pros. Atty., and Susan E. Day for appellee.

Robert Sanders and Alan Friedman, for appellant.

#### DECISION

[PETREE](#), Judge.

<sup>\*1</sup>

\_\_\_\_\_(Cite as: 1992 WL 158471, \*1 (Ohio App. 10 Dist.))\_\_\_\_\_

Defendant, Michael Merchant, appeals from his conviction in a bench trial before the Franklin County Court of Common Pleas upon three counts of aggravated vehicular assault and one count of operating a motor vehicle while intoxicated. In this appeal, he contends that the trial court applied an incorrect definition of recklessness with respect to the crime of aggravated vehicular assault, that the court erroneously failed to exclude evidence of defendant's intoxication due to an alleged defect in the consent form, and that his convictions of aggravated vehicular assault are against the manifest weight of the evidence. Because each of these contentions lacks merit, we affirm.

In the early morning hours of January 19, 1991, defendant's car collided with a second automobile driven by Melissa Bruce. Both Bruce and her two passengers, Edna Johnson and Dana Dietrich, sustained physical injuries in the accident. When the police arrived at the scene, they asked defendant to perform several field sobriety tests. Based upon his performance in these tests, defendant was arrested and transported to police headquarters. Once there, defendant was asked to consent to a BAC Verifier test. Defendant signed the form given to him, indicating his consent to take the test. Following the test, defendant was charged with one count of OMVI under [R.C. 4511.19](#) and three counts of aggravated vehicle assault under [R.C. 2903.08](#).

In a bench trial before the Franklin County Court of Common Pleas, the state sought to prove that the accident was caused by defendant after he recklessly ran a red light at the bottom of a freeway entrance ramp. The driver of the other car, Melissa Bruce, testified that she had the right-of-way when the accident occurred. The state also introduced the BAC Verifier test report, which indicated that defendant had a blood alcohol content of .141, well over the legal limit. Finally, the state established that each of the three persons riding in Bruce's car sustained physical injuries as a result of the accident.

Defendant was convicted on all four counts charged in the indictment. With respect to the three aggravated vehicular assault charges, the court explained that defendant's failure to stop for the red light in conjunction with his high blood alcohol content constituted recklessness under the facts and circumstances of this case. From this judgment, defendant filed this timely appeal, asserting three assignments of error:

"I. The trial court erred in analogizing the requisite culpable mental state of recklessness required for aggravated vehicular assault, [R.C. § 2903.08](#), to so-called 'reckless operation' under the Traffic Code, [R.C. § 4511.20](#).

"II. The trial court erred in allowing evidence from a BAC Verifier which appellant did not voluntarily consent to take.

"III. The trial court erred by finding appellant guilty of aggravated vehicular assault against the manifest weight of the evidence."

In the first assignment of error, defendant maintains that the trial court confused criminal recklessness as defined in [R.C. 2901.22\(C\)](#) with reckless operation of a motor vehicle under [R.C. 4511.22](#). Although we agree that these standards are not synonymous, the record reveals that the trial court applied the correct standard. In its remarks, the trial court did compare the two standards. However, in finding defendant guilty of aggravated vehicular assault, the court explicitly stated that it was applying the definition found in [R.C. 2901.22](#).

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The first assignment of error is not well-taken.

In the second assignment of error, defendant asserts that the trial court should have suppressed the results of his BAC Verifier test for the grounds stated in [Norris v. Brown \(Oct. 24, 1991\), Franklin App. No. 91AP-685](#), unreported (1991 Opinions 5089). In *Norris*, we held that the implied consent form then used by the Registrar of the Bureau of Motor Vehicles failed to adequately warn suspects of the consequences of refusing to submit to a chemical test. As the same form was used in this case, defendant maintains that the results of the test should have been suppressed for lack of effective consent. There is, however, a crucial difference between this case and *Norris*. In *Norris*, the suspect refused to submit to the test based upon the flawed language contained in the form. Here, defendant consented to take the test. Accordingly, any failure to advise him of the full consequences of refusal could have had no bearing on his consent to take the test.

The second assignment of error is not well-taken.

In the final assignment of error, defendant claims that his convictions for aggravated vehicular assault are against the manifest weight of the evidence. In fact, defendant's argument goes to sufficiency, not weight. He suggests that evidence of intoxication drawn from a BAC Verifier test in conjunction with a traffic violation is insufficient to establish recklessness as that term is defined in [R.C. 2901.22\(C\)](#). We disagree. "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature \* \* \*." [R.C. 2901.22\(C\)](#). Many courts have held that evidence of intoxication alone is sufficient to support a finding of recklessness. *Eg. State v. Runnels (1989), 56 Ohio App.3d 120, 126; State v. Dudock (1983), 6 Ohio App.3d 64, 65*. Combined with the traffic violation, the inference of intoxication drawn from defendant's blood alcohol level is sufficient to support a finding of recklessness.

The third assignment of error is not well-taken.

The assignments of error are overruled and the judgment of the trial court is affirmed.

*Judgment affirmed.*

YOUNG, P.J., and McCORMAC, J., concur.

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