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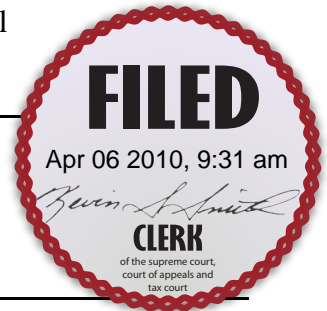
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**IN THE
COURT OF APPEALS OF INDIANA**



DAREN TOMEY,)

Appellant-Defendant,)

vs.)

No. 49A04-0910-CR-582

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Reuben B. Hill, Judge
The Honorable Mary Ann Oldham, Commissioner
Cause No. 49F18-0703-FD-52861

April 6, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Daren Tomey appeals his convictions for Theft,¹ a class D felony, and Resisting Law Enforcement² as a class D felony and a class A misdemeanor. Tomey argues that his convictions for both counts of resisting law enforcement violate the prohibition against double jeopardy and that the evidence is insufficient to support the convictions. Finding that Tomey should not have been convicted of both counts of resisting law enforcement, we reverse in part and remand with instructions to vacate the class A misdemeanor resisting law enforcement conviction. Finding the evidence sufficient to support the remaining convictions, we affirm in all other respects.

FACTS

At approximately 8:50 p.m. on March 27, 2007, Indianapolis Metropolitan Police Officer Glen Schmidt was dispatched to Five Points Road in Indianapolis on the report of a suspicious person or vehicle along the railroad tracks. After arriving at the scene, Officer Schmidt, who was wearing a police uniform, got out of his fully marked police car and observed a person later identified as Tomey walking alongside the tracks. When Officer Schmidt was within earshot of Tomey, approximately 100 to 150 yards away, he and other officers on the scene identified themselves as police officers and ordered Tomey to stop. The officers continued to approach Tomey, identifying themselves and ordering Tomey to stop approximately every twenty or thirty yards, eventually getting to within forty yards of Tomey.

¹ Ind. Code § 35-43-4-2.

Officer Schmidt observed Tomey moving back and forth between the woods and a truck, noticing that Tomey moved at a faster pace as the officers got closer to him. Officer Schmidt observed Tomey carry a large object and place it in the back of the truck.

At that point, a police helicopter arrived at the scene, illuminated Tomey with a white spotlight, and identified itself as a police vehicle. Tomey got into his truck and sped away, accelerating at a high rate of speed and “throwing gravel” as he drove away. Tr. p. 36-37. Shortly thereafter, Tomey lost control of the truck and slid off the side of the road. As Officer Schmidt approached the truck and continued to identify himself as a police officer and order Tomey to stop, Tomey exited the truck and fled on foot. Officer Kevin Stickford and his canine unit followed Tomey on foot. Officer Stickford told Tomey to stop or he would release the canine. Tomey eventually stopped and the officers placed him under arrest.

Officer Schmidt observed a large amount of copper wire that had been freshly cut in the bed of Tomey’s truck. Railroad companies use a 6- to 8-gauge copper wire along the tracks to control the signals and gate arms for crossing. The wire that the officers observed in Tomey’s truck was much thicker than ordinary household wiring and was consistent with wire commonly used on railroad tracks. There were multiple rolls of the wire, wound up like garden hoses, in the truck bed. All along the sides of the track where the officers had first observed Tomey was a “large amount” of freshly cut wire matching the diameter of the wire

² Ind. Code § 35-44-3-3.

in the truck bed. Id. at 41. Tomey did not work for the railroad or have permission to be on the tracks.

On March 30, 2007, the State charged Tomey with class D felony theft, class D felony criminal mischief, class D felony and class A misdemeanor resisting law enforcement, and class B misdemeanor railroad trespass. At Tomey's July 16, 2009, jury trial, the State dismissed the criminal mischief and railroad trespass charges. At the close of the trial, the jury found Tomey guilty of the remaining counts.

On September 10, 2009, the trial court, pursuant to alternative misdemeanor sentencing, entered judgments of conviction as class A misdemeanors on Tomey's two class D felony convictions. The trial court also entered judgment on the class A misdemeanor resisting law enforcement conviction. It imposed concurrent terms of 180 days on each of the three convictions, fully suspended except for time served. Tomey now appeals.

DISCUSSION AND DECISION

Tomey first argues that the convictions for both counts of resisting law enforcement run afoul of the prohibition against double jeopardy contained in the state and federal constitutions. The State concedes this argument, and we agree. Thus, we reverse in part and remand with instructions that the trial court vacate Tomey's class A misdemeanor law enforcement conviction and sentence.³

³ To clarify, the conviction to be vacated is the resisting conviction that was charged as a class A misdemeanor, not the conviction that was charged as a class D felony but entered as a class A misdemeanor.

Next, Tomey contends that there is insufficient evidence supporting his convictions for class D felony theft and class D felony resisting law enforcement. In evaluating the sufficiency of the evidence, we will neither reweigh the evidence nor assess witness credibility, looking instead to the evidence and reasonable inferences therefrom that support the verdict. O'Connell v. State, 742 N.E.2d 943, 949 (Ind. 2001).

To convict Tomey of theft, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally exerted unauthorized control over the property of another with the intent to deprive the owner of any part of its use or value. I.C. § 35-43-4-2. Tomey argues that the State failed to offer evidence proving that, in fact, the railroad owned the wire that was found in the back of his truck. It is true that no such direct evidence was offered. The State did, however, offer evidence that Tomey's truck bed contained multiple rolls of wire that was one-quarter to three-eighths of an inch thick wound up like garden hoses. The wire was much thicker than ordinary household wiring and was consistent with wire commonly used on railroad tracks. Additionally, Officer Schmidt observed a "large amount" of freshly cut wire along the sides of the railroad tracks where the officers had first observed Tomey. Tr. p. 41. The freshly cut wires alongside the tracks matched the diameter of the wire in the truck bed.

We find that it was reasonable for the jury to infer from this evidence that the wire found in Tomey's truck bed belonged to the railroad. The evidence also established that the officers observed Tomey place a large object in his truck bed, that he did not work for the

railroad, and that he did not have permission to be on the tracks. Thus, the evidence is sufficient to support his conviction for theft.

To convict Tomey of class D felony resisting law enforcement, the State was required to prove that he knowingly or intentionally fled from law enforcement in a vehicle after the officer, by visible or audible means, including operation of emergency lights, identified himself and ordered the person to stop. I.C. § 35-44-3-3. The record reveals that Officer Schmidt and other officers on the scene approached Tomey in fully marked police vehicles wearing police uniforms. They identified themselves as officers and ordered him to stop multiple times, getting to within forty yards of Tomey at one point. Tomey moved faster between the woods and his vehicle as the officers got closer. A police helicopter arrived on the scene, identified itself as such, and illuminated Tomey with a white spotlight, ordering him to stop. Tomey got into his vehicle, drove away at a high rate of speed, crashed his vehicle, and fled on foot. This evidence easily supports an inference that Tomey was fully aware that he was being chased by police officers. Tomey's arguments to the contrary amount to requests to reweigh the evidence, which we may not do. We find the evidence sufficient to support his conviction for resisting law enforcement.

The judgment of the trial court is affirmed in part, reversed in part, and remanded with instructions to vacate Tomey's class A misdemeanor resisting law enforcement conviction.

DARDEN, J., and CRONE, J., concur.