

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
: Case No. 2011-2075 and 2011-2178
Appellant/Cross-Appellee, :
: On Appeal from the Hamilton County
vs. : Court of Appeals, First Appellate
: District Case No. C-100637
JULIAN STEELE, :
:
Appellee/Cross-Appellant. :

MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF NEITHER PARTY

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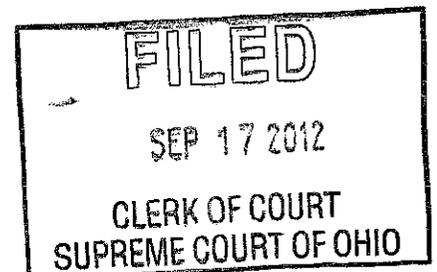


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STATEMENT OF THE CASE AND OF THE FACTS

Julian Steele was indicted on two counts of intimidation in violation of R.C. 2921.03(A). (Indictment Counts 3, 5 at 2-5, May 26, 2009; Trial Tr. vol. 1, 3:10-13, Aug. 16, 2010.) Both counts were founded on intimidation of a witness by way of “filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner[.]” (Indictment Counts 3, 5; Trial Tr. vol. 5 1030:4-16.) Count Three alleged Steele intimidated Ramone Maxton or “R.M.” *Id.* Count Five alleged Steele intimidated Alicia Maxton, Ramone Maxton’s mother. *Id.* The jury convicted Steele of intimidating Ramone Maxton, but acquitted him of intimidating his mother. (Tr. vol. 5, 1215:1-7; 1215:22-1216:3.)

It is undisputed that Steele, at the time a detective, was investigating a series of robberies when he brought Ramone to the police station. It is undisputed that Steele interviewed and interrogated Ramone. It is undisputed that Steele filed a complaint against Ramone after he confessed. The State presented evidence that Steele was interrogating Ramone to determine what he knew about the robberies, and whether he was involved. (Tr. vol. 2, 482:15-483:15.) The State also presented evidence, via a prosecutor and Ramone’s mother, that Steele believed Ramone was innocent and had falsely confessed when Steele filed a complaint and locked Ramone up. *Id.* at 487:16-22; vol. 3, 799:13-18, 800:10-24. Although Ramone was not involved in the robberies, he had found out about them when the assailants—his

mother's boyfriend and another boy living in the home—told him after-the-fact.¹ *Id.* at 677:11-16. At trial the State's theory was that Steele had signed charges based on false accusations to intimidate Ramone. *Id.* vol. 5, 1014:22-1015:14.

The First District affirmed Steele's intimidation conviction. *State v. Steele*, 1st App. Dist. No. C-100637, 2011-Ohio-5479, ¶ 24-26. This Court accepted Steele's third proposition of law stating: "The crime of intimidation . . . does not apply to police officers when they interview or interrogate a suspect."

STATEMENT OF INTEREST OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender is a state agency charged with the duty to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The Office also plays a key role in the promulgation of Ohio statutory law and procedural rules. The Office's primary focus is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system. The Ohio Public Defender has an enduring interest in protecting the integrity of the justice system,

¹ In his brief Steele asserts that Ramone knew who committed the robberies and later went shopping with them. This is incorrect. Ramone worked, went shopping after work, and then returned home, where he stayed for the night. (Tr. vol. 3, 677:11-680:12.) It was only later that Ramone was told about the robberies. This is apparent given both the times of the robberies—late night and early morning—as well as Alicia Maxton's testimony. (Tr. vol 3, 761:5-765:21; 769:17-771:13.)

and a special role in ensuring that the development and application of the criminal law is in accordance with the rights of Ohio's citizens. This Court has recognized this special role of the Ohio Public Defender as it relates to criminal appeals by the state, and has required that "[i]n a case involving a felony, when a county prosecutor files a notice of appeal under S. Ct. Prac. R. II or an order certifying a conflict under S. Ct. Prac. R. IV, the county prosecutor shall also serve a copy of the notice or order on the Ohio Public Defender." S. Ct. Prac. R. XIV, Sec. 2(A).

This case presents an important proposition of law with the potential to dramatically redefine the relationship between law enforcement and Ohio citizens. Critically, the changes proposed would affect the initial stages of any citizen's interaction with law enforcement—interviews and interrogations. The Office of the Ohio Public Defender and its clients will be directly affected by any action taken as to Proposition of Law III, accepted by the Court. Accordingly, the Office of the Ohio Public Defender offers this *amicus curiae* brief in support of neither party.

ARGUMENT

Argument of Amicus Curiae on Appellee/Cross-Appellant's Proposition of Law III

Exempting law enforcement from the intimidation statute, R.C. 2921.03, would redefine law enforcement's relationship with all Ohio citizens.

At the outset, the Public Defender must make clear that it takes no position as to any of the issues in this case, or on the merits of the case, except insofar as they relate to the Appellee Cross-Appellant's Third Proposition of Law. That being stated, amicus curiae asserts that regardless of how it decides the remaining issues in the case, this Court must reject that proposition.

A. Should this Court add an exemption granting law enforcement immunity from the intimidation statute?

Ohio criminalizes intimidating public servants, party officials, and witnesses. R.C. 2921.03(A). Intimidation is defined as trying to influence, intimidate, or hinder such individuals in the discharge of their duties. Intimidation can be achieved in one of three ways:

- By force;
- By unlawful threat of harm to any person or property; or,
- By filing, recording, or otherwise using a materially false or fraudulent writing with malicious purpose, in bad faith, or in a wanton or reckless manner.

Id. The statute does not exempt anyone from its application. As such, an exemption for law enforcement would require something more than simply construing the statute against the state and liberally in favor of Steele. Instead, this Court would have to rewrite the statute by reading into it a non-existent exemption. "The

polestar of construction and interpretation of statutory language is legislative intention.” *State ex rel Francis v. Sours*, 143 Ohio St. 120, 124, 53 N.E.2d 1021 (1944). “In determining the legislative intent of a statute ‘it 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.*’ (Emphasis added.)” *Wheeling Steel Corp. v. Porterfield*, 24 Ohio St.2d 24, 28, 263 N.E.2d 249 (1970), quoting *Columbus-Suburban Coach Lines v. Pub. Util. Comm.*, 20 Ohio St. 2d 125, 127, 254 N.E.2d 8 (1969). Steele asks this court to insert not a word, but an entire subsection to the intimidation statute.

Moreover, as noted in the State’s brief, when the legislature wants to exempt law enforcement from a particular statute, it says so—specifically. By way of example, R.C. 4511.191(A)(5)(b) sets forth what an officer’s rights if an individual arrested for drunk driving refuses a chemical test: “the law enforcement officer who made the request may employ whatever reasonable means are necessary to ensure that the person submits to a chemical test of the person's whole blood or blood serum or plasma.” More importantly, however, is the subsection’s exemption: “A law enforcement officer who acts pursuant to this division * * * is immune from criminal and civil liability based upon a claim for assault and battery or any other claim for the acts, *unless the officer so acted with malicious purpose, in bad faith, or in a wanton or reckless manner.* (Emphasis added.) *Id.*

This statute is instructive on two counts. First, it exemplifies the language that the legislature uses when it intends to grant law enforcement immunity from a statute. Second, it demonstrates the limitations the legislature might typically

include in such a grant. Even if the legislature had intended to grant law enforcement immunity from the intimidation statute, said immunity would be limited based on an officer's state of mind and intent. The immunity set forth in the OVI refusal statute therefore includes triggering intents identical to the ones set forth in the intimidation statute as to using a materially false or fraudulent writing. *Compare* R.C. 4511.191(A)(5)(b) *with* R.C. 2921.03(A). Had the legislature intended to exempt law enforcement from the operation of the intimidation statute, then, it surely would have been specific on the point.

Steele's contention that Ramon Maxton was not a "witness" based on this Court's decisions in *State v. Davis*, 132 Ohio St.3d 25, 132-Ohio-1654, 968 N.E.2d 466 and *State v. Malone*, 121 Ohio St.3d 244, 2009-Ohio-310, 903 N.E.2d 614 is similarly misplaced. Both cases interpreted R.C. 2921.04, a different statute. The language of R.C. 2921.04 is not present in R.C. 2921.03(A). *State v. Crider* is both more analogous and persuasive as to R.C. 2921.03(A), which "is designed to protect those persons who saw, heard or otherwise knew, or were supposed to know, material facts about a criminal proceeding. Once a person becomes possessed of such material facts, he likewise becomes a "witness" within the meaning of R.C. 2921.03(A)." 21 Ohio App.3d 268, syllabus ¶ 1, 487 N.E.2d 911 (9th Dist. 1984).

In sum, there is no legal support for the idea that police officers investigating crimes are not subject to the restrictions of R.C. 2921.03. And as a policy matter, it seems obvious that creating such blanket immunity would create a host of problems.

B. What are the practical consequences of an exemption granting law enforcement immunity?

The parties' briefs each set forth their own "slippery slopes." Steele contends that upholding his intimidation conviction opens the door to the widespread prosecution of police officers carrying out their duties. By contrast, the State contends that Steele is asking Ohio's trial courts to determine, statute by statute, which laws apply to law enforcement.

The Ohio Public Defender contends neither result is very likely. Both these envisioned results look to the effect the exemption would have on the judicial system, but past the effects an exemption would have on Ohio citizens. It is Ohioans everywhere that will feel the most immediate and dramatic consequences of a blanket grant of immunity to law enforcement.

Law enforcement is granted significant freedom in their interview and interrogation tactics. Officers can use deception in getting the suspect to the police station for interviewing. *State v. Lynch*, 98 Ohio St. 3d 514, 523, 2003-Ohio-2284, 787 N.E.2d 1185 (police use of deception to get Lynch to the police station, but not during the interview, did not render the confession involuntary). Officers can use deception to obtain confessions. *See Frazier v. Cupp*, 394 U.S. 731, 739, 89 S. Ct. 1420, 22 L. Ed. 2d 684 (1969) (holding that police misrepresentations were insufficient to make an otherwise voluntary confession involuntary). Officers can mislead suspects with regard to victim statements. *State v. Loza*, 71 Ohio St. 3d 61, 67-68, 1994-Ohio-409, 641 N.E.2d 1082 (1994) (confession admissible even though police misled suspect by falsely telling him the victim identified her assailant).

Officers can lie with respect to the evidence the police have against the victim. *State v. Ulch*, 6th Dist. No. L-00-1355, 2002 Ohio App. LEXIS 1866 (April 19, 2002) (holding that detective's use of lying techniques regarding the bruising on the victim, as part of the Reid Technique, to encourage appellant to make a statement did not violate appellant's right to due process). But the proposition of law before the Court would expand what officers can do when interviewing or interrogating a witness to include: (1) using force; (2) unlawfully threatening harm to a person or property; and (3) filing, recording, or using materially false or fraudulent writings. R.C. 2921.03(A). Depending on the Court's reading of the statute, officers will be able to carry out one or all of these actions with malicious purpose, in bad faith, or in a wanton or reckless manner. *Id.* It almost goes without saying that if the Court adopts this interpretation, interactions between law enforcement and citizens will be completely and dramatically altered.

It would be the state's appellate courts who would have to sort out the constitutional limitations on the grant of immunity. Those challenges will likely arise from individuals who were influenced or intimidated by force, threat, or fraudulent writings. Both Steele's and the State's "slippery slope" arguments are belied by a simple, if uncomfortable, fact—law enforcement officers are rarely prosecuted. See Human Rights Watch, *Shielded from Justice: Police Brutality and Accountability in the United States*, (July 1, 1998), <http://www.hrw.org/legacy/reports98/police/index.htm> (accessed September 16, 2012). The State's assertion that Ohio's courts will be flooded with officers

challenging the application of criminal statutes is unlikely (though all criminal defense attorneys representing officers would gladly preserve such challenges for appeal). Meanwhile, Steele's assertion that officers everywhere will be unconscionably prosecuted is alarmist—the exercise of prosecutorial discretion prevents this result. Indeed, it was only the especially egregious nature of Steele's actions that led to his prosecution.

For all of these reasons, the Ohio Public Defender respectfully requests this Court to refrain from an activist reading of R.C. 2921.03, and to maintain the current relationship between law enforcement and the citizens of this state. There is no persuasive reason to do otherwise, and Ohioans need to be able to trust the justice system to protect them from rogue law enforcement officials who misuse authority.

CONCLUSION

Amicus curiae urges this Court to reject Appellee/Cross-Appellant's Proposition of Law III.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



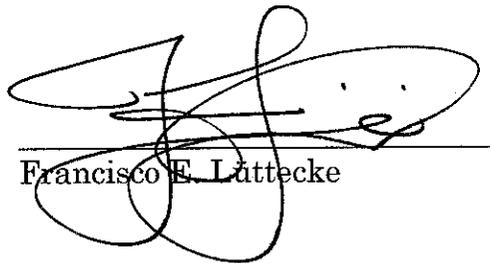
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing MERIT BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER IN SUPPORT OF NEITHER PARTY was forwarded by regular U.S. Mail, on this 17th day of September, 2012, to:

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