

IN THE SUPREME COURT OF OHIO

Scott Winland,

Appellant,

v.

State of Ohio,

Appellee.

08-0219

On Appeal from the Licking
County Court of Appeals,
Fifth Appellate District

Court of Appeals
Case No. 2007 CA 00037

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT SCOTT WINLAND

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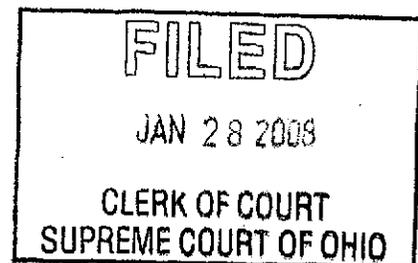


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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES SUBSTANTIAL CONSTITUTIONAL QUESTIONS

This case would be procedurally classified as a claimed appeal of right. The questions raised, however, strike at the very core fundamentals of constitutional rule under law. Are law enforcement and public officials going to respect the constitutional rights of individuals? Self-regulation and immunity of the judiciary are catastrophic mistakes if violations are going to be ignored. Confidence in the judiciary is in dire jeopardy when it appears that the officials representing it operate above the law.

In the present case the decisions rendered by both the Trial Court and affirmed by the Appellate are unreasonable given the entirety of the evidence and statutory and constitutional law. The Appellate court failed to even address the affirmative defense that was raised in its review of the evidence. It should be noted that the affirmative defense was supported by testimony of the States witness. Indeed, no evidence of any kind was introduced to oppose the clear and convincing evidence of an affirmative defense timely raised and shown to be the General Assemblies intent. The conflicting evidence relating to purported notice of the law also failed resolution by the Appellate. In actuality the Appellate court made improper and incorrect inferences by deriving conclusions unsupported by fact.

The errors of the Appellate Court were greatly compounded by the deficiencies of appellate counsel. It was neither reasonable nor sound strategy for counsel to fail to elaborate on the constitutional issues. The single strategy of counsel instead focused on the generic sufficiency of the evidence claims of evidence insufficient to sustain a guilty verdict and conviction against the manifest weight of the evidence. Even with ignoring the constitutional violations it should have been proven through counsels lesser claims that the state had failed to

establish reasonably guilt. Counsel does not appear to have grasped the basic elements of the offense charged or the state would have been held to proving why the affirmative defense was in error. Likewise, notice would have been shown to be inadequate and misleading. Clearly, counsel did not fulfill his obligations and prejudice can be evidenced by the meritorious constitutional claims as well as the reasonable assertion that judgment would not have been affirmed had evidence been argued properly.

Regardless of where the fault lies, it is inherently dangerous to endorse violation of constitutional rights. A guilty verdict acquired through violation of the law sends a message that rights and statutes are simply guidelines to be followed at the leisure of the officer or official. Honor and integrity are mere words holding no meaning to the judiciary if such unscrupulous behavior is to be tolerated. The lengthiness, complexity, and often-illogical nature of the laws are very difficult for the layperson to understand. On the other hand the concise plain words of the constitution, grounded in the laws of nature and nature's God are intuitive. If the people cannot rely on their authorities to honor these fundamental restrictions on their authority the people will not be likely to respect the more complex attributes of rule by law. Flawed procedures were implemented throughout this case from seizure to a delayed and flawed warrant to conviction constituting a grave miscarriage of justice.

A final aspect that should be reviewed is whether matters concentrated on by the prosecution unrelated to the charge impaired impartiality of the trial judge. Judge Branstool behaved in a manner that would seem to be contrary to the Code of Judicial Conduct. Refusing to allow the defendant to complete a motion for acquittal he stated he would not sit there and let the defendant cross-examine him. He additionally ordered a mental health assessment on the defendant apparently because the defendant expressed his desire to be left alone. Finally, he

ordered the defendant to pay for and wear a scam alcohol-monitoring bracelet despite the fact that alcohol had no bearing on the charge and no admissible evidence of alcohol use was ever produced.

Appellate jurisdiction of the court enables it to accept this case as the constitutional claims provide the right to do and it could equally direct the court of appeals to certify its record due to the publics' interest in a free society without arbitrary encroachment by the authorities. This court has the authority to correct the miscarriage of justice executed against the defendant as well as provide corrective measures to ensure honor and integrity are preserved in the judiciary.

STATEMENT OF THE CASE AND FACTS

On January 12th, 2007 the defendant took a bicycle to visit an ailing friend whom he believed might die. When he was going to leave that evening he discovered the bicycle had been stolen. Unable to secure transportation he decided to walk to his family's residence. After traveling a considerable distance in moderate rain the defendant finally exited the city of Newark. Due to the dropping temperatures and increase in rain intensity the defendant decided to travel to Marne where his grandmother lived and thereby cut nearly six miles off his trip. The narrow, unlit, rural roads and weather conditions nearly caused the defendant to be hit by cars several times. Swans road bisected a bike trail that lead directly into the Marne area and so the defendant again altered his course as the weather conditions had made walking down the road exceedingly dangerous. The new route would also cut nearly two additional miles off his trip.

A short way down the trail a covered bridge had been erected which offered the defendant an opportunity to rest and warm up in. The defendant sat down and pulled his coat

over his face in order to conserve heat. Some time later the honking of an automobile horn startled the defendant. Pulling his head out of his coat he was blinded by bright white lights (white headlights and white roof mounted lights similar in appearance to off-road lighting). Thinking that a group of kids were taking a joy ride the defendant continued to walk east. Incredibly the vehicle crossed the small covered bridge designed for foot-traffic and began to follow the defendant. The defendant believed a confrontation with unruly kids was imminent but continued to walk so as not to provoke a situation. After walking some 200 yards the defendant observed a second vehicle pull onto the trail in front of him. While the vehicle was sideways he could recognize it as a police cruiser. Only then did the vehicle behind the defendant turn on his red and blue lights so that the defendant could recognize it was actually a police cruiser.

Deputy Tankersley, who had shadowed the defendant failing to identify himself, then approached and demanded identification. The defendant informed him that he did not carry identification. The officers then patted the defendant down taking a Gerber gator pocketknife and a small credit card case. Deputy Tankersley informed the defendant he could be arrested for having stolen banking cards since the defendant had no identification. The defendant was handcuffed and placed in the cruiser while Deputy Tankersley talked on the radio. From what the defendant could make out from the radio conversation it appeared that he did not match the description of the individual they had been looking for. Deputy Tankersley then asked the defendant for his address to drive him home. The defendant stated that he would prefer to walk. Deputy Tankersley responded he would give the defendant a ride home or a ride to jail. The defendant stated he had done nothing wrong so if he were free to go he would walk. Deputy Tankersley stated then that the defendant would regret it and took him to jail.

At the Licking County Justice Center the defendant objected again in the presence of Deputy Tankersley and a large officer who the defendant believed to be a sergeant that he was being illegally seized. The large officer stated to the defendant that he was going to “teach you a lesson” and “give you an attitude adjustment”. The defendant was stripped to a wet t-shirt and jeans and placed in a cell to freeze without a blanket. The large officer soon returned and asked if the defendant felt any more cooperative. The defendant again stated that this was an illegal seizure and demanded to be released. The large officer stated he could charge the defendant with disorderly conduct while intoxicated and criminal trespass. The defendant incredulously asked how he could be charged with criminal trespass for walking down a bike trail and demanded an alcohol test if he was to be charged with an intoxication offense. The large officer simply commented that the defendant was going to have a cold night and locked him in the cell.

The following day prior to noon the defendant was let out of the cell and he again demanded to be released from illegal seizure. This time an individual the defendant believes to be a captain informed him he needed to educate himself on the law because his lack of identification violated provisions of the Homeland Security Act. Baffled by this revelation the defendant again asserted he had done nothing wrong and hadn't even been charged with anything. The captain left and a female officer informed the defendant he could bond out writing down charges of criminal trespass and disorderly conduct while intoxicated on a bond document. The defendant was never given any formal citation or summons on those charges nor was he ever read his Miranda Rights at any time. The defendant needed to feed cattle on his family's farm so he was able to persuade a Deputy Snodgrass to contact his sister to bond him out. Just prior to release Deputy Snodgrass fingerprinted the defendant and released his property. When the defendant asked Deputy Snodgrass how he could get his bond back since he had never been

formally charged and how to retrieve his pocketknife the deputy stated he would have to go to court.

At the Licking County Municipal Court on January 17th 2007 the defendant refused to sign anything and stated again he had not been charged with anything and was there solely to retrieve his property. A short while later the bailiff returned with a warrant filed January 17th 2007 at 9:34 a.m. where the complaint identified the sworn individual as "LICKING CNTY SHERIFF'S" and identified a charge of criminal trespass. The defendant objected to the complaint as invalid since a person whom perjury could touch had not sworn to it.

At the trial the defendant again objected to the complaint and first learned of an ATV theft. At no time previously had the defendant been questioned about any theft. Questioning by the Prosecution focused in large part on this theft. Deputy Tankersley recalled details such as appearing drunk but could not remember his coworker's name (the large sergeant) that he has routine contact with. Despite Deputy Tankersley's amnesia of several critical moments the defendant was able to establish the facts necessary for an affirmative defense. Likewise, the signs that one Deputy Evans photographed were confirmed to have been taken during daylight hours, not at night on an unlit rural road in a rainstorm. The defendant established he had been held without formal charge, that notice of the prohibition was inadequate, and that he held privilege of necessity. The defendant has never recovered his property. Despite all of this the trial court convicted the defendant and the Appellate affirmed on the basis of Counsels' appeal. The Appellate Court overruled the two assignments of error presented by Counsel leading directly to the defendants' current appeal to this court seeking dismissal of the charge and appropriate corrective measures to ensure such events do not transpire again in the future.

In support the appellant offers the following argument for his propositions.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: The Due Process Clause of the U.S. Constitutions 14th
Amendment forbids conviction of a crime without proving elements of that crime beyond a reasonable doubt.

This proposition has principal in U.S. Supreme court cases such as *Fiore v. White* 531 U.S. 225 (2001) as well as ORC (Ohio Revised Code) 2901.05 describing the burden of proof. The defendant was charged with ORC 2911.21(A)(2) an element of which is knowingly entering or remaining on land in violation of a restriction. The Appellate Court relied upon photographic evidence of two intersections posting a dusk to dawn restriction. The error in relying on this evidence is two-fold. First as Sergeant Evans testified these photographs were taken at 7:30 a.m. during daylight and he had never visited the locations on the night in question. Second, these intersections are hardly representative of the trail. In fact at the eight intersections of the trail between East Main Street and Swans Road the two photographed are the only ones with any signs posting a restriction at all. Clearly a daytime photograph does not indicate that a sign would be visible at night on an unlit rural road in a rainstorm. Appellate Court further relies on defendants' admission to having been on the trail once some time ago but this does not prove knowledge. As noted only two out of eight intersections currently are posted and there is no evidence that any signs existed in the past.

A second element is found in the statute as "use of which is lawfully restricted to certain persons, purposes, modes, or hours.". The signs photographed state "Dusk to Dawn Curfew Enforced". This wording is impermissibly vague for it to apply. A reasonable interpretation

would be that the persons restricted are minors. Searching the ORC the term curfew could only be found to apply to minors, individuals under community control sanctions, and during states of emergency none of which apply to the defendant. Furthermore as testified by the defendant and easily confirmable as prima facia evidence the rules of the trail published on the web at http://www.trail2health.org/rules_and_info.htm explicitly provide in safety tip 3. for use of the trail at night.

The third element is found in ORC 2911.21 (A) as “without privilege to do so”. As already noted the only individuals without privilege would appear to be minors, probationers, and during times of emergency. The defendant went further though establishing an affirmative defense based on the general assemblies declared intent that a person through necessity derives privilege to violate the criminal trespass law. The 1974 committee comment to H511 goes even further stating “Persons taking shelter from danger might claim privilege”. The defendant established by his own testimony and Deputy Tankersleys’ that it was raining and the defendant was soaking wet. The defendant referenced <http://www.wunderground.com> where historical precipitation and temperature information could be retrieved as well as <http://www.hypothermia.org> where temperature and treatment parameters could be found. The treatment chart indicates an individual should “seek dry shelter” and this is precisely what the covered bridge on the bike trail offered. Deputy Tankersley testified there were no alternative areas to shelter in. The defendant finally testified as to the dangers of almost being hit by cars on the road influencing his decision to take the trail. It is an affirmative defense supported by a preponderance of the evidence to have privilege due to the imminent harm imposed on the defendant from adverse weather where no real harm occurred to anyone by the defendant choosing to walk down a bike trail.

Proposition of Law No. II: Unconstitutionally vague notice of the statute allegedly violated is given, leading directly to arbitrary enforcement in violation of due process

Use of the word “curfew” on posted signs is unconstitutionally vague to apply to all persons actually seeing the sign. The fact that the signs are not universally posted at all intersections of the trail where access is permitted and that the published rules contradict the restriction further exacerbates the problem. As Deputy Tankersley testified, in 19 years of service the defendant was the only individual he had ever known to be charged with criminal trespass for walking down the bike trail. This is fundamentally unfair notice resting complete discretion in law enforcement to arbitrarily enforce the law. See *Kolender v. Lawson*, 461 U.S. 352 (1983); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); and *City of Chicago v. Morales*, 527 U.S. 41 (1999) among others.

Proposition of Law No. III: Seizure, confinement, and interrogation without formal charge violating the 4th amendment

The initial stop and seizure by Deputy Tankersley was lawful under *Terry v. Ohio*, 392 U.S. 1 (1968) but further detention required that Deputy Tankersley support the seizure with articulable facts (see: *United States v. Hensley*, 469 U.S. 221 (1985) and *Joshua v. Dewitt*, 341 F.3d 430 (6th circuit 2003)). If Deputy Tankersley was in fact investigating a theft his initial stop was valid but when the defendant did not match the suspect and no evidence other than his presence in the same township (admission by Deputy Tankersley at trial) came to fruition there

were no grounds to detain him on the issue. Detention of the defendant did occur but without any formal accusation or charge. The evidence and testimony is clear on this fact. No citation or summons were issued to the defendant, no Miranda Rights were given, the defendant was not even fingerprinted until noon the next day and then only as a matter of procedure incident to release. To be sure the defendant was threatened with a variety of charges, theft of his own personal bankcards, disorderly conduct while intoxicated, criminal trespass, and violating the Homeland Security Act. The fact remains that Deputy Tankersley did not issue any complaint, summons, citation, and etc. on any of these charges and if such complaint is ever produced the defendant believes it will be possible to prove fraud.

It is unconstitutional to seize someone and decide what to charge him with later. In the present case seizure occurred January 13, 2007 and a warrant issued January 17, 2007. The 4th Amendment of the U.S. Constitution states in part: no warrants shall issue, but upon probable cause, supported by Oath or affirmation. In the present case the warrant was issued four days after the seizure and only then when the defendant continued to insist he had been illegally seized without charge. Furthermore, as the defendant objected when ordered to plead to the charge and at the trial the complaint was invalid. The "Oath or affirmation" of the complaint was supported by "LICKING CNTY SHERIFF'S" a government agency that is not a person and not subject to the consequences of perjury. Through this Fourth Amendment violation any number of frivolous charges could be made, as no one is accountable.

Proposition of Law No. IV: Defendant was provided ineffective assistance of appellate council thereby causing prejudice violating the U.S. constitutions 6th Amendment.

The constitutional violations of proposition of law I, II, and III are meritorious arguments that would have reasonably succeeded in argument on appeal. Counsels' decision to instead use weaker arguments in appeal directly indicates ineffective assistance. It was neither sound nor reasonable to discard substantial rights violations in favor of generic evidence claims. Ohio Rule of Criminal Procedure 52(B) enabled Counsel to further argument the defendant initiated at trial. A prerequisite of competent Counsel is to recognize violations of the supreme law of the land. *McMann v. Richardson*, 397 U.S. 759 (1970) recognizes the right to effective assistance of Counsel, as does *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* set forth that a defendant must show that Counsels' performance was deficient. Ineffective Assistance of Counsel includes a claim Counsel failed to litigate competently a 4th Amendment claim (*Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)). Counsel had the additional responsibility to argue mitigating evidence such as the affirmative defense raised during trial. A basic responsibility of competent counsel is to understand the elements of a charge and recognize the defenses concerning them (*Richey v. Mitchell*, 395 F.3d 660 (6th Cir. Ohio 2005)). The vague arbitrary application of this statute is an obvious defense and Counsel had no strategic reason not to argue it as a violation of fundamental fairness. If these defenses are evident and supported in prior ruling to a pro se defendant then a competent Counsel surely should have recognized them.

The second requirement of *Strickland* is to establish that the deficient performance prejudiced the defense to the point that there is reasonable probability a different result would have occurred. If the Appellee had been held to proving the elements of the charge, or proving that notice was not vague and arbitrarily applied, or that seizure and the complaint were not invalid and unconstitutional then the result in the Appellate Court would almost surely have been different since no evidence exists to oppose these propositions.

Proposition of Law No. V: Plain error of the Appellate Court prejudiced the defendant in acquiring justice

Numerous plain errors affecting substantial rights can be gleaned from the Licking County Court of appeals judgment. On page 2 paragraph 4 it states that Deputy Tankersley arrested the defendant in violation of ORC 2911.21(A)(2) but the evidence plainly indicates Deputy Tankersley never issued any citation or summons of any kind. Had the Appellate Court examined the testimony it would clearly note the defendant objecting to the invalid complaint, which raises the violation of the Fourth Amendment. Second, on page 5 paragraph 18 there is plain error violating due process when the Court decided a photographed sign taken during daylight represented notice beyond a reasonable doubt when the defendant had been at the unlit rural location at night in a rainstorm. Further, without evidence in support, the Appellate Court took a past walk in the daytime as notice when there is no evidence that the signs even existed in the past or that the defendant had visited a portion of the trail where they even existed.

The Appellate Court further failed to examine the affirmative defense raised in its review of the record, which is plain error. By not examining all elements of the offense there is a violation of due process. Review of the record also reveals the arbitrary and vague nature of notice that the statute is enforced under, evidencing a miscarriage of justice and due process that constitutes plain error.

CONCLUSION

For the reasons stated above the defendant-appellant asks this Honorable Court to take jurisdiction and right the miscarriage of justice done him. The actions and behavior documented herein are not mere isolated examples of misconduct. Corruption, malfeasance, and intentional disregard for rights and procedure are a plague upon Licking County but the layperson sees futility in attempting to correct the situation. Canon 3 (B)(5), 3 (D)(1), and 3 (D)(2) of the Code of Judicial Conduct should be applied to the present case.

The defendant feels compelled under the circumstances to make a confession since Judge Branstool stated at trial that the defendant doesn't except responsibility for anything he does. In 1977 or 1978 the defendant stole a pack of gum from Harlows store in Newark. His mother returned him to the store and made him pay for it. This was the first and last theft ever committed by the defendant; he was three or four years old at the time.

Certificate of Service

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail or by personal delivery to the following or their respective responsible representatives: Supreme Court of Ohio (Clerks office 65 South Front Street, 8th Floor, Columbus, OH. 43215-3431), Licking County Court of Appeals (Courthouse, P.O. Box 4370 Newark, OH. 43058-4370), Licking County Municipal Court (Clerk 40 West Main Street, 3rd Floor, Newark, OH. 43055), Assistant Law Director Amy S. Weeks (Assistant Law Director, City of Newark Law Director, 40 West Main Street, 4th Floor, Newark, OH.43055) on January 25, 2008.

I hereby swear that the information contained herein is true to the best of my knowledge. It is submitted with sincere intent that justice is done.



Scott Winland

PRO SE DEFENDANT-APPELLANT

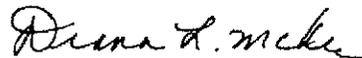
Notary Public/Individual duly authorized to administer oath:

Subscribed and duly sworn before me according to law, by the above named appellant this 25 day of January, 2008

County of Licking and State of Ohio.



DIANA MCKEE
Notary Public, State of Ohio
My Commission Expires Oct. 31, 2012



Signature of person administering oath

commission expiration

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FILED

2007 DEC 20 AM 9:19

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

SCOTT WINLAND

Defendant-Appellant

JUDGES:

Hon. John W. Wise, P.J.
Hon. Julie A. Edwards, J.
Hon. Patricia A. Delaney, J.

Case No. 2007 CA 00037

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Licking County Municipal
Court Case No. 07 CRB 00152

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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WED

Delaney, J.

{¶1} This appeal arises from Defendant-Appellant, Scott Winland, conviction and sentence for criminal trespass in the Licking County Municipal Court. Plaintiff-Appellee is the State of Ohio

STATEMENT OF THE FACTS AND THE CASE

{¶2} In the early morning hours of January 13, 2007, Deputy Michael Tankersley of the Licking County Sheriff's Department was patrolling the area of Dayton Road and Swans Road. He was investigating the theft of ATVs and the search for the suspects led him to a bike path, east of Swans Road. The bike path has entrances at Dayton Road and Swans Road. At each entrance, there is a sign that states, "Dusk to Dawn Curfew Enforced." While Deputy Tankersley was driving in his police cruiser on the bike path at approximately 2:06 a.m., he came across Appellant sleeping on a park bench in the rain.

{¶3} The deputy honked his horn a few times and Appellant woke up. Appellant got off the park bench and began to walk away. Deputy Tankersley followed Appellant east down the bike path and Deputy Miller approached in his police cruiser from the west. Appellant stopped when Deputy Miller reached Appellant's location. Deputy Tankersley got out of his cruiser and made contact with Appellant. Deputy Tankersley asked Appellant who he was and what he was doing on the bike path. Appellant did not respond. Deputy Tankersley testified that Appellant appeared to be intoxicated.

{¶4} Appellant did not respond to Deputy Tankersley's questions and did not cooperate. The deputy informed Appellant that he was placing him under arrest for

criminal trespass in violation of R.C. 2911.21(A)(2). He advised Appellant the bike path was closed from dusk until dawn.

{¶15} Appellant pled not guilty to the charged offense. The matter proceeded to a trial by the court on February 12, 2007. Appellant waived his right to counsel and testified at trial on his own behalf.

{¶16} At trial, Sergeant Evans of the Licking County Sheriff's Office was brought to testify regarding photographs he had taken of the signs posted at Swans Road and Dayton Road. The signs are posted in both directions at Swans Road and Dayton Road.

{¶17} Appellant testified that when he entered the bike path that evening, it was raining and the visibility was poor. He stated that he was unaware of any signs restricting the use of the bike path to daylight hours. Appellant testified that he entered the bike path at the Swans Road entrance heading east. He further testified that he had walked on the bike path during daylight hours, albeit some time ago.

{¶18} The trial court found Appellant guilty of Criminal Trespass. The trial court sentenced Appellant to thirty days in jail, with twenty-five days suspended. The trial court additionally sentenced Appellant to one year of probation and ordered counseling. The sentence was stayed pending appeal.

{¶19} Appellant raises two Assignments of Error:

{¶110} "I. THE EVIDENCE AGAINST THE APPELLANT WAS INSUFFICIENT TO SUSTAIN A GUILTY VERDICT FOR CRIMINAL TRESPASS.

{¶111} "II. APPELLANT'S CONVICTION FOR CRIMINAL TRESPASS WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

I., II.

{¶12} We will review Appellant's Assignments of Error together as they are interrelated. Appellant argues the verdict of guilty on the charge of criminal trespass was against the manifest weight of the evidence and not supported by sufficient evidence. We disagree.

{¶13} In *State v. Jenks* (1981), 61 Ohio St.3d 259, the Ohio Supreme Court set forth the standard of review when a claim of insufficiency of the evidence is made. The Ohio Supreme Court held:

{¶14} "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." *Id.* at paragraph two of the syllabus.

{¶15} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the trier of fact is in a better position

to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, syllabus 1.

{¶16} R.C. 2911.21(A)(2) provides a definition of criminal trespass: "(A) No person, without privilege to do so, shall do any of the following: *** (2) Knowingly enter or remain on the land or premises of another, the use of which is lawfully restricted to certain persons, purposes, modes, or hours, when the offender knows the offender is in violation of any such restriction or is reckless in that regard; ***."

{¶17} Appellant argues the State failed to establish Appellant was aware of the restrictions on the use of the bike path to only daylight hours. In the case of *State v. McMechan* (1988), 48 Ohio App.3d 262, 549 N.E.2d 211, the court held that in order to sustain a conviction under R.C. 2911.21(A)(2), there must be some form of communication of any restrictions on the use of the land to those entering it. *Id.* at syllabus. In *McMechan*, the court found the State did not establish beyond a reasonable doubt that the defendant was made aware of the daylight use restrictions on a park by either physical barriers to entry or by signs posted at each entrance to the park. *Id.* at 263.

{¶18} In the present case, we find there was sufficient evidence to support Appellant's conviction of criminal trespass and that Appellant was aware of the restrictions to the use of the bike path. First, Deputy Tankersley and Sergeant Evans testified there are signs posted at the entrances to the bike path at Swans Road and Dayton Roads stating, "Dusk to Dawn Curfew Enforced." (T. 13, 28). Second, Appellant testified that he entered the bike path at the Swans Road entrance. (T. 33).

Third, Appellant testified that he had walked on the bike path before during daylight hours. (T. 37). We find there is sufficient evidence to show that at Appellant's point of entry at Swans Road there was some form of communication of restrictions upon the use of the bike path.

{¶19} Based on our review of the record, we find that, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Appellant knowingly entered the bike path during the evening hours, the use of which is restricted to the daylight hours. We further find that the trial court, in convicting Appellant, did not lose its way so as to create a manifest miscarriage of justice.

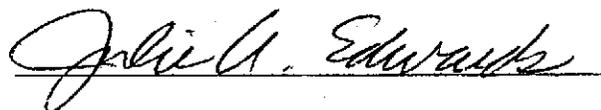
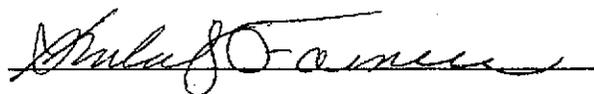
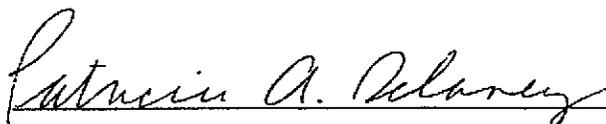
{¶20} Appellant's first and second Assignments of Error are overruled.

{¶21} The judgment of the Licking County Municipal Court is affirmed.

By: Delaney, J.

Wise, P.J. and

Edwards, J. concur.



JUDGES