

[Cite as *State v. McCaleb*, 2009-Ohio-6554.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
MADISON COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-01-002
- vs -	:	<u>OPINION</u> 12/14/2009
JOSEPH McCaleb,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM MADISON MUNICIPAL COURT
Case No. CRB-0800595

Stephen J. Pronai, Madison County Prosecuting Attorney, Gregory T. Merritt, 59 North Main Street, London, OH 43140, for plaintiff-appellee

J. Michael Murray, 8 East Main Street, West Jefferson, OH 43162, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Joseph McCaleb, appeals his conviction in the Madison County Municipal Court for one count of making a false allegation of police officer misconduct. We reverse the decision of the trial court.

{¶2} On the morning of June 12, 2008, Trooper Mark Woodring was patrolling traffic on Interstate 70, traveling westbound in his marked Highway Patrol

cruiser. He noticed a car traveling eastbound, and estimated the car's speed at 85 m.p.h. Woodring then employed his radar and clocked the car at 87 m.p.h. in the 65 m.p.h. zone of I-70. After crossing the median, Woodring caught up to the blue Toyota and initiated a traffic stop.

{¶3} The driver, later identified as McCaleb, explained that he had overslept that morning and was running late for work. Woodring issued McCaleb a ticket, which McCaleb later challenged in court. After McCaleb pled not guilty to the speeding violation, the court heard Woodring's testimony regarding the traffic stop. Specifically, Woodring recalled clocking McCaleb's speed at 87 m.p.h., turning into eastbound traffic via the median, following and finally catching up with McCaleb, the location of the actual stop, as well as the fact that he never lost sight of McCaleb's vehicle except for the amount of time it took to turn across the median and into eastbound traffic.

{¶4} On cross-examination, McCaleb asked at what mile marker Woodring pulled him over, to which Woodring responded, "I think we were probably 75 or 76." During McCaleb's testimony, he claimed that he was pulled over at mile marker 81. McCaleb then presented a receipt showing he had stopped to get gas at mile marker 80, and argued that he could not have been speeding because there was not enough time or distance for him to speed after he purchased gas and reentered the highway. Woodring then testified on redirect that there were no gas stations in the area where he initiated the traffic stop.

{¶5} The trial court found the evidence sufficient to prove that McCaleb was speeding and found him guilty of the traffic offense. The trial court imposed a fine and court costs, as well as assessed two points to McCaleb's license.

{¶16} A few hours after the trial ended, McCaleb faxed a letter accompanied by an "Allegation of Ohio State Highway Patrol Employee Misconduct" form to the Ohio State Highway Patrol in Columbus, Ohio. In the letter and on the form, McCaleb alleged that Woodring lied during his testimony in order to secure a conviction against him. Specifically, McCaleb stated that Woodring's testimony regarding the location of the traffic stop was wrong and that Woodring lied about having never lost sight of McCaleb's vehicle while he turned eastbound in pursuit.

{¶17} The Highway Patrol's Internal Affairs Bureau received the letter and accusation form and eventually gave them to Woodring's supervisor, Sergeant Gary Thompson. Thompson discussed the allegations with the Post Commander and later informed Woodring that he would be conducting an internal investigation into the matter.

{¶18} As part of the investigation, Thompson and Woodring reviewed a video recording of the traffic stop and compared it with Woodring's testimony regarding the location of the traffic stop. The video confirmed that Woodring's testimony was accurate. Thompson also discussed the matter with the trial judge who informed Thompson that he did not find McCaleb's testimony credible and that he had discredited the gas station receipt. Thompson also contacted the prosecutor who stated that Woodring had been forthcoming in the process and came across as professional and honest. Thompson attempted to call McCaleb to discuss the issue with him, but McCaleb failed to return the calls or to respond to messages.

{¶19} Thompson turned over the evidence he had collected as a result of his internal investigation to the Post Commander who found McCaleb's accusation of misconduct unfounded. After Woodring was exonerated, Thompson filed a complaint

against McCaleb for making a false allegation.

{¶10} McCaleb was found guilty after a jury trial. The trial court sentenced McCaleb to 180 days in jail and fined him \$1,000, with the majority of jail time and fines suspended. McCaleb now appeals his conviction raising the following assignments of error:

{¶11} Assignment of error No. 1:

{¶12} "THE VERDICT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} In his first assignment of error, McCaleb argues that the state failed to prove beyond a reasonable doubt that he filed a complaint alleging misconduct. While McCaleb couches his assignment of error in terms of manifest weight, his argument essentially challenges both the weight and sufficiency of the evidence. We find his argument meritorious.

{¶14} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298. The relevant inquiry becomes "whether, after viewing the evidence in a light most favorable to the prosecution, any reasonable 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.

{¶15} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether

in resolving conflicts in the evidence, the tier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed * * *." *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶16} According to R.C. 2921.15(B), "no person shall knowingly file a complaint against a peace officer that alleges that the peace officer engaged in misconduct in the performance of the officer's duties if the person knows that the allegation is false." We are also mindful that according to R.C. 2901.04(A), "sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused."

{¶17} Although R.C. 2921.15 fails to define "complaint," other courts that have addressed the statute have looked to Crim.R. 3 in which complaint is defined as, "a written statement of the essential facts constituting the offense charged. It shall also state the numerical designation of the applicable statute or ordinance. It shall be made upon oath before any person authorized by law to administer oaths." In *Akron v. Davenport*, Summit App. No. 21552, 2004-Ohio-435, the Ninth District Court of Appeals also considered the definition of complaint found in Webster's Revised Unabridged Dictionary (1913) 290, as "a formal allegation or charge against a party made or presented to the appropriate court or officer, as for a wrong done or a crime committed (in the latter case, generally under oath); an information; accusation."

{¶18} In *Davenport*, the Ninth District reversed the appellant's conviction for making a false allegation against a police officer where appellant told a police sergeant that his arresting officer had punched him. The sergeant recorded appellant's allegation and used the taped statement to initiate an investigation into the arresting officer's conduct. When the investigation revealed that the arresting

officer had not punched the appellant, the sergeant charged appellant with making a false allegation in violation of R.C. 2921.15.

{¶19} The court, after reviewing the applicable definitions of complaint, also considered whether the appellant had filed his allegation as is required by the statute. In doing so, the court defined "file" as "to bring before a court or legislative body by presenting proper papers in a regular way." *Davenport* at ¶17. The court then concluded that the appellant had not filed his accusation because he simply gave his statement and then took no further action against his arresting officer.

{¶20} Here, we are faced with a similar set of circumstances. McCaleb faxed a letter and an "Allegation of Ohio State Highway Patrol Employee Misconduct" form to the Highway Patrol's headquarters. The letter and the form set forth McCaleb's basic claims regarding Woodring's testimony, but neither the letter nor the form were signed under oath or contained the other information required by R.C. 2921.15.

{¶21} While the allegation form is seemingly closer to the definition of complaint offered in Crim.R. 3 than the taped statement made in *Davenport*, the form clearly lacks the formality inherent in a criminal complaint. At the top of the form, two paragraphs explain the purpose of the form, and that the form is a way to provide contact information to the Highway Patrol for investigation purposes. However, the form goes on to state, "**However, this form is not required in order for your complaint to be processed.**" (Emphasis in original.) Given that we are to construe the statute in favor of McCaleb, we cannot say that a non-essential document that merely requests contact information is a complaint as contemplated by R.C. 2921.15.

{¶22} Regarding the statute's requirement that the complaint be filed, McCaleb never filed his letter or allegation form with a court or legislative body.

Additionally, and similar to *Davenport*, McCaleb took no further action once he faxed his documents to headquarters. When Sergeant Thompson tried to reach McCaleb to follow up on his allegations, McCaleb never returned his phone calls and did not take any other action to pursue his allegations against Woodring.

{¶23} Therefore, McCaleb faxing his letter and allegation form cannot be considered filing a complaint of officer misconduct. Having found that the letter and form are insufficient to constitute a complaint as is required under R.C. 2921.15, we find the evidence insufficient to support McCaleb's conviction. McCaleb's first assignment of error is therefore sustained, his conviction is vacated, and he is discharged.

{¶24} Assignment of Error No. 2:

{¶25} "OHIO REVISED CODE SECTION 2921.15 IS UNCONSTITUTIONAL BECAUSE IT IS IN CONTRADICTION TO THE FREE SPEECH CLAUSE OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION."

{¶26} In his second assignment of error, McCaleb claims that the statute under which he was convicted is unconstitutional. However, as McCaleb failed to challenge the constitutionality of R.C. 2921.15 at trial, we will not address his argument because according to the Ohio Supreme Court, "failure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus. Although the court later clarified its holding in *Awan* to state that a court reserves "the right to consider constitutional challenges to the application of statutes in specific cases of plain error

or where the rights and interests involved may warrant it," this is not such a case. *In re M.D.* (1988), 38 Ohio St.3d 149, syllabus. Instead, we have sustained McCaleb's first assignment of error and have vacated his conviction on non-constitutional grounds.

{¶27} Judgment reversed, McCaleb's conviction is vacated and he is discharged.

RINGLAND and HENDRICKSON, JJ., concur.