[Cite as *State v. Brandon*, 2010-Ohio-3901.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23598
v.	:	T.C. NO. 2008CR4543
JOHN L. BRANDON, JR.	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 20th day of August, 2010.

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DONOVAN, P.J.

{¶ 1} Defendant-appellant John Brandon, Jr., appeals his conviction and sentence for one count of breaking and entering, in violation of R.C. 2911.13(A), a felony of the fifth degree; and one count of possession of criminal tools, in violation of R.C. 2923.24(A), a felony of the fifth degree. After a jury trial, Brandon was found guilty of the charged

offenses, and the trial court sentenced him to twelve months in prison on each count. The court further ordered that the sentences be served concurrently to each other but consecutively to the three year prison sentence imposed in a separate Montgomery County case, Case No. 2008-CR-815, for an aggregate sentence of four years in prison. Brandon filed a timely notice of appeal with this Court on August 25, 2009.

I

{¶ 2} At approximately 9:15 p.m. on Saturday, November 22, 2008, Dayton Police Officer Joshua Frisby responded to a report of a silent alarm activation at the Miami Valley Child Development Center located at 3805 Kings Highway in Dayton, Ohio. Upon arriving at the scene, Officer Frisby exited his cruiser and positioned himself behind a bush in front of the center. From his vantage point, Officer Frisby was able to remain undetected while he observed the area for suspects and waited for backup.

{¶ 3} Shortly thereafter, Officer Frisby observed a man, later identified as Brandon, walking away from the location to which the police had been dispatched. Officer Frisby testified that Brandon was wearing a black "bubble" coat and jeans. Officer Frisby further observed that Brandon was carrying a large blue duffle bag which he had hung around his neck. Officer Frisby testified that the duffle bag appeared to be heavy. Once Brandon was close to him, Officer Frisby announced his presence. Officer Frisby testified that he considered Brandon to be a burglary suspect at that point since no one was supposed to be on the grounds of the center at that time of night.

{¶ 4} After making contact, Officer Frisby conducted a brief pat down of Brandon for weapons, but did not find anything. As a safety precaution since backup had not yet

arrived, Officer Frisby placed Brandon in handcuffs and read him his *Miranda* rights. Officer Frisby then asked Brandon what he was doing and where he was coming from. Brandon responded that he was returning home from work. Officer Frisby asked Brandon if he could search the duffle bag that Brandon had been carrying. Brandon consented, and Officer Frisby searched the bag in which he discovered a tan Kroger grocery store bag containing five frozen Banquet meals, a white bag containing two cans of caffeine-free Pepsi, pliers, an operable flashlight, snips, a screwdriver, as well as other tools. Brandon told Officer Frisby that the he was carrying the tools because he was a "handyman." Brandon further stated that he had just purchased the frozen Banquet meals at a nearby grocery store named "Nabali's."

{¶ 5} Officer Frisby testified that he knew where Nabali's was located and that Brandon was not coming from that direction when he was stopped. Officer Frisby asked Brandon why the frozen meals were in a Kroger bag, rather than a Nabali's bag if he had just come from there. Officer Frisby testified that initially Brandon did not have an answer to that question; however, Brandon eventually stated that the Nabali's bag had ripped while he was walking and he replaced it with a Kroger's bag that he had on hand. Additionally, Brandon could not produce a receipt from Nabali's verifying the purchase.

{¶ 6} After backup arrived on the scene, Officer Frisby secured Brandon in the back of his police cruiser and went to investigate the section of the development center where the silent alarm had been triggered. Officer Frisby testified that he discovered that the window to the teacher's lounge had been propped open, the window screen had been cut, and a portion of the accordion screen attached to the air conditioning unit had likewise been

cut and moved back in order to facilitate an illegal entry into the lounge. Officer Frisby also observed that a garbage can had been knocked over inside the teacher's lounge.

{¶ 7} Officer Frisby called a school official in order to inform her of the breaking and entering, as well as to reset the alarm. During the conversation with the school official, Officer Frisby became aware that the frozen meals and cans of Pepsi found in Brandon's bag were the property of two employees who worked at the development center named Sandra Beard and Jennifer Sherman. At trial, Beard testified that she had placed a Kroger bag containing five or six Banquet frozen meals in a refrigerator in the teacher's lounge on the Friday before the break-in occurred. Similarly, Sherman testified that she had left two cans of caffeine-free Pepsi in the refrigerator in the teacher's lounge before leaving on Friday. During his investigation, Officer Frisby also became aware that Brandon had been previously convicted for breaking and entering at the same address only two years earlier on December 2, 2006. Officer Frisby subsequently arrested Brandon for breaking and entering and possession of criminal tools.

{¶ 8} On December 15, 2008, Brandon was charged by indictment with one count of breaking and entering and one count of possession of criminal tools. At his arraignment on December 18, 2008, Brandon stood mute, and the trial court entered pleas of not guilty on his behalf. On January 5, 2009, Brandon filed a motion to suppress. A hearing was held on the motion on January 22, 2009, and the trial court denied Brandon's motion to suppress on the same day.

{¶ 9} On August 5, 2009, the State filed a motion requesting that it be permitted to introduce evidence of Brandon's prior conviction for breaking and entering at the

development center pursuant to Evid. R. 404(B). On August 12, 2009, Brandon filed a motion in limine requesting that the State be prohibited from introducing evidence of his prior conviction. Immediately prior to trial, the court granted the State's motion and allowed the evidence to be introduced, albeit for the limited purpose permitted under Evid. R. 404(B). The court also gave limiting instructions to the jury in regards to how the evidence of the prior conviction was to be considered.

{¶ 10} After a jury trial, Brandon was found guilty and convicted for one count of breaking and entering and one count of possession of criminal tools. The trial court sentenced him accordingly. It is from this judgment that Brandon now appeals.

II

{¶ 11} Brandon's first assignment of error is as follows:

{¶ 12} "THE TRIAL COURT ERRED BY OVERRULING MR. BRANDON'S MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING HIS PRIOR CRIMINAL CONVICTIONS."

{¶ 13} In his first assignment, Brandon contends that the trial court erred when it refused to exclude evidence of Brandon's prior conviction for breaking and entering into the same development center two years earlier. Brandon argues that although evidence of the prior conviction could show that he "had knowledge that would have helped him commit the offense with which he was charged in [the present] case," its probative value was substantially outweighed by the danger of unfair prejudice introduction of the evidence would cause.

{¶ 14} Initially, we note that the admission or exclusion of evidence rests

soundly within the trial court's discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, ¶ 2 of the syllabus. The trial court's decision concerning the admission or exclusion of evidence will not be reversed absent an abuse of that discretion. *Id*. at 182. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio St. Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶ 15} Evid.R. 404(B) provides:

{¶ 16} "(B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 17} Other acts evidence is admissible only if "'there is substantial proof that the alleged other acts were committed by the defendant' and such evidence tends to show one of the matters enumerated in Evid. R. 404(B)." *State v. Lowe* (1994), 69 Ohio St.3d 527, 530. In order for the other acts evidence to be admitted, both prongs must be satisfied. Failure to meet one prong defeats the use of such evidence.

{¶ 18} The first prong, identity, i.e. whether appellant committed the other acts, may be used to prove identity in two situations. The first situation is where the other acts are inextricably interwoven or related to the alleged criminal act.

State v. Echols (1998), 128 Ohio App.3d 677, 692-693. The second situation is where the other acts involve a unique, identifiable plan of criminal activity so as to establish a modus operandi or behavioral fingerprint. Id. at 693.

{¶ 19} Evid.R. 403(A) provides that although relevant, evidence is inadmissible if its probative value is substantially outweighed by the danger of undue prejudice, of confusion of the issues, or of misleading the jury. The trial court has broad discretion in determining whether probative evidence is substantially outweighed by its prejudicial effects. See *State v. Jones* (2001), 91 Ohio St.3d 355. Abuse of discretion connotes unreasonable and arbitrary conduct on behalf of the trial court. *State v. Hancock*, 108 Ohio St.3d 57, 2006-160.

{¶ 20} The trial court explained its decision to admit the evidence of Brandon's prior conviction in the following portion of the record:

{¶ 21} "The Court: All right. The Court has considered the motion in limine filed by the State and the motion in limine to prevent that same evidence, filed by the defense. And the Court is going to find that there are sufficient similarities between the prior incident and the charge in this case, as argued, to allowed [sic] limited purpose testimony for purposes of identity, motive, preparation, plan, and knowledge.

{¶ 22} "And so, the Court's decision, the similarities being the same school, approximate entry method being allegedly similar, a duffle bag being involved, those are sufficiently similar to permit evidence for that limited purpose. The Court intends to give a limiting instruction prior to the evidence, and has asked the State to alert the Court when the two witnesses, apparently that would deal with that

matter, plan to testify, and the Court will read the limiting instruction at that time. And it will be [in the] final instructions that will go to the jury for their deliberations. That was the Court's ruling on the matter."

{¶ 23} After a thorough review of the record, we find that the trial court did not act unreasonably or arbitrarily in concluding that the probative value of admitting evidence of Brandon's prior conviction outweighed the prejudicial effect of said evidence on the jury. The most obvious similarity between Brandon's prior conviction and the instant set of charges was that Brandon broke into the same building. In both cases, he gained access to the building by moving the window A/C unit in order to open the window. In both cases, Brandon used a duffle bag in which to place the stolen items.

{¶ 24} Additionally, evidence of Brandon's 2006 conviction was probative under Evid. R. 404(B) in the present case since it would tend to show that Brandon had knowledge of the layout of the development center. When he was arrested in 2006 for breaking into the center, security personnel escorted him out of the building through the hallways to the front lobby, where the police eventually arrived to take him into custody. Testimony was adduced which established that the teacher's lounge which Brandon broke into was located right off the front lobby. Thus, the trial court did not abuse its discretion when it permitted the State to introduce evidence of Brandon's prior conviction pursuant to Evid. R. 404(B).

{¶ 25} Brandon's first assignment of error is overruled.

III

{¶ 26} Brandon's second assignment of error is as follows:

{¶ 27} "THE TRIAL COURT ERRED BY OVERRULING MR. BRANDON'S MOTION TO SUPPRESS EVIDENCE OBTAINED AS THE RESULT OF HIS UNLAWFUL DETENTION, AND OF THE SEARCH CONDUCTED AFTER HIS UNLAWFUL ARREST."

{¶ 28} In his second assignment, Brandon argues that the court erred when it overruled his motion to suppress because Officer Frisby did not have a reasonable, articulable suspicion sufficient to justify his detention. Moreover, Brandon asserts that Officer Frisby did not have probable cause to arrest him because the initial pat-down did not result in the discovery of any weapons or contraband, nor did Officer Frisby have "any reliable information linking [Brandon] to criminal activity."

{¶ 29} In regards to a motion to suppress, "the trial court assumes the role of trier of facts and is in the best position to resolve questions of fact and evaluate the credibility of witnesses." *State v. Hopfer* (1996), 112 Ohio App.3d 521, 548, quoting *State v. Venham* (1994), 96 Ohio App.3d 649, 653. The court of appeals must accept the trial court's findings of fact if they are supported by competent, credible evidence in the record. *State v. Isaac* (July 15, 2005), Montgomery App. No. 20662, 2005-Ohio-3733, citing *State v. Retherford* (1994), 93 Ohio App.3d 586. Accepting those facts as true, the appellate court must then determine, as a matter of law and without deference to the trial court's legal conclusion, whether the applicable legal standard is satisfied. Id.

{¶ 30} It is well recognized that warrantless searches are per se unreasonable under the Fourth and Fourteenth Amendments of the U.S.

Constitution unless the search comes under one of the narrow exceptions to this rule. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, an exception was created when the Court balanced a person's right to be free from unreasonable searches and seizures against its interest in protecting the police and public from harm. Id. After weighing these interests the Court held that police officers were allowed to perform limited protective searches for concealed weapons when the surrounding circumstances created a suspicion that an individual may be armed and dangerous. Id.

{¶ 31} In Ohio, the propriety of a *Terry* stop must be viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of syllabus. The totality of the circumstances must "be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold." *State v. Andrews* (1991), 57 Ohio St. 3d 86, 87-88, citing *State v. Freeman* (1980), 64 Ohio St.2d 291, 295. In order to be legal "a search for weapons, whether of the immediate person of the suspect, or of areas to which the suspect has access or will gain access, must be justified by a reasonable and articulable suspicion that the suspect is dangerous and will gain immediate control of weapons." *State v. Bell*, Montgomery App. No. 21518, 2006-Ohio-4648, at _81, quoting *State v. Daniel*, Montgomery App. No. 13891, at _7, citing *Michigan v. Long* (1983), 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201.

{¶ 32} "It is the very essence of *Terry* to permit officers to briefly detain an individual for investigation in order to resolve ambiguities in their conduct which

also suggest criminal activity. [citations omitted]. The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information may be most reasonable in light of the facts available to the officer at the time. *State v. Freeman* (1980), 64 Ohio St.2d 291, 295-296." *In re A.D.B.*, Montgomery App. No. 21517, 2007-Ohio-1894.

{¶ 33} In the instant case, Officer Frisby was responding to a report of a silent alarm being triggered at a child development center. After arriving at the scene, Officer Frisby observed Brandon walking away from the very building he was sent to investigate. The building was closed, and Brandon was not authorized to be on school grounds. Further, it was dark outside, Brandon was wearing a large black coat where a weapon could easily be concealed. Brandon was also carrying a duffle bag that appeared to Officer Frisby to be conveying unknown items. Under the totality of the circumstances, Officer Frisby had a reasonable, articulable suspicion that Brandon was engaged in criminal activity. Thus, Officer Frisby was justified in performing a brief investigatory pat-down for weapons.

{¶ 34} We note that Brandon asserts that the silent alarm which was triggered at the development center was comparable to an anonymous tip that a crime was occurring. Brandon argues that the report of the alarm lacked sufficient indicia of reliability because the report did not contain any information regarding the

description or number of potential suspects. Thus, Brandon contends that Officer Frisby did not have a reasonable, articulable suspicion based on the triggering of the alarm which justified the stop and pat-down of Brandon.

{¶ 35} It is generally accepted that an anonymous tip, standing alone, is insufficient to justify a police officer's stop and frisk of an individual. *State v. Allen*, Cuyahoga App. No. 91107, 2009-Ohio-2572. The reasoning which supports this proposition of law, however, is inapplicable to a report of the triggering of a silent alarm. An anonymous tip consists of a report that a crime is taking place along with a description of the individual or individuals involved. Once the police arrive, they must be able to corroborate the tip with specific, articulable facts before they can justify a stop and frisk.

{¶ 36} Conversely, the silent alarm in the present case was monitored by a private company who simply reported that the alarm had been triggered to the Dayton Police, who were then tasked with investigating the report. The duty of determining whether a crime had taken place or if the report was merely a false alarm belonged to the police officers who were dispatched to the development center. The fact that the report that Officer Frisby relied upon did not contain any descriptive information did not render it unreliable. It was not the purpose of the report of the silent alarm to provide descriptive information of the intruder. The purpose of the alarm was merely to alert the police that a crime may have been taking place at the development center. Based on his own observations once he arrived at the center, Officer Frisby developed a reasonable, articulable suspicion which justified the stop and pat-down of Brandon.

{¶ 37} Brandon also asserts that he was illegally placed under arrest when Officer Frisby handcuffed him after the initial pat-down. It is undisputed that Officer Frisby's investigatory stop and detention of Defendant constituted a seizure for Fourth Amendment purposes. *State v. Cook*, Montgomery App. No. 20427, 2004-Ohio-4793. However, for a seizure to constitute an arrest there must be (1) an intent to arrest, (2) a seizure made under real or pretended authority, (3) accompanied by an actual or constructive seizure or detention, (4) that is so understood by the person arrested. *Cook,* 2004-Ohio-4793*,* quoting *State v. Barker* (1978), 53 Ohio St.2d 135.

{¶ 38} "Handcuffing a suspect in the course of an investigative detention does not necessarily turn that investigative detention into an arrest, so long as handcuffing is reasonable under the circumstances; for instance, to maintain the status quo and prevent flight." *State v. Carter*, Montgomery App. No. 21145, 2006-Ohio-2823.

{¶ 39} Officer Firsby provided the following explanation for his decision to handcuff Brandon during direct testimony at the hearing on the motion to suppress:

{¶ 40} "The State: And you indicated that after the pat-down you placed [Brandon] in handcuffs?

{¶ 41} "Officer Frisby: Yes, I did.

{¶ 42} "Q: What was the reason for placing him in handcuffs?

{¶ 43} "A: Again, Your Honor, my backup had not arrived yet. This was all a dynamic situation. Everything was still, you know – as I stated before, it's a very large complex. I did do a quick cursory pat-down. There is a potential – always a

potential that I did miss something on that pat-down.

{¶ 44} "Q: Okay.

{¶ 45} "A: It was just a much safer environment for not only me but the Defendant as well."

{¶ 46} Officer Frisby was investigating whether Brandon was the individual who triggered the silent alarm at the development center. At the time Officer Frisby handcuffed Brandon, backup had not yet arrived. It was dark outside, and Brandon was wearing a large bulky coat and carrying a duffle bag in which stolen items could readily be concealed. At that point, Officer Frisby reasonably suspected that Brandon was connected to the burglary. Furthermore, Officer Frisby did not know if accomplices were still roaming the premises of the development center. We conclude that handcuffing Brandon while investigating the triggering of the silent alarm was reasonable under the circumstances, given the information available to the officer at the time. Additionally, this detention was lawful in order to maintain the crime scene until it could be secured, and a formal arrest could be effectuated.

{¶ 47} Brandon's second assignment of error is overruled.

IV

{¶ 48} Brandon's third assignment of error is as follows:

{¶ 49} "ANY STATEMENTS MADE BY MR. BRANDON AFTER HIS ARREST SHOULD HAVE BEEN SUPPRESSED BECAUSE MR. BRANDON WAS NOT INFORMED OF HIS *MIRANDA* RIGHTS."

{¶ 50} In his third assignment, Brandon argues that he was not advised of

his *Miranda* rights before being questioned by Officer Frisby and before giving his consent to the search of the duffle bag. Thus, Brandon contends that the trial court erred when it denied his motion to suppress.

{¶ 51} At the hearing on the motion to suppress, Officer Frisby provided the following testimony:

{¶ 52} "The State: After you handcuffed him, what did you do next?

{¶ 53} "Officer Frisby: At that point I read the Defendant his *Miranda* rights.

{¶ 54} "Q: Okay. And by this time have you explained to him the situation of what's going on or not yet?

{¶ 55} "A: I advised him that we were here on a burglary alarm and yes – and – yes. That's all he – I explained to him at that point.

{¶ 56} "Q: And is that prior to your *Mirandizing* him?

{¶ 57} "A: Yes, that is prior to *Mirandizing* him.

{¶ 58} "Q: Okay. And you indicated that next you *Mirandize* him?

{¶ 59} "A: Yes, that's correct.

{¶ 60} "***

{¶ 61} "Q: Okay. At the time you were *Mirandizing* him, or even before that, did he appear under the influence of any alcohol or medication to you?

{¶ 62} "A: No. I didn't – I didn't observe anything like that.

{¶ 63} "Q: Okay. At that point in time when you *Mirandized* him or – subsequent to that, did he ever ask for an attorney?

{¶ 64} "A: No, he did not.

{¶ 65} "Q: Okay. And did he agree to speak with you then?

{¶ 66} "A: Yes, sir, he did.

{¶ 67} It is clear from the record of the suppression hearing that Officer Frisby provided Brandon with the proper *Miranda* warnings prior to questioning him and gaining consent to search the duffle bag. Brandon's assertion that he was not apprised of his constitutional rights is simply not supported by the record.

{¶ 68} Brandon's third assignment of error is overruled.

V

{¶ 69} Brandon's fourth and final assignment of error is as follows:

{¶ 70} "THE TRIAL COURT'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 71} In his final assignment, Brandon contends that the verdict was against the manifest weight of the evidence.

{¶ 72} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 73} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10

Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 74} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 75} In the instant case, we find that Brandon's convictions for breaking and entering and possession of criminal tools is not against the manifest weight of the evidence. The credibility of the witnesses and the weight to be given their testimony are matters for the jury to resolve. At trial, Brandon testified that his presence on the grounds of the development center was just a coincidence, and that he was merely walking home from a construction project with the tools which were found in his duffle bag. Additionally, Brandon testified that he bought the frozen dinners and the two cans of caffeine-free Pepsi at Nabali's grocery store which he claims was "nearby" where he was apprehended. Brandon also points out that no fingerprints were recovered from the teacher's lounge where the break-in occurred.

{¶ 76} Brandon also repeats his argument that his prior conviction for breaking and entering, as well as the statements made to Officer Frisby, and the stolen property and tools taken from the duffle bag should have been excluded from evidence at trial. However, the evidence was properly admitted by the court.

{¶ 77} Brandon's recitation of the events leading up to his arrest was severely undermined by the State's case against him. Moreover, the jury was free to believe the testimony of the State's witnesses, namely Officer Frisby, Sandra Beard, and Jennifer Sherman. Having reviewed the entire record, we cannot conclude that the evidence weighs heavily against a conviction, or that a manifest miscarriage of justice has occurred.

{¶ 78} Brandon's fourth and final assignment of error is overruled.

VI

{¶ 79} All of Brandon's assignments having been overruled, the judgment of the trial court is affirmed.

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GRADY, J. and FROELICH, J., concur.

Copies mailed to:

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