[Cite as *State v. Richards*, 2002-Ohio-2162.]

IN THE COURT OF APPEALS FOR DARKE COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 1557
v.	:	T.C. NO. 01 CRB 002 0462
JEFFREY A. RICHARDS	:	
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 3rd day of May, 2002.

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WOLFF, P. J.

{¶1} Jeffrey Richards was found guilty after a bench trial of obstructing official business, as proscribed by R.C. 2921.31. The trial court imposed a fine of $25 and costs. He assigns error as follows:

{¶2} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT IN THAT THE DECISION RENDERED FOUND THAT THE ELEMENTS OF THE CRIME HAD BEEN PROVEN BEYOND A REASONABLE DOUBT WHICH IS NOT SUPPORTED BY THE EVIDENCE AND IS IN CONFLICT WITH CURRENT, BINDING

AND NON-BINDING CASE LAW."

{¶3} The State's evidence consisted of the testimony of Darke County Sheriff's Deputy Wendy Fritz. She testified that she responded to a call at 3:00 a.m. concerning an underage drinking party at a residence in Hollansburg.

{¶4} Upon arrival, she observed Richards and two others in the backyard. Richards was in a truck and Deputy Fritz was told he refused to leave. Deputy Fritz ordered Richards to remain where he was while she went inside with the other two people. Deputy Fritz was engaged in an "active investigation" and the order to Richards to remain where he was was based on Deputy Fritz's need to further talk with him because "(t)he complaints were against him." Deputy Fritz had taken Richards' driver's license from him before she went inside the residence.

{¶5} While inside, Deputy Fritz learned from the residents that Richards had supplied the liquor for the party, giving her probable cause, "in (her) mind," to cite or arrest Richards for contributing to the delinquency of a minor.

{¶6} When she exited the house, Deputy Fritz observed that the keys had been removed from Richards' truck and Richards had vanished. Deputy Fritz called for a tow truck which arrived 30 - 45 minutes after she had first encountered Richards and ordered him to stay where he was.

{¶7} After the tow truck had arrived, Deputy Fritz again saw Richards and ordered him to stop several times. Deputy Fritz intended to either cite or arrest Richards at that time and he "ran to avoid arrest." Fritz did not tell Richards he was under arrest. Because she was unable to cite or arrest Richards when she ordered him to stop, Deputy Fritz and the sheriff's office were required to expend additional time and

effort in serving a citation upon Richards

{¶8} "Q. Do you believe when you commanded him to stop several times that you were issuing a lawful or not a lawful order for him to do what you're requesting him to do?

{¶9} "A. Lawful order.

{¶10} "Q. Did he comply with your order? Yes or no?

{¶11} "A. No.

{¶12} "Q. Okay. As a result of him failing to comply with your order when you told him to stop and he booked, he ran away, did you have to or someone have to issue these citations the next day?

{¶13} "A. The same day, later that morning, yes.

{¶14} "Q. Okay. Would that trip have been necessary for you or any other officer if he had stayed there and you wrote the citations out at the scene and given them to him?

{¶15} "A. No."

{¶16} In finding Richards guilty, the trial court stated in part:

{¶17} "Well, the issue here is – actually, I don't think the appropriate word anymore is probable cause. I'm not quite sure why – when we left the words probable cause behind. It's articulable facts that indicate there's a possibility that a crime as (sic) been committed. I think that's the operative language."

{¶18} "I have some significant questions as to whether there was sufficient articulable facts when the first order to stay where you were was issued primarily because the officer wasn't sure who the owner of the property was so that there wasn't sufficient indication of trespass."

{¶19} "There certainly, however, was sufficient articulable facts in possession of the officer when she saw the Defendant the second time and ordered him to stop or

stay where he was. And his failure to stop, while it may not have prevented the ultimate issuing of the citations, it did delay it which obstructed the officer in the performance of her public duty."

{¶20} The State appears to agree with Richards' principal argument that if Deputy Fritz possessed no more than a reasonable, articulable suspicion of wrongdoing, Richards would not have been guilty of violating R.C. 2921.31 by ignoring her command that he stop. Indeed, the Court of Appeals for Highland County has so held in *State v. Gillenwater*, (April 2, 1998), Highland App. No. 97 CA 0935, unreported. While we have reservations about the soundness of *Gillenwater,* we reluctantly conclude that the State's evidence was fatally deficient for a more fundamental reason.

{¶21} The testimony tended to establish that Deputy Fritz had probable cause to believe that Richards had committed the offense of contributing to the delinquency of a minor by supplying liquor for an underage drinking party, and our review of Deputy Fritz's testimony satisfies us that such probable cause did exist.

{¶22} The trial court confused the concepts of reasonable, articulable suspicion and probable cause, but where the evidence demonstrates probable cause, the trial court's confusion of concepts is not a basis for reversal. However, the trial court and the parties appear to have overlooked the fact that the first degree misdemeanor offense of contributing to the delinquency of a minor (R.C. 2919.24) was not committed in Deputy Fritz's presence. As such, the fact that she had probable cause to believe that Richards committed that offense would not have authorized her to cite or arrest him for that offense without her having first obtained an arrest warrant or summons in lieu of a warrant. See R.C. 2935.03(A)(1); Crim.R. 4(A).

{¶23} Obstructing Official Business is defined at R.C. 2921.31(A):

{¶24} "No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties." (Emphasis ours).

{¶25} Richards' contentions as to the elements of the offense are (1) that he was privileged to ignore the command to stop and (2) that because Deputy Fritz had already obtained the information she had intended to seek from Richards from the residents, he did not prevent, obstruct, or delay Deputy Fritz's performance.

{¶26} As a general proposition, we think that a person is not privileged to ignore a police officer's order to stop where the officer has probable cause to believe that the person has committed a crime. Here, Richards had been ordered to remain with his truck 30 - 45 minutes before Officer Fritz, having learned in the meantime that he had supplied the liquor for the party, ordered him to stop. The fact that Deputy Fritz was not then authorized to cite or arrest him, did not confer upon Richards a privilege to ignore her command that he stop. Richard's obedience of the command to stop may well have assisted Deputy Fritz in the performance of her lawful duties although, as explained below, his failure to stop - on this record - does not show that he hampered or impeded Deputy Fritz in the performance of her lawful duties.

{¶27} It would appear — on this record — that Richards did not, in fact, prevent, obstruct, or delay Deputy Fritz's investigation because she did obtain from the residents the information she had intended to seek from Richards. Nevertheless, "a purpose to prevent, obstruct, or delay the performance . . . of any authorized act" is readily

inferable from the evidence.

{¶28} Where the State's case is fatally deficient is in its lack of proof on the question of whether Richard's ignoring Deputy Fritz's orders to stop "hamper(ed) or impede(d her) in the performance of (her) lawful duties." Emphasis ours. As the above-quoted passage of Deputy Fritz's testimony reveals, the only inconvenience to Deputy Fritz and the sheriff's office was the additional time and effort expended in serving Richards with a citation over what it would have been if she could have issued the citation at the scene.

{¶29} However, as observed above, Deputy Fritz was not authorized to arrest or cite Richards without first obtaining an arrest warrant or summons in lieu of warrant for this misdemeanor she had not observed. Deputy Fritz had taken Richard's driver's license and there is no testimony that it did not contain his current address. Thus, there is no evidence that the time and effort necessary to serve the citation in this case was any greater than it would have been had Richards heeded Deputy Fritz's commands to stop. She was not authorized to arrest or cite him without a warrant or summons in lieu of warrant. Hence, Richard's ignoring the commands to stop did not hamper or impede Deputy Fritz's performance of a lawful duty. In the absence of any evidence that Richard's failure to stop resulted in any expenditure of time and energy that would not have normally been expended in obtaining a warrant or summons in lieu of warrant and serving it on an individual, the evidence fails to establish that Richard's failure to stop hampered or impeded Deputy Fritz's performance of her lawful duties.

{¶30} The assignment of error is sustained.

{¶31} The judgment will be reversed, and the defendant will be discharged.

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YOUNG, J., concurs.

GRADY, J., dissenting:

{¶32} I respectfully dissent from the decision of the majority.

{¶33} Defendant-Appellant was convicted of violating R.C. 2921.31(A), which provides:

{¶34} "No person without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within his official capacity, shall do any act which hampers or impedes a public official in the performance of his lawful duties."

{¶35} Ohio law enforcement officers, including deputy sheriffs, are authorized by R.C. 2935.03(A) to arrest and detain a person found violating the law of the state of Ohio within the political subdivision in which the officer is appointed. That authority necessarily comprehends a duty to investigate alleged violations of law.

{¶36} Deputy Fritz was dispatched to investigate a complaint of underage consumption of alcohol. She was therefore engaged in her lawful duties when she went to the location concerned, where she encountered the Defendant sitting outside. Deputy Fritz ordered him to remain where he was, and she then went inside to investigate further. She learned from minors inside that Defendant had given them the beer they'd consumed. She then went back out to confront the Defendant, but he was gone.

{¶37} When Defendant-appellant left the scene after Deputy Fritz ordered him to

remain there, and subsequently ran off when she ordered him to stop, his conduct hampered or impeded the deputy's performance of her lawful duties. His purpose to prevent, obstruct, or delay her performance of those duties may readily be inferred.

{¶38} Judge Wolff suggests that Defendant's conduct does not constitute a violation of R.C. 2921.31(A) because "the only inconvenience to Deputy Fritz and the sheriff's office was the additional time and effort expended in serving Richards with a citation (after locating him the following day) over what it would have been if she could have issued the citation at the scene." (Opinion, p.6). However, and by its express terms, R.C. 2921.31(A) prohibits conduct performed with a purpose to "delay" the officer's performance of an official duty, and that clearly happened here. A *de minimus* delay of only a few minutes may not present a violation, but the delay of several hours in this instance, until Defendant could be found, was neither *de minimus* nor a minor inconvenience.

{¶39} The real issue is whether Defendant was privileged to act as he did. R.C. 2921.31(A) exempts acts of obstruction when a subject is privileged by law to engage in the conduct involved. I believe that Defendant was not, at least when he ran away after Deputy Fritz saw him return to the scene again ordered him to stop.

{¶40} The issue of privilege became confused in the trial court over the question of probable cause. Deputy Fritz would have been required to have probable cause to arrest Defendant, or even to cite him. However, she was not restricted to those purposes when she ordered him to stop after he had returned to the scene. The encounter was a classic *Terry* stop, for which the deputy was required to possess no more than a reasonable and articulable suspicion that Defendant was involved in

criminal activity. *Terry v. Ohio* (1968), 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868. Deputy Fritz possessed a suspicion of that kind after the young people inside the house told her that Defendant had provided them beer. She was then authorized by law to detain him in the process of investigating those suspicions.

{¶41} The majority rejects this proposition, relying on *State v. Gillenwater* (April 2, 1998), Highland App. No. 97CA0935, unreported. In that case, the Fourth District Court of appeals stated: "We do not believe that mere flight from a request for a *Terry* stop constitutes a violation of the obstructing official business statute." *Id*., at p. 4. The *Gillenwater* court appears to have reasoned that the Fourth Amendment protections which *Terry* confers somehow create a privilege to walk away from a *Terry* stop. In my view, that misconstrues the nature of the Fourth Amendment protections and their application in a *Terry* setting.

{¶42} The Fourth Amendment is not a positive grant of authority. It is instead a prophylactic measure that prevents a law enforcement officer who performs an official duty from engaging in an unreasonable search and seizure in the process. In that event, the subject of the officer's unreasonable (and illegal) acts is privileged to decline cooperation. The privilege even permits the subject of an illegal stop to turn and walk away without thereby violating the obstructing official business statue, R.C. 2921.31(A). However, that when a valid *Terry* stop does occur a subject is not likewise privileged to walk away. Being a valid stop, the Fourth Amendment is satisfied, and its prohibitions do not then impinge on the officer's exercise of his or her lawful authority in performing the stop so as to permit the suspect to walk away.

{¶43} When a valid *Terry* stop takes place, having been seized by an officer

exercising his or her lawful authority, a subject who breaks the detention and flees for the purpose of obstructing or delaying the officer's performance of those duties violates R.C. 2921.31(A). The subject is not privileged to engage in such conduct. The *Gillenwater* court appears to have concluded that a privilege exists because the subject is free to walk away. However, that's merely the test applied to determine whether or not a seizure occurs. See *United States v. Mendenhall* (1980), 446 U.S. 544, 100 S.Ct. 1270, 64 L.Ed.2d 497. The privilege it suggests exists only when no seizure has occurred. When a valid seizure does occur, the privilege doesn't apply.

{¶44} A reading of *Gillenwater, supra*, reveals why that court found that a privilege to walk away existed. That was because, notwithstanding its pronouncements, *Gillenwater* didn't involve a *Terry* stop.

{¶45} In *Gillenwater, supra,* an officer was outside an apartment complex looking to find one Donald Streitenberger, who had allegedly threatened several persons, including Gillenwater. When the officer looked behind a dumpster he found Gillenwater crouched there. The officer ordered Gillenwater to come out and sit on the ground. Concerned that Gillenwater might run off, the officer reached to touch him, whereupon Gillenwater ran off. He was subsequently located and charged with obstructing official business, and was convicted. His conviction was reversed by the appellate court, which held that an R.C.2921.31(A) violation is not demonstrated by a flight from a *Terry* stop.

{¶46} In my view the outcome in *Gillenwater* was correct, but the case was wrongly decided for the reason on which the Fourth District relied. The defendant, Gillenwater, was only a possible victim of the offense the officer was investigating, not

the suspect who was alleged to have committed it. That was Streitenberger. The officer was surely authorized to interview Gillenwater. However, he was prevented by *Terry* from seizing Gillenwater because Gillenwater was not suspected of committing any crime. Asking Gillenwater to remain may have been a prudent and sensible thing to do, but Gillenwater was privileged to ignore that request and run off, not being the subject of any seizure the officer was authorized by law to perform.

{¶47} The *Gillenwater* court relied on several other Ohio cases in reaching its decision. Those cases, likewise, fail to portray an officer's exercise of some lawful authority that the defendant's conduct obstructed. See: *Warrensville Hts. v. Watson* (1976), 50 Ohio App.2d 21 (warning oncoming vehicles of a radar speed trap); *Hamilton v. Hamm* (1986), 33 Ohio App.3d 175 (refusal to sign an agreement to pay a fine); *Columbus v. Michael* (1978), 55 Ohio App.2d 46 (refusing to comply with an officer's warrantless request to open a door).

{¶48} One case the *Gillenwater* court cited which did involve an actual *Terry* stop is *State v. McCullogh* (1990), 61 Ohio Misc. 607. However, the court there did not explain why flight from a *Terry* stop is insufficient to support an obstructing official business conviction, except to suggest to do that would permit arrests on a mere *Terry* standard. That view ignores the fact that the suspect's flight is conduct subsequent to and independent of the particular suspicion on which the *Terry* stop was founded. The state's burden to prove that additional conduct, such as flight, avoids the concern the court expressed.

{¶49} The application of the Fourth Amendment adopted by the *Gillenwater* court, and by the majority here, views the Fourth Amendment as the source of an

officer's authority to perform a stop. It isn't. Some relevant statute, R.C. 2935.03(A) in this instance, confers the authority. The Fourth Amendment simply restrains its exercise. When its restraint applies, for lack of a reasonable and articulable suspicion in a purported *Terry* stop, for example, a person who exercises the liberty interest that the Fourth Amendment preserves has not obstructed the officer's performance of his duty, because the subject is privileged to act as he does. However, absent the privilege, when the *Terry* stop is authorized by a reasonable and articulable suspicion, the conduct may constitute obstruction.

{¶50} It may seem to some to be a questionable extension of the *Terry* rule to hold that a suspect who flees from a valid *Terry* stop thereby violates the obstructing official business statute. I believe that it's not questionable, but only a novel question. Nevertheless, it is sound and rational. *Terry* confers no privilege on a suspect who is validly detained to break his detention. Had Terry himself broken from Officer McFadden's grasp and fled down Euclid Avenue on that day in late October of 1963, Terry would also have violated the obstructing official business statute. There's no reason to hold otherwise here with respect to Defendant's flight from Deputy Fritz when she told him to stop. I would affirm.

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