[Cite as *State v. Lentz*, 2015-Ohio-1572.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-14-1084

Appellee — Trial Court No. CR0201302750

v.

Jordan Lentz — **DECISION AND JUDGMENT**

Appellant — Decided: April 24, 2015

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jennifer Liptack-Wilson, Assistant Prosecuting Attorney,
for appellee.

Stephen D. Hartman, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a March 20, 2014 judgment of the Lucas County Court of Common Pleas, which denied appellant's motion to suppress filed in the underlying drug possession case. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellant, Jordan Lentz, sets forth the following sole assignment of error:

> The trial court committed reversible error when it denied Appellant's Motion to Suppress evidence of six pills which turned out to be Oxycodone and Acetaminophen because officers did not have probable cause to arrest Appellant on the Disorderly Conduct-Intoxication charge.

{¶ 3} The following undisputed facts are relevant to this appeal. On September 3, 2013, the Toledo Police Department received a report of an assault in progress occurring near a major intersection located in east Toledo. A description of the assailant was furnished by the party reporting the incident. Following receipt of this report, officers were dispatched to the location of the incident.

{¶ 4} As the responding officers travelled to the location, they observed appellant, who matched the description of the assailant, walking less than a block away from the location given for the assault. Accordingly, given the matching description and proximity, the officers stopped appellant.

{¶ 5} Upon stopping appellant, one of the officers observed appellant to be exhibiting multiple indicia of substance use such as slurred speech, glassy eyes, and an odor of alcohol. Based upon 21 years of experience as a police officer and his direct observations of appellant, the officer concluded that appellant was intoxicated.

{¶ 6} Under these circumstances, with an intoxicated individual walking along a busy east Toledo street and given that the facts suggested that appellant had just committed an assault, the officer determined that appellant posed a risk of harm.

Appellant was arrested and charged with disorderly conduct-intoxication. Appellant was subsequently identified by the victim as the assailant. Following appellant's arrest, the arresting officer performed a safety search of appellant's person and recovered six pills in appellant's pocket later determined to be oxycodone.

{¶ 7} On October 10, 2013, appellant was indicted on one count of aggravated possession of drugs, in violation of R.C. 2925.11(A), a felony of the fifth degree. On February 21, 2014, appellant filed a motion to suppress alleging that the seizure of the drugs was improper as it occurred prior to the identification of appellant by the victim. The motion was denied. On April 14, 2014, appellant voluntarily entered a plea of no contest to the single drug possession count. This appeal ensued.

{¶ 8} In the single assignment of error, appellant similarly maintains that the trial court's denial of the motion to suppress was improper because the drugs were recovered from appellant's person prior to being positively identified by the assault victim as the perpetrator. We are not persuaded.

{¶ 9} The Supreme Court of Ohio delineated in *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, at ¶ 8, the applicable standard of review to be utilized in a disputed motion to suppress case as follows:

> Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact and is therefore in the best position to resolve factual questions and evaluate the credibility of witnesses * * *

> Consequently, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence * * * Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard.

{¶ 10} We have carefully reviewed and considered the record of evidence in this matter in order to determine if the record encompasses convincing evidence of impropriety in connection to the recovery of the subject drugs from appellant's person sufficient so as to warrant reversal.

{¶ 11} The record reflects that immediately prior to appellant's arrest a report was made to the Toledo Police Department of an assault in progress at a specific intersection in east Toledo. A detailed description of the perpetrator was furnished. Upon timely responding to the vicinity of the reported assault, the responding officers observed appellant, who matched the description of the assailant, walking in close proximity to the location of the assault. Accordingly, appellant was stopped and questioned by the officers. In the course of that exchange, an officer possessing 21 years of experience as a police officer observed appellant to exhibit multiple signs of intoxication so as to present a potential risk of harm.

{¶ 12} Faced with these facts and circumstances, the record shows that the responding officers placed appellant under arrest and thereby conducted a safety search of appellant's person in the course of the arrest. During the search, multiple pills were

recovered from appellant which were later determined to be oxycodone. Appellant was subsequently positively identified by the victim of the underlying assault as the perpetrator of that offense.

{¶ 13} Although it is asserted that this court's holding in *State v. Graves,* 173 Ohio App.3d 526, 2007-Ohio-4904, 879 N.E.2d 239 (6th Dist.) mandates reversal in this matter, we do not concur. In *Graves*, the Norwalk Police Department responded to a description furnished by a drug informant of a man allegedly in possession of a bag of marijuana. The responding officers located a man standing on the sidewalk in the location given matching the description provided by the informant. The officers found the suspect exhibited indicia of intoxication. The suspect was arrested for disorderly conduct/public intoxication and a bag of marijuana was recovered from his person during the search performed incident to the arrest.

{¶ 14} In reversing the denial of the motion to suppress in *Graves*, this court emphasized that the element of risk of harm was absent given the context of a man standing alone on a sidewalk matching the description of someone possibly in possession of marijuana. This court held in pertinent part, "Consequently, police lacked probable cause to arrest appellant because appellant was only standing or walking on the sidewalk. Appellant did not create a risk of harm." *Graves*, ¶ 25.

{¶ 15} We find that the circumstances present in *Graves* are materially distinguishable, and therefore not controlling, in the instant case. In contrast to the scenario in *Graves*, in which no physical assault had just occurred and it was a matter of a

suspect potentially in possession of marijuana based upon an informant, the facts of this case encompass police officers responding to an emergency 9-1-1 call from a concerned citizen of an assault in progress, observing a suspect matching the description of the assailant in the immediate vicinity of the physical assault, and then determining that suspect to also exhibit signs of intoxication.

{¶ 16} R.C. 2910.01(A)(7) statutorily defines risk as, "[A] significant possibility, as contrasted with a remote possibility, that a certain result may occur or that certain circumstances may exist." In *Graves*, there was no evidence sufficient to constitute the element of risk of harm, thereby undermining probable cause for the disorderly conduct arrest and invalidating the evidentiary value of the drugs recovered during the search incident to that arrest. That is not the situation reflected by the instant case. In this case, the probable cause for the disputed disorderly conduct/public intoxication arrest was established by the risk of physical harm posed by an intoxicated person matching the description of the perpetrator of an assault that was reported to 9-1-1 as it was occurring, walking down the public streets of Toledo in the immediate vicinity of the reported assault location shortly after the report was made.

{¶ 17} We find that under the facts and circumstances of the present case, there was more than a remote possibility that appellant presented a risk of physical harm to himself or another so as to furnish probable cause for the disputed disorderly conduct

arrest which led to the search of appellant's person. Accordingly, we find that the denial of the motion to suppress was not improper. We find appellant's assignment of error not well-taken.

{¶ 18} Wherefore, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE

James D. Jensen, J.,
DISSENTS.

JENSEN, J.

{¶ 19} I respectfully dissent. The question before the trial court on the motion to suppress was whether the Toledo Police Department had probable cause to arrest appellant under the Toledo disorderly conduct ordinance, Toledo Municipal Code

509.03(b)(2). I find there was no probable cause to arrest appellant under the ordinance. Thus, appellant's sole assignment of error should have been well-taken.

{¶ 20} Toledo Municipal Code 509.03(b)(2) provides "No person, while voluntarily intoxicated, shall do either of the following: * * * (2) Engage in conduct or create a condition that presents a risk of physical harm to the offender or another, or to the property of another." "Risk" is defined as "a significant possibility, as contracted with a remote possibility, that a certain result may occur or that certain circumstances may exist." Toledo Municipal Code 501(g).

{¶ 21} Toledo Municipal Code 509.03(b)(2) is identical to R.C. 2917.11(B)(2). In *State v. Graves*, 6th Dist. Lucas No. H-07-005, 2007-Ohio-4904, we held that

> The disorderly conduct statute focuses not on the drunken state of the accused but rather upon his conduct while drunk. *State v. Pennington*, 5th Dist. Stark No. 1998CA00137, 1998 WL 818632 (Nov. 16 1998). The law requires some affirmative behavior on the part of the defendant and does not prohibit merely being intoxicated. *State v. Jenkins*, 6th Dist. Lucas No. L-97-1303, 1998 WL 161190, *7. *Id.* at ¶ 7.

{¶ 22} Here, Toledo Police officers spotted the appellant—a man who matched the description of the suspect—while responding to a call of an assault in progress. The officers testified that when they approached appellant, he was not doing anything to cause

inconvenience or annoyance to anyone, he was not harassing anyone, and he was not doing anything that created a risk of physical harm—he was "just walking on the sidewalk."

{¶ 23} In the arresting officer's own words, appellant was arrested for disorderly conduct "due to his signs of intoxication" and "for his own safety." Yet, when asked which specific factors led the officer to believe that an arrest was warranted, the officer could not describe any affirmative conduct on behalf of appellant that caused the officer to believe that appellant presented a risk of physical harm to himself. Rather, the arresting officer stated,

> He was walking down the sidewalk, and when we saw him I believe I testified we were very close to the scene so we whipped around. So I didn't have a whole lot of time to watch his gait, his walk, to see if he was stumbling. Although, during our interview with him he was smelling strongly of alcoholic intoxicant, exhibited slurred speech and glassy eyes. And if we do not take some course of act, in some cases, then it can be upon the City and upon us if something happens to that individual after we stop them. In other words, he gets injured, gets hit by a car, falls, then we can be held accountable.

{¶ 24} In *Graves*, a man matching a suspect's description was standing or walking on a sidewalk, alone, in front of an informant's downtown area apartment building in the chilly, early morning hours. *Graves* at ¶ 3. Upon speaking with the suspect, officers

determined that he had "a strong odor of alcohol on his breath, his speech was slurred, and his movements were slow and deliberate." *Id.* at ¶ 3. The surrounding streets were empty, he did not attempt to run, and at no time did he venture into the street. *Id.* at ¶ 24. After careful consideration of the record, we determined that law enforcement officers did not have probable cause to effectuate an arrest for disorderly conduct because Graves' conduct did not create a risk of harm to himself. *Id.* at ¶ 25.

{¶ 25} Here, the state offered no affirmative act, other than appellant's drunken state, to support its belief that appellant was a risk to himself. The majority describes Essex as a "busy" Toledo street, but there is nothing in the record to support this conclusion. Further, the officer's suggestion that appellant might have fallen or gotten hit by a car were merely remote possibilities and not within the meaning of risk as defined by the statute.

{¶ 26} For these reasons, appellant's arrest for disorderly conduct was, in my opinion, unlawful. Therefore, the seizure of evidence incident to that arrest violated appellant's Fourth Amendment right against unreasonable searches and seizures. I would reverse the decision of the trial court.