[Cite as *State v. Redd*, 2004-Ohio-4689.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 20284

vs. : T.C. CASE NO. 03CRB2149

CHARLES E. REDD: (Criminal Appeal from Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 3rd day of September, 2004.

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GRADY, J.

{¶1} Defendant, Charles Redd, appeals from his conviction and sentence for failure to comply with an order of a police officer.

{¶2} On September 22, 2003, while driving on Nottingham

Road near S.R. 48 in Harrison Township, Defendant saw that a female whom he knew had been stopped by the Ohio State Patrol. Sgt. Charles Wilkerson had pulled the female over on suspicion of driving under the influence of alcohol. Sgt. Wilkerson and the suspect were in a parking lot, and Sgt. Wilkerson was administering field sobriety tests.

{¶3} Defendant noticed that the woman was crying and he stopped his vehicle on Nottingham Road and called out to the woman, asking if she was okay. Because Defendant's vehicle was interfering with traffic on Nottingham Road and Defendant was distracting Sgt. Wilkerson from conducting his field sobriety tests, Sgt. Wilkerson ordered Defendant to move on.

{¶4} In response to Sgt. Wilkerson's order to leave, Defendant pulled his vehicle forward a short distance, ten or fifteen feet, approximately one car length, and again called out to the woman, inquiring if she was okay. Once again Sgt. Wilkerson told Defendant to leave, and this time he did.

{¶5} Defendant returned a short time later. By now, Sgt. Wilkerson had handcuffed the woman and secured her in the rear set of his police cruiser. This time Defendant drove into the parking lot where Sgt. Wilkerson and his female arrestee were located. Defendant parked about fifteen feet away and remained inside his vehicle while he silently observed Sgt. Wilkerson's actions.

{¶6} Sgt. Wilkerson approached Defendant's vehicle and

told Defendant to leave. Defendant began arguing that he had a right to know what Sgt. Wilkerson was doing and to observe his conduct. Sgt. Wilkerson again advised Defendant to leave, to move on, and warned him that if he didn't leave he would be arrested. When Defendant did not leave, Sgt. Wilkerson arrested him.

{¶7} Defendant was charged by complaint in Vandalia Municipal Court with failure to comply with an order of a police officer in violation of R.C. 2921.331(A). Following a trial to the court, Defendant was found guilty. The trial court sentenced Defendant to thirty days in jail but suspended twenty-seven days, fined Defendant two hundred fifty dollars plus court costs, and placed Defendant on probation.

{¶8} Defendant timely appealed to this court from his conviction and sentence, which has been stayed pending this appeal.

FIRST ASSIGNMENT OF ERROR

{¶9} "THE TRIAL COURT ERRED BY OVERRULING DEFENDANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE, AS THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SHOW THAT THE OFFICER'S ORDER TO LEAVE THE SCENE OF AN ARREST WAS A 'LAWFUL ORDER' PERTAINING TO THE CONTROL AND REGULATION OF TRAFFIC."

{¶10} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether

reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶11} "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.

{¶12} R.C. 2921.331(A) prohibits failure to comply with the lawful order of a police officer who is invested with authority to direct, control, or regulate traffic. The term "lawful order" isn't defined, but it reasonably encompasses the officer's lawful exercise of the authority to which the section refers: the direction, control, or regulation of traffic. Notably, the further provisions of the section specifically refer to conduct involving the operation of a motor vehicle by an offender.

{¶13} Defendant sat in his automobile and ignored the officer's orders to leave the scene. The officer testified that he was concerned that the Defendant might in some way interfere with his arrest of the Defendant's friend, and as a result was distracted by the Defendant's conduct. The officer said also that he was concerned for his own safety. The officer was entitled to that concern. However, the friend was by then handcuffed and confined in the officer's cruiser, and Defendant had made no effort to leave his vehicle or otherwise accost or interfere with the officer. Neither did the Defendant's vehicle impede traffic in any way or create a safety concern. Except for his persistence in remaining there, the Defendant did little if anything that might cause concern.

{¶14} The State argues that Sgt. Wilkerson's order that Defendant leave the parking lot was a "lawful order" per R.C. 2921.331(A) because it was associated with the officer's exercise of his authority to arrest Defendant's friend for a violation of R.C. 4511.19, which involves control or regulation of traffic. The State concedes that Defendant was not involved in some activity which constituted a traffic violation. Indeed, it appears that by merely sitting in his vehicle in an open parking lot, Defendant was not engaged in any conduct that implicated the direction, control, or regulation of traffic subject to the officer's lawful authority.

{¶15} Defendant argues that he had a right to be where

he was, and that he also had a right to observe the officer's discharge of his public duties. We agree. The prohibitions of R.C. 2921.331(A) must be applied with that in mind. Two other principles likewise apply. The Defendant must have engaged in conduct that R.C. 2921.331(A) expressly prohibits. R.C. 2901.21(A)(1). And, the prohibitions imposed by R.C. 2921.331(A) must be strictly construed against the state and liberally construed in favor of the accused. R.C. 2901.04(A).

{¶16} Returning to the Defendant's conduct and the concerns the officer had, a charge that might more comfortably apply to both is a violation of R.C. 2921.31(A), Obstructing Official Business. That section provides:

{¶17} "No person without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties."

{¶18} R.C. 2921.31(A) presents an additional question of Defendant's privilege to act as he did. More importantly, it also requires the state to prove that Defendant acted with the prohibited purpose. That requirement conveniently distinguishes curious or concerned onlookers from those persons who intend to obstruct or impede an officer.

{¶19} These anomalies are not resolved by judicial fiat, unguided by legislative direction. Again, we are required

by R.C. 2901.04(A) to construe sections of the Revised Code strictly against the state and liberally in favor of the accused. Doing that, we hold that the "lawful order" of a police officer that R.C. 2921.331(A) contemplates, and with which an offender fails to comply in order for a violation to occur, is one that involves the offender's act or omission in operating a motor vehicle which, by law, an officer is charged with authority to direct, control, or regulate. The manner of that operation need not be unlawful. It is only necessary that the officer be charged by law with authority to direct it and that the offender fails to comply with the officer's particular direction.

{¶20} Defendant's conduct consisted of nothing more than his failure to drive away from where his vehicle was lawfully parked when the officer directed him to do so. On this record, the direction the officer gave was not one predicated on the authority conferred on him by law to direct, control, or regulate traffic. Therefore, we cannot find that Defendant failed to comply with an order that was "lawful" within the contemplation of R.C. 2921.331(A). A contrary holding would criminalize any failure to comply with an order an officer gives while the officer is engaged in traffic direction or control, even one unrelated to those purposes. We believe that the General Assembly did not intend that broad application when it enacted R.C. 2921.331(A).

{¶21} Even construing the evidence presented in this

case in a light most favorable to the State, reasonable minds could only conclude that the evidence fails to prove the essential elements of the offense charged. Therefore, the trial court erred in failing to grant Defendant's motion for a directed verdict of acquittal.

{¶22} The first assignment of error is sustained. The judgment of the trial court will be reversed, Defendant's conviction vacated, and Defendant ordered discharged.

SECOND ASSIGNMENT OF ERROR

{¶23} "THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶24} Our disposition of the first assignment of error renders this assignment of error moot. Accordingly, we need not address this claim. App.R 12(A)(1)(c).

{¶25} Having sustained Defendant's first assignment of error, his conviction will be vacated and Defendant ordered discharged.

FAIN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. Jack D. Duncan