

IN THE COURT OF APPEALS OF CLARK COUNTY, OHIO

STATE OF OHIO :
Plaintiff-Appellee : C.A. CASE NO. 09CA0089
vs. : T.C. CASE NO. 09CR0454A
SHANE RADCLIFF : (Criminal Appeal from
Defendant-Appellant : Common Pleas Court)

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O P I N I O N

Rendered on the 10th day of December, 2010.

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GRADY, J.:

{¶1} Defendant, Shane Radcliff, appeals from his conviction
and sentence for theft and fleeing and eluding.

{¶2} On May 16, 2009, Defendant and his girlfriend, Erica
Dotson, pulled up in front of the Home Depot on North Bechtle Avenue

in Springfield in a Penske moving van that Dotson had rented. Dotson remained in the passenger seat while Defendant got out and loaded a CubCadet lawnmower into the back of the truck. The mower was priced at one thousand two hundred and ninety-nine dollars.

{¶ 3} A Home Depot employee, Gerald McWhorter, asked Defendant to show his receipt for the lawnmower. Defendant said he would get the receipt. Defendant got into the driver's seat of the truck, and told Dotson to show McWhorter the receipt that was laying on the console. Dotson saw that the receipt was from Sears. As Dotson raised the receipt up to the window to show McWhorter, Defendant drove off. McWhorter suspected that Defendant had stolen the lawnmower. As Defendant drove away, Lonnie Barclay, who had witnessed the incident, got into his vehicle and followed Defendant. Police were called and Barclay kept them advised of the truck's location.

{¶ 4} As Defendant drove the truck through Springfield, Officer Fredendall, who had been advised by the dispatcher to be on the lookout for the truck, spotted the truck on Spring Street near Selma Road. Officer Fredendall attempted a traffic stop with his cruiser's emergency lights and siren activated, but the truck sped away. Officer Fredendall pursued the truck through Springfield. During that chase Defendant violated several traffic laws, and the pursuit became so dangerous that Springfield police

called it off.

{¶5} Defendant drove the truck to London, Ohio, and then returned to Springfield. On the way back to Springfield, police once again began pursuit of the truck as it approached Springfield, but had to abandon the chase for safety reasons before the truck entered Springfield city limits. Defendant drove the truck to 1343 Rutland Avenue, where neighbors saw the truck arrive. Dotson got out of the truck and later called police. She admitted that she and Defendant had been in the truck and that Defendant had stolen the lawnmower.

{¶6} Defendant was indicted on one count of theft, equipment valued at over five hundred dollars, but less than five thousand dollars, in violation of R.C. 2913.02(A)(1), a felony of the fifth degree, and two counts of fleeing and eluding, substantial risk of serious physical harm to persons or property, in violation of R.C. 2921.331(B), felonies of the third degree. Following a jury trial, Defendant was found guilty of all charges. The trial court sentenced Defendant to one year on the theft charge and five years on each of the fleeing and eluding charges, and ordered all of the sentences to be served consecutively for a total sentence of eleven years.

{¶7} Defendant timely appealed to this court from his conviction and sentence.

FIRST ASSIGNMENT OF ERROR

{¶ 8} "THE TRIAL COURT COMMITTED PLAIN ERROR AND VIOLATED APPELLANT'S RIGHTS WHEN IT FAILED TO RECOGNIZE THE OFFENSES FOR WHICH HE WAS INDICTED AND SENTENCED CONSTITUTED ALLIED OFFENSES OF SIMILAR IMPORT."

{¶ 9} Defendant argues that the trial court erred by failing to merge his convictions on two counts of fleeing and eluding which constitute allied offenses of similar import pursuant to R.C. 2941.25. That section provides:

{¶ 10} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 11} "(B) Where the defendant's conduct constitutes two or more

{¶ 12} offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 13} Ordinarily, a two-step analysis is required to determine whether two crimes are allied offenses of similar import. *State v. Cabrales*, 118 Ohio St. 3d 54, 2008-Ohio-1625. No such analysis

is required in this case, because we are dealing with two counts of the same offense, fleeing and eluding in violation of R.C. 2921.331(B). Therefore, pursuant to R.C. 2941.25(B), the issue is whether those offenses were committed separately or with a separate animus as to each.

{¶ 14} The evidence presented at trial clearly demonstrates that the two counts of fleeing and eluding were committed separately. Immediately following the theft of the lawnmower, Springfield police located and pursued the Penske truck through the city until the pursuit became so dangerous it had to be called off. The truck subsequently left Springfield, went to London, Ohio area, and then returned again to Springfield. As the truck was returning and approaching the Springfield area, police once again tried unsuccessfully to stop the vehicle with stop sticks and pursued the vehicle, in a second pursuit until it entered the Springfield city limits, at which time the second pursuit was called off for safety reasons.

{¶ 15} Because the two counts of fleeing and eluding were committed separately in time, Defendant was properly convicted and sentenced for both of them. R.C. 2941.25(B).

{¶ 16} Defendant's first assignment of error is overruled.

SECOND ASSIGNMENT OF ERROR

{¶ 17} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT

OF THE EVIDENCE AND THE TRIAL COURT DECISION SHOULD BE REVERSED."

{¶ 18} Defendant argues that his convictions on the two counts of fleeing and eluding were against the manifest weight of the evidence because Dotson's testimony was the only evidence establishing that Defendant was the driver of the Penske truck, and her testimony was not credible because she told multiple conflicting stories to police and was facing charges herself as a result of this incident.

{¶ 19} A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 20} "[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, *supra*.

{¶ 21} 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* (1967), 10 Ohio St.2d 230. In *State v.*

Lawson (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 22} "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."

{¶ 23} 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 facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the jury, to determine. *DeHass*.

{¶ 24} During her testimony at trial, Dotson admitted that she had initially lied to police during their investigation because she was afraid, but she eventually told the truth and told police that Defendant was the driver of the Penske truck. The jury was also aware that Dotson was facing charges as a result of this incident, and that she could receive leniency in her own case in exchange for her testimony. Nevertheless, the jury chose to

believe Dotson. Neither was Dotson the only witness who connected Defendant with operation of the truck. The Home Depot employee who confronted Defendant and asked for a receipt for the lawnmower, McWhorter, testified that he did not see anyone get into the truck other than Defendant. One of the police officers involved in the pursuit of the truck, Officer Chrisman, identified the shirt Defendant is seen wearing in the Home Depot surveillance video as the same one worn by the driver of the Penske truck. The evidence established that Defendant was the driver of the Penske truck that contained the lawnmower stolen from Home Depot.

{¶ 25} The jury did not lose its way simply because they chose to believe the State's witnesses and their version of the events, which they had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 26} Defendant's second assignment of error is overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 27} "THE TRIAL COURT COMMITTED ERROR IN SENTENCING THE APPELLANT TO THE MAXIMUM CONSECUTIVE SENTENCE AND THE TRIAL COURT SHOULD BE REVERSED."

{¶ 28} Defendant argues that the maximum, consecutive sentences imposed by the trial court are contrary to law and an abuse of discretion.

{¶ 29} In *State v. Jeffrey Barker*, Montgomery App. No. 22779, 2009-Ohio-3511, at ¶36-37, we wrote:

{¶ 30} "The trial court has full discretion to impose any sentence within the authorized statutory range, and the court is not required to make any findings or give its reasons for imposing maximum, consecutive, or more than minimum sentences. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph 7 of the syllabus. Nevertheless, in exercising its discretion the trial court must consider the statutory policies that apply to every felony offense, including those set out in R.C. 2929.11 and 2929.12. *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, 846 N.E.2d 1, at ¶ 37.

{¶ 31} "When reviewing felony sentences, an appellate court must first determine whether the sentencing court complied with all applicable rules and statutes in imposing the sentence, including R.C. 2929.11 and 2929.12, in order to find whether the sentence is contrary to law. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124. If the sentence is not clearly and convincingly contrary to law, the trial court's decision in imposing the term of imprisonment must be reviewed under an abuse

of discretion standard. *Id.*"

{¶ 32} "'Abuse of discretion' has been defined as an attitude that is unreasonable, arbitrary or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 19 OBR 123, 126, 482 N.E.2d 1248, 1252. It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary." *AAAA Enterprises, Inc. v. River Place Community Redevelopment* (1990), 50 Ohio St.3d 157, 161.

{¶ 33} In its journalized Judgment Entry of Conviction, the trial court indicated that it had considered the record, oral statements by counsel and Defendant, Defendant's prior criminal record, the principles and purposes of sentencing, R.C. 2929.11, and the seriousness and recidivism factors, R.C. 2929.12. The court also informed Defendant during sentencing about post-release control requirements. The court complied with the applicable rules and statutes in imposing its sentence. Furthermore, the one year prison term the court imposed on the theft charge and the five year prison terms the court imposed on each of the fleeing and eluding charges, while the maximum sentences for those offenses, are nevertheless within the authorized range of available punishments for felonies of the fifth and third degree respectively. R.C. 2929.14(A)(5), (A)(3). Defendant's sentence

is not clearly and convincingly contrary to law. *Kalish*.

{¶ 34} Moreover, Defendant's sentence is supported by this record. Defendant has an extensive prior criminal record that includes many theft related offenses, assault, fleeing and eluding, violation of a protection order, burglary and disorderly conduct.

R.C. 2929.12(D)(2). Defendant's conduct in driving recklessly and ignoring traffic laws in an attempt to elude police posed a substantial risk of serious physical harm to persons and property in the vicinity. Defendant did express genuine remorse at sentencing, R.C. 2929.12(E)(5), but the court concluded that in order to protect the public from future crime by Defendant, maximum, consecutive sentences were necessary in this case. R.C. 2929.11.

No abuse of discretion on the part of the trial court in imposing a total sentence of eleven years has been demonstrated.

{¶ 35} R.C. 2921.331(C)(5)(b) provides that in imposing a sentence for fleeing and eluding in violation of R.C. 2921.331(B) where the trier of facts finds that the operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property, R.C. 2921.331(C)(5)(a)(ii), the court in determining the seriousness of the offender's conduct shall consider all of the factors in R.C. 2921.331(C)(5)(b)(i)-(ix). Neither the transcript of the sentencing hearing nor the Judgment Entry of Conviction

specifically indicates that the trial court considered the R.C. 2921.331(C) (5) (b) (i) - (ix) factors in this case as it was required to do, although including in the record a recitation that the court considered the factors is clearly the preferred practice. Nevertheless, the evidence presented in this case demonstrates that Defendant ran the red light at Selma Road and Spring Street, where the police pursuit began. Defendant drove a large Penske moving truck at high speed the wrong way down a narrow one-way street, East Pleasant Street, where many houses line the street.

Defendant exceeded the speed limit and ran stop signs and red lights, and went left of center during the pursuit. At the intersection of East High Street and Belmont Avenue, Defendant ran the red light and weaved in and out of traffic. At that point, Springfield police called off the pursuit due to Defendant's reckless driving and the size of the Penske truck.

{¶ 36} Defendant drove the truck out of Springfield and Clark County and over into London, Ohio. Defendant then returned to Springfield. On Plattsburg Road police deployed stop sticks in an effort to stop the truck but the truck ran over them and kept going with police in pursuit. At U.S. 40 and Buena Vista Road, the truck ran a stop sign and went off the road and down into a ditch in order to avoid a police cruiser that was blocking the road. The pursuit continued down U.S. 40 but was called off when

the truck began weaving in and out of traffic as it approached the Springfield city limits.

{¶ 37} The evidence the trial court heard relevant to the R.C. 2921.331(C)(5)(b)(i)-(ix) factors, and the presumption of regularity accorded to the trial court's proceedings, supports a finding that the court considered the R.C. 2921.331(C)(5)(b)(i)-(ix) factors.

{¶ 38} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

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Hon. Douglas M. Rastatter