

[Cite as *State v. Bason*, 2005-Ohio-6492.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86112

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	JOURNAL ENTRY
	:	
-VS-	:	AND
	:	
DWIGHT BASON	:	OPINION
	:	
Defendant-Appellant	:	

Date of Announcement of Decision:	DECEMBER 8, 2005
--------------------------------------	------------------

Character of Proceeding:	Criminal appeal from Court of Common Pleas Case No. CR-458102
--------------------------	---

Judgment:	Conviction affirmed; sentence vacated and cause remanded for resentencing.
-----------	---

Date of Journalization:

Appearances:

For Plaintiff-Appellee:	WILLIAM D. MASON Cuyahoga County Prosecutor JAMES D. MAY, Assistant Prosecuting Attorney 1200 Ontario Street Cleveland, Ohio 44113
-------------------------	---

For Defendant-Appellant:	BRITTA M. BARTHOL, ESQ. P.O. Box 218 Northfield, Ohio 44067
--------------------------	---

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Dwight Bason ("defendant"), appeals from his conviction and sentence for failure to comply with the order or signal of police officer, with enhancements and receiving stolen property. For the reasons that follow, we affirm the conviction; vacate the sentence and remand for resentencing.

{¶ 2} Defendant waived jury trial and was convicted following a bench trial. On September 26, 2004, Officer Hernandez of the Westlake Police Department activated the overhead lights of his patrol car to stop a stolen vehicle. Defendant briefly exited the vehicle in a well-lit shopping center before re-entering the car and driving away. He drove through the parking lot, down a major road, and onto residential property. Defendant and another occupant of the vehicle jumped out of the moving car, which eventually came to rest on some shrubbery between the yards. Defendant was soon thereafter apprehended in the vicinity.

{¶ 3} The trial court denied defendant's motion for acquittal and found him guilty as charged. The co-defendant was acquitted. The trial court imposed sentence and the sentencing journal entry included a term of post-release control. Defendant raises three assignments of error for our review.

{¶ 4} "I. The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that appellant was guilty of failure to comply with order or signal of police officer enhanced by the furthermore clause."

{¶ 5} "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, paragraph two of the syllabus.

{¶ 6} Defendant does not challenge that sufficient evidence existed to support his convictions for receiving stolen property and failure to comply with the order or signal of police officer. Rather, defendant claims there was insufficient evidence to convict him of the enhancement provision of R.C. 2921.331 because he believes the evidence did not establish a "substantial risk" of "physical harm to persons" and/or "serious physical harm to property" as defined by law. We do not agree.

{¶ 7} According to the record evidence, defendant drove a stolen vehicle at a high rate of speed through a parking lot, down a main street at nearly twice the speed limit, and into residential property. At that point, defendant drove over a fence, onto a front lawn, and exited the moving vehicle. Then, by fortune rather than design, a row of shrubs between the yards immobilized the vehicle. The homes of the yards the vehicle drove through were occupied

residences. The officers were unable to turn the engine off due to a stripped steering wheel. That no serious harm occurred to persons or property does not overcome the evidence that sufficiently established a substantial risk of it. Accordingly, Assignment of Error I is overruled.

{¶ 8} "II. Appellant's convictions for receiving stolen property and failure to comply with order or signal of police officer along with the enhancement provision were against the manifest weight of the evidence."

{¶ 9} A reviewing court may find a verdict to be against the manifest weight of the evidence even though legally sufficient evidence supports it. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 1997 Ohio 52. To warrant reversal from a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the factfinder clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387.

{¶ 10} Defendant maintains the trial court lost its way in deciding this case. In addition to those arguments advanced under his first assignment of error, defendant challenges the weight of the evidence concerning the arresting officer's identification of defendant. However, this officer testified as follows:

{¶ 11} On September 26, 2004 at 2:30 a.m., he was on duty patrolling the streets of Westlake, particularly Detroit Road. At the intersection of Crocker and Detroit Roads, he observed an Oldsmobile at a red light, ran the plates, and discovered it was a stolen vehicle. At trial, the prior and current owner of the subject vehicle confirmed that it was stolen at the time in question. The vehicle entered a shopping center when the officer activated the overhead lights of his patrol car. The driver exited the vehicle and was facing the officer. It was a well-lit shopping plaza and the officer got a good look at the driver before he ordered him back into the car. The officer positively identified defendant in court as the driver of the stolen vehicle.

{¶ 12} Defendant then drove off through the parking lot at an excessive speed and the officer pursued. The sirens were activated together with the red and blue overhead lights of the patrol car. Defendant sped down Detroit Road at about 60 mph., across a main intersection, into an apartment complex. Defendant lost control of the vehicle, ran over a fence, and then jumped out of the moving car. The vehicle ran north by the side of house towards the apartment complex. A line of shrubs between the property line of two houses stopped the vehicle. Officer Hernandez attempted unsuccessfully to shut off the engine. The peeled steering column prevented him from turning it off. Defendant was apprehended by other officers minutes after exiting the vehicle. Subsequently, the co-defendant was apprehended in the same general area.

{¶ 13} The trial court found Officer Hernandez' testimony credible and we have no reason to find otherwise. Officer Hernandez was certain of his identification of defendant and did not claim to be able to identify the other occupant of the vehicle. We note that the trial court acquitted the co-defendant due to a lack of evidence that would link him to the vehicle. The weight of the evidence supported defendant's convictions. Accordingly, Assignment of Error II is overruled.

{¶ 14} "III. The post-release control term was not properly imposed at the time of sentencing."

{¶ 15} Defendant contends that the trial court erred by failing to inform him that post-release control was mandatory. The State concedes error but maintains the appropriate remedy is to remand for resentencing rather than vacate the post-release control portion of the sentence. "The court's duty to include a notice to the offender about post-release control at the sentencing hearing is the same as any other statutorily mandated term of a sentence. And ***, a trial court's failure to notify an offender at the sentencing hearing about post-release control is error.

{¶ 16} "Accordingly, when a trial court fails to notify an offender about post-release control at the sentencing hearing but incorporates that notice into its journal entry imposing sentence, it fails to comply with the mandatory provisions of R.C. 2929.19(B)(3)(c) and (d), and, therefore, the sentence must be vacated and the matter remanded to the trial court for

resentencing." *State v. Jordan*, 104 Ohio St.3d 21, 28, 2004-Ohio-6085, ¶¶26-27.

{¶ 17} Assignment of Error III is sustained in part.

{¶ 18} Conviction affirmed; sentence vacated and cause remanded for resentencing.

It is ordered that appellant and appellee share equally the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for resentencing.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., P.J., and
KENNETH A. ROCCO, J., CONCUR.

JAMES J. SWEENEY
JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).