ORIGINAL

IN THE SUPREME COURT OF OHIO,
COLUMBUS, OHIO

STATE OF OHIO,	)	CASE NO. 2011-0244
	)	
Appellee,	)	
	)	On Appeal from the Eleventh District Court
-vs-	)	of Appeals, Case No. 2009-L-104
	)	
MICHAEL T. SWIDAS,	)	Lake County Court of Common Pleas, Case
	)	No. 08-CR-000719
Appellant.	)	

REPLY BRIEF OF APPELLANT,
MICHAEL T. SWIDAS

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I STATEMENT OF FACTS

In characterizing this case as some sort of 1930s film noir filled with dark nights, screeching tires, and the smell of fear, Appellee mischaracterizes, misstates, and otherwise presents erroneous facts. There was no dispute between Appellant and Cory Altizer anymore than there is a dispute between a mugger and his victim – and, indeed, Altizer and his friends had previously mugged Appellant. (T.p. 413-418). Appellant was regularly bullied, intimidated, threatened and beaten by Altizer, as thoroughly presented in the Statement of Facts of Appellant's initial brief. There has never been any evidence, or even any indication that Appellant was involved in a dispute with Altizer.

More importantly, Appellee repeatedly states that Altizer and friends did not leave Horvath's until about forty five minutes after Appellant exited the bar. (Appellee's Brief at pages 1 and 9). This is simply untrue. As set forth in Appellant's initial Brief, upon leaving Horvath's, Appellant ran into his recently made friend Anthony, and the two talked for <u>less than five minutes</u>. (T.p. 425-430, 457-462). Appellant then walked to his car. (T.p. 457-462). Just as he opened his driver's side door to enter his vehicle, Appellant heard someone say "hey", and saw Altizer and Joseph Naples. (T.p. 425-430). There was no forty five minute interval and the Eleventh District certainly never considered any such absurdity. Instead, it is clear that very soon after Altizer noticed that his regular punching bag, Appellant, had left the bar, he and Naples went out to the parking lot to give Appellant a bit more of the abuse that Altizer had been inflicting upon Appellant for years. All of Appellee's transcript citations as to this issue are from the testimony of either Altizer or Naples, both of whose testimony was repeatedly contradicted and proven to be false by themselves and by a disinterested witness; Robert Bendes testimony illustrates that Naples was moving toward Appellant, not retreating at the time that shots were

fired. (See Appellant's initial brief, Naples testimony at T.p. 159-161 and Bendes' testimony at T.p. 115, 121). There was no forty five minute "staging" as Appellee would have this Court believe. There was a brief moment – a moment during which Appellant was leaving the bar so as to avoid Altizer. Altizer and Naples, however, were not about to let Appellant leave peacefully.

Next, Appellee states with absolute certainty that Appellant's car was running at the time that Altizer and Naples exited Horvath's, and during the incident. Again, this is not the case. After Appellant and his friend Anthony finished their conversation, and as Appellant approached his car, he remotely unlocked it, causing the headlights to illuminate. (T.p. 457-462). The sole disinterested witness in this case, Robert Bendes, testified that the lights of Appellant's car were illuminated and that he **thought** the car might be running – likely because the lights were on. Those lights, however, were only illuminated because Appellant had remotely unlocked his car.

Again, Appellant reminds this Court of his proficiency in handling firearms, that he could have easily shot and killed all of his attackers if such had been his goal, but that his shots were fired in an attempt to escape imminent bodily harm – the same type of harm Altizer and friends had inflicted upon him many times. (T.p. 463-467).

ARGUMENT

Proposition of Law No. I: R.C. 2941.146 is unconstitutionally vague as applied to a defendant who discharges a firearm while standing outside of a motor vehicle.

Appellee is free to characterize this argument as a "simple" "pedantic" question with a "simple answer". (Appellee's Brief at 4). Generally speaking, it seems that such seemingly simple and pedantic questions are those that fill treatises and divide courts. Seemingly simple terms and phrases like "reasonable belief", "probable cause", "likely", and "separate" (as with animus) are regularly debated in trial courts, courts of appeals, and this Court. Likewise, the term "from" in this case appears quite innocuous until examined in the context of this case.

Appellant wholeheartedly agrees with the Eleventh District's method of analysis and citation to State v. Evankovich, 7th Dist. No. 09 MA 168, 2010-Ohio-3157, at ¶6. The Eleventh District wrote:

> **{¶15}** "In order to determine legislative intent it is a cardinal rule of statutory construction that a court must first look to the language of the statute itself. *** 'If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.' ***
> **{¶16}** "To determine the intent of the General Assembly '"(i)t is the duty of this court to give effect to the words used (in a statute), not to delete words used or to insert words not used."' ***
> **{¶17}** "A court may interpret a statute only where the words of the statute are ambiguous. *** **Ambiguity exists if the language is susceptible of more than one reasonable interpretation.** *** If a statute is ambiguous, the court, in determining the intent of the General Assembly, may consider several factors, including the object sought to be obtained, the legislative history, and other laws upon the same or similar subjects. ***
> **{¶18}** **"Statutes defining criminal offenses and penalties are to be strictly construed against the state and liberally in favor of the accused**. R.C. 2901.04(A). However, '(t)he canon in favor of strict construction of criminal statutes is not an obstinate rule which overrides common sense and evident statutory purpose.' *** 'The canon is satisfied if the statutory language is given fair meaning in accord with the manifest intent of the General Assembly.' ***." Id. at ¶6-9.

In this case, **the Appellee clearly recognizes the ambiguity of the statute by arguing many possible alternatives for the use of the term "from".** While arguing that a person of "ordinary intelligence" would be able to understand the meaning of such a supposedly "plain and unambiguous" terms of "common usage" in their "usual, normal, or customary meaning", Appellee also states:

> The word "from" can be used "to indicate a starting point of a physical movement" and "to indicate the starting or focal point of an activity". Merriam-Webster Collegiate Dictionary (2003) 502. The word "from" can also be "used to indicate source or origin" and "used to indicate agent or instrumentality". Random House Webster's College Dictionary (1997) 521. The word "from" is synonymous with "arising out of", "beginning at", "coming out of", "deriving out of", "originating at", "out of", and "starting with". Roget's 21st Century Thesaurus (1992) 382.

First, it is clear that the four or so possible definitions listed by Appellee above of the term "from" do not mean the same thing. This is clear by the alternative arguments made by Appellee. First, Appellee argues that the vehicle was a "staging ground for the attack". (Appellee's Brief at 9). Here again, Appellee presupposes the false notion that Appellant had been waiting near his car for forty five minutes to attack Altizer. However, as set forth in the Statement of Facts above, and throughout Appellant's initial Brief, there was no such time period. Appellant was walking to his car and attempting to leave as Altizer and Naples set upon him. There was no "staging ground."

Further, it is vital to note that this argument does not address the term "from" as it relates to a question of shooting from some proximity to a vehicle. Appellee argues that the car "served as the starting point and origin of the attack" (the "staging ground"), making particularized, italicized note of the fact that Appellant retrieved the weapon from beneath his car's seat. (Appellee's Brief at 10). Thus, it seems – but is unclear, that Appellee is arguing that, because it

believes that Appellant supposedly waited near his car to begin what it characterizes as an attack, and because he retrieved the weapon from his vehicle, those two facts somehow mean that he fired "from" the vehicle. Thus, in this argument, being somewhere near a vehicle prior to shooting and then retrieving a weapon from a car for the shooting – though not necessarily being anywhere near the car – is how Appellee characterizes the "simple" term "from."

Next, Appellee uses one of the other definitions of "from": it argues that the car was an "instrumentality of the attack." (Appellee's Brief at 10). Here, rather than the implicit argument above, Appellee directly describes its belief that the term "from" encompasses the conduct in this case because "Appellant was in physical contact with his vehicle, leaning over the vehicle while shooting." (Appellee's Brief at 10). Thus, in this argument, the location of the weapon *prior* to the shooting is immaterial, as is the location of the shooter *prior* to the shooting. Here, shooting "from" is not about preparation, it concerns the circumstances *at the moment* that the weapon is discharged. Appellee says that "from" is satisfied here by Appellant's alleged physical contact with the vehicle, according now to Appellee leaning over it *as he shot.*

Finally, Appellee characterizes "from" based upon the manner of exit. Because the car was ready for use as, and used as, the manner of immediately leaving the shooting, Appellee argues, shots that were fired were "from" the vehicle. Thus, proximity of the shooter or the gun to the vehicle in this argument is immaterial, the fact that the car is used to immediately leave the shooting means that the shots came "from" the car, regardless of where the gun had been kept, the place at which the shots were discharged, etc. As with the first, argument made by Appellee, the car's nature as an accessory to the shooting – whether before or after – defines "from" where shots were fired. Proximity, according to Appellee's arguments, is of no matter.

Finally, Appellee makes one final attempt to define "from" by stating that "R.C. 2941.146 is designed to punish those who would use a vehicle to assist them in injuring others with a firearm." Rather than debate the question of "from" as to the degree of proximity of the discharge of a firearm in space or time to a vehicle, this final proposal requires the answers to even more questions that no one has ever asked, and that the statute does not address: what does it mean to "use" a vehicle, and what does it mean for a vehicle to "assist" in injuring others?

If Appellee cannot present a single, clear definition of the term "from" for purposes of the statute in question, how can it argue that a person of "ordinary intelligence" should be able to understand the "plain meaning" of such a term? Appellee has presented at least five alternative theories as to what it means to fire "from" a vehicle – some of which do not involve any measure of proximity to the vehicle!

Likewise, the three Judges of the Eleventh District could not reach an agreement as to the term "from. The Dissenting Opinion states that,

> **{¶115}** The majority highlights the facts that the vehicle was running, its headlights were on, and the door was open to buttress its conclusion. These facts, however, do not change the pivotal point that the firearm was shot while appellant was standing in the parking lot. The majority's resolution of this issue is both legally and pragmatically unsettling. Now, a jury may reach the R.C. 2941.146 issue if the facts merely show a defendant discharged a firearm near or, perhaps, within the vicinity of a motor vehicle. Not only is this outcome contrary to common sense, it also renders the requirement that the firearm be discharged "from a motor vehicle" mere surplusage.

It is not just counsel for Appellant and counsel for Appellee that cannot agree upon the meaning of the term "from". Here, three appellate judges, who are presumed to be reasonable people, cannot agree as to the meaning of the term "from" in the statute. If attorneys and judges are

unable to agree upon a term within a legal context, it is entirely unreasonable to claim that a layperson should be able to discern the meaning of such.

Finally, Appellee refers this Court to out of State cases and statutes, though such a review is extraneous. As illustrated by the Dissenting Opinion in the Court of Appeals, Ohio courts have repeatedly expressed their understanding of the subject statute and resoundingly held that "from" describes something all-together different from the facts of this case:

> **{¶117}**Moreover, a survey of cases which included R.C. 2941.146 specifications further demonstrates that R.C. 2941.146 has been applied in limited situations; to wit, circumstances involving either drive-by shootings or situations in which an individual has discharged a firearm from within, or partially within the framework of a vehicle. See *State v. Hodge*, 5th Dist. No. 09 CA 23, 2010-Ohio-2717 (firearm discharged while the defendant was traveling in his vehicle); *State v. Clark*, 7th Dist. No. 08 MA 15, 2009-Ohio-3328 (shooter sat on the door frame of moving vehicle, discharging the firearm across the roof of the car); *State v. Varney*, 5th Dist. No. 08 CA 3, 2009-Ohio-207 (firearm discharged through the open passenger window); *State v. Holdbrook*, 12th Dist. No. CA2005-11-482, 2006-Ohio-5841 (firearm discharged while inside a vehicle); *State v. Jones* (Mar. 5, 2002), 10th Dist. No. 01AP-649, 2002-Ohio-880 (firearm discharged by driver of vehicle through passenger side window). Even *State v. Marshall* (Aug. 14, 1998), 6th Dist. No. L-97-1199, 1998 Ohio App. LEXIS 3700, a case cited by the majority, is fundamentally aligned with the foregoing authority in that the shooter in that matter "had one foot in and one foot out of [the car]," i.e., the firearm was discharged while the shooter was at least partially in the vehicle. Id. at *9.
>
> **{¶118}** The facts of this case demonstrate that appellant was not involved in a drive-by shooting and he was neither inside nor partially situated in the vehicle. Appellant was standing in the parking lot next to the vehicle when he discharged his firearm. Even though the actus reus did not obviously match socially prohibited conduct set forth in R.C. 2941.146, the trial court nevertheless allowed the matter to go to the jury.

"From" is not as simple as Appellee would have it. Indeed, "from" a motor vehicle is not clear at all. It does not provide an ordinary citizen with fair warning as to the dictates of the statute, but does allow for "arbitrary, capricious and generally discriminatory enforcement by

officials given too much authority and too few constraints." State v. Hull (1999), 133 Ohio App.3d 401. This Court must construe such ambiguity against the State and find that R.C. 2941.146 is unconstitutionally vague as applied to Appellant. R.C. 2901.04(A).

CONCLUSION

In light of the above, the Appellant respectfully submits that the judgment of the trial and appellate courts is improper and that the matter must be reversed and remanded to the trial court for further proceedings consistent with Ohio law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Reply Brief of Appellant**, is being served via regular U.S. Mail, postage prepaid on this 1st day of September, 2011, upon:

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