

12-0956

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Plaintiff/Appellee,

-vs-

WILLIAM M. HART

Defendant/Appellant.

SUPREME CT. CASE NO.

On Appeal from the Twelfth District Court of Appeals, Brown County Ohio

Court of Appeals Case No. CA-2011-03-008

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT WILLIAM M. HART

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

In this case a citizen was jailed, as the aftermath of a non-violent conversation in a public place, with a local elected official, and dealing expressly with issues of government services. The citizen was jailed for more than the maximum time he could be punished with for the only offense he was convicted of, although an Ohio Statute plainly says he is to be “discharged” under those circumstances. The citizen was given terms of a sentence anyway, that arguably conflict with his constitutional rights to due process of law. The lower court decision allows that procedure and result. This Court should accept these important issues for statewide resolution and uniform construction of the statutes and constitutional provisions, or it can happen again.

A. Discharge of a misdemeanor Defendant after serving more than the maximum possible sentence. This Issue presents the important construction of a statute, which applies in any case where a criminal defendant is charged with both felonies and misdemeanors, but is held in jail for more time than he could possibly be sentenced to for the most serious misdemeanor he is charged with – and the only offense he is convicted of. The statutory language appears to mandate no trial, conviction or sentence in that circumstance. But there is no guidance from this Court on the construction of that Statute. There is no case applying the Statute where both a felony and a misdemeanor are charged. This case construed the applicable statute contrary to what appears to be the only reasonable construction of it, resulting in a first-time conviction and sentence that should not exist.

As of the date of trial, Hart had served 63 days in jail, 3 more than the maximum possible incarceration for misdemeanor he was charged with (and the only thing he was eventually convicted of). R.C. 2929.27(B). Therefore:

*Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge: (1) For a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged;*

R.C. 2945.73(C)(1) (Emphasis added). That right of discharge "is a bar to any further criminal proceedings against him based on the same conduct." R.C. 2945.73(D).

This is not just an issue of how long it takes to bring someone to trial. This is an issue of, once a person has served time longer than the sentence for a misdemeanor, they can't be tried or convicted for that misdemeanor. R.C. 2945.73(C)(1) clearly says they can't. The State argued, and the Court of Appeals agreed (§ 30-33), that because he was also charged with a felony, the "longer" period applies and  *Cancels*  the discharge requirement. That concept rewards what happened here:  *overcharging offense conduct by a prosecutor* . More importantly, that "longer" period is only applicable by R.C. 2945.71 or 2945.72, which R.C. 2945.73(C)  *expressly overrides*  – and applies “[r]egardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code . . . .”

Additionally, R.C. 2945.71 and 2945.72 are general provisions, dealing with all trial time limits, no matter what the charges or how long someone is incarcerated. R.C. 2945.73(C)(1) is a special provision, only applicable to misdemeanors and persons incarcerated for more than the maximum sentence that could be imposed for that misdemeanor. An interpretation that creates a conflict between them must defer to the special of the two. R.C. 1.51. Therefore, even if there were a conflict between the statutes, the special provision, R.C. 2945.73(C)(1), requiring discharge, applies. See  *State v. Skaags* , 10<sup>th</sup> Dist. No. 05AP-554, 2006-Ohio-1476, § 12-13, and 23-24 (applying R.C. 2945.73(C)(1) to dismiss misdemeanor charges after incarceration past the maximum sentence). As that Court stated:

Appellant's case falls directly within the provisions of R.C. 2945.73(C)(1). *Because appellant was held in jail for more than the maximum sentence that could be imposed on the most serious misdemeanor charge, he was entitled to discharge on all of the charges lodged against him.* Appellant's single assignment of error is sustained.

*Id.* at ¶ 27 (emphasis added).

There are no terms or conditions added, no requirement that only a misdemeanor be charged or be the only basis for holding the defendant, and there are no tolling provisions; but the lower court essentially added those conditions to the Statute, and took out the "regardless of whether a longer term" may apply from the other statute. As this Court knows, "Courts have a duty to give effect to the words used in a statute and not to delete words used *or insert words not used.*" *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 30 (emphasis added); *State v. Hughes*, 86 Ohio St.3d 424, 427, 715 N.E.2d 540 (1999) ("However, the fundamental right to a speedy trial cannot be sacrificed for judicial economy or presumed legislative goals. In construing a statute, we may not add or delete words.") (Holding superseded by statute).

Further, by the legislature excluding such provisos (2945.73(C)(1) only applies if only misdemeanor is charged), the Court must assume they were left out on purpose. *Expressio unius est exclusio alterius* is the Latin maxim that means that the expression of one or more terms implies the exclusion of those not expressed. *Bank One, N.A. v. PIC Photo Finish, Inc.*, 2d Dist. No. 1665, 2006-Ohio-5308, ¶23. Typically, this maxim is applied where there is a listing of items in an associated group or series, which "justif[ies] the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003).

In addition, "[w]hen the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for [a court] to apply the rules of statutory

interpretation.” *Symmes Twshp. Bd. of Trustees v. Smyth*, 87 Ohio St.3d 549, 553, 721 N.E.2d 1057 (2000). Yet that is what the lower court did. But as this Court stated in *State v. Bartrum*, 121 Ohio St. 3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶18: “We have emphasized that ‘where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.’” (Citations and quotations omitted).

Therefore, even if the *trial* on the felony could have been conducted after 45 or before 270 days (the speedy trial limits for both his charges), merely because Hart was also charged with a felony, he nonetheless should have been discharged *for the misdemeanor* either after serving 60 days in jail, or when that was the only remaining charge against him – when the jury found him “not guilty” of the felony. Other courts have come to this conclusion. *Columbus v. Bryan*, 10<sup>th</sup> Dist. No. 03AP-1136, 2004-Ohio-3885 (State conceded error in not dismissing criminal trespassing charge against defendant who had been held in jail more than the maximum sentence for that charge); *State v. Brown*, 5<sup>th</sup> Dist. No. 1996CA00300, 1997 WL 115846 (defendant discharged on fourth-degree misdemeanor charge, after having served the 30-day maximum time for the offense, even though brought to trial within the time allowed by R.C. 2945.71 or .72).

That issue alone (Proposition of Law No. I) is supported by statutory construction and substantial case law, although this lower court disagreed and appears to have rewritten the law. The case relied upon by the lower court, *State v. Williams*, 2d Dist. No. 20104, 2004-Ohio-5273 (*State v. Hart*, at ¶ 31), stating that “By its explicit terms, subsection (C) limits discharge to offenders charged *solely* with misdemeanors.” (Emphasis is original). But that case *does not say that at all*. It says: “By its explicit terms, R.C. 2945.73(C) only applies to offenses that are classified as misdemeanors.” *Williams, supra* at ¶ 20. In *Williams*, the defendant was arguing

his *felony* charges should be dismissed, because he was held in jail for more than the maximum he could be punished for his fifth-degree felony. *Id.* at ¶ 16-19. The lower court cited that case for a proposition it does not state, and is factually and legally inapposite.

The Proposition represents the opportunity for this Court to construe, and clear up once and for all, what otherwise are conflicting statutory provisions: one saying this defendant (or any other defendant charged with felonies and misdemeanors and having served more time in jail than the maximum misdemeanor incarceration he/she can be given) *must be discharged for that misdemeanor*; and the other statute providing only a trial time limit. This case is also, for a first-time offender, a substantial personal injustice.

B. The Constitutionality of a conviction for Unlawful Restraint due to a public conversation with an elected official. This case also presents unique questions of constitutional freedoms when dealing with elected government officials, and the boundaries between citizens' contacts with those elected officials and the criminal law. Proposition No. II requires the Court to construe whether or not a non-violent public confrontation with an elected official, even if inconvenient or annoying, is a crime. Every citizen in the State, every court, and every elected or other public official dealing with the public would benefit from clarification of those boundaries.

A conviction for the third-degree misdemeanor of Unlawful Restraint requires proof that the defendant knowingly restrained someone's liberty *without privilege* to do so. R.C. 2905.03(A). Here the only evidence was that Hart confronted, verbally, in public, an elected government official to discuss and address his concerns about that lack of official government law enforcement action within that official's government responsibility. Hart was privileged, by the Constitution, to so confront him.

A "privilege" means "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12). The only evidence was that a citizen stopped an elected public official in public to discuss a matter of government services and law enforcement in the locality within that official's jurisdiction. There was no force or threat or evidence of, it was part of a long term concerted effort to get the government to address a grievance, and it lasted for only minutes, in a public place, in broad daylight, and with others around.

The important issue for this Court to address is the extent of the Constitutional protection to confront elected officials, and whether such Constitutional right is within the statutory "privilege." The conduct here was privileged, being protected by the United States and Ohio Constitutions. The United States Constitution prohibits any law "abridging the freedom of speech . . . and to petition the government for a redress of grievances." U.S. Const., Amend I. Similarly, the Ohio Constitution protects the people's right "to instruct their representatives; and to petition the general assembly for the redress of grievances." Ohio Const., Art. I, Sec. 3. Even more broadly, the Ohio Constitution provides:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press.

Ohio Const., Art. I, Sec. 11. The lower court noted (§ 51-52) that the First Amendment does not allow a crime. But sometimes what might otherwise be a crime is still protected. For example, wearing a Ninja mask at a city commission meeting, although otherwise disorderly conduct or inducing panic, *is protected*. *Dayton v. Esrati*, 125 Ohio App.3d 60, 707 N.E.2d 1140 (2d Dist. 1997). See also *State v. Lessin*, 67 Ohio St.3d 487, 620 N.E.2d 72 (1993), where this Court held that burning the American flag is a means of expressing dissent and cannot be a

crime. But it could also, factually, be disorderly conduct, criminal damaging or mischief, etc.

As a result of the broad protections of the First Amendment, sometimes even *threats* are protected. *Brandenburg v. Ohio*, 395 U.S. 444, 447-49, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Watts v. United States*, 394 U.S. 705, 706-708, 89 S.Ct. 1399, 22 L.Ed.2d 664 (1969) (finding the statement “if they ever make me carry a rifle the first man I want to get in my sights is L.B.J.,” was protected “political hyperbole”). At best, what can be said of Hart's conduct is that he was expressing his opinions as to the enforcement of the law and insisting his elected commissioner hear him out. Hart's intent was only to obtain a redress of his grievances against the government as a result of their conduct, and lack of it. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) (“Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action”); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971) (finding that “offensive” and coercive speech may be protected). See also *Burger v. Board of Trustees*, 58 Ohio Misc. 21, 389 N.E.2d 866 (C.P. 1978) (restraints on expression may not be justified simply by the fact that there may be other times, places, or circumstances for such expression). Yet here, unless this Court intervenes, a citizen was punished for doing just that.

As the United States Supreme Court said in *Coates v. Cincinnati*, 402 U.S. 611, 611-614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and in others, *conduct* otherwise protected by the First Amendment cannot be prohibited or punished merely because it annoys, or angers, or offends, induces unrest, or is objectionable or obnoxious to others. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 408-409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). In *People v. Hickman*, 988 P.2d 628 (Colo. 1999), a defendant set off a firecracker near the home of a witness who had previously testified against him in an unrelated proceeding. The allegation was that the defendant called the

witness and stated that the “next one’s gonna blow your head off,” and “hope you sleep well after that.” As a result that defendant was charged with one count of “retaliation,” a felony under Colorado law. *Id.* at 632-633. The defining terms of the offense included doing an “unlawful act,” as Unlawful Restraint in Ohio requires the offense to be “without privilege.” The Colorado Supreme Court reviewed that conviction, and determined that statute punished protected speech. “This broad meaning of the term applies to a wide range of communications and conduct, many of which are protected by the First Amendment.” *Id.* at 639 (emphasis added). There “can be no doubt that the freedom to express disagreement with state action, without fear of reprisal based upon the expression, is unequivocally among the protections provided by the First Amendment.” *McCurdy v. Montgomery County*, 240 F.3d 512, 520 (6<sup>th</sup> Cir. 2001).

As applied here the Unlawful Restraint statute also “sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments.” *Akron v. Rowland*, 67 Ohio St.3d 374, 387, 618 N.E.2d 138 (1993), quoting *Grayned v. Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Even a “clear and precise enactment may . . . be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.” *Id.*, quoting *Grayned, supra* at 114. “First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.” *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612, 93 S.Ct 2908, 37 L.Ed.2d 830 (1973) (citations omitted). The United States Supreme Court has therefore struck down the application of an overbroad statute, even if the activities of those challenging the statute are *unprotected* forms of speech. *NAACP v. Button*, 371 U.S. 415, 432, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Such statutes are void because they fail “to give a person of ordinary intelligence fair

notice that his *contemplated conduct* is forbidden by the statute . . . [or if] it encourages *arbitrary and erratic arrests and convictions.*" *Papachristou v. Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (emphasis added).

This Court should accept this case, in observance of the United States Supreme Court's admonition that "in cases raising First Amendment issues . . . an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984), quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1038, 111 S.Ct. 2720, 115 L.Ed.2d 888 (1991) ("Full deference to these factual findings does not justify abdication of our responsibility to determine whether petitioner's statements can be punished consistent with First Amendment standards"); *Bachellar v. Maryland*, 397 U.S. at 566 ("Since petitioners argue that their conduct was constitutionally protected, we have examined the record for ourselves. When 'a claim of constitutionally protected right is involved, it "remains our duty . . . to make an independent examination of the whole record."').<sup>1</sup>

This Court is requested to also honor that constitutional obligation, and accept this case to review the important constitutional rights implicated in this case, and to answer for the entire State whether it is permitted to criminally prosecute and convict a person, because of their act of expressing, to a public official, an expression of their grievance against the government, just because it is accompanied by a temporary "wait" in a public parking lot to hear it out.

C. Barring a citizen from contacting government officials other than at formal meetings. The case also presents questions applicable to all misdemeanor sentencing and the

limits by statute on the sanctions that can be imposed that intend to restrain the exercise of what would otherwise be constitutional rights of the citizens, but for the terms of a misdemeanor sentence. Hart undoubtedly has a constitutional right to petition his government for redress of grievances, and to express his opinions. U.S. Const., Amend. I; Ohio Const., Art. I, Sec. 3, and 11. The sentence here though says he can't write a letter, call on the phone, file a petition, or attend any government function other than a "formal meeting." It is therefore prohibitively overbroad and unconstitutional, and a restraint of one of the most important rights in a democratic republic. Deciding these issues would clarify misdemeanor sentencing for every court handling misdemeanor offenses, on a unique set of facts and circumstances.

#### STATEMENT OF THE CASE AND FACTS

Appellant William Michael Hart (Hart) owns a bicycle shop in Georgetown, Ohio. His customers are regular users of the roads and bike paths in Brown County and for several years have had problems with unrestrained and unregistered (and therefore unaccountable) dogs along the roads and paths, causing at least a perception of annoyance and inconvenience, if not safety, particularly for bikers. Hart attempted through government channels to address the enforcement of the dog laws in Brown County as a result, and did so for years. He regularly complained to dog warden authorities and the police; attended County Commission meetings; engaged in communications with the Commissioners outside of meetings; contacted prosecuting attorneys; and supplied statements and photographic evidence. His efforts included up to 8 different agencies, 25 or more times. His efforts were described as "pleading his case," and crying to the government, to "please help me."

For the most part these efforts were fruitless, and more often than not were ignored. One official meeting was stopped early when he got up to speak. He was insulted, laughed at, called

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<sup>1</sup>*Bachellar* invalidated on First Amendment grounds a state criminal conviction.

names, and threatened. He developed a reputation among the local government as a "thorn" in their sides, and his business suffered as a result. Charges were filed against him on unrelated complaints, but dismissed for lack of evidence.

On July 21, 2010, Hart was walking his dog around 7:30 a.m. He saw one of the County Commissioners, Ralph Jennings. Hart approached Jennings to discuss issues with the lack of County enforcement of the dog laws. Jennings was in his car, preparing to leave, but his car door was open, his seat belt on, and the car was not started. Jennings was speaking on his cell phone to someone, and Hart waited for him to finish his calls, and Jennings concluded his calls to speak to Hart. During the conversation, in a parking lot, Hart was in the small space of the open car door, approximately two feet from Jennings. Jennings was not able to say if Hart's contact with the edge of Jennings' car door was to hold it open or to just lean on it ("convenience"). Jennings also knew Hart. They had had numerous prior contacts and conversations, both in and out of official Commission meetings, over a period of years, and without major incident.

Hart complained about the lack of enforcement and the lack of effort by Jennings on Hart's complaints and his evidence of non-enforcement of the law. Jennings described that he listened to Hart for "several minutes." There were other people in the area. Jennings claimed that in the course of the conversation (10-15 minutes), that he asked several times for Hart to step away from the car so Jennings could leave, and claimed that he could not leave because pulling away would have "injured [Hart's] dog." Jennings claimed instead Hart kept "yelling" at him. But it was undisputed that Hart made no physical contact, and no threats of harm to Jennings or to anyone's person or property. According to Jennings, Hart never told him he couldn't leave.

At some point bystanders got involved and asked Hart to leave Jennings alone. Hart walked away from Jennings' car to speak to one of them. After that, a police officer arrived, who

asked Jennings to stay so he could find out what was going on, which Jennings did, as did Hart. The officer interviewed the persons involved and who saw the incident, and then cited Hart for disorderly conduct and let him go. After discussions though with other officials, including more with Jennings and the same prosecutors Hart had repeatedly complained to about the lack of law enforcement, a few hours later the officer increased the charges to felony Intimidation and also Unlawful Restraint. Hart was arrested at his business the same day.

Hart was indicted on both charges. He was arraigned on August 2, 2010. On that same date, the State filed a "Suggestion of Incompetency." Although no factual basis for the "suggestion" was included in the pleading, the alleged basis was an unspecified "concern" raised by some family member, a prior assessment of some kind by a social worker, and a three-day evaluation at a hospital *followed by a release and discharge*. He *and his counsel* denied any claim of incompetency. The hospital report, from a psychiatrist (not a social worker), ordered Hart released from the hospital. The Court though ordered the evaluation and that Hart be held in jail. After the evaluation a hearing was conducted finding Hart to be competent to stand trial. Hart was later released on bond, having served 63 days in jail (three more than the maximum possible incarceration for the misdemeanor he was charged with).

After pretrial motions relating to time limits were filed and denied, a jury found Hart not guilty of Intimidation, but guilty of Unlawful Restraint. Hart was sentenced to the maximum, 60 days in jail, but given credit for time served (63 days). He was also sentenced to a prohibition against contact with County Commissioners other than at formal meetings, and without any time limit. On appeal, the convictions and sentence was affirmed, other than the indefinite time limit.

#### ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

**Proposition of Law I: A defendant cannot be convicted of a third-degree misdemeanor after having been held in jail for 63 days before trial, regardless of whether**

**the defendant is also charged with or can be tried for and convicted of a more serious offense at the same time.**

As of the date of trial, Hart had served 63 days in jail. The maximum possible incarceration for the third-degree misdemeanor he was charged with (and the only thing he was eventually convicted of) is 60 days. R.C. 2929.27(B). R.C. 2945.73(C)(1) though provides for discharge of a defendant on a misdemeanor if held for longer than the maximum sentence. See this Memorandum, *supra* at 1-2. That right of discharge "is a bar to any further criminal proceedings against him based on the same conduct." R.C. 2945.73(D).

Although a longer period is provided when charged with a felony, that "longer" period is only applicable by R.C. 2945.71 or 2945.72, which R.C. 2945.73(C)(1) *expressly overrides* – and applies “[r]egardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code . . . .” *State v. Skaags*, 10<sup>th</sup> Dist. No. 05AP-554, 2006-Ohio-1476, ¶ 12-13, and 24-27. Additionally, R.C. 2945.71 and 2945.72 are general provisions, and R.C. 2945.73(C)(1) is a special provision, so an interpretation that creates a conflict between them must defer to the special of the two. R.C. 1.51. And, Courts cannot add words to a Statute that aren’t there. *State ex rel. Steele v. Morrissey*, 103 Ohio St.3d 355, 360, 2004-Ohio-4960, 815 N.E.2d 1107, ¶ 30. Further, by the legislature excluding such provisos (2945.73(C)(1) only applies if only misdemeanor is charged), the Court must assume they were left out on purpose. *Bank One, N.A. v. PIC Photo Finish, Inc.*, 2d Dist. No. 1665, 2006-Ohio-5308, ¶23. The Court of Appeals though construed the Statute as only applying if only a misdemeanor is charged, regardless of the outcome, and even though “solely” or “only” is not in the Statute.

Hart should therefore have been discharged *for the misdemeanor* either after serving 60 days in jail, or when that was the only remaining charge against him.

**Proposition of Law II: A conviction for Unlawful Restraint is unconstitutional**

**when the evidence is only that the defendant was having a non-violent public confrontation with a public official over a matter of government service.**

A conviction for Unlawful Restraint requires proof that the defendant knowingly restrained someone's liberty *without privilege* to do so. R.C. 2905.03(A). A "privilege" means "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12). The only evidence was that a citizen stopped an elected public official in public to discuss a matter of government services and law enforcement in the locality within that official's jurisdiction. There was no force or threat or evidence of, it was part of a long term concerted effort to get the government to address a grievance, and it lasted for only minutes, in a public place, in broad daylight, and with others around. The conduct here was privileged, being protected by the United States and Ohio Constitutions. U.S. Const., Amend I; Ohio Const., Art. I, Sec. 3; and Ohio Const., Art. I, Sec. 11. See this Memorandum, *supra* at 6-7. The lower court noted (¶ 51-52) that the First Amendment does not allow a crime. But sometimes what might otherwise be a crime is still protected. *State v. Lessin*, 67 Ohio St.3d 487, 620 N.E.2d 72 (1993); *Dayton v. Esrati*, 125 Ohio App.3d 60, 707 N.E.2d 1140 (2d Dist. 1997).

As the United States Supreme Court said in *Coates v. Cincinnati*, 402 U.S. 611, 611-614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), and in others, *conduct* protected by the First Amendment cannot be prohibited or punished merely because it annoys, or angers, or offends, induces unrest, or is objectionable or obnoxious to others. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 408-409, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

As applied here, the Unlawful Restraint statute is also unconstitutionally overbroad, as it "sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." *Akron v. Rowland*, 67 Ohio St.3d 374, 387, 618 N.E.2d 138 (1993), quoting

*Grayned v. Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

**Proposition of Law III: A misdemeanor sentence cannot include a sanction prohibiting any contact with certain public officials other than at formal meetings.**

Hart also undoubtedly has a constitutional right to petition his government for redress of grievances, and to express his opinions. U.S. Const., Amend. I; Ohio Const., Art. I, Sec. 3, and 11. See also, this Memorandum, *supra*. The sentence here though says he can't write a letter, call on the phone, file a petition, or attend any government function other than a "formal meeting." It is therefore overbroad and unconstitutional.

CONCLUSION

For the reasons discussed above this case does involve matters of public and great general interest and substantial constitutional questions. The Appellant requests that this court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

**THOMAS G. EAGLE CO., L.P.A.**

  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served upon Prosecuting Attorney for Brown County, Jessica Little, Esq., 200 East Cherry Street, Georgetown, OH 45121, Ohio, by ordinary U.S. Mail this 1st day of June, 2012.

  
\_\_\_\_\_  
**Thomas G. Eagle** (#0034492)

IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO  
BROWN COUNTY

FILED  
COURT OF APPEALS

STATE OF OHIO,

APR 27 2012

Plaintiff-Appellee,

CASE NO. CA2011-03-008

- vs -

BROWN COUNTY CLERK OF COURTS

OPINION  
4/30/2012

WILLIAM M. HART,

Defendant-Appellant.

CRIMINAL APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS  
Case No. 2010-2114

Jessica Little, Brown County Prosecuting Attorney, Mary McMullen, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

Thomas G. Eagle, 3386 North State Route 123, Lebanon, Ohio 45036, for defendant-appellant

**HENDRICKSON, J.**

{¶ 1} Defendant-appellant, William Hart, appeals his conviction and sentence in the Brown County Court of Common Pleas for one count of unlawful restraint.

{¶ 2} On January 14, 2011, appellant was found guilty of unlawful restraint in violation of R.C. 2905.03(A). The charges stemmed from an ongoing dispute between appellant and the Brown County Commissioners' office regarding its alleged failure to enforce

animal control laws. Appellant, the owner of a bicycle rental shop, alleged that his customers were attacked by several dogs due to the commissioners' decision not to ticket the owners for failing to confine the animals. On July 21, 2010, appellant approached County Commissioner Ralph Jennings at the United Dairy Farmers convenience store, located in Georgetown, Ohio, with the intent of discussing the commissioners' inaction.

{¶ 3} According to Jennings, appellant approached his parked vehicle as he was preparing to leave UDF. Jennings testified he had just fastened his seatbelt when he discovered appellant standing inside his driver's side door, which was still ajar. Appellant had his hand on top of Jennings' door, making it impossible for Jennings to shut it without injuring appellant. At that point, appellant began yelling at Jennings, calling him "immoral, corrupt, and criminal," and demanding that Jennings "do [his] job" as commissioner. Jennings repeatedly asked appellant to step away from his vehicle so that he could leave, but appellant refused and continued yelling. After approximately 15 minutes, a UDF employee, Rita Planck, came outside to investigate the commotion. Planck stated that appellant was holding Jennings' car door open and would not allow Jennings to close it, despite his continued efforts to do so. When appellant refused Planck's request to leave, she went inside to call the police because she feared for Jennings' safety.

{¶ 4} After Planck retreated inside, a former police officer, Mike Bullis, diverted appellant's attention and led him away from Jennings' vehicle to discuss the situation. Bullis asked appellant to let Jennings leave because appellant was "intimidating" Jennings by standing in his doorway. Shortly after appellant spoke to Bullis, the police arrived and escorted appellant off the property.

{¶ 5} Appellant was arrested on July 21, 2010, and bonded out of jail the following day. He was then hospitalized for a court-ordered psychiatric evaluation until July 27, when he was returned to jail. On July 29, 2010, appellant was charged with one count of

intimidation, a third-degree felony in violation of R.C. 2921.03(A), and one count of unlawful restraint, a third-degree misdemeanor in violation of R.C. 2905.03(A). Based upon information the state received during its investigation, the state believed appellant may not have been competent to stand trial. Thus, on August 2, 2010, the state filed a suggestion of incompetency and requested a competency evaluation. Over appellant's objection, the trial court granted the state's request and tolled the time for trial while appellant was evaluated. See R.C. 2945.72(B) and (H).

{¶ 6} During a competency hearing on September 21, 2010, the court found appellant was competent to stand trial. The court then released appellant on bond and scheduled a jury trial for January 12, 2011. Prior to trial, appellant moved to dismiss the case on speedy-trial grounds. The court denied the motion, and appellant was subsequently found not guilty of intimidation, but guilty of unlawful restraint. The court sentenced appellant to 60 days in jail, with credit for 63 days already served. The court also ordered appellant to have no contact with Jennings, other than in an official setting, and payment of court costs.

{¶ 7} Appellant timely appeals, raising three assignments of error.

{¶ 8} Assignment of Error No. 1:

{¶ 9} THE TRIAL COURT ERRED IN NOT DISMISSING THE CHARGES FOR VIOLATION OF THE SPEEDY TRIAL STATUTES.

{¶ 10} In his first assignment of error, appellant raises three issues for review. We will address each issue in turn.

#### **Statutory Right to a Speedy Trial**

{¶ 11} Appellant first argues the trial court erred by not dismissing his charges on speedy-trial grounds.

{¶ 12} The right to a speedy trial is guaranteed to all state criminal defendants by the Sixth and Fourteenth Amendments to the United States Constitution and Section 10, Article I

of the Ohio Constitution. *State v. Noble*, 12th Dist. No. CA2007-03-008, 2008-Ohio-355, ¶ 7.

To preserve this right, the legislature enacted Ohio's speedy-trial statutes. *Id.*

{¶ 13} R.C. 2945.71(D) provides:

A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree of offense charged \* \* \*.

{¶ 14} Here, the highest degree of offense facing appellant was a third-degree felony. Pursuant to R.C. 2945.71(C)(2), a criminal defendant who is charged with a felony must be brought to trial within 270 days after his arrest. See *State v. Barnett*, 12th Dist. No. CA2002-06-011, 2003-Ohio-2014, ¶ 8. For the purposes of speedy-trial calculation, each day that a defendant is incarcerated in lieu of bail solely on the pending charge counts as three days. R.C. 2945.71(E); *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478, ¶ 7. However, R.C. 2945.72 provides circumstances that extend or toll the time within which a defendant must be brought to trial. See *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, ¶ 17. Pertinent to this appeal, R.C. 2945.72(B) tolls speedy-trial time for "[a]ny period during which the accused is mentally incompetent to stand trial or during which his mental competence to stand trial is being determined, or any period during which the accused is physically incapable of standing trial \* \* \*."

{¶ 15} On August 2, 2010, the trial court granted the state's request for a competency evaluation, and subsequently found appellant competent to stand trial on September 21, 2010. Appellant argues that this time was not tolled under R.C. 2945.72(B) because the state, rather than the accused, requested the evaluation. Thus, according to appellant, the 50 days he spent in jail between August 2 and September 21, 2010, should be charged to the state under the triple-count provision of R.C. 2945.71(E). We disagree with appellant, as

R.C. 2945.37(B) specifically states:

In a criminal action in a court of common pleas, a county court, or a municipal court, the court, *prosecutor*, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before the trial has commenced, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

(Emphasis added.)

{¶ 16} Pursuant to the express language of the statute, a prosecutor may raise the issue of a defendant's competency to stand trial. Moreover, nothing in R.C. 2945.72(B) restricts the tolling provision to motions filed by the accused. "Had the Ohio General Assembly intended to apply this tolling provision solely to defense competency motions, it could have written the statute in that manner." *Smith v. Warden, Lebanon Corr. Inst.*, S.D. Ohio No. 1:10-CV-673, 2011 WL 6817822, \* 16 (Dec. 28, 2011); *State v. Jordan*, 101 Ohio St.3d 216, 2004-Ohio-783, ¶¶ 24, 30. Thus, the state properly requested that appellant undergo a competency evaluation on August 2, 2010, at which time the tolling provision in R.C. 2945.72(B) took effect. See *State v. Blessing*, 5th Dist. No. 02 CA 13, 2004-Ohio-190, ¶¶ 3, 10. Moreover, the tolling period continued until the trial court made its competency determination 50 days later, on September 21, 2010. *State v. Palmer*, 84 Ohio St.3d 103, 106-107 (1998); *State v. Duncan*, 9th Dist. No. 3117-M, 2001 WL 1044206, \* 5 (Sept. 12, 2001).<sup>1</sup>

{¶ 17} Thus, out of the 63 days appellant was held in jail in lieu of bail prior to trial, 50 of those days were tolled and only 13 were subject to the triple-count provision in R.C.

1. In his statement of facts, appellant notes that the competency examiner failed to issue a report within the 30-day time limit imposed by R.C. 2945.371(G). However, "the tolling effect of R.C. 2945.72(B) cannot be cut short by an examiner's failure to file a competency report within the prescribed time frame." *Palmer*, 84 Ohio St.3d at 107.

2945.71(E). Thus, as of the competency determination on September 21, 2010, only 39 days were chargeable to the state. R.C. 2945.71(C)(2). Between September 21, 2010 and trial on January 12, 2011, an additional 113 single-count days had elapsed. Thus, at the time of trial, only 152 days were chargeable to the state out of the 270 days allotted under R.C. 2945.71(C)(2). Because appellant was brought to trial in a timely manner, the trial court did not err in denying appellant's motion to dismiss on speedy-trial grounds.

### **Evidence Warranting the Competency Evaluation**

{¶ 18} Appellant next argues the trial court abused its discretion by ordering his competency evaluation.

{¶ 19} "Fundamental to our adversarial system of justice is the due process right of a criminal defendant who is legally incompetent not to be subjected to trial." *State v. Were*, 94 Ohio St.3d 173, 174 (2002). The United States Supreme Court has defined the test for competency to stand trial as whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding - and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402, 403, 80 S.Ct. 788 (1960).

{¶ 20} In R.C. 2945.37, the General Assembly codified a criminal defendant's right to a competency hearing and set forth the test to determine competency as follows:

(B) In a criminal action in a court of common pleas or municipal court, the court, prosecutor, or defense may raise the issue of the defendant's competence to stand trial. If the issue is raised before trial, the court shall hold a hearing on the issue as provided in this section. If the issue is raised after the trial has commenced, the court shall hold a hearing on the issue only for good cause shown or on the court's own motion.

\* \* \*

(G) A defendant is presumed to be competent to stand trial. If, after a hearing, the court finds by a preponderance of the evidence that, because of the defendant's present mental

condition, the defendant is incapable of understanding the nature and objective of the proceedings against the defendant or of assisting in the defendant's defense, the court shall find the defendant incompetent to stand trial and shall enter an order authorized by section 2945.38 of the Revised Code.

{¶ 21} Here, the state filed a pretrial motion requesting a competency evaluation on August 2, 2010. See, e.g., *State v. Hinkston*, 182 Ohio App.3d 232, 2009-Ohio-2631, ¶ 11 (4th Dist.). Thus, in accordance with R.C. 2945.37(B), the trial court was *required* to hold a hearing in order to determine appellant's competency. Further, once the issue of a defendant's competency is raised, R.C. 2945.371(A) provides that the court "may order one or more evaluations of the defendant's present mental condition \* \* \*." Under these circumstances, we cannot say the trial court abused its discretion by ordering appellant's competency evaluation and by holding a subsequent hearing on the issue. See *State v. Bock*, 28 Ohio St.3d 108, 109 (1986).

{¶ 22} Appellant also argues the state lacked evidentiary support to warrant its suggestion of incompetency. It appears the crux of this argument is that the state used its request as a pretext to circumvent appellant's speedy-trial rights. We disagree with this argument.

{¶ 23} In requesting the competency evaluation, the state relied on the following evidence, which the court had in its possession on August 2, 2010: (1) a report by a licensed social worker at the Talbert House, (2) a letter from a concerned family member, and (3) an assessment from Clermont Mercy Hospital, where appellant was held for five days and evaluated by Dr. Larry Graham, a licensed psychiatrist. After reviewing the documents, the court concluded,

there are some indications, in [the Talbert House] report, potential dangerousness manifested by some of the comments and \* \* \* there is some concern in the attachments to the report, and then we have Dr. Graham, [who] says "[t]he patient really has no ability to understand his dilemma and his perspective,

from other points of view, and I believe his rigidity reflects more on his personality \* \* \*."

{¶ 24} The court further noted that the Talbert House report referenced the same "personality" issues, which led the social worker to conclude that appellant presented "a substantial risk of physical harm to others as well as, somewhat, to himself."

{¶ 25} Upon review, we cannot say this was an improper basis for the state to doubt appellant's competence to stand trial. In addition to appellant's apparent inability to understand his "dilemma," he underwent two medical evaluations, which included a five-day stay in a psychiatric ward immediately following his arrest. See *Pate v. Robinson*, 383 U.S. 375, 387, 86 S.Ct. 836 (1966) ("[i]n the event a sufficient doubt exists as to [the offender's] present competence[,] such a hearing must be held"); *State v. Berry*, 72 Ohio St.3d 354, 359 (1995). Moreover, while counsel for appellant made a somewhat muddled argument as to the relative significance of the evaluations, he ultimately admitted, "there is enough evidence there in the Talbert House report to more than support the State's position, if they want a competency evaluation." Under these specific circumstances, we find the state's request for the evaluation was not a pretext, but rather an exercise in precaution to preserve appellant's due process right to a fair trial. *Robinson*, 383 U.S. at 378.

{¶ 26} Lastly, we reject appellant's argument that competency evaluations are not warranted absent a finding of very specific criteria, including evidence of "irrational" behavior, defiant demeanor at trial, or counsel's doubts as to one's competency. Appellate courts are not limited to such criteria in evaluating the basis for a competency evaluation.

{¶ 27} Accordingly, we reject appellant's second sub-argument.

#### **Maximum Incarceration for a Misdemeanor**

{¶ 28} In his third sub-issue, appellant claims he could not be convicted of unlawful restraint, a third-degree misdemeanor, because he had been held in jail for 63 days prior to

trial, three days longer than the maximum term of imprisonment for the offense. Appellant argues he was therefore entitled to discharge on the misdemeanor pursuant to R.C. 2945.73(C), which states:

Regardless of whether a longer time limit may be provided by sections 2945.71 and 2945.72 of the Revised Code, a person charged with misdemeanor shall be discharged if he is held in jail in lieu of bond awaiting trial on the pending charge:

For a total period equal to the maximum term of imprisonment which may be imposed for the most serious misdemeanor charged \* \* \*.

{¶ 29} When an accused is discharged pursuant to R.C. 2945.73(C), the discharge bars any further criminal proceedings against him based on the same conduct. R.C. 2945.73(D).

{¶ 30} The state argues R.C. 2945.73(C) does not apply here because appellant was charged with not only a misdemeanor, but a felony, as well. We agree.

{¶ 31} By its explicit terms, subsection (C) limits discharge to offenders charged *solely* with misdemeanors. See *State v. Williams*, 2nd Dist. No. 20104, 2004-Ohio-5273, ¶ 20. The statute is not ambiguous in this regard, and we may not ignore the plain language or insert words not used. See, e.g., *State v. Teamer*, 82 Ohio St.3d 490, 491 (1998). Had the legislature intended for R.C. 2945.73(C) to apply to a combination of felonies and misdemeanors, it presumably would have stated as such in the statutory language. Thus, because appellant was charged with a felony as well as a misdemeanor, he was not entitled to discharge under R.C. 2945.73(C).

{¶ 32} Because R.C. 2945.73(C) did not apply, appellant remained subject to the requirements of R.C. 2945.71(D), which provides, in pertinent part:

A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of

the charges within the time period required for the highest degree of offense charged, as determined under divisions (A), (B), and (C) of this section.

{¶ 33} Thus, when an accused faces a combination of felony and misdemeanor charges arising from the same act, he must be brought to trial "within the time period required for the highest degree of offense charged \* \* \*." *Id.* Because appellant was charged with a felony, the state had 270 days to bring him to trial on all charges, including the misdemeanor. *Id.*; R.C. 2945.71(C)(2).

{¶ 34} The cases appellant cites do not change our position, where, in each case, the offenders entitled to discharge under R.C. 2945.73(C) were indicted *solely* for misdemeanors. *State v. Skaggs*, 10th Dist. No. 05AP-554, 2006-Ohio-1476; *Columbus v. Bryan*, 10th Dist. No. 03AP-1136, 2004-Ohio-3885; *State v. Brown*, 5th Dist. No. 1996CA00300, 1997 WL 115846 (Feb. 24, 1997). These cases are inapposite, as this case involves a felony charge in addition to the misdemeanor.

{¶ 35} Lastly, we reject appellant's contention that R.C. 2945.73(C) supersedes R.C. 2945.71(D). In 1999, the General Assembly amended R.C. 2945.71(D) to instruct how the speedy-trial statutes apply to offenders charged with a combination of felonies and misdemeanors arising from the same act. In doing so, the General Assembly reflected its intent to extend the time to try the misdemeanors within the limits for the highest felony offense. Inasmuch as "combination" offenses are now addressed in R.C. 2945.71(D), but not R.C. 2945.73(C), it is clear the General Assembly did not intend R.C. 2945.73(C) to impact R.C. 2945.71(D) in this regard. *Compare Mansfield v. Budea*, 5th Dist. No. CA-2889, 1992 WL 28856, \* 2 (Feb. 6, 1992) ("[t]o hold that defendant must be tried within the time that remains from the lesser misdemeanor period would place an unduly severe burden on the prosecution").

{¶ 36} Accordingly, we reject appellant's third sub-argument and overrule the first

assignment of error.

{¶ 37} Assignment of Error No. 2:

{¶ 38} THE TRIAL COURT ERRED IN CONVICTING THE DEFENDANT OF UNLAWFUL RESTRAINT.

{¶ 39} Once again, appellant raises several sub-arguments within his assignment of error. First, appellant challenges the sufficiency and manifest weight of the evidence supporting his conviction. He also argues his conviction violated his First Amendment right to free speech.

### **Manifest Weight and Sufficiency of the Evidence**

{¶ 40} Appellant first contends his unlawful restraint conviction was supported by insufficient evidence and was against the manifest weight of the evidence. This argument lacks merit.

{¶ 41} When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Graham*, 12th Dist. No. CA2008-07-095, 2009-Ohio-2814, ¶ 65. When addressing sufficiency, 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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶ 42} In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines 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 conviction must be reversed and a new trial ordered. *Graham* at ¶ 66; *State v. Cummings*, 12th Dist. No. CA2006-09-224, 2007-Ohio-4970, ¶ 12.

{¶ 43} Because sufficiency is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. *Graham* at ¶ 67. "Thus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." *Id.*

{¶ 44} Here, appellant was convicted of unlawful restraint in violation of R.C. 2905.03(A), which states, "[n]o person, without privilege to do so, shall knowingly restrain another of the other person's liberty." A person acts knowingly, "regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "Privilege" is defined as "an immunity, license, or right conferred by law, bestowed by express or implied grant, arising out of status, position, office, or relationship, or growing out of necessity." R.C. 2901.01(A)(12).

{¶ 45} The term "restraint" implies a "limitation in some form on progress or advancement which otherwise might occur." *State v. Combs*, 2nd Dist. No. 98CA137, 2000 WL 84563, \* 4 (Jan. 28, 2000). As commonly used in R.C. 2905.03, restraint requires proof that the victim was "compelled to remain where he does not wish to remain or go where he does not wish to go, and that person be restrained of his liberty without sufficient complaint or authority." *State v. Williams*, 75 Ohio App.3d 293, 298 (8th Dist. 1991). "Proof of the restraint of another's liberty does not need to show that such restraint was of a particular duration \*\*\* or was accomplished in a particular manner." (Internal citations omitted.) *State v. Martin*, 10th Dist. Nos. 02AP33, 02AP34, 2002-Ohio-4769, ¶ 32. This court has previously found sufficient evidence establishing the element of restraint where there is a "real" or "material" interference with another's liberty, as contrasted with a "petty annoyance, or a slight inconvenience, or an imaginary conflict." *State v. Swearingen*, 12th Dist. No. CA2001-01-005, 2001 WL 950671, \* 2 (Aug. 20, 2001).

{¶ 46} During trial, Jennings testified he had just buckled his seatbelt when appellant appeared in his open doorway and placed his hand on top of the door, which prevented Jennings from shutting it. Jennings testified he was "trapped" and could not back out of his parking space without injuring appellant. Over the course of 15 minutes, Jennings made numerous requests to leave, all of which appellant ignored. Curiously, appellant recorded the entire conversation, which only corroborates Jennings' account. For example, the following exchange took place:

APPELLANT: Why don't you do your job is my question. Why do I have to ask you to do your job \* \* \* are you proud of the fact that you don't do your job? You think you're some sort of righteous guy who can decide to hand out justice according to you instead of the law? What makes you above the law? Nothing. \* \* \* Stand up and be a man is what I'm telling you \* \* \* do your job. Why won't you do your job? \* \* \* You're immoral, you will not do your job, you're a politician, you don't care about the law.

JENNINGS: Michael, I'm gonna head to work \* \* \*.

\* \* \*

APPELLANT: When will you do your job? You don't have the balls to do your job, is that it? \* \* \* When are you gonna do your job?

\* \* \*

JENNINGS: Michael, I'm gonna leave, okay?

APPELLANT: No, you're gonna tell me why you will not do your job.

JENNINGS: I'm gonna leave, okay?

APPELLANT: When are you gonna do your job?

\* \* \*

JENNINGS: I don't have any more to say to you \* \* \* I'm trying to leave here \* \* \*.

APPELLANT: Yeah, I know, but I'm trying to get an answer. \*\*

\* When are you gonna uphold the law?

JENNINGS: Can you step back from my door, so I can \* \* \* I'm ready to leave, Michael.

APPELLANT: I'm ready to get justice \* \* \* When does justice happen, Ralph? \* \* \* Why don't you have an answer?

\* \* \*

JENNINGS: Could you step back \* \* \*.

APPELLANT: No, sir.

\* \* \*

JENNINGS: You and I are done talking.

APPELLANT: No we're not, sir you work for me, that's where you get confused. You need to do your job. It's not that simple. Didn't I tell you I was gonna not go away? \* \* \*

JENNINGS: I want to leave here, Michael.

APPELLANT: But you gotta do your job. You swore to do your job, and now I'm confronting you because you haven't, and you don't have a reason. Why is that?

JENNINGS: I'm done with you today, Michael.

APPELLANT: I'm not done, you haven't done your job.

JENNINGS: I'm done, Michael, bye bye.

APPELLANT: No, you're not.

{¶ 47} Moreover, a UDF employee, Rita Planck, testified that when she went outside, she saw appellant standing in Jennings' doorway, preventing him from shutting the door. Planck testified she feared for Jennings because appellant was "very mad, screaming, [and] hollering \* \* \*." After Planck went inside to call the police, Mike Bullis, a former police officer, approached appellant to inform him that he was "intimidating" Jennings by standing in front of Jennings' open door.

{¶ 48} Upon review, we find there was credible evidence that appellant knowingly

blocked Jennings in his vehicle against his will while appellant attempted to get an "answer." Thus, we cannot say the jury clearly lost its way or created a manifest miscarriage of justice in finding appellant guilty of unlawful restraint. Having found appellant's conviction was not against the manifest weight of the evidence, it follows that the evidence was sufficient to support the conviction.

### First Amendment Right to Free Speech

{¶ 49} Appellant next argues his conviction violated his right to free speech under the First Amendment to the United States and Ohio Constitutions. He argues the simple act of "insisting" that an elected official hear his grievances was privileged free speech and could not support the conviction for unlawful restraint.

{¶ 50} We do not dispute that a person has a constitutionally protected right of free speech and freedom to petition for redress of grievances. See, e.g., *State v. Scott*, 123 Ohio App.3d 331, 338 (2nd Dist.1997). However, the First Amendment does *not* require "that a person exercising the right of free speech be guaranteed the opportunity to communicate with any other person, under any circumstances, but rather that the speaker be afforded a reasonable opportunity to make his views known in a public forum." *Id.* at 339. See also *State v. Wellman*, 173 Ohio App.3d 494, 2007-Ohio-2953, ¶ 31 (1st Dist.).

{¶ 51} Here, appellant's conviction does not evoke concerns of free speech or freedom of expression. A person may be found guilty of unlawful restraint only if their conduct interferes with another's liberty in a "real" or "material" way that is not privileged. See *Swearingen*, 2001 WL 950671 at \*2. Appellant's hostile language, coupled with his conduct that "trapped" Jennings in his vehicle over his clear objection, went beyond the bounds of reasonableness, and crossed the line into criminal behavior. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 501-502, 69 S.Ct. 684 (1949) ("[s]tates cannot consistently with our Constitution abridge those freedoms [of speech] to obviate slight

inconveniences or annoyances"). We believe appellant's right to free speech does not justify his behavior, and that the evidence, if believed, was sufficient to convince the average mind of appellant's guilt beyond a reasonable doubt. See *State v. Rajeski*, 12th Dist. No. CA2002-11-120, 2003-Ohio-2783, ¶ 8 ("[defendant's] invocation of his right to free speech does not excuse or justify his boorish behavior").

{¶ 52} We note this holding is in line with the United States Supreme Court precedent "which has rejected the contention that the First Amendment extends to speech that is incidental to or part of a course of criminal conduct \* \* \*." *State v. Worst*, 12th Dist. No. CA2004-10-270, 2005-Ohio-6550, ¶ 55, quoting *State v. Tarbay*, 157 Ohio App.3d 261, 2004-Ohio-2721, ¶ 16 (1st Dist.). See also *Giboney, Cincinnati v. Thompson*, 96 Ohio App.3d 7, 22 (1st Dist.1994).

{¶ 53} Appellant's second assignment of error is overruled.

{¶ 54} Assignment of Error No. 3:

{¶ 55} A TRIAL COURT ERRED IN SENTENCING THE APPELLANT.

{¶ 56} Appellant asserts two sub-issues in his final assignment of error, which we will address in turn.

### **Misdemeanor Sanctions**

{¶ 57} Appellant first argues the trial court erroneously added an additional sanction to his sentence that prohibited him from having contact with Jennings outside of formal settings. Appellant claims this sanction is overbroad because of its unlimited duration and that it was not properly imposed under R.C. 2929.25, which governs misdemeanor community control sanctions.

{¶ 58} R.C. 2929.25(A)(1) states:

Except as provided in sections 2929.22 and 2929.23 of the Revised Code or when a jail term is required by law, in sentencing an offender for a misdemeanor, other than a minor

misdemeanor, the sentencing court may do either of the following:

Directly impose a sentence that consists of one or more community control sanctions authorized by section 2929.26, 2929.27, or 2929.28 of the Revised Code. The court may impose any other conditions of release under a community control sanction that the court considers appropriate. If the court imposes a jail term upon the offender, the court may impose any community control sanction or combination of community control sanctions in addition to the jail term.

Impose a jail term under section 2929.24 of the Revised Code from the range of jail terms authorized under that section for the offense, suspend all or a portion of the jail term imposed, and place the offender under a community control sanction or combination of community control sanctions authorized under section 2929.26, 2929.27, or 2929.28 of the Revised Code.

{¶ 59} Thus, under the statute, a court has two choices: (1) it may directly impose community control sanctions, including jail time, or (2) it may impose a jail term, suspend all or part of the jail term, and impose community control sanctions. Regardless of the choice that is made, R.C. 2929.25(A)(2) provides that the duration of all community control sanctions in effect at any time cannot exceed five years.

{¶ 60} R.C. 2929.25(A)(3) requires a trial court to notify an offender of the possible sanctions for violating community control at the sentencing hearing. Specifically, R.C. 2929.25(A)(3) states:

At sentencing, if a court directly imposes a community control sanction or combination of community control sanctions pursuant to division (A)(1)(a) of this section, the court shall state the duration of the community control sanctions imposed and shall notify the offender that if any of the conditions of the community control sanctions are violated the court may do any of the following:

Impose a longer time under the same community control sanction if the total time under all of the offender's community control sanctions does not exceed the five-year limit specified in division (A)(2) of this section;

Impose a more restrictive community control sanction under

section 2929.26, 2929.27, or 2929.28 of the Revised Code, but the court is not required to impose any particular sanction or sanctions;

Impose a definite jail term from the range of jail terms authorized for the offense under section 2929.24 of the Revised Code.

{¶ 61} In the present case, the trial court imposed a 60-day jail term, but credited the entire jail sentence based on the 63 days appellant had served prior to trial. The court then discussed the consequences of violating community control, stating,

I did some research \* \* \* and it appears that there are a couple of options the Court would have in the event any Defendant violated misdemeanor sanctions. And the primary ones would be, number one, to extend the period of the sanctions or to impose more restrictive sanctions, and secondly, to impose any appropriate jail sentence, up to the maximum sentence that is permissible, which, in this case, would be 60 days. Mr. Hart has already done that 60 days \* \* \* [so] it may be an order without any teeth to really back it up, if I were to place Mr. Hart under sanctions, so I'm not going to do so.

{¶ 62} However, despite this statement, the court ordered appellant to have "no contact" with Jennings outside of his formal position as county commissioner, but failed to specify the duration of the order. As such, appellant argues the court failed to comply with R.C. 2929.25(A)(3). We agree.

{¶ 63} As an initial matter, we find the no contact order was effectively a community control sanction, which we have recognized is a legitimate sanction in the past. *State v. Miller*, 12th Dist. No. CA2010-12-336, 2011-Ohio-3909, ¶ 21. See also *State v. Hosler*, 3rd Dist. No. 16-09-21, 2010-Ohio-980, ¶ 19. We also find this was a "direct" imposition of community control under R.C. 2929.25(A)(1)(a), as it was impossible to "suspend" jail time that appellant had already served. See R.C. 2929.25(A)(1)(b). See also R.C. 2929.25(D)(3).

{¶ 64} Under R.C. 2929.25(A)(3), the trial court was then required to notify appellant of, among other things, the duration of the no contact order. It is clear from the record that the court did not comply with this requirement during the sentencing hearing. See *State v.*

*Fisher*, 12th Dist. No. CA2006-01-008, 2006-Ohio-6079, ¶ 16 (notification required by R.C. 2929.25(A)(3) must occur at the sentencing hearing).<sup>1</sup> This error requires us to reverse and remand the matter to the trial court for resentencing.<sup>2</sup> See *State v. Hildebrand*, 4th Dist. No. 08CA864, 2008-Ohio-6526, fn. 1; *State v. Sims*, 4th Dist. No. 04CA2779, 2006-Ohio-528, ¶ 16.

{¶ 65} Thus, on remand, the trial court must advise appellant of what portion of his original community control sanction, if any, remains in effect. The court must then provide the proper notice required by R.C. 2929.25(A)(3), including the duration of the no contact order, even though it is implicitly five years or less under R.C. 2929.25(A)(2). See *State v. Shugart*, 7th Dist. No. 08 MA 197, 2009-Ohio-2635, ¶ 37. Lastly, since appellant has already served the maximum jail term for his misdemeanor conviction, on remand, the court cannot impose additional jail time, either as a condition of appellant's sentence or punishment for a community control violation. See R.C. 2929.25(D)(3).

{¶ 66} To this extent only, appellant's third assignment of error is sustained.

### Overbreadth and Vagueness

{¶ 67} Because the trial court could consider the same community control sanction on remand, we will address appellant's final challenge to the sanction. Here, appellant argues that the no contact provision is overbroad and void for vagueness. According to appellant, the sanction infringes on his "constitutional right to petition his government for redress of grievances, and to express his opinions."

{¶ 68} When imposing community control, trial courts may fashion additional conditions or requirements "[i]n the interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior \*\*\*." R.C. 2929.25(C)(2). In *State v. Talty*, 103 Ohio

2. Appellant also suggests the court failed to notify him of the consequences of a community control violation, but as quoted above, this is not the case. See R.C. 2929.25(A)(3)(a)-(c).

St.3d 177, 2004-Ohio-4888, the Supreme Court of Ohio adopted a test to determine the reasonableness of community control conditions. Under the test, courts should consider whether the condition "is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." *Id.* at ¶ 12. However, the community control conditions cannot be overly broad so as to unnecessarily impinge upon the offender's liberty. *Id.* at ¶ 13. We review the trial court's imposition of community control sanctions under an abuse-of-discretion standard. *Id.* at ¶ 10.

{¶ 69} During the sentencing hearing, the trial court described the no contact order as follows:

I am also gonna order that, Mr. Hart, you will have no undue or inappropriate contact with the Brown County Commissioners and Ralph Jennings, in particular, outside of their formal setting as commissioners of this county. This does not preclude nor foreclose you from attending a meeting to set forth your petitions or requests. \* \* \* [A]gain, I'm just ordering that you not have any undue or inappropriate contact with them, outside the setting, and, specifically, with Commissioner Jennings.

{¶ 70} Moreover, the sentencing entry states appellant may have "no contact with County Commissioners, other than attending formal meetings, *specifically* Ralph Jennings." (Emphasis added.)

{¶ 71} We find that under these facts, the trial court did not abuse its discretion when it prohibited appellant from "*specifically*" contacting Jennings outside of his capacity as a county commissioner. (Emphasis added.) First, the no contact provision is reasonably related to appellant's rehabilitation and bears some relation to the crime, as it restricts appellant's access to the elected officials who incited his hostile behavior in the first place. See *Talty*, 2004-Ohio-4888 at ¶ 12. Moreover, the condition is reasonably related to

appellant's future criminality, where it helps to maintain some degree of control over him and helps protect Jennings from similar contact with appellant in the future. Contrary to appellant's opinion, this is not a blanket ban on his right to petition the government. The court specifically stated it was not prohibiting appellant from approaching the commissioners in their formal setting, in an appropriate manner, and for a "legitimate purpose." See *Shugart*, 2009-Ohio-2635 at ¶ 32.

{¶ 72} For these reasons, we find the no contact condition of appellant's sentence is not overly broad or impermissibly vague.

{¶ 73} Judgment affirmed in part, reversed in part, and remanded for resentencing only.

POWELL, P.J., and RINGLAND, J., concur.

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IN THE COURT OF APPEALS  
TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY  
FILED  
COURT OF APPEALS

STATE OF OHIO, APR 27 2012

Plaintiff-Appellee, : CASE NO. CA2011-03-008  
BROWN COUNTY CLERK OF COURTS :  
: JUDGMENT ENTRY

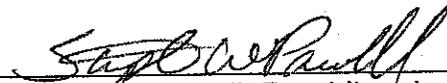
- VS -

WILLIAM M. HART, :  
Defendant-Appellant. :

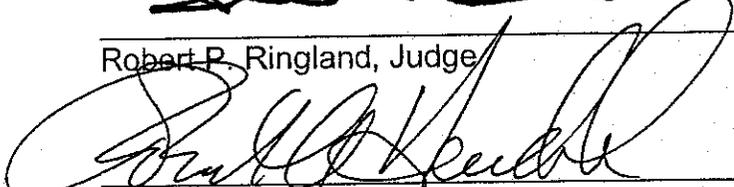
The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part and reversed in part and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Brown County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed 50% to appellant and 50% to appellee.

  
\_\_\_\_\_  
Stephen W. Powell, Presiding Judge

  
\_\_\_\_\_  
Robert P. Ringland, Judge

  
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Robert A. Hendrickson, Judge