

[Cite as *State v. Canady*, 2019-Ohio-106.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 107157

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**TERRY CANADY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
AFFIRMED IN PART, MODIFIED IN PART,  
AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-17-618247-A

**BEFORE:** S. Gallagher, J., Kilbane, A.J., and Jones, J.

**RELEASED AND JOURNALIZED:** January 10, 2019

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SEAN C. GALLAGHER, J.:

{¶1} Appellant Terry Canady appeals his conviction for discharge of a firearm on or over a public road or highway. Upon review, we modify appellant's conviction by reducing it from a felony of the third degree to a misdemeanor of the first degree, and we remand the matter for resentencing upon that offense only. We otherwise affirm.

### **Background**

{¶2} Appellant, who was 17 years old at the time of the alleged offenses, was bound over to the general division of the court of common pleas. He was charged under a five-count indictment, and the case ultimately proceeded to a jury trial. The jury found appellant guilty on "Count Four – Lesser Included Offense of Discharge of Firearm Upon or Over Road" in violation of R.C. 2923.162(A)(3), with one- and three-year firearm specifications. The trial court entered the conviction as a felony of the third degree. Appellant was found not guilty of the remaining

charges. Following merger of the firearm specifications, the trial court sentenced appellant to a prison term of three years on the firearm specification, to be served prior and consecutive to a term of two years on the underlying charge, for a total of five years. Appellant was given 582 days credit for time served.

### **Conceded Error**

{¶3} On appeal, appellant filed a motion requesting that he be released from prison on personal bond. He argued that he was erroneously sentenced for a third-degree felony when the jury verdict form supported only a conviction for a first-degree misdemeanor, and that the firearm specifications are not authorized. Although the motion was initially denied, the state filed a notice of conceded error and agreed that the jury verdict form for the Count 4 lesser included offense supports only a conviction of a misdemeanor of the first degree. As discussed below under the second assignment of error, this is supported by the record. Because the maximum sentence that can be imposed is 180 days and appellant has already served the maximum sentence permitted, this court granted appellant's motion for release from prison on personal bond. The appeal is now before us for review.

### **Assignments of Error**

{¶4} In his appellate brief, appellant presents eight assignments of error for review. We need only address the first and second assignments of error.

{¶5} Under his first assignment of error, appellant claims that his conviction under Count 4 must be vacated because it violates his constitutional right against double jeopardy.

{¶6} Count 4 charged appellant with discharge of a firearm on or over a public road or highway, a felony of the first degree, in violation of R.C. 2923.162(A)(3), with firearm specifications. The jury returned a verdict of not guilty for the charged offense, but found

appellant guilty of “Count Four – Lesser Included Offense of Discharge of Firearm Upon or Over Road,” which is conceded to have been a misdemeanor of the first degree. Appellant argues that this was improperly set forth as a “lesser included offense” because the additional provisions of R.C. 2923.162(C) are sentencing enhancement provisions. He asserts that since the jury already found him not guilty of R.C. 2923.162(A)(3) as charged, any additional inquiry was required to stop and that his conviction amounts to a violation of his double jeopardy rights.

{¶7} Because no objection was raised in the trial court, we review for plain error. Under Crim.R. 52(B), “plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” “Plain error exists only if ‘but for the error, the outcome of the trial clearly would have been otherwise,’ and is applied ‘under exceptional circumstances and only to prevent a manifest miscarriage of justice.’” *State v. Harrison*, 122 Ohio St.3d 512, 2009-Ohio-3547, 912 N.E.2d 1106, ¶ 61, quoting *State v. Long*, 53 Ohio St.2d 91, 97, 372 N.E.2d 804 (1978).

{¶8} The least degree of the offense of discharge of a firearm upon or over a public road or highway in violation of R.C. 2923.162(A)(3) is a misdemeanor of the first degree. R.C. 2923.162(C)(1). However, if it is determined that the violation caused serious physical harm to any person, the offense is a felony of the first degree pursuant to R.C. 2923.162(C)(4). Here, appellant was found not guilty of the first-degree felony offense as charged, but guilty of the basic form of that offense. This was simply a matter of a failed enhancement. Appellant’s conviction did not violate double jeopardy, and no plain error is found to exist. Appellant’s first assignment of error is overruled.

{¶9} Under his second assignment of error, appellant raises the claim that the jury verdict form for Count 4 supports only a conviction for a misdemeanor of the first degree, without the

imposition of a firearm specification. This assignment of error has been conceded by the state and is supported by the record.

{¶10} The jury verdict form upon which appellant was found guilty of “Count Four - Lesser Included Offense of Discharge of Firearm Upon or Over Road” in violation of R.C. 2923.162(A)(3) did not reference the degree of the offense or any aggravating factors. R.C. 2923.162(C)(1) provides that a violation of R.C. 2923.162(A)(3), discharge of a firearm upon or over a public road or highway, is a misdemeanor of the first degree. In this situation, the guilty verdict constituted “a finding of guilty of the least degree of the offense charged” pursuant to R.C. 2945.75(A)(2). *See State v. Shaw*, 2018-Ohio-403, 105 N.E.2d 569, ¶ 31-37 (8th Dist.). The Supreme Court of Ohio has held as follows:

R.C. 2945.75(A) plainly requires that in order to find a defendant guilty of “an offense \* \* \* of more serious degree,” the guilty verdict must either state “the degree of the offense of which the offender is found guilty” or state that “additional element or elements are present.” R.C. 2945.75(A)(2) also provides, in the very next sentence, what must occur if this requirement is not met: “Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.”

*State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735, ¶ 12.

{¶11} Accordingly, the jury verdict form at issue supports only a conviction of a misdemeanor of the first degree. In addition, the one- and three-year firearm specifications cannot be imposed upon a misdemeanor offense under R.C. 2929.14(B)(1)(a).

{¶12} Appellant's second assignment of error is sustained. In light of this ruling, appellant has withdrawn all remaining assignments of error.<sup>1</sup>

### **Conclusion**

{¶13} The trial court's judgment is affirmed in part and modified in part. Appellant's conviction for discharge of a firearm on or over a public road or highway is reduced from a felony of the third degree to a misdemeanor of the first degree to conform to the verdict form. We remand the case to the trial court to properly enter a conviction on Count 4 for a misdemeanor of the first degree without firearm specifications and for resentencing on that offense only.

{¶14} Judgment affirmed in part and modified in part. Case remanded with instructions.

It is ordered that appellant recover of appellee costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., and  
LARRY A. JONES, SR., J., CONCUR

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<sup>1</sup> Per appellant's response to appellee's notice of conceded error, "should this Court sustain Appellant's First or Conceded Second Assignment(s) of Error, to the extent that any remaining Assignments of Error 3-8 would not be rendered moot[,] Appellant would withdraw such from consideration by this Honorable Court."