

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 09-CA-66
MICHAEL HOPKINS	:	
	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Appeal from the Richland County Court of
Common Pleas Case No. 2008-CR-492H

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: May 28, 2010

APPEARANCES:

For Plaintiff-Appellee:

JAMES J. MAYER, JR.
Richland County Prosecutor
38 South Park Street
Mansfield, Ohio 44902

For Defendant-Appellant:

RYAN M. HOOVLER
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Mansfield, Ohio 44902

KIRSTEN PSCHOLKA-GARTNER
Assistant Prosecuting Attorney
(Counsel of Record)

Delaney, J.

{¶1} Defendant-Appellant, Michael Hopkins, appeals from his conviction of one count of Failure to Comply With the Order or Signal of a Police Officer, a felony of the third degree, in violation of R.C. 2921.331(B), stemming from his actions occurring on June 28, 2008.

{¶2} At approximately 3:00 a.m. on June 28, 2008, Appellant was traveling in a red Chevrolet pick-up truck on State Route 13, when Trooper Stoffer of the Ohio Highway Patrol, observed Appellant travel left of center. Trooper Stoffer activated his overhead lights and attempted to pull Appellant over; however, Appellant failed to pull over and continued traveling northbound on Route 13, weaving in and out of his lane as he drove past a car and a semi-truck, both of which were traveling in the opposite direction.

{¶3} Trooper Stoffer then activated his siren, but Appellant still refused to pull over. Appellant instead turned onto State Route 545, where he accelerated to speeds in excess of 90 miles per hour in a 55 mile per hour zone. Appellant drove the truck over a set of railroad tracks; at that time the truck went airborne and the tailgate fell off of the truck and onto the roadway directly into the path of Trooper Stoffer's cruiser. Appellant lost control of his vehicle while on Route 545 and the truck veered off of the road and rolled into a ditch.

{¶4} Appellant was removed from the vehicle and was checked for injuries. While he was being examined, he exhibited signs of intoxication and was given a breathalyzer test. His blood alcohol level registered at 0.149, nearly twice the legal limit. Appellant stated to Trooper Stoffer that he had been driving; however, he denied

that he had been drinking and stated that he did not know he was being pursued. According to the trooper, there were no adverse weather conditions during the chase, but the roads were still wet from a prior rain.

{¶5} Trooper Stoffer issued Appellant a citation for operating a vehicle while intoxicated, for driving under suspension, and traveling left of center. He also filed a felony complaint against Appellant for failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B). Appellant waived his right to a preliminary hearing and his case was bound over to the Richland County Grand Jury.

{¶6} The Richland County Grand Jury indicted Appellant on one count of failure to comply, in violation of R.C. 2921.331(B), and alleged that Appellant's operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property, in violation of R.C. 2921.331(C)(5)(a)(ii), making the crime a felony of the third degree.

{¶7} Appellant pled not guilty to the charge at his arraignment. On December 31, 2008, he appeared for a trial date and changed his plea to no contest to the charge. During the plea hearing, Appellant's trial counsel argued that the charge of failure to comply should be reduced to a misdemeanor of the first degree because there was insufficient evidence to establish that Appellant caused a substantial risk of serious physical harm to anyone other than himself. The trial court rejected counsel's argument and proceeded to find Appellant guilty of the felony of the third degree. The trial court admitted a video captured on Trooper Stoffer's dash camera, which recorded the whole chase.

{¶8} Appellant was sentenced to two years in prison. The trial court, during sentencing, noted that Appellant was being sent to prison because he "created a

situation that could have gotten [him] killed, that could have gotten other people killed, and [he] didn't take it seriously." The court went on to state that it would consider granting Appellant judicial release after Appellant had served 30 days of his sentence. On July 22, 2009, the trial court granted Appellant's motion for judicial release and the remainder of Appellant's prison term was suspended.

{¶9} Appellant now challenges his conviction under R.C. 2921.331(B), of the third degree felony, and raises one Assignment of Error:

{¶10} "I. THE TRIAL COURT ERRED WHEN IT FOUND THE DEFENDANT/APPELLANT GUILTY AND SENTENCED HIM TO A THIRD DEGREE FELONY FAILURE TO COMPLY CHARGE BASED ON AN INTERPRETATION OF OHIO REVISED CODE 2921.331(B) WHICH ALLOWED FINDING THE DEFENDANT/APPELLANT GUILTY WHEN HE ONLY CAUSED A SUBSTANTIAL RISK OF SERIOUS HARM TO HIMSELF AND NO ONE ELSE."

I.

{¶11} In his sole assignment of error, Appellant claims that there was insufficient evidence to convict him of failure to comply under R.C. 2921.331(B) and (C)(5)(a)(ii), a felony of the third degree.

{¶12} Appellant concedes that there was sufficient evidence to convict him of the underlying misdemeanor failure to comply, in violation of R.C. 2921.331. His complaint is that the evidence was insufficient to prove the enhancement to the third degree felony because there was no evidence that he created a substantial risk of serious harm to persons or property.

{¶13} R.C. 2921.331(C)(5) provides that:

{¶14} “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:

{¶15} “* * *

{¶16} “(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.”

{¶17} A substantial risk is defined in R.C. 2901.01(A)(8) as “a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.”

{¶18} Appellant contends that because the only person that he presented a risk to was himself, that his conviction under R.C. 2921.331(B) as a third degree felony cannot stand. We disagree.

{¶19} The evidence shows that Appellant was traveling in a red Chevrolet pick-up truck on State Route 13, when Trooper Stoffer observed him travel left of center. When Trooper Stoffer activated his overhead lights and attempted to pull Appellant over Appellant refused to pull over and continued traveling northbound on Route 13, weaving in and out of his lane as he drove past a car and a semi-truck, both of which were traveling in the opposite direction.

{¶20} During the pursuit, Appellant violated numerous traffic laws, accelerated to speeds in excess of 90 miles per hour in a 55 mile per hour zone, and the tailgate of his truck fell into the roadway directly into the path of Trooper Stoffer’s cruiser. Appellant lost control of his vehicle while on Route 545 and the truck veered off of the road and

rolled into a ditch. Upon extracting Appellant from his vehicle, the trooper discovered that Appellant was also driving with a blood alcohol level of almost twice the legal limit.

{¶21} These facts constitute sufficient evidence that Appellant created a substantial risk of physical harm to persons or property, those persons being himself, Trooper Stoffer, and other motorists on the road. Additionally, he created a substantial risk of harm to property, that being the trooper's cruiser, his own vehicle, and the real property where he wrecked his vehicle.

{¶22} Even if we were only to consider the "substantial risk" that Appellant posed to himself, Ohio courts have held that a substantial risk to one's self is sufficient for a conviction under R.C. 2921.331(B) as a felony of the third degree. See *State v. Hall*, 8th Dist. No. 92625, 2009-Ohio-5695 (finding that sufficient evidence of substantial risk of physical harm existed where offender ran three to four stoplights, "nearly" collided with a parked car, and where offender jumped from the vehicle while it was still moving, almost running over himself); see also, *State v. Moore* (January 28, 1993), 8th Dist No. 61673, (finding that offender put himself and passenger in danger of serious physical harm by refusing to submit to officer's order); *State v. Payne*, 3rd Dist. No. 5-04-21, 2004-Ohio-6487 (determining that offender who ignored ten stop signs and exceeded speeds of one hundred miles per hour and wrecked his car, causing his vehicle significant damage, had placed himself and others at substantial risk of serious harm).

{¶23} Although this incident occurred in the middle of the night when traffic was light, there was still a strong possibility of a collision between Appellant's vehicle and Trooper Stoffer's cruiser, especially given Appellant's erratic, high speed driving, and the fact that he was legally intoxicated.

{¶24} Moreover, the mere fact that Appellant did not cause an actual collision with another vehicle or serious harm is irrelevant. Here, he was convicted under R.C. 2921.331(C)(5)(a)(ii), which deals with a “substantial risk.” Because Appellant was fortunate enough not to actually cause harm is of no consequence. It is only the strong possibility that harm could occur that creates culpability under R.C. 2921.331(C)(3). *State v. Semenchuk* (1997), 122 Ohio App.3d 30, 701 N.E.2d 19. Based on the circumstances described above, the trial court could reasonably conclude that a substantial risk of serious physical harm to persons or property existed as a result of Appellant’s reckless driving.

{¶25} Finding Appellant’s argument to be without merit, we overrule his assignment of error. The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

[Cite as *State v. Hopkins*, 2010-Ohio-2441.]

IN THE COURT OF APPEALS FOR RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
MICHAEL HOPKINS	:	
	:	
Defendant-Appellant	:	Case No. 09-CA-66
	:	

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to Appellant.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE