IN THE SUPREME COURT OF OHIO

SCOTTY R. McDONALD,	:	12-1177
Appellant,	:	On Appeal from the Lawrence County Court of Appeals, Fourth Appellate District
vs.	:	
STATE OF OHIO,	:	Court of Appeals Case No. 11CA1
Appellee.	:	

APPELLANT'S BRIEF OF SCOTTY R. McDONALD

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STATEMENT OF FACTS

On October 25, 2010, a Lawrence County Grand Jury returned a single count indictment charging Appellant, Scotty R. McDonald, with Failure to Comply with Order or Signal of Police Officer, in violation of Ohio Revised Code section 2921.331(B), (C)(5)(a)(ii), a felony of the third degree. McDonald was arraigned on November 3, 2010, and, on January 10, 2011, the case proceeded to jury trial.

At trial Sergeant Gleo Runyon of the Coal Grove Police Department testified that on September 30, 2010, he was sitting in his police cruiser adjacent to the Ashland bridge on U.S. 52. He was facing east watching traffic. (Trial Tr. at 33:12-34:11). At around 3a.m., Runyon saw headlights approach at high speed. He activated his radar and clocked the approaching car at 112 miles per hour. Id. at 34:9-36:13.

Runyon testified that, after the car (which was Mr. McDonald's Camaro) had passed his location, he "turned left[and] proceeded to follow the subject. Turned my lights and siren on in an attempt to catch up with the subject." Id. at 36:15-36:17. Runyon testified that he hit a maximum speed on U.S. 52 of 120 miles per hour. Id. at 55:20-56:1. Runyon also testified that he caught up to Mr. McDonald on the Coal Grove exit ramp and was thereafter behind him as McDonald drove into town. Id. at 36:18-36:21. The race ended when, after McDonald got off the highway, he sustained a flat tire and stopped in Ironton, OH. Id. at 41:3-41:7.

However, it is exactly 1 mile, traveling West on US-52, from the Ashland Bridge to the Coal Grove exit. Google Maps, http://goo.gl/maps/KABbM (last visited Oct. 18, 2012). And, contrary to Runyon's testimony that he attained 120mph in the pursuit on US-52, none of the 2009 Police Interceptors tested in a state study of police vehicles were able to reach 120mph in one mile. Mich. Dep't State Police, Dep't Mgmt & Budget, & Mich. State Police Precision

Driving Unit, 2009 Model Year Police Vehicle Evaluation Program, at 26 (2008), http://www.michigan.gov/documents/msp/VehicleTestBook2009_MSP_web_260463_7.pdf.

Moreover, at 112 miles per hour, McDonald would have made the trip from the Ashland bridge to the Coal Grove exit, in 32 seconds.[1] Hypothetically then, if Runyon took 2 seconds to get his car turned around, and thereafter accelerated to 60mph in the next 8 seconds, to 80mph in the next 6 seconds, 100mph in the next 9 seconds and, even assuming he reached almost exactly 120mph by the end of the one-mile stretch of highway,[2] he would have taken over 44 seconds to reach the turnoff.[3] In other words, since McDonald, at 112mph made the trip in only 32 seconds,

---

[1] $32.14\text{sec} = 5280\,ft \div \left(\frac{112\,mi/hr \times 5280\,ft/mi}{60\,\text{min}/hr \times 60\,\text{sec}/\,\text{min}}\right)$

[2] These figures approximate the data points collected in the Michigan State Police Test. Mich. Dep't State Police, Dep't Mgmt & Budget, & Mich. State Police Precision Driving Unit, 2009 Model Year Police Vehicle Evaluation Program, at 26 (2008), http://www.michigan.gov/documents/msp/VehicleTestBook2009_MSP_web_260463_7.pdf.

[3] $88\,fps = \frac{60\,mph \times 5280\,ft/mi}{3600\,\text{sec}/hr}$

$117.\bar{3}\,fps = \frac{80\,mph \times 5280\,ft/mi}{3600\,\text{sec}/hr}$

$146.\bar{6}\,fps = \frac{100\,mph \times 5280\,ft/mi}{3600\,\text{sec}/hr}$

$176\,fps = \frac{120\,mph \times 5280\,ft/\text{min}}{3600\,\text{sec}/hr}$

$d = (v_i \times t) + \left(0.5 \times \frac{v_f - v_i}{t} \times t^2\right)$

$352\,ft = (0\,fps \times 8\,\text{sec}) + \left(0.5 \times \frac{88\,fps - 0\,fps}{8\,\text{sec}} \times 8\,\text{sec}^2\right)$

$616\,ft = (88\,fps \times 6\,\text{sec}) + \left(0.5 \times \frac{117.\bar{3}\,fps - 88\,fps}{6\,\text{sec}} \times 6\,\text{sec}^2\right)$

$1188\,ft = (117.\bar{3}\,fps \times 9\,\text{sec}) + \left(0.5 \times \frac{146.\bar{6}\,fps - 117.\bar{3}\,fps}{9\,\text{sec}} \times 9\,\text{sec}^2\right)$

$3124\,ft = 5280\,ft - (352\,ft + 616\,ft + 1188\,ft)$

it would have taken Sergeant Runyon over 12 seconds to reach the exit ramp after Mr. McDonald had already exited the highway. At speeds over 100mph, 12 seconds is a very long gap between cars. At 112mph, for instance, McDonald's car would cover 1971 feet, over six and one-half football fields.[4] Thus there is, as a matter of judicially noticeable fact and mathematical truth, some question as to whether Runyon would have been close enough behind McDonald for McDonald to see the lights or hear the siren. Indeed, Sergeant Runyon himself testified that he was not one-hundred percent sure that Mr. McDonald saw his lights or heard his siren. (Trial Tr. at 71:6-71:15).

At the close of the trial, the jury was presented with a verdict form which read, as follows:

> We, the jury, find the Defendant, SCOTTY R. McDONALD (Guilty or Not Guilty) of Count One: Failure to Comply with Order or Signal of Police Officer And Caused A Substantial Risk of Serious Physical Harm To Persons or Property.

(App'x at 27). The jury circled "Guilty" and all jurors signed the verdict. Id. However the verdict form in no place mentioned that McDonald was to be convicted of a third degree felony. Id. Nor did it mention that, in order to be convicted and sentenced to a third degree felony for a failure to comply with a signal of a police officer, McDonald had to have "willfully" failed to comply in order to flee or elude the police officer. Id. McDonald had failed to comply with Runyon's signals. He was driving drunk at high speeds, and that did pose a substantial risk of serious physical harm to persons or property. But the question, which the verdict form does not

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$3124\,ft = \left(146.\overline{6}\,fps \times t\,\text{sec}\right) + \left(0.5 \times \frac{176\,fps - 146.\overline{6}\,fps}{t\,\text{sec}} \times t\,\text{sec}^2\right)$ Solve for t. $t = 19.\overline{36}\,\text{sec}$

$44.\overline{36}\,\text{sec} = 2\,\text{sec} + 8\,\text{sec} + 6\,\text{sec} + 9\,\text{sec} + 19.\overline{36}\,\text{sec}$

[4] $1971.2\,ft = 12\,\text{sec} \times \left(\frac{112\,mph \times 5280\,ft/mi}{3600\,\text{sec}/hr}\right)$

mention and the jury's verdict thus, did not answer, is whether McDonald saw or heard the signal and "willfully" chose to ignore it. The verdict form did not even indicate the degree of the offense from which one might otherwise glean that the jury intended for McDonald to be found guilty of and sentenced for, a third degree felony.

ARGUMENT

PROPOSITION OF LAW – A verdict form that includes the language, "substantial risk of serious physical harm to persons or property" from R.C. 2921.331(C)(5)(a)(ii) but neither the *mens rea* language of R.C. 2921.331(B) nor the degree of the offense, through which the jury could indicate its intent that the defendant be convicted and sentenced to a third degree felony, is insufficient to sustain a third degree felony conviction for a violation of R.C. 2921.331(B).

Ohio Revised Code section 2921.331, as it existed when McDonald's case came to trial, provided, in relevant part:

> **Failure to comply with order or signal of police officer.**
>
> (A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.
>
> (B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.
>
> (C) (1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.
>
> (2) A violation of division (A) of this section is a misdemeanor of the first degree.
>
> (3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.
>
> (4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.
>
> (5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:
>
> (i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

> (ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

Ohio Rev. Code § 2921.331(A)-(C)(5)(a)(ii) (2004).

As mentioned above, McDonald was indicted for a violation of section 2921.331(B), (C)(5)(a)(ii). In order to be guilty of this, as opposed to a simple "failure to comply" violation of 2921.331(A) there are two aggravating items of proof that must be shown: First, that the defendant's failure to comply was perpetrated with the specific intent to "willfully [] elude or flee a police officer." Ohio Rev. Code § 2921.331(B). Second, that "[t]he operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property." In other words, if a defendant were driving recklessly and causing a substantial risk of serious physical harm to persons or property and, through inadvertence, failed to comply with a direction from a police officer, that person would not be a felon. A violation of 2921.331(A) cannot be a felony, even if substantial risk of serious harm exists because it does not have the additional specific intent element of culpability found in 2921.331(B) – willful intent to flee and elude. As the verdict form indicated neither that McDonald was charged with a third degree felony nor the specific intent element indicating a violation of 2921.331(B), the jury, by signing the form, did not find McDonald guilty of a third degree felony. They found only that he had failed (for reasons unstated) "to Comply with Order or Signal of Police Officer And Caused A Substantial Risk of Serious Physical Harm To Persons or Property." (App'x at 27).

The facts of this case surely support the inference that McDonald's high-speed drunk driving caused a risk of serious physical harm to (at a minimum) property and that McDonald did not comply with the signals Sergeant Runyon issued. However judicially noticeable facts, mathematical truths, and even Runyon's testimony, suggest a legitimate question as to whether McDonald saw and willfully disobeyed Runyon's signal in order to flee or whether he disobeyed

Runyon because he was drunk, driving like a lunatic before he ever passed Runyon's police car, and simply never noticed the officer's blinking lights in the distance behind him. Under these circumstances, it is reasonable to conclude that the jury's verdict means what it says – the jury found McDonald guilty of a simple, not willful, "Failure to Comply with Order or Signal of Police Officer" and that he "Caused A Substantial Risk of Serious Physical Harm To Persons or Property." Id. As the jury apparently did not find McDonald guilty of conduct justifying a third degree felony nor state that they intended him to be convicted of a third degree felony, McDonald should not stand convicted and sentenced of a felony. This is true as a matter of fairness and logic and it is also the law in the State of Ohio.

Ohio Revised Code section 2945.75 provides as follows:

> **Degree of offense - proof of prior convictions.**
>
> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> . . . .
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

Ohio Rev. Code § 2945.75(A)(2) (2008). In Mr. McDonald's case, the verdict form stated neither the degree of the offense nor all the additional elements that must be present to find him guilty of a third degree felony—to wit, that Mr. McDonald "willfully" disobeyed an order or signal intending to flee and elude. (App'x at 27); see also Ohio Rev. Code § 2921.331(B). Thus, it does not meet the requirements of section 2945.75.

Section 2945.75(A)(2), moreover, is no mere technicality. It is the statutory expression of one of the founding principles of Anglo-American jurisprudence – that a person stands convicted only of accusations submitted to and "confirmed by the unanimous suffrage of twelve

of his equals and neighbors, indifferently chosen, and superior to all suspicion." 4 W. Blackstone, Commentaries on the Laws of England 343 (1769). In short, as the United States Supreme Court observed in Ring v. Arizona, "the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone." 536 U.S. 584, 588-89 (2002) (internal quotation marks omitted) (citations omitted); see also, Blakely v. Washington, 542 U.S. 296, 306 (2004) (holding that every disputed fact necessary to impose a sentence must be found by a jury and stating, "the judge's authority to sentence derives wholly from the jury's verdict."); see also, e.g., Id. at 303 (citations omitted) ("the 'statutory maximum' for [sentencing] purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant."); State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 52 & *in passim* (quoting Ring, 536 U.S. at 610 (Scalia, J., concurring)) (applying Blakely and related U.S. Supreme Court cases to Ohio's sentencing scheme and repeating that "all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt."). In this case, McDonald was sentenced to four years. (App'x at 23). This is above the maximum 180 days allowed for a first degree misdemeanor. Ohio Rev. Code § 2929.24(A)(1) (2011). It is, however, within the five-year maximum for a third degree felony that was allowed under statute at the time of his sentencing. Ohio Rev. Code § 2929.14(A)(3)(b) (2009). Thus, as said above, the requirements of section 2945.75 are no mere technicality. If McDonald's sentence is to be constitutional, the mandates of section 2745.75(A)(2) must be strictly obeyed – and the jury's verdict must reflect that they found every

fact necessary to sentence him to a felony or that they intended that he be sentenced to a third degree felony.

That 2745.75(A)(2) must be strictly applied is true as a matter of constitutional law, but it is also true as a matter of Ohio Supreme Court precedent. The Ohio Supreme Court, applying section 2745.75(A)(2) has already addressed a similar issue to that confronted here:

> Pelfrey's offense of tampering with records would have constituted a misdemeanor under R.C. 2913.42(B)(2)(a) but for the additional element that the records at issue were government records, a circumstance that elevates the crime to a third-degree felony under R.C. 2913.42(B)(4). However, neither the verdict form nor the trial court's verdict entry mentions the degree of Pelfrey's offense; nor do they mention that the records involved were government records. The statute [section 2945.75] provides explicitly what must be done by the courts in this situation: the "guilty verdict constitutes a finding of guilty of the least degree of the offense charged." R.C. 2945.75(A)(2). In this case, therefore, Pelfrey can be convicted only of a misdemeanor offense, which is the least degree under R.C. 2913.42(B) of the offense of tampering with records.
>
> Because the language of R.C. 2945.75(A)(2) is clear, this court will not excuse the failure to comply with the statute or uphold Pelfrey's conviction based on additional circumstances such as those present in this case. The express requirement of the statute cannot be fulfilled by demonstrating additional circumstances, such as that the verdict incorporates the language of the indictment, or by presenting evidence to show the presence of the aggravated element at trial or the incorporation of the indictment into the verdict form, or by showing that the defendant failed to raise the issue of the inadequacy of the verdict form. We hold that pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense.

State v. Pelfrey, 112 Ohio St. 3d 422, 2007-Ohio-256, 860 N.E.2d 735, at ¶¶ 13-14. Since Pelfrey explained that strict compliance with 2945.75 was necessary, a number of Ohio Courts, have analyzed section 2921.331 in situations similar to the case at bar.

In State v. Schwable, the Third District Court of Appeals decided exactly the issue posed here. 2009-Ohio-6523, *in passim.* The relevant verdict forms at Schwable's trial were written thus:

The jury verdict form A on count one of the indictment provided that:

> *We, the jury, find the Defendant, Larry R. Schwable guilty of failure to comply with an order or signal of a police officer.*

The jury verdict form B on count one of the indictment provided that:

> *We, the jury, find the Defendant, Larry R. Schwable guilty of failure to comply with order or signal of a police officer, and we further find the operation of the motor vehicle by the defendant did cause a substantial risk of serious physical harm to persons or property.*

However, neither verdict form stated the degree of the offense or the section number of the statute under which Schwable was convicted.

Schwable, 2009-Ohio-6523, at ¶ 9. The Schwable court then concluded:

> The general name of the offense is failure to comply with an order or signal of a police officer, but Schwable was charged under part (B) which contains the additional elements of willfully fleeing or eluding a police officer, and with the aggravating factor under (C)(5)(a)(ii), causing a substantial risk of serious physical harm to persons or property, elevating the offense to a third degree felony. However, part (A) of the jury verdict form contained a guilty finding for failure to comply with an order or signal of a police officer, which is the language contained in section (A) of the statute, and did not state the additional elements of willfully fleeing or eluding contained in section (B) of the statute. Additionally, neither the (A) nor (B) verdict form contained the degree of the offense, or the statute section number. . . . . Although there was an additional finding in part (B) of the verdict form that Schwable caused a substantial risk of serious physical harm to persons or property, only section (B) of the statute can be elevated to a third degree felony by a substantial risk of harm finding. A conviction under section (A) is exclusively a first degree misdemeanor.
>
> Consequently, because the plain language of the verdict form only supports a conviction for a violation of section (A) of the statute, the jury finding that Schwable created a substantial risk of harm is rendered meaningless, and only a first degree misdemeanor conviction under section (A) of the statute can stand.

Id. at ¶¶19-20. Other Ohio cases that have considered the applicability of section 2945.75 to verdict forms for violations of 2921.331 have reached roughly similar conclusions. See, State v. Brown, 2010-Ohio-4453, at ¶¶ 17-19 (deciding that a defendant's conviction of a fourth degree felony for a violation of 2921.331 must be reduced to a first degree misdemeanor because the verdict form failed to include the degree of the offense or language regarding the aggravating elements in 2921.331(C)); State v. Davis, 2009-Ohio-5273, at ¶¶ 38-50 (finding that a

defendant's conviction of a third degree felony for a violation of 2921.331(B), (C)(a)(5)(ii) must be reduced to a first degree misdemeanor because the verdict form failed to mention aggravating facts even though the verdict form specified that the level of the offense was a felony (though it failed to specify what level felony)); but c.f., State v. Garver, 2011-Ohio-2349, *in passim* & at ¶ 20 (finding that, having failed to raise the issue on direct appeal, the defendant could not collaterally attack the verdict form using Pelfrey, yet commenting, in *dicta*, that because the substantial risk of harm was mentioned in the verdict form, the verdict form complied with Pelfrey despite not mentioning the elements of 2921.331(B) or the level of the offense).

In short, as a matter of Ohio State caselaw and for reasons both constitutional and statutory, the question in these cases is a simple one: What did the jury's verdict say and does that support the conviction and sentence? The jury's verdict, in this case, supports only a misdemeanor. The jury found two things: First, they found that McDonald was guilty of "Failure to Comply with Order or Signal of Police Officer." (App'x at 27). This is sufficient to conclude they found that McDonald had "failed to comply with a[] lawful order or direction of a[] police officer . . ." in violation of section 2921.331(A). Second, they found that McDonald had "Caused A Substantial Risk of Serious Physical Harm To Persons or Property." (App'x at 27). This is sufficient to conclude that the jury found McDonald had "caused a substantial risk of serious physical harm to persons or property" sufficient to elevate a failure to comply offense provided that the failure to comply was also perpetrated with the specific intent to willfully flee and elude. Ohio Rev. Code § 2921.331(B), (C)(5)(a)(ii). However, the jury gave no indication that McDonald, in his failure to comply, had "willfully" intended to "elude or flee a police officer." Ohio Rev. Code § 2921.331(B). Thus, the fact that the jury also found that his conduct had the side-effect of causing "a substantial risk of serious physical harm to persons or property"

is of no legal significance. The plain language of the jury's verdict shows they did not find every fact necessary to convict and sentence McDonald for a third degree felony nor did they indicate, by specifying the degree of the offense, that that is what was intended. Thus, McDonald should not and cannot, as a matter of Ohio Supreme Court precedent, Ohio State statutory law, and the U.S. Constitution, be found guilty of a third degree felony for "willfully" disobeying a signal or be sentenced to years in prison thereupon.

CONCLUSION

There is reason to believe, based on the testimony in the record, judicially noticeable fact, and mathematical truth, that McDonald may not have seen Runyon's signal and thus may not have been "willfully" fleeing or seeking to elude. After all, McDonald was already driving like a maniac when Runyon first saw him. This is not a situation where McDonald was driving sedately and then accelerated to 112 to get away. He was already driving 112. Moreover, Runyon himself noted that McDonald may not have seen his signal or heard his siren. This factual observation suggests the just result would be a strict construction of the jury's verdict. However, even if the case is considered entirely without reference to the facts, the law mandates such strictness.

Pelfrey and section 2945.75 are clear as are the constitutional principles underlying them – a jury verdict form must contain the degree of the offense or all the factual elements necessary to sustain a higher tier of a graduated sentencing offense. Otherwise, a defendant may only stand convicted and may only be sentenced to the level of the offense for which the jury's verdict establishes guilt – the least level of the offense. In this case, the jury found two things: First, consistent with section 2921.331(A), they found McDonald had "Fail[ed] to Comply with Order or Signal of Police Officer." (App'x at 27). Second, consistent with 2921.331(C)(5)(a)(ii), they found that McDonald had "Caused A Substantial Risk of Serious Physical Harm To Persons or

Property." Id. What the jury did not find, however, was anything to indicate that McDonald had "willfully [] elude[d] or fle[d] a police officer." Ohio Rev. Code § 2921.331(B). Thus, the fact that the jury also found that his failure to comply (which could well have been inadvertent) had the side-effect of causing "a substantial risk of serious physical harm to persons or property" does not elevate the offense above a first-degree misdemeanor.

The conviction and sentence should be vacated and the case remanded with instructions to the trial court to enter a judgment against McDonald for a first degree misdemeanor violation of section 2921.331 and sentence him accordingly.

October 26, 2012

Respectfully submitted,

Benjamin A. Tracy, Counsel of Record

Benjamin A. Tracy

COUNSEL OF RECORD FOR APPELLANT,
SCOTTY R. McDONALD

CERTIFICATE OF SERVICE

I certify that the Appellant's Brief and Appendix were filed with the Ohio Supreme Court and copies of the same were sent by U.S. Postal Service First Class Mail to counsel for appellee, Brigham M. Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Court House, Ironton, OH 45638 on October 26, 2012.

Benjamin A. Tracy

COUNSEL OF RECORD FOR APPELLANT,
SCOTTY R. McDONALD

APPENDIX TABLE OF CONTENTS

The Supreme Court of Ohio

State of Ohio

v.

Scotty R. McDonald

Case No. 2012-1177

ENTRY

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Lawrence County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 2 of the court of appeals' Judgment Entry filed June 13, 2012, but rephrased by the court as follows:

"Is the inclusion of 'substantial risk of serious physical harm to persons or property' language from R.C. 2921.331(C)(5)(a)(ii) sufficient to sustain a third degree felony conviction for a violation of R.C. 2921.331(B) when the verdict fails to set forth the degree of the offense, and also fails to reference or include language from R.C. 2921.331(B)?"

It is ordered by the court that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Lawrence County.

(Lawrence County Court of Appeals; No. 11CA1)

Maureen O'Connor
Chief Justice

IN THE SUPREME COURT OF OHIO

SCOTTY R. MCDONALD,	:	12-1177
Appellant,	:	On Appeal from the Lawrence County Court of Appeals, Fourth Appellate District
vs.	:	
STATE OF OHIO,	:	Court of Appeals Case No. 11CA1
Appellee.	:	

NOTICE OF CERTIFIED CONFLICT

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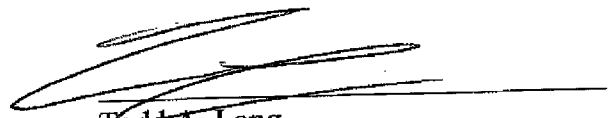
NOTICE OF CERTIFIED CONFLICT

Appellant Scotty R. McDonald hereby gives notice of certified conflict to the Supreme Court of Ohio from the judgment of the Lawrence County Court of Appeals, Fourth Appellate District, entered in Court of Appeals Case No. 11CA1 on June 13, 2012. Pursuant to S.Ct. Prac. R. 4.1, a copy of the court of appeals order certifying a conflict, a copy of the certifying court's opinion, and a copy of the conflicting court of appeals opinion are attached to this notice.

Respectfully submitted,

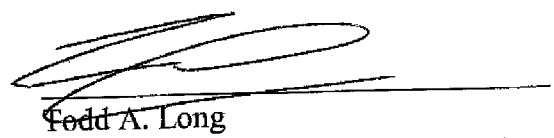


Todd A. Long

COUNSEL OF RECORD FOR APPELLANT,
SCOTTY R. MCDONALD

CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Certified Conflict was sent by ordinary U.S. mail to counsel for appellee, Brigham M. Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Court House, Ironton, Ohio 45638 on July 13, 2012.



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SCOTTY R. MCDONALD

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 11CA1
vs.	:	
SCOTTY R. MCDONALD,	:	ENTRY ON MOTION TO CERTIFY CONFLICT
Defendant-Appellant.	:	

This matter now comes on for consideration of appellant's motion to certify a conflict to the Ohio Supreme Court for final resolution pursuant to App.R. 25 and Ohio Constitution, Article IV, Section 3(B)(4). We previously affirmed his conviction for failure to comply with the order of a police officer and causing a substantial risk of harm to persons/property, in violation of R.C. 2921.331(B)&(C)(5)(A)(ii). See State v. McDonald, Lawrence App. No. 11CA1, 2012-Ohio-1528.

In affirming appellant's conviction, we declined to follow a Third District case which held inclusion of the language set out in subpart (C)(5)(A)(ii) of R.C. 2921.331 was insufficient to sustain a third degree felony conviction under the statute. See State v. Schwable, Henry App. No. 7-09-03, 2009-Ohio-6523, at ¶¶20-22. The Schwable Court held that because the jury verdict failed to set forth the degree of the offense, the verdict failed to comply with R.C. 2945.75(A)(2) as well as State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256. We found,

however, that the jury's incorporation of language from subpart (C)(5)(a)(ii) was, in fact, sufficient to comply with R.C. 2945.75(A)(2) and Pelfrey. That said, we acknowledged our conflict with the Schwable case and indicated that we would entertain a motion to certify that conflict to the Ohio Supreme Court. See McDonald, supra at ¶9, fn. 2. Accordingly, appellant's motion is well taken and is hereby sustained.

We thus certify the following question to the Ohio Supreme Court for final resolution: Is the inclusion of the "substantial risk of serious physical harm to persons or property," language from R.C. 2921.331(B)(5)(a)(ii) sufficient to sustain a third degree felony conviction under that statute when the verdict fails to set forth the degree of the offense?

Kline, J. & McFarland, J.: Concur

IT IS SO ORDERED

BY: _____
Peter B. Abele
Presiding Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, : Case No. 11CA1

vs. :

SCOTTY R. MCDONALD, : DECISION AND JUDGMENT ENTRY

Defendant-Appellant. :

APPEARANCES:

COUNSEL FOR APPELLANT: James D. Owen and Todd A. Long, 5354 North High Street, Columbus, Ohio 43214

COUNSEL FOR APPELLEE: J.B. Collier, Jr., Lawrence County Prosecuting Attorney, and Brigham M. Anderson, Lawrence County Assistant Prosecuting Attorney, Lawrence County Courthouse, 111 South Fourth Street, Ironton, Ohio 45638-1521

CRIMINAL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED:

ABELE, P.J.

This is an appeal from a Lawrence County Common Pleas Court judgment of conviction and sentence. A jury found Scotty R. McDonald, defendant below and appellant herein, guilty of failure to comply with the order of a police officer and, in doing so, causing a substantial risk of harm to persons or property, in violation of R.C. 2921.331(B)&(C)(5)(A)(ii).

Appellant assigns the following errors for review:

FIRST ASSIGNMENT OF ERROR:

"THE VERDICT FORM AND THE RESULTING JUDGMENT ENTRY WERE INSUFFICIENT UNDER OHIO REVISED CODE SECTION 2945.75 TO SUPPORT MCDONALD'S CONVICTION AND SENTENCE FOR FAILURE TO COMPLY WITH AN ORDER OR SIGNAL OF A POLICE OFFICER, AS A FELONY OF THE THIRD DEGREE."

SECOND ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT INSTRUCTED THE JURY ON RECKLESSNESS, WHICH RESULTED IN A SUBSTANTIAL AND INJURIOUS AFFECT ON MCDONALD'S RIGHTS."

THIRD ASSIGNMENT OF ERROR:

"THE TRIAL COURT COMMITTED PLAIN ERROR IN PERMITTING THE STATE TO ELICIT TESTIMONY ABOUT MCDONALD'S POST-ARREST SILENCE IN VIOLATION OF HIS FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION AND BY ALLOWING THE STATE TO COMMENT ON THE SILENCE IN CLOSING."

FOURTH ASSIGNMENT OF ERROR:

"THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT WHEN HE APPEALED TO THE JURY TO ACT AS THE COMMUNITY CONSCIENCE IN VIOLATION OF MCDONALD'S RIGHT TO A FAIR TRIAL."

FIFTH ASSIGNMENT OF ERROR:

"MCDONALD WAS DEPRIVED OF HIS RIGHT TO A FAIR TRIAL BY INEFFECTIVE ASSISTANCE OF COUNSEL."

SIXTH ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN OVERRULING DEFENDANT'S MOTION FOR A JUDGMENT OF ACQUITTAL BECAUSE THE ELEMENTS OF THE OFFENSE HAD NOT BEEN PROVEN."

In the early morning hours of September 30, 2010, Coal Grove Police Sergeant Gleo Runyon was pointing a radar gun at traffic

on Route 52. Sgt. Runyon soon clocked a vehicle driving west, toward Ironton, at 112 miles per hour. Sgt. Runyon thereupon activated his lights and siren and began to pursue the vehicle.

Eventually, Sgt. Runyon caught up to the vehicle at the Coal Grove off-ramp, but the vehicle did not stop. Instead, the driver ran a stop sign, as well as several red lights. Sgt. Runyon continued pursuit, at approximately 85 miles per hour, into Ironton. At some point, the vehicle blew a tire and came to a stop. Sgt. Runyon arrested appellant and transported him to the Ironton Police Department. A breath test revealed a 0.163 alcohol content.

On October 25, 2010, the Lawrence County Grand Jury returned an indictment that charged appellant with the aforementioned offense. At the jury trial, Sgt. Runyon testified to chasing appellant through Ironton at a speed of 85 miles per hour. He told the jury that the chase gave him reason for "alarm" as appellant was approaching an establishment named "Shenanigans," where there "appeared to be five or six people standing out on the sidewalk." Sgt. Runyon stated that he activated another siren on his cruiser to warn those people.

At the conclusion of the trial, the jury returned a guilty verdict and the trial court sentenced appellant to serve four years in prison. This appeal followed.

I

In his first assignment of error, appellant asserts that the verdict against him is deficient. In particular, he cites R.C. 2945.75[1] and State v. Pelfrey, 112 Ohio St.3d 422, 860 N.E.2d 735, 2007-Ohio-256, wherein the Ohio Supreme Court vacated a conviction on a greater degree of an offense because the verdict form did not set out the degree of the offense, nor did it list the aggravating factors that elevated the offense. Appellant argues that the verdict form in this case is equally deficient.

Although appellant correctly points out that the verdict form in the case sub judice does not set forth the degree of the offense, it does state that appellant's failure to comply with the police officer's order "Caused A Substantial Risk of Serious Physical Serious Harm to Persons or Property." Under the statute, the least degree of the offense for failing to comply with the direction of police is a first degree misdemeanor. R.C. 2921.331(C)(2)&(3). However, the offense becomes a third degree felony when, inter alia, a trier of fact determines that a defendant's actions caused a "substantial risk of serious physical harm to persons or property." Id. at (B)(5)(a)(ii). Here, the jury verdict incorporated the foregoing language from

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[1]R.C. 2945.75(A)(2) states "[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged."

the statute and, thus, satisfied R.C. 2945.75 and Pelfrey. Although technically obiter dicta, we further note that this is the same conclusion our Fifth District colleagues reached in State v. Garver, Holmes App. No. 10-CA-11, 2011-Ohio-2349, at ¶20.

Appellant cites State v. Schwable, 2009-Ohio-6523, Henry App. No. 7-09-03, 2009-Ohio-6523, at ¶¶20-22, wherein the Third District held that a verdict that contained the "substantial risk" language of R.C. 2921.331(C)(5)(a)(ii) was "meaningless" if the verdict form did not also set out that the defendant "willfully" fled or eluded police. We, however, decline to follow Schwable. Admittedly, the "willfully" mens rea, which must be found for a violation of R.C. 2921.331(B), does not exist for a violation of R.C. 2921.331(A). Nevertheless, a violation of subsection (B) of the statute is every bit as much a first degree misdemeanor as is a violation of subsection (A), but with two exceptions. Id. at (C)(3). Those exceptions include circumstances set out in "divisions" (C)(4)&(C)(5) of the statute. Id. at (C)(3). Thus, the type of aggravating elements to which the Ohio Supreme Court referred to in Pelfrey would be contained in those sub-divisions, rather than subsection (B) which includes the "willfully" fleeing or eluding elements.

In short, it is not the element of "willfully" fleeing or eluding that elevates the crime from a first degree misdemeanor

to a third degree felony but, rather, the fact that the defendant is causing a substantial risk of physical harm to person/property. Because that language from the statute was included in the jury verdict, we conclude that verdict complied with R.C. 2945.75 and Pelfrey.[2]

Accordingly, we hereby overrule appellant's first assignment of error.

II

Appellant's second assignment of error involves the jury instructions. In particular, appellant cites the trial court's definition for a reckless mental state when, as noted above, willfulness is the mens rea required for commission of this particular offense. Appellant concedes, however, that no objection was lodged to the instruction, but asserts that we should find plain error.

Generally, notice of plain error under Crim.R. 52(B) must be taken with the utmost of caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. State v. Gardner, 118 Ohio St.3d 420, 889 N.E.2d 995, 2008-Ohio-2787, at ¶78; also see State v. Puckett, 191 Ohio App.3d 747, 947 N.E.2d 730, 2010-Ohio-6597 at ¶14; State v. Patterson, Washington App. No. 05CA16, 2006-Ohio-1902, at ¶14. Furthermore, "[a] silent

[2] We concede that this case conflicts with Schwable. Thus, we will entertain a motion to certify a conflict for final resolution.

defendant has the burden to satisfy the plain-error rule[,] and a reviewing court may consult the whole record when considering the effect of any error on substantial rights." State v. Rizer, Meigs App. No. 10CA3, 2011-Ohio-5702, at ¶26; State v. Davis, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶22.

Although it is unclear why a definition for recklessness was included in the jury instructions, we conclude that it did not affect a substantial right or inflict a miscarriage of justice. The trial court gave the definition for recklessness, but did not instruct the jury that it should apply that definition and determine whether appellant behaved recklessly. The court did, in fact, correctly define "willfully" for the jury and, as the following portion of the transcript reveals, instructed the jury to apply that particular mens rea in reaching its verdict:

> "The defendant is charged in Count One with failing to comply with an order or signal of a police officer. Before you can find the defendant guilty, you must find beyond a reasonable doubt that Scotty R. McDonald . . . did operate a motor vehicle so to willfully elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop and the operation of said motor vehicle caused a substantial risk of serious physical harm to persons or property." (Emphasis added.)

In sum, although the trial court did define recklessness for the trier of fact, the court actually instructed the jury to determine if appellant had acted willfully. The court did not ask the jury to determine if appellant behaved recklessly. Thus, any negative impact from the extraneous definition in the

instructions is speculative at best and, thus, does not warrant a finding of plain error.

Accordingly we hereby overrule appellant's second assignment of error.

III

Appellant's third assignment of error involves Officer Runyon's testimony, as well as comments from the assistant prosecutor during closing argument, that appellant claims violated his Fifth Amendment rights. The first such instance involves the colloquy between Sgt. Runyon and the prosecution:

> "Q. * * * Did you arrest him right away?
>
> A. Yes I did.
>
> Q. Okay, did you notice anything else about him when you arrested him?
>
> A. Yes, I did. I smelt the odor of what seemed to be an alcoholic beverage coming off his person and asked him if he had been drinking which he just kind of shrugged his shoulders and mumbled, <u>didn't want to comply or answer any questions for me</u>." (Emphasis added.)

Appellant argues that this answer constitutes an impermissible comment on appellant's exercise of the constitutional right to remain silent and this constitutes plain error. The prosecution counters that it is unclear when appellant was arrested and whether Sgt. Runyon actually referred to appellant's post-arrest silence.

We believe that the transcript reveals that appellant was arrested "right away" after he exited his vehicle. Nevertheless, the precise timing of appellant's arrest is largely irrelevant as the Ohio Supreme Court has held that evidence of pre-arrest silence is generally inadmissible. See State v. Leach, 102 Ohio St.3d 135, 807 N.E.2d 335, 2004-Ohio-2147, at the syllabus. Furthermore, it appears that the comment suggests appellant's guilt. That said, we are not persuaded that this constitutes error, let alone plain error. The gist of Leach is that such testimony cannot be introduced as "substantive evidence" of guilt of the crime for which a defendant is being tried. Here, the trial involved an alleged violation of R.C. 2921.331, not R.C. 4511.19. Intoxication or alcohol consumption is not an element of the offense and, thus, Sgt. Runyon's testimony did not supply any substantive evidence of guilt. We also believe it speculative that the testimony caused appellant prejudice.

We also find no merit to appellant's arguments concerning alleged improper comments made during the prosecution's closing argument. During cross-examination, Sgt. Runyon was asked how he could be sure that appellant saw his "signal" to stop. When he was asked if he was one hundred percent sure appellant had seen the signal, Sgt. Runyon demurred. During closing argument, the prosecution alluded to this testimony with the following comment:

> "Now you heard [defense counsel] ask Officer Runyon, were you a hundred percent sure that [appellant] saw

> and heard your siren? The Officers said well, I'm not a hundred percent sure, I can't tell for sure, he never said that he did it, that he heard it." (Emphasis added.)

To begin, we are unsure whether this is a comment on appellant's silence or a mischaracterization of the testimony altogether. Although we located that portion of the cross-examination when Sgt. Runyon admitted to not being one hundred percent sure that appellant heard the siren, we cannot find any testimony where Runyon said appellant never said that he heard it. Indeed, the actual testimony of Sgt. Runyon is that he simply "assume[d] appellant heard the signal." We also believe that common sense does appear to support Runyon's view of the matters.

Moreover, appellant has not persuaded us that any of this caused appellant prejudice. Sgt. Runyon's admission on cross was actually damaging to the prosecution's case. If appellant did not hear or see any signal to stop, then he could not be said to have willfully evaded police. Thus, we are not persuaded that plain error under Crim.R. 52(B) is present in the case sub judice.

For these reasons, we hereby overrule appellant's third assignment of error.

IV

In his fourth assignment of error, appellant argues that a prosecution comment in its closing argument constitutes

prosecutorial misconduct. Once again because appellant did not object to the comment he has waived all but plain error.

The standard generally applied to evaluate a prosecutorial misconduct claim is whether the remarks were improper, and, if so, whether they prejudicially affected the accused's substantial rights. State v. Lang, 129 Ohio St.3d 512, 954 N.E.2d 596, 2011-Ohio-4215, at ¶155; State v. Smith (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883. The touchstone of analysis is the fairness of the trial, not culpability of the prosecutor. Lang, supra at ¶155; State v. Trimble, 122 Ohio St.3d 297, 911 N.E.2d 242, 2009-Ohio-2961, at ¶200.

In the case sub judice, the alleged improper remark is as follows:

> "And we ask when you retire to that Jury Room that you take that jury form and you tell the defendant that you can't do this in our county. You can't drive in excess of eighty miles per hour and run through stop signs and run through red lights in order to get away from a police officer because you're drunk."

Appellant argues that this is the sort of "send a message" argument that this Court has previously looked askance. See e.g. State v. Smith, Highland No. 09CA29, 2010-Ohio-4507, at ¶68; State v. Turner, Scioto App. No. 08CA3234, 2009-Ohio-3114, at ¶47. As we noted in Smith, these sorts of arguments "typically rely on community outrage and invite the jury to render a verdict based on the outrage rather than the facts of the case." 2010-Ohio-4507, at ¶68. Here, however, the uncontroverted evidence

reveals that appellant did drive in excess of eighty miles per hour and did ignore numerous stop signs and red lights. In other words, the prosecutions's argument was tailored to the facts adduced at trial rather than community passions.

Further, claims of prosecutorial misconduct must also be examined in the context of the entire trial. State v. Burns, Stark App. No. 2010CA279, 2011-Ohio-815, at ¶21; State v. Dyer, Scioto App. No. 07CA3163, 2008-Ohio-2711, at ¶34.

Thus, in the case sub judice, appellant has not persuaded us that the prosecution's remarks were impermissible, let alone reach the level of plain error.

For all these reasons, we hereby overrule appellant's fourth assignment of error.

V

Appellant's fifth assignment of error asserts that his conviction must be reversed because he received constitutionally ineffective assistance from trial counsel.

Our analysis begins with the settled premise that a criminal defendant has a constitutional right to counsel, and this right includes the right to effective assistance from counsel. McMann v. Richardson (1970), 397 U.S. 759, 771, 25 L.Ed.2d 763, 90 S.Ct. 1441,; also see State v. Pierce, Meigs App. No. 10CA10, 2011-Ohio-5353, at ¶18. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) his

counsel's performance was deficient, and (2) such deficient performance prejudiced the defense and deprived him of a fair trial. See e.g. Strickland v. Washington (1984), 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052; also see State v. Perez, 124 Ohio St.3d 122, 920 N.E.2d 104, 2009-Ohio-6179, at ¶200. However, both prongs of the Strickland test need not be analyzed if a claim can be resolved under one. State v. Madrigal (2000), 87 Ohio St.3d 378, 389, 721 N.E.2d 52; State v. Saultz, Ross App. No. 09CA3133, 2011-Ohio-2018, at ¶19. In other words, if it can be shown that an error, assuming arguendo that such error does exist, did not prejudice a defendant, an ineffective assistance claim can be resolved on that basis alone. Pierce, supra at ¶18. To establish existence of prejudice, a defendant must demonstrate that a reasonable probability exists that, but for counsel's alleged error, the result of the trial would have been different. See State v. White (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; State v. Bradley (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus.

Appellant offers two arguments to support his claim that trial counsel's representation was constitutionally ineffective. First, he argues that counsel should have objected to a number of the issues that we previously reviewed under the plain error standard. As we noted in our review of those issues, however, appellant has not persuaded us that any error in fact occurred,

let alone plain error. Appellant also claims that counsel should have objected when the prosecution argued that appellant should have heard the signal to stop. He does not, however, explain why that argument was objectionable and its impropriety is not obvious to this Court.

Appellant's other argument is that trial counsel did not present any evidence in appellant's defense. Appellant, however, offers nothing to prove the existence of any relevant evidence to offer in his defense. Prejudice, for purposes of the second prong of the Strickland test, must be affirmatively shown and will not be presumed. See e.g. Saultz; State v. Clark, Pike App. No. 02CA684, 2003-Ohio-1707, at ¶ 22; State v. Tucker (Apr. 2, 2002), Ross App. No. 01 CA2592. Here, appellant must make some showing that relevant and probative evidence actually did exist and could have been offered in his defense.

For these reasons, we are not persuaded trial counsel erred in his representation, nor are we persuaded that any such error, even if it arguably existed, prejudiced the defense.

Accordingly, for these reasons, we hereby overrule appellant's fifth assignment of error.

VI

Appellant asserts in his sixth assignment of error that the trial court erred by denying a Crim.R. 29(A) motion for judgment of acquittal he made at the end of the prosecution's case in

chief.

Generally, the standard used to review a Crim.R. 29(A) argument is the same that would apply to arguments that challenge the sufficiency of evidence. State v. Jackson, 188 Ohio App.3d 803, 937 N.E.2d 120, 2010-Ohio- 1846, at ¶5; also see e.g. State v. Brooker, 170 Ohio App.3d 570, 868 N.E.2d 683, 2007-Ohio-588, at ¶¶8-9. In reviewing for the sufficiency of evidence, our inquiry must focus upon adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541. State v. Jenks (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492. Thus, we must determine whether, after viewing the evidence and all of the inferences reasonably drawn therefrom, in a light most favorable to the prosecution, any rational trier of fact could have found all of the essential elements of the offense beyond a reasonable doubt. Jenks, 61 Ohio St.3d at 273; also see Jackson v. Virginia (1979), 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560. In the case sub judice, we conclude that sufficient evidence was adduced at trial to support appellant's conviction.

Appellant argues that only two witnesses exist who witnessed the course of events - himself and Sgt. Runyon. Because appellant pled not guilty to the charges in this case, appellant maintains that he essentially denied the charge against him. To

the extent this argument is characterizing the case as being one of conflicting accounts as to what happened, we note that in determining whether the trial court erred in denying the Crim.R.29 motion, we must assume that the witness testified truthfully. See State v. Samuel, Franklin App. No. 11AP-158, 2011-Ohio-6821.

Appellant also cites Sgt. Runyon's testimony that he could not be one hundred percent certain that appellant heard the signals to stop his vehicle and cites that as proof that he should not have been convicted. However, Sgt. Runyon testified he activated his lights and siren during the entire pursuit. The pursuit also occurred "in the middle of the night" which again, common sense would tell us that it would be exceedingly difficult for appellant not to have seen the lights behind him. This is particularly true in view of the fact that Sgt. Runyon testified that he caught up with appellant at the Coal Grove "on-ramp" on Route 52. In any case, we believe that sufficient evidence did exist to give the case to the jury and that the trial court did not err when it overruled appellant's Crim.R. 29 motion for judgment of acquittal. Accordingly, we hereby overrule appellant's sixth assignment of error.

Having considered all of the errors assigned and argued we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

LAWRENCE, 11CA1

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and appellee to recover of appellant 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 Lawrence County Common Pleas Court to carry this judgment into execution.

If a stay of execution of sentence and release upon bail has been previously granted, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, J. & McFarland, J.: Concur in Judgment & Opinion

For the Court

BY: _____
Peter B. Abele
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

STATE OF OHIO,

PLAINTIFF,

VS.

SCOTTY R. McDONALD

DEFENDANT.

JUDGMENT ENTRY
CASE NO. 10-CR-258

This matter came on for sentencing on January 14, 2011, before this Court with all parties present. The Defendant was with his counsel, John E. Kehoe and the State of Ohio being represented by Brigham M. Anderson, Assistant Prosecuting Attorney.

The Defendant having been found guilty by a jury of his peers on January 10, 2011, of the charge of Failure to Comply with the Order or Signal of a Police Officer, a violation of Ohio Revised Code Section 2921.33 (B)(C)(5) (A)(ii), a felony of the third degree.

The Court having considered the statements of counsel and Defendant, having weighed the purposes and principles of sentencing in O.R.C. 2929.11, the seriousness and recidivism factors in O.R.C. 2929.12, and following the guidance of O.R.C. 2929.13, does **HEREBY SENTENCE THE DEFENDANT, SCOTTY R. McDONALD,** to serve a term of incarceration of four (4) years in the appropriate state penal institution.

Further, it is the Order of this Court that Defendant's participation in the Intensive Program Prison ("IPP") is hereby specifically denied.

The Court informed the Defendant that he shall be subject to a period of post-release control. Post-release control is mandatory for all offenses of first degree felonies, second degree

felonies, felony sex offenses or a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened to cause physical harm to a person, and optional for all other felonies; that the period of post-release control for all felonies of the first degree and felony sex offenses, is five (5) years; for a felony of the second degree that is not a felony sex offense, three (3) years; for a felony of the third degree that is not a felony sex offense and in the commission of which the offender caused or threatened physical harm to a person, three (3) years.

If the Defendant violates the terms of the post-release control, the Defendant may be returned to prison for up to nine (9) months with a maximum for repeat violations of 50% of the stated term. In the event the violation is a new felony, the Defendant may be returned to prison for one (1) year or the remaining period of the post-release control, which ever is greater, and receive a prison term for the new felony.

In the event the Defendant is ever placed on Community Control Sanctions, if the Defendant violates the term of the Community Control Sanctions, the Court may impose a longer period of time on Community Control Sanctions, more restrictive sanctions or a specified prison term.

This notice of post-release control is incorporated herein and made part of the Court's Order.

Bond discharged.

Defendant is granted credit for time served, to-wit: 1 days(09/30/10-10/01/10) along with future custody days while the Defendant awaits transportation to the appropriate state institution.

It is further Ordered that the Defendant pay all the costs of this prosecution for which execution is hereby awarded.

The Court advised the Defendant of his right to appeal and to do so without cost, to obtain counsel for an appeal and that counsel will be appointed without cost if he is unable to obtain counsel, and his right to documents required in that appeal without cost, and his right to have Notice of Appeal timely filed on his behalf.

As a result of these admonishments and the Defendant's replies thereto, the Court appointed Attorney David Reid Dillon as appellate counsel.

JUDGE D. SCOTT BOWLING

J. B. COLLIER, JR. #0025279
PROSECUTING ATTORNEY

BRIGHAM M. ANDERSON #0078174
ASSISTANT PROSECUTING ATTORNEY

JOHN E. KEHOE #0032409
ATTORNEY FOR DEFENDANT

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

2011 JAN 12 PM 2:47

STATE OF OHIO,

PLAINTIFF,

VS.

SCOTTY R. McDONALD,

DEFENDANT.

JUDGMENT ENTRY
CASE NO. 10-CR-258
Judge D. Scott Bowling

This cause came on for a jury trial which commenced on the 10th day of January, 2011, and concluded the same date.

The Court finds that the jury returned its verdict as follows: The jury found the defendant guilty of Count One of the Indictment of the offense of Failure to Comply with the Order or Signal of a Police Officer, a third degree felony.

The Court hereby Orders a pre-sentence investigation by the Adult Probation Department of this Court and hereby sets sentencing for 8:30 AM on January 12, 2011.

JUDGE D. SCOTT BOWLING

J. B. COLLIER, JR. #0025279
PROSECUTING ATTORNEY

BRIGHAM M. ANDERSON #0078174
ASSISTANT PROSECUTING ATTORNEY

JOHN E. KEHOE #0032409
ATTORNEY FOR DEFENDANT

IN THE COURT OF COMMON PLEAS
LAWRENCE COUNTY, OHIO

STATE OF OHIO	)	
PLAINTIFF(S)	)	CASE NO. 10-CR-258
VS	)	VERDICT FORM
SCOTTY R. MCDONALD	)	
DEFENDANT(S)	)	

We, the jury, find the Defendant, SCOTTY R. MCDONALD (Guilty or Not Guilty) of Count One: Failure to Comply with Order or Signal of Police Officer And Caused A Substantial Risk of Serious Physical Harm To Persons or Property.

Each of us said Jurors concurring in said Verdict signs their name this 10 day of January, 2011.

1. [redacted]
2. [redacted]
3. [redacted]
4. [redacted]
5. [redacted]
6. [redacted]
7. [redacted]
8. [redacted]
9. [redacted]
10. [redacted]
11. [redacted]
12. [redacted]

If not guilty, proceed to Verdict Form #2, if guilty, stop and contact Bailiff.

Ohio Rev. Code § 2921.331 (2004)

2921.331 Failure to comply with order or signal of police officer.

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C)(1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in sections 2929.12 and 2929.13 of the Revised Code that are required to be considered, all of the following:

(i) The duration of the pursuit;

(ii) The distance of the pursuit;

(iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;

(iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;

(v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;

(vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;

(vii) Whether the offender committed a moving violation during the pursuit;

(viii) The number of moving violations the offender committed during the pursuit;

(ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) As used in this section:

(1) "Moving violation" has the same meaning as in section 2743.70 of the Revised Code.

(2) "Police officer" has the same meaning as in section 4511.01 of the Revised Code.

Ohio Rev. Code § 2945.75 (2008)

2945.75 Degree of offense - proof of prior convictions.

(A) When the presence of one or more additional elements makes an offense one of more serious degree:

(1) The affidavit, complaint, indictment, or information either shall state the degree of the offense which the accused is alleged to have committed, or shall allege such additional element or elements. Otherwise, such affidavit, complaint, indictment, or information is effective to charge only the least degree of the offense.

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

(B)(1) Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(2) Whenever in any case it is necessary to prove a prior conviction of an offense for which the registrar of motor vehicles maintains a record, a certified copy of the record that shows the name, date of birth, and social security number of the accused is prima-facie evidence of the identity of the accused and prima-facie evidence of all prior convictions shown on the record. The accused may offer evidence to rebut the prima-facie evidence of the accused's identity and the evidence of prior convictions. Proof of a prior conviction of an offense for which the registrar maintains a record may also be proved as provided in division (B)(1) of this section.

(3) If the defendant claims a constitutional defect in any prior conviction, the defendant has the burden of proving the defect by a preponderance of the evidence.