[Cite as *State v. Mitchell*, 2011-Ohio-2465.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-05-107
	:	O P I N I O N
- vs -		5/23/2011
	:	
RONALD J. MITCHELL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 09CRB05526-A

Mary K. Dudley, City of Hamilton Prosecuting Attorney, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Christopher J. Pagan, 1501 First Avenue, Middletown, Ohio 45044, for defendant-appellant

HUTZEL, J.

{¶1} Defendant-appellant, Ronald J. Mitchell, appeals his conviction and sentence in the Hamilton Municipal Court for speeding, failure to comply, and resisting arrest.

{¶2} The relevant facts of this case are as follows. On October 29, 2009, Officer Bret Britt of the Hamilton Police Department was performing radar detail in a

marked police cruiser. During his shift, Officer Britt received a radar reading indicating a nearby vehicle was traveling 51 m.p.h. in a 35 m.p.h. zone. As a result, Officer Britt enabled his emergency lights, at which time the vehicle pulled into a left turn lane.

{¶3} Officer Britt approached the vehicle, at which time he recognized appellant from several prior traffic incidents. Officer Britt testified he asked appellant 12 separate times to present his driver's license, but that appellant sat in his vehicle with his arms crossed and demanded to see a supervisor. Officer Britt warned appellant if he refused to comply with his orders, appellant would be arrested. Officer Britt further testified he ordered appellant to place his vehicle in park and to turn off the ignition, but appellant continued to ignore him.

{¶4} As a result of appellant's noncompliance, he was placed under arrest, but refused to exit his vehicle. Officer Britt thus handcuffed appellant while he remained inside his vehicle and advised appellant he would be "tazed" if he failed to exit. When appellant finally exited his vehicle, Officer Britt walked him to the police cruiser and attempted to retrieve appellant's wallet from his back pocket. In response, appellant pushed off the police cruiser and attempted to turn to face Officer Britt. At this time, an off-duty police officer, Officer Timothy Mohr, testified he witnessed the struggle and came to assist Officer Britt in detaining appellant. Officer Mohr performed a pat-down search of appellant and subsequently placed him in the police cruiser.

{¶5} Pursuant to this incident, appellant was charged with failure to comply with an order or signal of a police officer in violation of R.C. 2921.331 and resisting arrest in violation of R.C. 2921.33. Appellant was also cited for speeding in violation

of Hamilton Codified Ordinance 333.03.

{¶6} On March 15, 2010, appellant's speeding charge was tried to the bench. Appellant was found guilty as charged, but the court reserved sentencing until a jury rendered a verdict on appellant's remaining charges for failure to comply and resisting arrest. The same day, the jury returned a finding of guilty on both charges, at which time the court fined appellant $250 for resisting arrest. Appellant was also sentenced to serve 97 days in jail with 90 days suspended, given a three-year license suspension, placed on community control for two years, and fined an additional $500 for failure to comply with a police order. Appellant was also ordered to pay $90 in regard to his speeding violation.

{¶7} Appellant timely appeals, raising four assignments of error for review.

{¶8} Assignment of Error No. 1:

{¶9} "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MITCHELL OF FAILING TO COMPLY WITH AN ORDER OF POLICE OFFICER UNDER RC [sic] 2921.331(B)."

{¶10} Assignment of Error No. 2:

{¶11} "THE TRIAL COURT ERRED IN TRYING AND CONVICTING MITCHELL FOR VIOLATING RC 2921.331(A) WHEN HE WAS CHARGED WITH VIOLATING RC [sic] 2921.331(B)."

{¶12} Appellant's first and second assignments of error are closely related, therefore we will address them together.

{¶13} On appeal, appellant correctly states the complaint alleged a violation of "R.C. 2921.331" and quoted the statutory language of subsection (B), namely, "[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." Appellant argues that despite this language, the state presented evidence solely related to subsection (A),[1] and absent a valid amendment, appellant lacked an opportunity to defend relative to subsection (A). See Crim.R. 7(D). Moreover, appellant argues he is entitled to an acquittal because the state presented insufficient evidence relating to the "charged offense," i.e., R.C. 2921.331(B). We disagree.

{¶14} Initially, we note appellant failed to object to the alleged defect in the complaint prior to trial, as required by Crim.R. 12(C)(2). See, e.g., *Cuyahoga Falls v. Biehl*, Summit App. No. 22244, 2005-Ohio-2809, ¶4. Accordingly, our review of the alleged error within the complaint sub judice must proceed, if at all, under the plain error analysis of Crim.R. 52(B). Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise. Id.; *State v. Biros*, 78 Ohio St. 3d 426, 436, 1997-Ohio-204.

{¶15} Under the particular facts of this case, we conclude the omission of a specific subsection within the complaint did not amount to plain error or prejudice appellant in preparing his defense, where its substance was sufficient to inform appellant he was charged with violating R.C. 2921.331(A). See, also, Crim.R. 7(B). While it is true that the complaint initially recites the form language of R.C. 2921.331(B), it goes on to recite the substantive facts constituting the offense that clearly follow subsection (A). Specifically, the complaint states: "To Wit: * * * REFUSING TO PROVIDE A DRIVER'S LICENSE WHEN ASKED 12 TIMES. MR.

1. R.C. 2921.331(A) states: "No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic."

MITCHELL WAS ADVISED THAT IF HE REFUSED TO COMPLY HE WOULD BE ARRESTED. HE CONTINUED TO REFUSE AND WAS ARRESTED. Contrary to section 2921.331, Revised Code, State of Ohio[.]"

{¶16} Similar facts occurred in *State v. Broughton* (1998), 51 Ohio App.3d 10, where defendant argued the complaint against her was defective because it failed to designate the statutory subsection with which she was charged, i.e., either R.C. 2917.11(B)(1) or (B)(2). However, this court found the complaint's "substance was sufficient to inform appellant that she was charged with a violation of R.C. 2917.11(B)(1)." Id. at 11. Specifically, this court held "[s]ince the purpose of a criminal complaint is to inform the accused of the identity and *essential facts* constituting the offense charged, and since the instant complaint meets those requirements, we find it was not defective." Id. (Emphasis added.) See, also, *State v. Meyer* (May 8, 2000), Delaware App. No. 99CAC09-045, 2000 WL 699658, at *2 (affirmed speeding conviction despite lack of specific subsection in complaint where "original citation gave [defendant] notice in general terms of the nature of the offense"); *Bellville v. Kieffaber*, 114 Ohio St.3d 124, 2007-Ohio-3763, ¶19.

{¶17} In the case at bar, as previously discussed, the "essential facts" constituting the offense charged clearly pertain to the elements of R.C. 2921.331(A). Under these circumstances, we find the complaint's substance was sufficient to notify appellant that the basis for the charge was his failure to comply with Officer Britt's orders to present his license under R.C. 2921.331(A), rather than any alleged acts to

"elude or flee" the officer under R.C. 2921.331(B).[2] See *Broughton*, 51 Ohio App.3d at 11; *State v. Hess*, Jefferson App. No. 02 JE 36, 2003-Ohio-6721, ¶16. Cf. *Niles v. Yeager*, Trumbull App. No. 2004-T-0004, 2004-Ohio-6698, ¶17. Since the instant complaint informed appellant of the "identity and essential facts constituting the offense charged," namely R.C. 2921.331(A), we further find it was not defective. See *Hess*; *State v. Hensley*, Warren App. No. CA2009-11-156, 2010-Ohio-3822, ¶18.

{¶18} We also note that appellant, his attorneys, the prosecutor, and the trial judge treated the complaint as valid at all stages of the proceedings, never noticing any flaw therein. Specifically, during its case-in-chief, the state presented evidence demonstrating appellant failed to comply with Officer Britt's numerous orders to present his driver's license. Officer Britt explained that at some point, he stopped asking and instead "ordered" appellant to present his license because "he just wouldn't comply at all." While it is true Officer Britt also testified appellant refused to park his vehicle when asked to do so, the jury heard ample evidence that appellant acted, at the least, in a noncompliant manner with respect to the officer's order to present his license, in accordance with the elements of R.C. 2921.331(A).

{¶19} Moreover, we note that during the state's closing argument, it stated "[t]here is no doubt that Officer Britt had the authority and was using the authority as a traffic officer to order [appellant] to hand over his license. [Appellant] refused to comply and everything followed from that." Such a statement clearly follows the language of R.C. 2921.331(A), which again states: "No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct,

2. Accordingly, appellant's claim that there was insufficient evidence to convict him of violating R.C. 2921.331(B), "as charged," is irrelevant in light of our conclusion that appellant never faced charges under that subsection.

control, or regulate traffic."

{¶20} Finally, appellant's jury received instructions from the court solely regarding the elements of R.C. 2921.331(A). Specifically, under count one, failure to comply with a police order, the instructions explained that before the jury could find appellant guilty, it had to agree that he "failed to comply with any lawful order or direction of any police officer invested with authority to control or regulate [sic] traffic." Based on these instructions, the jury was not under the impression that the state intended to pursue charges of any other sort.

{¶21} Based on the evidence presented, the jury clearly found the state carried its burden in proving appellant's conduct constituted the charged offense, as instructed. Thus, even if the complaint had listed the relevant alphabetical subsection, there is nothing in the record to indicate appellant would have been acquitted or that he would have proceeded differently during trial. See *Biros*, 78 Ohio St.2d at 437; *State v. Carse*, Franklin App. No. 09AP-932, 2010-Ohio-4513, ¶19; *State v. Bell*, Montgomery App. No. 22448, 2009-Ohio-4783, ¶19. Moreover, if appellant remained confused by the omission of the alphabetical subsection, "he could have and should have sought clarification prior to trial." *Meyer*, 2000 WL 699658 at *1.

{¶22} Accordingly, appellant's first and second assignments of error are overruled.

{¶23} Assignment of Error No. 3:

{¶24} "THE M-4 SPEEDING WAS REQUIRED TO BE TRIED TO A JURY."

{¶25} In his third assignment of error, appellant argues the trial court lacked jurisdiction to try his speeding charge to the bench since the record contains no

written waiver of his right to a jury trial pursuant to R.C. 2945.05. We agree.

{¶26} "A criminal defendant's right to a jury trial is guaranteed in the Sixth and Fourteenth Amendments to the United States Constitution and Sections 5 and 10, Article I of the Ohio Constitution." *State v. Burnside*, Montgomery App. No. 23504, 2010-Ohio-1235, ¶45. Regarding serious offenses, an accused may not be deprived of this right unless it is knowingly, intelligently, and voluntarily waived. See R.C. 2945.05; Crim.R. 23(A). However, in "*petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial*. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later. Failure to demand a jury trial as provided in this subdivision is a complete waiver of the right thereto." Crim.R. 23(A). (Emphasis added.) Further, "[w]here a defendant in a petty offense case has a right to a trial by jury and pleads not guilty and demands a jury trial in the manner provided by Crim.R. 23(A), it must appear of record that such defendant waived this right in writing in the manner provided by R.C. 2945.05 in order for the trial court to have jurisdiction to try the defendant without a jury." *State v. Grier*, Montgomery App. No. 23662, 2010-Ohio-5751, ¶14.

{¶27} In the case at bar, appellant was charged with speeding in violation of Hamilton Codified Ordinance 333.03, a fourth-degree misdemeanor. If convicted of the charge, appellant faced up to 30 days in jail. Thus, appellant was charged with a petty offense. See Crim.R. 2(D) (defining petty offense as "a misdemeanor other than [a] serious offense"). Accordingly, appellant had a right to demand a jury trial, which he indisputably did in a written request filed November 18, 2009. See R.C.

2945.17; *State v. Petitjean*, Butler App. No. CA2005-05-123, 2006-Ohio-1435, ¶4. At that point, the trial court could not conduct a bench trial unless appellant subsequently executed a jury waiver that was (1) in writing, (2) signed by appellant, (3) filed, (4) made part of the record, and (5) made in open court. See, e.g., *Grier*, 2010-Ohio-5751 at ¶15. "In the absence of strict compliance with R.C. 2945.05, a trial court lacks jurisdiction to try the defendant without a jury." Id., quoting *State v. Pless*, 74 Ohio St.3d 333, 337, 1996-Ohio-102. Moreover, the fact that appellant did not object to the trial court conducting a bench trial with respect to his speeding charge is of no consequence. See *Grier* at ¶15, quoting *State v. Tate* (1979), 59 Ohio St.2d 50, 53 ("[s]ilent acquiescence to a bench trial is not sufficient to constitute a waiver of a defendant's right to a jury trial").

{¶28} Accordingly, where appellant filed a written jury demand pursuant to Crim.R. 23(A) and the record does not contain a subsequent written waiver as mandated by R.C. 2945.05, the trial court erred in conducting a bench trial with respect to the speeding charge.

{¶29} Appellant's third assignment of error is sustained.

{¶30} Assignment of Error No. 4:

{¶31} "THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MITCHELL OF RESISTING ARREST UNDER RC [sic] 2921.33(A)."

{¶32} In his fourth and final assignment of error, appellant argues there was insufficient evidence before the trial court to support a resisting arrest conviction. Specifically, appellant argues the state presented insufficient evidence to prove an

essential element of the crime of resisting arrest: a "lawful" arrest.[3] R.C. 2921.33(A). We disagree.

{¶33} In the case at bar, appellant was arrested for failure to comply in violation of R.C. 2921.331(A). In determining the lawfulness of appellant's arrest, this "court need not find that the elements of the underlying charge have been proven [beyond a reasonable doubt], but there must exist a 'reasonable basis' for the arrest." *State v. Thompson* (1996), 116 Ohio App.3d 740, 743; *In re Snow*, Clinton App. No. CA2001-05-017, 2001-Ohio-8656, at 3. In other words, an arrest is "lawful" if the surrounding circumstances would give a reasonable police officer cause to believe that an offense has been or is being committed. See, e.g., *Cleveland v. Swiecicki*, Cuyahoga App. No. 80681, 2002-Ohio-4027; *State v. Williamson*, Butler App. No. CA2003-02-047, 2004-Ohio-2209, ¶13.

{¶34} As evidence of appellant's failure to comply, the state presented Officer Britt's testimony that upon initiating the traffic stop, he asked appellant 12 separate times to present his driver's license, but that appellant sat in the vehicle with his arms crossed and demanded to see a supervisor. Officer Britt warned appellant if he refused to comply with his orders, appellant would be arrested.

{¶35} In light of this testimony, we find the evidence presented to the jury was sufficient to establish appellant's arrest for failure to comply was "lawful," i.e., that following a valid traffic stop, Officer Britt had cause to believe appellant committed the offense of failure to comply. R.C. 2921.331(A). See, also, *Columbus v. Harbuck* (Nov. 30, 2000), Franklin App. No. 99AP-1420, 2000 WL 1753110, at *6.

{¶36} At this juncture, we note that under the circumstances of this case,

3. Appellant does not contest any other elements of the offense.

appellant's speeding violation would have provided an alternate basis for a "lawful" arrest. A review of appellant's speeding citation indicates appellant was apprehended for a violation of Hamilton Codified Ordinance 333.03, a fourth-degree misdemeanor that appellant admits "carried potential jail-time." [sic] Thus, even if appellant had fully complied with Officer Britt's orders, grounds for a "lawful" arrest existed pursuant to section 333.03 because Officer Britt clearly had cause to believe appellant committed the speeding violation. See, e.g., *State v. Robinette*, 80 Ohio St.3d 234, 239, 1997-Ohio-343 (officer's act of stopping defendant was justified because defendant was speeding); *City of East Cleveland v. Ferell* (1958), 168 Ohio St. 298; *State v. Bolden*, Preble App. No. CA2003-03-007, 2004-Ohio-184, ¶13-14; *State v. Wells* (Dec. 18, 1995), Butler App. No. CA95-03-046.

{¶37} Finally, we reject appellant's argument that a police officer may only order a motorist to display his or her license when the motorist's "identity is at issue" pursuant to R.C. 4507.35. In so arguing, appellant relies on *State v. DiGiorgio* (1996), 117 Ohio App.3d 67. However, the sole issue in *DiGiorgio* was whether defendant furnished "satisfactory proof, within the contemplation of R.C. 4507.35, that he was a validly licensed driver, so as to render his arrest for driving without a driver's license unlawful." Id. at 69. By contrast, our concern here is not whether appellant presented satisfactory proof that he was licensed to drive, but whether appellant's refusal to furnish the item requested constituted an entirely different offense, namely, failure to comply under R.C. 2921.331(A).

{¶38} For the foregoing reasons, appellant's fourth assignment of error is overruled.

{¶39} Judgment affirmed in part, reversed in part, and the cause is remanded

with respect to appellant's speeding charge.

POWELL, P.J., and RINGLAND, J., concur.