COURT OF APPEALS
THIRD APPELLATE DISTRICT
ALLEN COUNTY

STATE OF OHIO

PLAINTIFF-APPELLEE **CASE NO. 1-99-65**

v.

JAMIE L. SMITH **O P I N I O N**

DEFENDANT-APPELLANT

CHARACTER OF PROCEEDINGS: Criminal appeal from Municipal Court

JUDGMENT: Judgment affirmed in part, reversed in part and remanded

DATE OF JUDGMENT ENTRY: March 31, 2000

ATTORNEYS:

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For Appellee

WALTERS, J., Appellant, Jamie L. Smith, appeals a judgment of the Lima Municipal Court, Allen County, Ohio, convicting him on one charge of using a weapon while intoxicated, and one charge of obstructing official business. For the reasons that follow, we affirm in part and reverse in part the judgment of the trial court.

During the early evening hours of May 12, 1999, Appellant was involved in an altercation at the Firehouse bar in Lima. As a result, he was asked to leave the establishment by owner, Frank Lombardo. Several hours later, during the early morning hours of May 13, 1999, police officers responded to the Firehouse on a report that gunshots were fired in the area. After speaking with eyewitnesses and searching the surrounding neighborhood, police recovered two handguns and obtained a description of the suspect. Shortly thereafter, Appellant was arrested and charged with intoxication, aggravated menacing, using weapons while intoxicated, pointing and discharging a firearm, and obstructing official business.

Subsequently, on July 27, 1999, a trial to the bench was conducted on the preceding charges. After hearing testimony from numerous witnesses, the trial court found Appellant not guilty on the charges of aggravated menacing, and pointing and discharging a firearm. However, the trial court found Appellant guilty on the charges of using weapons while intoxicated in violation of R.C.

2923.15(A), a first degree misdemeanor; obstructing official business in violation of R.C. 2921.31(A), a second degree misdemeanor; and intoxication.[1]

Appellant timely appeals the convictions of using weapons while intoxicated, and obstructing official business, assigning two errors for our review.

Assignment of Error No. 1

> **The trial court erred in finding the defendant guilty of carrying a firearm while under the influence of alcohol when such a verdict is against the manifest weight of the evidence.**

The proper standard to employ when considering an argument that a conviction was against the manifest weight of the evidence has been set forth as follows:

> **"The [appellate] 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 [fact-finder] clearly lost its way * * *"**

State v. Thompkins (1997), 78 Ohio St.3d 380, 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Appellate courts are cautioned to sustain manifest weight arguments only in the most extraordinary cases. *Thompkins,* 78 Ohio St.3d at 387.

Revised Code 2923.15(A) provides:

> **No person, while under the influence of alcohol or any drug of abuse, shall carry or use any firearm or dangerous ordnance.**

[1] Although the record does not demonstrate the applicable Revised Code section, Appellant does not appeal this conviction and, therefore, we accept the trial court's findings of fact as true.

Explicit in this statute is a finding that the offender was under the influence of alcohol or any drug of abuse. Not only does the record sufficiently establish that Appellant was under the influence of alcohol during the early morning hours of May 13, 1999, but Appellant does not appeal the trial court's determination that he was intoxicated. Therefore, we accept the trial court's finding that he was under the influence.

Notwithstanding, Appellant claims that the record insufficiently demonstrates that he was carrying or using a firearm or dangerous ordnance. In support, Appellant argues that testimony by the State's witnesses, Frank Lombardo, Caleb Hartman, Christina Hilgart, and Jonathan Smith, is inconclusive to support a conviction on this charge. Specifically, Appellant argues that these four witnesses testified that they neither saw Appellant carrying a firearm, nor were they able to positively identify him near the area where the crime was committed.

Despite Appellant's argument, the veracity of these witness' testimony was challenged by several Lima police officers that also testified at trial. Specifically, Officer Godfrey testified that on May 13, 1999, Christina Hilgart provided a description of the suspect to police that differed from her testimony at trial. Additionally, Officer Mohler testified that Frank Lombardo told her that he overheard Appellant threaten to return with a gun after being asked to leave the

bar. At trial, however, Lombardo testified that he could not remember Appellant making such a statement. Finally, Officer Delong testified at trial that on May 13, 1999, Jonathan Smith, a relative of Appellant, identified the suspect as a white male with long blond hair. However, at trial, Smith testified that he never got a good look at the suspect and was not sure if the suspect was male or female.

After hearing all the evidence, the trial judge stated that the only believable testimony was that of the police officers, and that the testimony of the other witnesses "was largely one of self interest, protecting family, friends and customers..." The court then noted the testimony of Detective Stevenson, who stated that Appellant had previously identified one of the weapons recovered by police as being owned by his brother Timothy Smith. The court also noted that there is more reason to believe that Jonathan Smith positively identified Appellant as the individual with the gun on the night in question, than to believe his ambiguous testimony at trial.

After reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we find that the trial court did not clearly lose its way in resolving this matter. As did the trial court, we find it decidedly convenient that the testimony of several of the witness at trial differed in great detail from their prior statements made to police officers. Therefore, we hold that the trial court's decision was not against the manifest weight of the evidence.

Accordingly, Appellant's first assignment of error is not well taken and is therefore overruled.

Assignment of Error No. 2

> **The trial court abused its discretion by finding Defendant guilty of obstructing official business for failing to obey a police officer's order to stop where there was no probable cause to arrest Defendant.**

The crime of obstructing official business is found in R.C. 2921.31(A), which states:

> **No person, without privilege to do so and with the 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.**

Appellant argues that the trial court abused its discretion in finding Appellant guilty of obstructing official business. Initially, we note that sufficiency of the evidence, not abuse of discretion, is the correct standard of review. Regarding sufficiency of the evidence, the Supreme Court of Ohio stated:

> **An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.**

State v. Jenks (1991), 61 Ohio St.3d 259, at syllabus.

With respect to the elements of obstructing official business, Appellant concedes that he impeded official police business by running from police officers after being ordered to stop. Notwithstanding, Appellant argues that pursuant to R.C. 2921.31(A) he was privileged to run from the officers because they lacked probable cause to arrest him.

In *Terry v. Ohio* (1968), 392 U.S. 1, 20 L. Ed.2d 889, 88 S. Ct. 1868, the United States Supreme Court held that police officers may conduct a brief, investigatory stop of an individual, even in the absence of probable cause, if the officer has a reasonable, articulable suspicion that criminal activity is afoot. However, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *See also State v. Andrews* (1991), 57 Ohio St.3d 86, 87.

The record demonstrates that on the night of the incident, police officers had spoken with several eyewitnesses who provided a description of the suspect, as well as his whereabouts. Specifically, police learned that the suspect was a white male with long blond hair, wearing a white t-shirt. Police also learned that the suspect was seen in the area where the gunshots were fired, fleeing both on foot and in a beige van. Additionally, Appellant was seen in the general vicinity of the crime, and he matched the description of the suspect given to police.

Accordingly, we find that the record sufficiently demonstrates that police officers had a reasonable articulable suspicion to effectuate an investigatory stop pursuant to *Terry*, above.

Additionally, we note that Appellant was not privileged to run from police officers after being ordered to stop. Revised Code Section 2901.01(12) defines privilege as:

> **[A]n immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity.**

Regarding this issue, the First District Court of Appeals stated:

> **"Privilege" in the context of R.C. 2921.31 refers to a positive grant of authority entitling one to deliberately obstruct or interfere with a police officer performing his lawful duty.**

State v. Stayton (1998), 126 Ohio App.3d 158, 163. In *Stayton*, the court also noted that an individual is not privileged simply because his or her conduct is not illegal. *Id*. The burden of proof is on Appellant to establish a privilege. *State v. Foster* (Sept. 17, 1997), Seneca App. No. 13-97-09, unreported. Appellant has failed to identify and establish a privilege pursuant to R.C. 2901.01(12) and, therefore, Appellant's acts are not privileged.

Notwithstanding the fact that police officers had reasonable suspicion to conduct an investigatory stop, Appellant further argues that the act of fleeing from

a police officer during a *Terry* stop does not constitute obstructing official business pursuant to R.C. 2921.31(A). We agree.

In *State v. Gillenwater* (April 2, 1998), Highland App. No. 97 CA 0935, unreported, the Fourth District Court of Appeals directly addressed this issue. In ruling that fleeing from a police officer during a *Terry* stop is not obstructing official business, the court held that the defendant's actions did not constitute "an affirmative act that directly interfered with the patrolman's duty." *Id*. The court in Gillenwater further stated:

> **If the legislature had intended such conduct to constitute an offense, we believe that it would have enacted legislation to that effect, as it has with other flight situations and failures to comply with an officer's order.**

Id.

While we sympathize with the plight of law enforcement officers who are reasonably attempting to conduct their duties to investigate criminal behavior, and while we are not condoning Appellant's suspicious behavior, we cannot hold that merely fleeing from a request to stop constitutes the type of affirmative act required by the legislature to sustain a conviction for the specific offense of obstructing official business. As further support for our decision, we note several analogous decisions from various appellate districts. *See State v. Raines* (1997), 124 Ohio App.3d 430 (fleeing from a police officer during a *Terry* stop does not constitute resisting arrest); *City of Garfield Heights v. Simpson* (1992), 82 Ohio

App.3d 286, *City of Hamilton v. Hamm* (1986), 33 Ohio App.3d 175 (both holding that one cannot obstruct official business by doing nothing).

Accordingly, Appellant's second assignment of error is well taken and is therefore sustained.

Having found error prejudicial to the Appellant herein, in the particulars assigned and argued, the judgment of the trial court is hereby affirmed with respect to Appellant's conviction for using weapons while intoxicated, and reversed with respect to Appellant's conviction on obstructing official business, and the matter is remanded for further proceedings in accordance with this opinion.

Judgment affirmed in part and reversed in part and Cause remanded.

HADLEY, P.J., concurs.

BRYANT, J.,. dissents.

BRYANT, J. Because I believe that fleeing from an officer attempting to effect a lawful *Terry* detention can be an affirmative act sufficient to constitute Obstructing Official Business, I respectfully dissent with that part of the majority opinion holding that the evidence against Appellant was insufficient to support his conviction.

The majority holds that "…merely fleeing from a request to stop [does not] constitute…the type of affirmative act required by the legislature to sustain a conviction for obstructing official business." That is, the majority holds today that, as a matter of law, when a suspect flees from a police officer who is attempting to effectuate a constitutionally valid *Terry* stop, the act of fleeing is not an "affirmative act" sufficient to support a conviction pursuant to R.C.§2921.31.

In the case *sub judice*, assuming *arguendo* that the officers lacked probable cause to make an arrest, the majority concedes that there was reasonable suspicion sufficient to briefly detain Appellant as part of an warrantless, investigatory stop under the principles announced in *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889, and its progeny. The record indicates that the officers were responding to gunshots and, after speaking with numerous eyewitnesses, obtaining the name and a description of the Appellant, stopping two vehicles, engaging in a foot pursuit, and recovering two handguns, Appellant was arrested. The Obstructing Official Business charge arises from Appellant fleeing from two police officers who, while conducting a foot search for an individual matching Appellant's description, observed Appellant walking in the vicinity of the shooting. Upon observing Appellant, one police officer instructed Appellant to "stop," whereupon Appellant ran. Following a lengthy foot chase, Appellant was discovered hiding under a bush and was apprehended.

The essential elements of the crime of Obstructing Official Business are: (1) an act by a defendant; (2) that hampers or impedes a public official; (3) in the performance of lawful duties; (4) the act by defendant must be done with the purpose to prevent, obstruct, or delay such performance; and, (5) defendant does so without a privilege to so act.

The act with which we are here concerned is that of Appellant fleeing from the police officers after being told to stop. The majority concedes that Appellant was not privileged to run from the police officers after being ordered to stop. Furthermore, there is no dispute that police officers are "public officials" within the ambit of the statute. See, e.g., *Dayton v. Peterson* (1978), 56 Ohio Misc. 12. Similarly, there is no dispute that a police officer acts lawfully when he attempts to initiate the brief detention associated with a *Terry* stop.

The remaining two elements, engaging in the act with the purpose to prevent, obstruct, or delay performance with the result of the act being that the public official was hampered or impeded, although ostensibly in dispute, were also clearly established by the evidence. It is certainly reasonable to infer that by fleeing in response to a lawful order to stop, Appellant intended to prevent, obstruct, or delay the police officers in their attempt to detain Appellant during the course of their investigation. Likewise, there was sufficient evidence that Appellant hindered the officers in the performance of their lawful duties.

Appellant's actions clearly hindered the officers' ability to determine whether Appellant was involved in the underlying report. Similarly, by fleeing, Appellant impeded the officers' lawful investigatory stop of Appellant.

The majority places great importance on the decision rendered by the Fourth Appellate District in *State v. Gillenwater* (April 2, 1998), Highland App. No. 97CA0935, unreported, wherein that court concluded as follows:

> **[W]e do not believe that the legislature intended flight from a *Terry* situation to constitute a criminal offense. If the legislature had intended such conduct to constitute an offense, we believe that it would have enacted legislation to that effect, as it has with other flight situations and failures to comply with an officer's order. (Citations omitted). *Id*. at *4.**

I disagree. The facts of this case clearly implicate the statute; there are no concerns with the text of the statute being vague or ambiguous. Furthermore, when the statute is applied to the present facts, the result is a constitutionally valid conviction. When a statute is clear in its text, is implicated by the facts of the case, and when applied produces a constitutionally valid result, I see no reason for resorting to "principles" of statutory construction in an effort to reach the conclusion that otherwise prohibited conduct was not really intended by the legislature to be prohibited.

Any necessary questions concerning the legislative intent may be satisfied by considering the Committee Comment:

> **This section consolidates a plethora of separate sections in former law of which the gist was hampering, impeding, obstructing, or interfering with particular public officials in certain duties. *Under this section, the means used to commit the offense is unimportant,* so long as it is done without privilege, and with the purpose of preventing, obstructing, or delaying an official act, and actually has its intended effect. (Emphasis added).**

The enacting body made it clear that *any* act done without privilege and with purpose to obstruct, prevent, or delay an official act, that has the intended effect, is sufficient to support a conviction pursuant to R.C.§2921.31. So long as the remaining elements are established by the requisite burden of proof, fleeing from a lawful *Terry* stop falls, in my view, within the ambit of the statute, as evidenced by the text of the statute and the Committee Comment.

In support of their conclusion, the majority relies upon a line of cases that are purportedly "analogous" to *Gillenwater*. The first case cited by the majority is *State v. Raines* (1997), 124 Ohio App.3d 430. *Raines* is completely inapplicable to the present case. *Raines* involved a defendant who fled from a lawful *Terry* stop and was ultimately charged with Resisting Arrest, pursuant to R.C.§2921.33. Resisting Arrest is simply not analogous to Obstructing Official Business as suggested by the majority. An essential element of Resisting Arrest is that the defendant must have resisted a *lawful arrest*. See, R.C.§2921.33(A). When a police officer lacks probable cause to make a warrantless arrest but does possess reasonable suspicion sufficient to briefly detain Appellant as part of a warrantless,

investigatory stop under the principles announced in *Terry*, there is no "arrest" in the constitutional sense sufficient to support a Resisting Arrest conviction. Consequently, the majority's reliance upon those cases holding that flight from a lawful *Terry* stop is insufficient to support a conviction pursuant to R.C.§2921.33 is misplaced.

In further support of their conclusion the majority cites a lines of cases holding that an omission or failure to act does not constitute an affirmative act sufficient to support a conviction for Obstructing Official Business. While I agree with the result, this line of cases is of no consequence to the present case. Appellant is not charged with refusing to sign an agreement to pay a fine imposed by a court or refusing to be fingerprinted, disclose his name, or provide his driver's license, rather, Appellant is charged with fleeing from a lawful command to stop. Purposely fleeing from what is obviously a police officer performing an official act is certainly not an omission or failure to act.

The rule adopted by the majority today deprives investigating officers of a tool provided by the legislature and potentially places police officers at an unnecessary risk. That is, the holding of the majority potentially inhibits the police officer in the performance of his lawful duty by possibly encouraging suspects to flee.

In sum, because I believe that a defendant may be convicted of a violation of R.C.§2921.31 where he purposely flees from what is obviously a police officer performing an official act, I would overrule Appellant's Second Assignment of Error and hold that there was sufficient evidence to support the conviction for Obstructing Official Business.