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TO FILE REHEARING MOTION  
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
THIRD DISTRICT  
JULY TERM A.D., 2004

R.E.D., a juvenile,  
  
Appellant,  
  
v.  
  
THE STATE OF FLORIDA,  
  
Appellee.

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\*\*  
\*\* CASE NO. 3D04-849  
\*\*  
\*\* LOWER  
\*\* TRIBUNAL NO. 03-10064  
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Opinion filed October 20, 2004.

An Appeal from the Circuit Court for Miami-Dade County,  
Lester Langer, Judge.

Bennett H. Brummer, Public Defender, and Harvey J. Sepler,  
Assistant Public Defender, for appellant.

Charles J. Crist, Jr., Attorney General, and Richard L.  
Polin, Assistant Attorney General, and Joseph N. De Vera,  
Certified Legal Intern, for appellee.

Before GREEN, RAMIREZ, and SHEPHERD, JJ.

RAMIREZ, J.

R.E.D. appeals the trial court's adjudication of a  
delinquency order upon which the court found him guilty of

obstruction, as well as the trial court's order of commitment. We reverse because there is no evidence to support the charge of obstruction.

Miami-Dade Police Officer Raymond Robinson, an undercover narcotics team officer, testified that he first saw R.E.D. together with an unnamed male on a street corner located near a target house. Officer Robinson observed R.E.D. and the unnamed male walk over to the target house. He then heard R.E.D. tell two other unnamed males who also approached the target house "99 that's the police there." The unnamed male who was with R.E.D. thereafter told Officer Robinson "hey that's the police, you need to get out of here." R.E.D. and the other unnamed males subsequently fled. The police thereafter arrested R.E.D.

Appellee State of Florida charged R.E.D. with the single offense of unlawfully resisting, obstructing, and opposing, without violence, a law enforcement officer in the lawful execution of a legal duty or process, pursuant to section 843.02, Florida Statutes (2003). The State based its charge on R.E.D.'s obstruction of the police officer's ongoing investigation. The trial court subsequently found R.E.D. guilty of the charged offense of obstruction and adjudicated him delinquent.

R.E.D. argues that he did not resist a police officer or obstruct a police officer engaged in the lawful exercise of a

legal duty. We agree and adopt Judge Gunther's analysis in Jay v. State, 731 So. 2d 774, 775 (Fla. 4th DCA 1999). "To support a conviction under section 843.02, the state must show: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the action by the defendant constituted obstruction or resistance of that lawful duty." See also S.G.K. v. State, 657 So. 2d 1246, 1247 (Fla. 1st DCA 1995). In D.G. v. State, 661 So. 2d 75, 76 (Fla. 2d DCA 1995), the court provides three legal duties, when coupled with words alone, which will result in obstruction of justice, (1) serving process; (2) legally detaining a person; or (3) asking for assistance. The State does not argue that Officer Robinson was serving process or asking for assistance. The State contends that Officer Robinson was legally detaining a person. Thus, if the officer could have arrested the two other unnamed males who fled as a result of R.E.D.'s warning, the State would have a valid obstruction prosecution. The problem for the State, however, is that at the point that R.E.D. warned the two unnamed males, the unnamed males had not yet committed any crime. The State argues that an interference with an officer's ongoing sting operation constitutes obstruction. This is an argument that the court in Jay expressly rejected.

In Jay, the officer involved in a sting operation attempted to solicit two females when the defendant instructed the females

not to enter a vehicle and identified the officer as a cop. The two females eventually walked away and the police did not arrest them. The court concluded that there was no evidence that the two females had committed any crime upon which the officer could have based an arrest. Thus, the officer was "not legally detaining a person," and therefore he was not engaged in the lawful execution of any legal duty. Jay, 730 So. 2d at 777.

We find that Officer Robinson, like the officer in Jay, was not involved in the process of detaining anyone when he encountered R.E.D., and he was thus not engaged in the lawful execution of any legal duty. When R.E.D. warned the two unnamed males of the police's presence, Officer Robinson was not yet prepared to arrest the two unnamed males and had no other basis upon which to prevent the escape of the unnamed males as suspects. The unnamed males had simply approached the target house, were not involved in any criminal activity, and were never arrested. These facts are quite different from the facts in Porter v. State, 582 So. 2d 41, 42 (Fla. 4th DCA 1991), where the defendant's words, "28 plain clothes," impeded the officers' attempt to arrest known drug dealers who effectively escaped apprehension. In the case before us, Officer Robinson was thus not involved in the execution of a legal duty when R.E.D. warned the two unnamed males of the police's presence.

We therefore reverse R.E.D.'s conviction for obstruction and remand this cause to the trial court.

GREEN, J., concurs.

(Shepherd, J. dissenting)

I respectfully dissent. No one yells "99 police" to signal that the ice cream truck is coming. Forecasting "99 police" is meant to alert all nearby hearers of police presence, so that any illegal acts can quickly come to a close, evidence can be flushed, and law enforcement can be frustrated.

This case is on all fours with Porter v. State, 582 So. 2d 41 (Fla. 4th DCA 1991), where the lookout Porter yelled out certain code words and caused suspected drug dealers to run from the scene. The police had had the area under surveillance and were hoping to have the element of surprise to their advantage until Porter shouting "28 plainclothes" foiled their drug sweep. Porter was arrested and convicted for obstructing and interfering with the officers in performance of their duties. "In short, Porter served as a lookout for drug dealers and because of his warning to them they were able to escape from the police officers." Porter, 582 So. 2d at 42.

In Porter, the circuit court in considering the testimony of the police officer noted that it was

well aware of . . . lookouts who[se] sole purpose is to aid and assist others engaged in criminal endeavors. And they do so by notifying others [that] the police are in the area so that they may discard their evidence. That is not constitutionally protected

speech. . . . It does constitute in the court's view evidence of the crime of obstruction . . . .

Id.

Similarly here also, on December 12, 2003, Officer Raymond Robinson had been conducting a reverse operation in the subject neighborhood, and a couple of the houses had already been taken down. Detectives were posted both inside and outside the homes under surveillance, so that buyers could be directed in to make the sale. Officer Robinson was meandering outside of the target house on his bicycle, and sometimes on foot, with an ear piece under his hooded street attire to keep in contact with the detectives inside. His official duties in support of the operation were to observe whether persons were selling in the area, to see what people were warning about the police, and to alert the officers in the house of who was coming to purchase drugs. Officer Robinson testified that twelve arrests had already been made that day as a result of the reverse operation in that neighborhood.

On the day in question, while Officer Robinson and his associates inside were engaged in carrying out the sting operation, two individuals were about to enter the gates of the target house when R.E.D. gave them the unmistakable warning to flee—"99 that's the police there." R.E.D.'s companion told Robinson to skedaddle, with a "get out of here, poppy." As a

result of the warning, the two unnamed individuals who were approaching the house changed directions and left. R.E.D. was arrested by other officers in the area for obstructing police work.

Undoubtedly, R.E.D.'s speech-conduct obstructed the police officer's ongoing investigation and brought their sting operation to a grinding halt. In my opinion, the lower court was correct in finding that R.E.D. was guilty of violating § 843.02, Fla. Stat. (2003) in "obstruct[ing] . . . any officer . . . in the execution of any legal duty."

The majority's conclusion, relying on Jay v. State, 731 So. 2d 774 (Fla. 4th DCA 1999), that an officer must legally or physically detain a suspect before a lookout can be charged with obstruction, is illogical. In Jay, the undercover officer was engaged in a discussion with two prostitutes when Jay warned them to discontinue association by identifying the officer as a cop.

I believe Jay was wrongly decided. It makes little sense to condition the concept of "execution of legal duty," to mere physical apprehension after the legal elements for a crime are complete. I am confident that the officers in Jay were not talking to the ladies there for their own pleasure in seeking witty banter. The course of conversation engaged in with the prostitutes beforehand in that case was as much the execution of



official police duties, as would have been their subsequent detainment and arrest of the ladies, should they have so solicited. A lookout through his words of warning can interfere with the execution of law enforcement during the pre-commission stage of the crime, as well as during the post-commission arrest stage with his actions. See J.V. v. State, 763 So. 2d 511, 513 (Fla. 4th DCA 2000) (Polen, J. dissenting) ("the actions of the suspected seller indicated some likelihood that he was about to sell [Detective] Silverman illegal drugs. I would hold that Silverman was performing a legal duty, and J.V.'s warning interfered with or obstructed that performance"). There is no legal or other reason to create the false distinction of pre- and post- crime commission, when the end result of improvident verbal utterances can prematurely disrupt and frustrate police operations and objectives, as much as physical actions can following a crime. See Wilkerson v. State, 556 So. 2d 453 (Fla. 1st DCA), rev. denied, 564 So. 2d 1088 (Fla. 1990) (a bystander who protested police effects to arrest drug suspect had his conviction affirmed because his conduct involved physical opposition to police, in addition to yelling and cursing).

Unfortunately, there is some tension in this area of the case law. Compare Jay v. State, 731 So. 2d 774 (Fla. 4th DCA 1999) and Porter v. State, 582 So. 2d 41 (Fla. 4th DCA 1991). The differences between the facts of Porter and Jay are

negligible, yet the same district which considered both cases went in opposite directions. See also J.V. v. State, 763 So. 2d 511 (Fla. 4th DCA 2000) (majority and dissenting opinions). Even our district has not been completely clear on this subject. See State v. Dennis, 684 So. 2d 848 (Fla. 3d DCA 1996).

In its brief, the defense puts considerable reliance on our Dennis decision. In that case, officers were hiding out in a car waiting for their cue to make an arrest following the sale of drugs at a distant location, when Dennis yelled out "ninety-nine." Dennis who was not the target of the undercover drug operation was placed under arrest for obstruction. We found that Dennis did not commit a crime by yelling "ninety-nine," noting that

there was no testimony indicating defendant was aware of anyone selling drugs several blocks away. Words alone generally cannot support a charge of obstruction of justice. Dennis was correct in his assertion that there was no evidence connecting him to the drug deal and also no evidence that his yelling "Ninety-nine" resulted in the target getting away.

Dennis, 684 So. 2d at 849 (citations omitted). Dennis is factually different from the instant case because Dennis gave his warning "several blocks away" from the target house, id., while here, the siren was sounded by the front gate. Furthermore, Dennis' yelling did not "result[] in the target getting away," id., while R.E.D.'s alarm did cause two individuals to leave the subject house. Because of these

differences, Dennis, in some respects, should require the affirmation of R.E.D.'s conviction.

Though factually distinguishable and unhelpful to R.E.D.'s defense, Dennis, in my view, is also internally flawed. In considering the case law from the Fourth District, we redeemed Dennis because he was unlike the defendant Porter who "was part of the criminal activity, since he was acting as a lookout." Dennis, 684 So. 2d at 849, citing Porter, 582 So. 2d at 41. In so doing, we may have created the impression that one who is unconnected to the underlying criminal activity should be treated more softly.

It is my opinion that both the Dennis and Jay cases are splitting hairs. Again, it begs common sense to condition the outcome of these cases on whether the obstructionist was a sponsored lookout, such as in Dennis, or whether the elements of the crime were finalized so that the officer could make a legal arrest, such as in Jay. Whether the crime is complete, or whether the obstructionist is a member of the criminal enterprise under investigation, shouting out warnings of police presence is done for the obvious—to assist criminal brethren avoid arrest by curbing its otherwise willingly deviant behavior, to give a "heads up" on eliminating potentially prosecutorial evidence, and to obstruct police efforts. For when

is the presence of law enforcement broadcast in high crime volume neighborhoods for innocuous reasons?

Lastly, in this genre of cases, I also find it quite troublesome that the speech conduct of these obstructionists can merely be brushed off as an exercise of the First Amendment rights. See Dennis, 684 So. 2d at 849 ("Words alone generally cannot support a charge of obstruction of justice"). Context is paramount. There is a grave difference between the words uttered by an obstructionist to signal police presence to balk an undercover operation, and uttering generalized sentiments against authority or questioning police. Compare Jay, Porter, and City of Houston v. Hill, 482 U.S. 451 (1987) (local ordinance found overbroad when defendant convicted of obstruction had told police to pick on someone his own size); D.G. v. State, 661 So. 2d 75 (Fla. 2d DCA 1995) (defendant's verbal protest and refusal to answer police questions during a search for a robbery suspect held not to be obstruction of justice). It is confounding that a defendant's sheer opposition and desire to frustrate police work by bellowing warnings in gang and drug-infested neighborhoods, where many of its citizens would welcome a restored and orderly atmosphere, could remotely be considered protected constitutional activity.

In sum, no one ever warns unless there is trouble! R.E.D.'s conviction should not totter on abstruse issues of

whether he was a formal lookout, how much knowledge he may have had of ensuing criminal activity, whether the projected criminal act was embryonic or full-term, or misapplication of the First Amendment. R.E.D. has cast his lot in siding with and assisting his criminal brethren; but for his statements, the official police operation would not have come to a halt. This is sufficient to support a conviction under § 843.02, Fla. Stat. (2003). For the reasons expressed in this opinion, I would affirm the conviction below.

So dissenting.