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POSTURE

The Court took jurisdiction of this case on September 5, 2012, based on a conflict of law in the Ohio District Courts of Appeal. On October 26, 2012, McDonald timely filed an appellant's brief addressing the proposition of law as articulated by this Court in its September 5, 2012, Entry. On November 20, 2012, Appellee timely filed its brief. This reply brief by Appellant now follows.

DISCUSSION OF APPELLEE'S RESPONSE – FACTS

That McDonald never Saw Runyon's Signal has been an Argument Since Trial and Throughout the Appellate Process

Appellee's brief sets forth the facts as it sees them and then asserts the following:

In an attempt to argue that the Appellant was not able to see the officer on the night in question, the Appellant sets forth mathematical equations, google maps[sic], and a study by the Michigan State Police. These are facts that were never presented at trial and were not considered by the jury or the Fourth Appellate District. These "facts" and "mathematical truths" are now being presented by the Appellant for the first time and were never considered prior to this Court's review.

(Appellee's Brief, 12-1177, 11/20/12 at 6).

However, at trial, the jury was taken on a tour of the scene and thus would have seen for themselves how close the point where McDonald passed Sergeant Runyon was to where Runyon claimed to have caught McDonald. (Trial Tr. at 23:12-25:19). And McDonald's trial counsel specifically elicited the relative speeds of the vehicles and talked in his closing argument about the physical impossibility of Runyon having caught McDonald in the distance he claimed to have done. *Id.* at 53:20-54:7, 54:19-56:8, 57:4-57:10, 58:2-58:5, 97:2-98:1.

Then on direct appeal to the Fourth District Court of Appeals, Appellant used a statement of facts considerably similar to that used in this Court – including Google Maps as an illustrative

tool¹ and a number of mathematical equations. (Appellant's Brief, 11CA1, 04/26/11 at 2-4). The result of this was the conclusion that Runyon would have lagged far behind McDonald at the time when McDonald exited the highway and began his ill-fated trip through town. Id.

Candor to the Court demands an acknowledgement that the material presented in his Supreme Court brief possesses a level of detail and sophistication considerably above that which was presented at trial and possibly exceeding that which was presented on direct appeal in the Fourth District.² However, the core notion in Appellant's statement of facts has been a theme throughout this case, from trial to the present proceeding – Runyon, who was stationary when McDonald blazed past him at 112, could not possibly have caught McDonald within a mile, would have been a long way behind when McDonald left the freeway, and thus McDonald may not have seen or heard his signal.

That McDonald may not have seen Runyon's Lights or Heard his Siren is of no Direct Significance to the Narrow Legal Issue Appealed, but Fairness Issues Presented by this Factual Question Militate in Favor of a Strict Interpretation of the Jury's Verdict

The issue before this Court is ultimately a legal one and the background facts are therefore, as a matter of pure deductive logic, irrelevant. However, the truth, that Runyon could not have caught McDonald within the distance in which he claimed to have done, does help to illustrate the importance of convicting and sentencing a person only upon facts found by a jury. In this case, the facts show that McDonald may not have seen or heard the signal to stop and thus may not have "willfully" disobeyed it. (Appellant's Brief, 12-1177, 10/26/12 at 1-3). Runyon himself admitted that he was not "a hundred percent sure" that McDonald saw his lights or heard

¹ An expedient solution since, unlike the jury, the Court of Appeals was unlikely to view the scene.

² In addition, the reference to the Michigan Study (a publicly available government resource providing scientific data) was not cited in the direct appeal prior to the filing of McDonald's appellant's brief in this Court.

his siren. (Trial Tr. at 71:6-71:15). If the jury had been presented with a verdict form asking them whether McDonald saw and “willfully” disobeyed Runyon’s order and signal, they may well have checked “no” and reached a “not guilty” verdict on that charge.

Instead, the jury was asked (via the verdict form) whether McDonald had “Fail[ed] to Comply with Order or Signal of Police Officer And Caused A Substantial Risk of Serious Physical Harm To Persons or Property.” (Appellant’s App’x at 27). The jury’s answer and, frankly, McDonald’s answer, to that question is “yes.” McDonald did fail to comply (albeit inadvertently) with a signal and, by driving drunk at high speeds, he did pose a substantial risk of serious harm to (at a minimum) property. However, because the jury was never clearly presented with the factual question relevant for determining which version of the statute McDonald was to be convicted and sentenced upon, fairness demands that he stand convicted only of what the jury’s verdict explicitly states.

DISCUSSION OF APPELLEE’S RESPONSE – LAW

Both as a Matter of Constitutional Law and Statutory Law, a Person May Only Stand Convicted and be Sentenced on Facts Found by a Jury

As covered in greater detail in Appellant’s Merit Brief, a person stands convicted of and may be sentenced upon only those accusations submitted to and “confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.” 4 W. Blackstone, Commentaries on the Laws of England 343 (1769); see also, Blakely v. Washington, 542 U.S. 296, 306 (2004) (holding that every disputed fact necessary to impose a sentence must be found by a jury and stating, “the judge’s authority to sentence derives wholly from the jury’s verdict.”); Ring v. Arizona, 536 U.S. 584, 588-89 (2002) (emphasis omitted) (internal quotation marks omitted) (citations omitted) (“the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if

punished according to the facts reflected in the jury verdict alone.”); State v. Foster, 109 Ohio St. 3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶ 52 & *in passim* (quoting Ring, 536 U.S. at 610 (Scalia, J., concurring)) (applying Blakely and related U.S. Supreme Court cases to Ohio’s sentencing scheme and repeating that “all facts essential to imposition of the level of punishment that the defendant receives -- whether the statute calls them elements of the offense, sentencing factors, or Mary Jane -- must be found by the jury beyond a reasonable doubt.”). The principle from these high court cases is codified in the Ohio Statutes at Ohio Revised Code section 2945.75(A)(2).

In an effort to escape the simple import of this principle, Appellee makes two legal arguments: First, Appellee argues that the willfulness *mens rea* element of the third degree felony failure to comply offense is not “the” elevating element. (Appellee’s Brief, 12-1177, 11/20/12 at 7, 10). Second Appellant argues that, even if the jury verdict forms were defective, the jury instructions function as a curative.³ Id. at 8-9. These arguments shall be addressed in sequence.

One Cannot be Convicted and Sentenced to an Elevated Tier of a Graduated Sentencing Offense Unless the Jury’s Verdict Reflects All the Elements Necessary to Justify a Conviction and Sentence at that Tier or Specifically Indicates the Higher Tier of the Offense – One Need Not Distinguish Elevating Elements from Other Necessary Elements

Appellant focuses on whether the *mens rea* element of willfulness is “the element which elevates the crime of failure to comply with order or signal” to a third degree felony. Id. at 7, 10.

³ Appellee also devotes some space to an argument that the second verdict form has some bearing on the question before this Court. (Appellee’s Brief, 12-1177, 11/20/12 at 8). Appellant is not sure precisely what Appellee is arguing by making reference to the fact that the jury could have used the second verdict form if they had not found that McDonald caused “a substantial risk of serious physical harm to persons or property.” Moreover, the second verdict form does not appear in Appellee’s appendix despite the fact that Appellee’s brief cites page 18 of its appendix for the form. Id. Thus, though Appellant does not concede whatever argument Appellee is attempting, this third potential argument by Appellee shall not be addressed in the body of this brief.

It concludes that it is not, because if McDonald had willfully failed to comply but not caused a substantial risk of harm to persons or property, he would still only have been guilty of a misdemeanor. *Id.* at 10. However, substantial risk of harm is not, by itself, sufficient either. That is, if McDonald had caused a substantial risk of harm but failed to comply through inadvertence or even recklessness rather than willfulness, he still would only have been guilty of, at most, a misdemeanor. Ohio Rev. Code § 2921.331(C)(5)(a)(ii) (2004). In other words, Appellee’s analysis misses the heart of the issue because it incorrectly focuses on trying to isolate “the element which elevates” the crime. (Appellee’s Brief, 12-1177, 11/20/12 at 7, 10). Instead, the focus should be on whether the elements necessary to substantiate the conviction were stated in the verdict or whether the higher tier of the offense was specifically stated. Ohio Rev. Code § 2945.75(A) (2008); *Ring*, 536 U.S. at 588-89.

The constitutional principles underpinning section 2945.75 are quite clear, “the Sixth Amendment does not permit a defendant to be exposed to a penalty exceeding the maximum he would receive if punished according to the facts reflected in the jury verdict alone.” *Ring*, 536 U.S. at 588-89 (emphasis omitted) (internal quotation marks omitted) (citations omitted). And it is undisputed that unless a failure to comply is both willful and accompanied by a substantial risk of serious physical harm to persons or property, it cannot be more than a misdemeanor. Ohio Rev. Code § 2921.331. Admittedly, the way section 2921.331 is written, the “substantial risk” element is a separate sub-section and can conveniently be labeled a separate elevating element. Ohio Rev. Code § 2921.331(C)(5)(a)(ii). Moreover, Ohio Revised Code section 2945.75 triggers “[w]hen the presence of one or more additional elements makes an offense one of more serious degree” Thus, it was understandable that Appellee erroneously attempted to draw a distinction based on the format and organization of section 2921.331 in order to claim that the

verdict, under 2945.75, need not have set out the *mens rea*. However, regardless of the formatting of section 2921.331 and the way its subsections are divided, section 2921.331 sets out a single crime, “failure to comply with an order or signal of a police officer.” Ohio Rev. Code § 2921.331(C)(1). That crime can be committed with no specific *mens rea* and, in that case, even if a substantial risk of serious harm results, the crime is a misdemeanor. Ohio Rev. Code § 2921.331(A). It can also be committed willfully and, in that case, if a substantial risk of serious harm results, the crime is a third degree felony. Ohio Rev. Code § 2921.331(B), (C)(5)(a)(ii). Willfulness is a fact necessary to sentence a defendant to a third degree felony violation of section 2921.331 and it is, therefore, “one [of the] additional elements [that] makes [the] offense of [‘failure to comply with an order or signal of a police officer’] one of more serious degree” Ohio Rev. Code § 2945.75(A); Ohio Rev. Code § 2921.331(C)(1).

In short, regardless of where, in the statute, the elements are listed, no court could convict or sentence McDonald to a third degree felony for a failure to comply unless the jury had found that he acted willfully in failing to comply and that he posed a substantial risk of serious physical harm to persons or property. An omission of either one of those findings would cap the maximum possible conviction and sentence at a first degree misdemeanor. There is no way to tell from the jury’s verdict in this case, whether the jury decided that McDonald willfully, recklessly, or inadvertently failed to comply with Runyon’s signal. (Appellant’s App’x at 27). Thus, McDonald cannot and should not be convicted and sentenced as if the jury had concluded that he was guilty of a third degree felony for a willful failure to comply.

Jury Instructions do not Cure a Defect in the Verdict Form and, even if they did, the Jury Instructions in this Case would not Because they were Unclear on the *Mens Rea* of the Offense

This Court, in State v. Pelfrey, quoted and affirmed a Second Appellate District decision which stated, in relevant part, “[Defendant]’s failure to raise this defect [missing necessary

elements and offense level in the verdict form] at trial did not waive it, and the fact that the indictment and jury instructions addressed the [missing material] did not cure the non-compliance with R.C. § 2945.75(A)(2).” State v. Pelfrey, 112 Ohio St. 3d 422, 2007-Ohio-256, 860 N.E.2d 735, at ¶ 5. On that legal basis alone, Appellant’s claim that the trial court’s instruction cured whatever defects existed in the verdict form, ought fail. However, analysis of the jury instructions themselves shows that even if they could be considered, they hardly provide confidence that the jury made the necessary *mens rea* finding of willfulness in this case.

The trial court instructed:

The defendant is charged in **Count 1** with failing to comply with an order or signal of a police officer. Before you can find the defendant guilty, you must find beyond a reasonable doubt that Scotty R. McDonald on or about September 30, 2010, and in Lawrence County, Ohio, did operate a motor vehicle so as wilfully[sic] to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop, and the operation of said motor vehicle caused a substantial risk of serious physical harm to persons or property.

“Recklessly”. A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

(Appellee’s App’x at 7). In short, right after telling the jury that they needed to find that McDonald had acted willfully before they could find him guilty, the trial court instructed the jury instead on recklessness. The trial court’s instruction would have likely confused the jury about whether they should consider recklessness or willfulness. In addition, recklessness is the presumed instruction on offenses which do not otherwise list a mental state, like the base level “failure to comply” offense. Ohio Rev. Code § 2901.21(B) (2000); see also Ohio Rev. Code § 2921.331(A). Thus, even if the verdict form were read with the jury instructions for context, the presence of a recklessness instruction suggests that the jury might have been intended to consider

an offense without a stated *mens rea*, like the base level “failure to comply offense.” In other words, the presence of a recklessness instruction supports the notion that when the jury signed the verdict finding that McDonald had “Fail[ed] to Comply with Order or Signal of Police Officer” the jury was finding that McDonald had recklessly, not willfully, “fail[ed] to comply” Ohio Rev. Code § 2921.331(A).

Moreover, after the Court listed all the elements of the offense the jury was to consider (including recklessness) it summed up:

If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of Failure to Comply with Order or Signal of Police Officer And The Operation Of The Motor Vehicle Caused Substantial Risk Of Serious Physical Harm To Persons Or Property, your verdict must be guilty as charged as against Scotty McDonald.

(Appellee’s App’x at 10). In short, even as the trial court summed-up its instructions, it failed to explain or even mention that there was an important distinction between failing to comply recklessly and failing to comply willfully.

The jury instructions in this case cannot, as a matter of law, be considered to rehabilitate a defective jury verdict under section 2945.75 and Pelfrey. Even if they could, the particular jury instructions used in this case would not do so because they are ambiguous about the level of the offense the jury was to consider – reckless or willful, felony or misdemeanor.

CONCLUSION

There are two ways to comply with the Constitution and Ohio law in drafting a verdict form. First, one can simply name the offense and the level of the offense. Then, if the jury finds the defendant guilty, a reviewing or sentencing court knows what level and type of offense the jury decided the defendant committed. The reviewing or sentencing court is then justified in inferring that the jury followed the jury instructions and found each element necessary for the

level and title of offense indicated in the verdict form and as set out in the jury instructions.⁴ Second, one can use a more detailed verdict form which sets out each element that the jury must find. Then, if the jury finds the defendant guilty, a reviewing or sentencing court knows that the jury decided each element necessary for the level of the offense ultimately to be imposed. What cannot be done however, and what was done in this case, is to eschew the first route in favor of the second, but then not ask the jury to decide all the necessary elements.

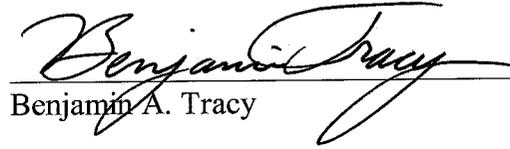
One cannot tell, by looking at the verdict form (or for that matter, the jury instructions) what offense the jury found McDonald had committed. True, they found he posed a substantial risk of serious harm to persons or property, but if the jury thought McDonald failed to comply with the officer's signal inadvertently or recklessly, the finding on the risk of harm is of no criminal consequence. As the record stands, there is no way to tell what mental state the jury attributed to McDonald. Because the verdict lists neither that the offense was a third degree felony nor all the elements necessary to convert a misdemeanor failure to comply offense into a third degree felony, the only available conclusion is that the jury did not find McDonald guilty of a third degree felony. His conviction and sentence should be vacated and the case remanded with instructions to the trial court to enter a judgment against McDonald for a first degree misdemeanor violation of section 2921.331 and sentence him accordingly.

⁴ Provided, of course, that unlike the jury instructions in this case, the instructions are clear about what the correct elements of the offense are.

December 10, 2012

Respectfully submitted,

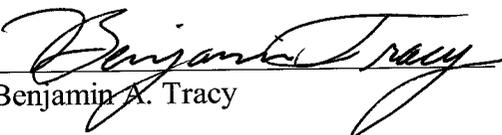
Benjamin A. Tracy, Counsel of Record


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CERTIFICATE OF SERVICE

I certify that this Reply Brief was filed with the Ohio Supreme Court and a copy of the same was sent by U.S. Postal Service First Class Mail to counsel for Appellee, Brigham M. Anderson, Assistant Lawrence County Prosecuting Attorney, Lawrence County Court House, Ironton, OH 45638 on December 10, 2012.


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