ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	:	Case No. 11-0685
Plaintiff-Appellant	:	ON APPEAL FROM THE MONTGOMERY COUNTY COURT OF APPEALS, SECOND APPELLATE DISTRICT
v.	:	
Tracy B. Davis, Sr.	:	
Defendant-Appellee	:	COURT OF APPEALS CASE NO. 23858

MERIT BRIEF OF APPELLEE

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STATEMENT OF FACTS

Generally, Appellee agrees with the Statement of Facts given in Appellant's Merit Brief. Appellee would add that Nelson, the alleged victim in the intimidation charge, testified that before she had any contact with the police or knew anything was wrong, Davis told her to tell the police that someone else was driving the van.[1]

ARGUMENTS

Proposition of Law:

A CONVICTION FOR INTIMIDATION OF A WITNESS UNDER R.C. 2921.04(B) IS NOT SUSTAINABLE WHEN THE INTIMIDATION OCCURS AFTER LAW ENFORCEMENT OFFICERS HAVE COMMENCED AN INVESTIGATION IN A CASE BUT PRIOR TO A CRIMINAL ACTION OR PROCEEDING.

The matter before the Court is one of statutory construction and interpretation of legislative intent. This requires the Court to look to the words of the statute itself, and then to give effect to the words used, not to delete words used or to insert words not used.[2] Furthermore, R.C. §2901.04(A) directs that sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

Intimidation of a witness occurs when a person, knowingly and by force or by unlawful threat of harm to any person or property, attempts to influence, intimidate or hinder an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness.[3]

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[1] Tr. 399
[2] *Bernardini v. Conneaut Area City School Dist. Bd. Of Edn.* (1979), 58 Ohio St.2d 1, 4
[3] R.C. §2921.04(B)

Criminal action or proceeding is undefined in the Ohio Revised Code. However, this Court has noted that the phrase commonly indicated the involvement of a Court.[4] Broken down, this Court defined "action" to include "all the formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the Court."[5] This Court has further used the term "criminal action" in its definition of prosecution by defining "prosecution" as "a criminal action; a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime."[6] This Court defined "proceeding" as the "regular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment.[7]

Based upon these definitions, this Court determined that a "criminal action or proceeding" implies a formal process involving a court, and found that there is no indication that R.C. §2921.04(B) should be interpreted in any other way.[8]

Further support for this Court's interpretation in *Malone* can be found in the statute itself. The particular statute under which Davis was convicted also includes provisions addressing intimidating a victim. This provision states that no person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate or hinder the victim of a crime in the filing or prosecution of criminal charges . . .[9]

In writing the statute as it did, the legislators intended to differentiate what conduct was criminal as to witnesses and victims. R.C. §2921.04(B) clearly applies to a victim immediately

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[4] *State v. Malone* (2009),121 Ohio St.2d 244, 247
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] R.C. 2921.04(B)

upon the commission of the underlying crime, prior to the involvement of any legal authorities.[10] However, the provision involving witnesses is not so temporally broad, as it is written to apply only if the witness is already involved in a criminal action or proceeding.[11] If the legislature intended it to be as broad as the State would like, it simply could have included witnesses in the same provision as victim. The legislature would not have coupled witnesses with attorneys, because by doing so, the statute indicates that the statute does not apply until there is some process initiated that requires their participation.[12] The legislature could have used the word act instead of action.[13] The legislature could have used the language contained the in the Tampering with Evidence statute, R.C. §2921.12, which applies to defendants who know that an official proceeding or investigation is in progress, or is about to or likely to be instituted.[14]

While this Court has acknowledged that intimidation of a witness should not be countenanced and does real harm to the administration of justice, Ohio's statutory scheme does not protect a witness in a potential criminal action through R.C. §2921.04.[15] The statute requires a witness's *involvement* in a criminal action or proceeding, not merely his or her potential involvement.[16] The statute simply does not apply to witnesses or attorneys who *might* become involved in a criminal action or proceeding.[17] It applies only to witnesses and attorneys who *are involved* in a criminal action or proceeding.[18]

In *State v. Malone*, this Court determined that because the intimidation occurred after the criminal act but prior to any proceedings flowing from the criminal act in a court of justice,

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[10] *Malone* at 248
[11] *Id.*
[12] *Id.* at 249
[13] Merit Brief of Appellee, Donald K. Malone III, Ohio Supreme Court Case No. 07-2189, p. 11
[14] *Id.*
[15] *Malone* at 249
[16] *Id.* at 248 (emphasis sic)
[17] *Id.* (emphasis sic)
[18] *Id.* (emphasis sic)

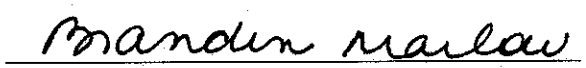
insufficient evidence exists to convict *Malone* for intimidation of a non-victim witness.[19] In doing so, this Court implicitly overturned two lower court decision regarding this statute, *State v. Gooden*[20] and *State v. Hummell*[21], by stating that neither is grounded in R.C. 2921.04, because the statute does not apply to witnesses and attorneys who might become involved in a criminal action or proceeding.

In the instant case, even assuming Davis made the alleged threat, no evidence was presented that the threat was made in the course of a criminal action or proceeding, or that witness Nelson had become involved in any investigation that could result in a criminal action or proceeding. At the time of the alleged threat, witness Nelson was not a witness with any duty in which Davis threatened her into not discharging. Without a criminal action or proceeding pending, Davis could not have intimidated a non-victim witness as alleged.

CONCLUSION

For the foregoing reasons, the Second District Court of Appeals decision should be affirmed, and this Court should determine that a conviction for Intimidation of a Witness under R.C. §2921.04(B) is not sustainable when the intimidation occurs after law enforcement offices have commenced an investigation in a case but prior to criminal action or proceeding, particularly when the witness has had no contact with law enforcement prior to the intimidation..

Respectfully Submitted,



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[19] *Id.* at 249
[20] (2004), Cuyahoga App. No. 82621, 2004-Ohio-2699
[21] (1998), Morrow App. No. CA-851, 1998 WL 355511

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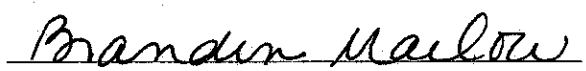
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Merit Brief was sent by first class mail on November 16, 2011 to R. Lynn Nothstine, Assistant Prosecuting Attorney, Montgomery County Prosecutor's Office, PO Box 972, Dayton, Ohio 45422.

Respectfully Submitted,



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2901.04 Rules of construction for statutes and rules of procedure.

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

Effective Date: 03-23-2000; 09-23-2004

2921.12 Tampering with evidence.

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.

(B) Whoever violates this section is guilty of tampering with evidence, a felony of the third degree.