

ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio,	:
	: Case No. 2012-1070
Plaintiff-Appellant,	:
	: On Appeal from the
v.	: Lorain County Court of Appeals,
	: Ninth Appellate District,
David T. Washington,	: Case No. 11CA010015
	:
Defendant-Appellee.	:

MERIT BRIEF OF APPELLEE DAVID T. WASHINGTON

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INTRODUCTION

When it was filed, the State's appeal addressed a question that this Court had not directly answered—whether the State may redefine an offense at sentencing in a way that contradicts the story the State told the jury so that the State may obtain consecutive sentences for otherwise allied offenses. As a result, the State's brief attempts to tease out a holding on this issue from the various opinions in *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314.

But *State v. Williams*, Slip Op. No. 2012-Ohio-5699, issued eight days before the State filed its merit brief in this case, resolves this case. In *Williams*, this Court held that courts of appeals should conduct de novo reviews of trial court findings on allied offense issues, deferring only to "factual determinations" made by the jury. *Id.* at ¶ 26. The Ninth District did exactly that in this case. After noting that the State was raising a theory at sentencing that contradicted the theory it raised at trial, the court independently reviewed the facts as presented to the jury, and ruled that Mr. Washington's convictions for failure to comply with a police officer's order and obstruction of official business were allied offenses. Opinion at ¶ 17. And given that the court of appeals determination of the facts was the same as the trial prosecutor's theory of the case, the State is in no position to argue that the Ninth District got it wrong.

Further, judicial estoppel prevents a party from arguing an issue, winning that issue, and then arguing the opposite. The United States Supreme Court has ruled that

this type of argument must lose “to prevent the perversion of the judicial process[,]” and to prevent “parties from ‘playing fast and loose with the courts.’” *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808; 149 L.Ed.2d 968 (2001), quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982) and *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3rd Cir. 1953).

In this case, the Ninth District independently applied the facts as found by the jury, but the State asks this Court to instead apply the facts as found by the trial judge at sentencing. *Williams* resolves this case. This Court should either summarily affirm the decision of the court of appeals pursuant to *Williams* or dismiss this case as improvidently allowed.

STATEMENT OF THE CASE

Summing up the case, the jury found Mr. Washington not guilty of all charges that involved violence: robbery, assault, and felonious assault. T.p. 612-3. The jury found him guilty of failure to comply, obstructing official business, and two counts of theft. T.p. 613.

Mr. Washington has only one other addition to Appellant's statement of the case. After the Appellee filed its brief in this Court, the Ninth District granted Mr. Washington's motion for a delayed appeal of the resentencing that occurred as a result of the Ninth District judgment that is before this Court in this case. That appeal is being briefed in the Lorain County Court of Appeals.

STATEMENT OF THE FACTS

Brief summary of the facts.

A few minutes after David Washington and a companion took a car from a woman in the parking lot of Midway Mall in Elyria, local police located the stolen car and began a high-speed chase. T.p. 249-50. Mr. Washington continue to flee even after stop sticks blew out his tires. T.p. 251-2. So about ten minutes after he left the mall parking lot, he stopped and continued to briefly flee on foot. T.p. 233; 365. He want a little ways into some woods and hid in what the police described as a "drainage ditch," where he was quickly apprehended without further incident. T.p. 365. In his opening

statement, the prosecutor explained that the *entire event*, from carjacking to arrest, lasted 11 minutes. T.p. 17.

The State presents as "fact" a claim that the jury rejected.

The Appellant's statement of the facts includes transcript citations, but generally fails to state which witness's testimony supports any given statement. As a result, the State treats all testimony it presented as though the jury accepted it as true. This is especially important when it comes to the allegation that Mr. Washington swerved during the chase to try to hit a police officer. The State accurately describes the officer's testimony on which the State charged Mr. Washington with felonious assault. T.p. 333-9. But the State's version of the facts omits that Mr. Washington denied intentionally swerving toward the police officer, T.p. 424, and that the jury acquitted Mr. Washington of the felonious assault charge. T.p. 612-3. Instead, the jury convicted Mr. Washington of failure to comply and obstructing official business based on the risk of harm created during the car chase. T.p. 147-8, 613.

The State tells the jury one thing, and appellate courts another.

The State's factual statement omits reference to its shifting and contradictory theories of the facts. The prosecutor told the grand jury that Mr. Washington committed two offenses that began in Lorain County—fleeing and eluding and obstructing official business. Indictment. Consistent with that theory, the prosecutor at trial told the jury that the risk Mr. Washington created during the car chase proved a "risk of physical

harm" needed to elevate obstructing official business to a felony. R.C. 2921.31(B)—in its opening statement, the prosecutor alleged:

Obstructing official business has to do, it's very same similar to the assault on a police officer, both counts of that is when the defendant ran he imperiled not only the officers' lives, and you will see as Officer Miller is pursuing to catch up to this chase, the people in front of him necessitated him slamming on his brakes, dodging other people on the road, so not only was Officer Miller and the other officers in danger, but so were other people like you that were out there driving eastbound on I-90 on February 26th of this year.

T.p. 147-8. Notably, the State made *no* mention of any risk of physical harm that accrued during the on-foot portion of the chase. And the State barely mentioned the foot portion of the chase—which one of the officers had called "short[,]” T.p. 365—during its closing argument, and then only to establish the time of the chase to show that Mr. Washington was in the car during the auto chase:

Defendant finally gave up the chase. He parked the car, you saw. As the defendant jumped out of the driver's side, the video didn't show the passenger jumping out of the passenger side, but the defendant jumps out, defendant is on the ground and running in Westlake at 4:38 p.m.

You can see my writing isn't the best. It's 11 minutes, 11 minutes from the time the Elyria Police put the BOLO [Be On the Look Out for] out, the defendant is on the ground running, 13 minutes at most since the actual carjacking occurred.

T.p. 533-4. And again, the State made no mention of any risk of physical harm that accrued during the on-foot portion of the chase.

But now, the prosecutor claims that the car portion of the chase constituted failure to comply, and the "short" foot portion of the chase constituted obstructing

official business. The trial court speculated at the resentencing hearing that the foot portion of the chase raised new risks. The court found that when the on-foot part of the chase began, Mr. Washington and his companion were “still trying to escape[,]” but then the court speculated that there was:

a different set of risks involved to the public from this new course of conduct. Because it is a new course of conduct, and because, to me, having observed the testimony in the case, and recall (sic) what was described, I see that as a separate event different from a failure to comply and stop your car. They stopped the car, not on their own, but once it was stopped, they had a choice, and they made it and it wasn't a good one. Officers, regardless of whether or not there's evidence as to what time of day it was or, you know, whether there was a swamp or not a swamp or other dangers, to me whenever you go on a chase on foot there are unique dangers. *You don't have to present any special testimony about that.* I know the officers when into the woods. They didn't know what was going to happen. Maybe they were going to find these guys armed, maybe someone was going to trip over a tree root and get hurt. Maybe a scuffle would ensue. Luckily, nothing worse happened.

T.p. 20-21 (resentencing, emphasis added.)

No actual evidence was introduced to support the trial court's speculation. And in the State's briefs in both the court of appeals and in this Court, the prosecutor does not even speculate about any risk of physical harm to a person that might have occurred during the “short” on-foot portion of the chase. Most importantly, the jury heard *no evidence* that Mr. Washington posed or created a risk of physical harm during the on-foot portion of the chase. Instead, the officers testified that Mr. Washington stopped his car, exited the car, and ran into the woods, where he was quickly found laying down in a drainage ditch. T.p. 365-6.

In short, the State won the argument that the on-foot portion of the chase was part of the offense of failure to comply, but now argues that the foot chase was *not* part of the offense of failure to comply. T.p. 612-3.

An uncited allegation in the State's brief.

The State claims that Mr. Washington's trial counsel argued that the foot chase was separate from the failure to comply. Brief at 12. But the State has provided no transcript citation for that assertion, and counsel for Mr. Washington can find no such argument anywhere in the transcript. But even if trial counsel made that argument, Mr. Washington *lost the issue*. No doctrine prohibits a litigant from accepting an adverse factual finding and continuing the litigation on that basis.

ARGUMENT

Proposition of Law:

When the State aggregates a defendant's actions to prove the elements of two convictions for the same acts, the State may not argue at sentencing that part of the acts constituted one crime, and another part constituted the other crime.

I. This Court should either dismiss this case as improvidently allowed or summarily affirm the court of appeals based on *State v. Williams*, Slip Op. No. 2012-Ohio-5699.¹

A. *Williams* holds that courts of appeals properly conduct de novo reviews of facts relevant to an allied offense determination.

The court of appeals took a different view of the facts as found by the jury than did the trial court. And under *Williams*, the court of appeals was entitled to do exactly that. The court of appeals pointed out that the State was arguing a different theory on appeal than the one it argued at trial:

The evidence here was that Washington fled from the police and continued to flee until he was apprehended. His flight from the police amounted to a continuous course of conduct, beginning on the highway and ending in the woods. The State relied upon the same evidence to prove both Washington's failure to comply and obstructing official business charges. As such, the State in no way differentiated between the two.

Opinion at ¶ 17. But immediately after acknowledging the State's newfound understanding of the facts, the court independently reviewed the evidence as submitted to the jury:

¹ *Williams* was issued after this Court accepted this case, and eight days before the State filed its brief.

The record reflects that Washington's failure to comply count and his obstructing official business count were not: (1) of dissimilar import; (2) committed separately; or (3) committed with a separate animus. See R.C. 2941.25(B). Washington acted with one specific goal in mind: to evade the police. It was possible to commit both failure to comply and obstructing official business with the same conduct, and the evidence was that Washington actually committed both offenses with the same state of mind. *Johnson* at ¶ 48-49. His offenses arose from the same conduct, involved similar criminal wrongs, and resulted in similar harm. *Id.* at ¶ 70 (O'Connor, J., concurring). The conclusion, therefore, must be that his offenses are allied offenses of similar import that must merge. See *State v. Congrove*, 5th Dist. No. 11-CA-5, 2012 Ohio 1159, ¶ 26-29 (concluding that offenses were allied under *Johnson* because the evidence showed that the charges arose from the same conduct and the defendant acted with a single state of mind).

Id. This holding was independent of the State's shifting and contradictory theories, and it is exactly the kind of *de novo* review that appellate courts are supposed to do pursuant to *Williams*. Moreover, the State would be hard pressed to argue that the court of appeals misunderstood the facts when that court adopted the State's trial theory of the case.

B. *Williams* holds that juries, not trial judges, determine the facts of a case.

The issue presented in the State's brief is whether the State can argue a new theory to the trial judge at sentencing that the jury never considered. Specifically, at trial, the State argued that Mr. Washington committed fleeing and eluding and obstruction of official business by leading the police on a chase—first in a car, and then briefly on foot. T.p. 147-8. The State relied on the risk of physical harm caused during the car part of the chase to show the risk of physical harm needed to win the risk of

physical harm element of the obstruction charge. *Id.* And the State won. The jury convicted Mr. Washington of both offenses as charged and argued. But now, the State asks this Court to disregard the jury's decision and to give the trial judge a blank slate to decide what exactly the defendant was convicted of.

This Court held in *Williams* that in allied offense cases, "it is the jury making factual determinations, and the reviewing court owes deference to those determinations, but it owes no deference to the trial court's application of the law to those facts." *Williams* at ¶ 26.² The lone dissenting justice quoted this part of the majority decision, and then asserted that the Court "confuses the work of a jury with that of the court" because "the jury is not involved in an allied-offense determination." *Id.* at ¶ 29-30 (O'Donnell, J., dissenting). The State's position in this case is the position of the dissent in *Williams*—a position considered and rejected by six justices of this Court. Accordingly, this Court has considered and rejected the argument the State makes in this case. There is no need to write an additional opinion saying the same thing. This Court should summarily affirm the Ninth District's decision in this case or, in the alternative, this Court should dismiss this case as improvidently allowed.

² While *State v. Johnson* was a splintered opinion, this Court decided *Williams* with a majority decision supported by six justices.

II. The State can propose two conflicting alternative theories, but it can't win both.

A. Judicial estoppel bars the State's argument.

This case is about preventing what the United States Supreme Court held was a "perversion of the judicial process." *New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808; 149 L.Ed.2d 968 (2001), quoting *Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166 (4th Cir. 1982). Specifically, at trial, the State won the argument that the on-foot portion of the chase was part of the offense of failure to comply, but the State now argues that the foot chase was *not* part of the offense of failure to comply. Worse, at trial, the State introduced no evidence that Mr. Washington caused a risk of harm during the foot chase, and instead relied on the risk of harm during the car chase to prove that element of felony obstruction.

The United States Supreme Court has unanimously ruled that "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire*, 532 U.S. at 749, quoting *Davis v. Wakelee*, 156 U.S. 680, 689, 39 L.Ed. 578, 15 S.Ct. 555 (1895). The rule is needed "to protect the integrity of the judicial process," *id.*, quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982), "to prevent the perversion of the judicial process[.]" *id.*, quoting *In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990), to prevent "parties from 'playing

fast and loose with the courts[.]” *id.*, quoting *Scarano v. Central R. Co.*, 203 F.2d 510, 513 (3rd Cir. 1953), and to prevent the “improper use of judicial machinery,” *Id.*, quoting *Konstantinidis v. Chen*, 200 U.S. App. D.C. 69, 626 F.2d 933, 938 (D.C. Cir. 1980).

While there is no fixed rule as to when judicial estoppel applies, “several factors typically inform the decision whether to apply the doctrine in a particular case[.]” *New Hampshire*, 532 U.S. at 750. “First, a party’s later position must be ‘clearly inconsistent’ with its earlier position.” *Id.*, quoting *United States v. Hook*, 195 F.3d 299, 306 (7th Cir. 1999); *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 206 (5th Cir. 1999). “Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create ‘the perception that either the first or the second court was misled[.]’” *Id.*, quoting *Edwards*, 690 F.2d at 599. “A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Id.* at 751 (Citations omitted.)

In this case, all three factors militate in Mr. Washington’s favor. First, the State’s positions are “clearly inconsistent.” The car chase cannot be both part of the obstruction offense, and not part of the obstruction offense. Second, if the State’s sentencing theory is true, the State “misled” the jury at trial. At trial, the State told the jury that the risk of physical harm during the car chase elevated the obstruction charge to a felony. T.p. 147-

8. And at trial, the State did not produce any evidence (or even argue) that Mr. Washington created a risk of physical harm during the foot chase. Finally, if defense counsel had known at trial that the State was basing its obstruction charge solely on the foot chase, counsel could have pointed out at closing that the State introduced no evidence of the risk of physical harm during that part of the chase, which would have lowered the offense to a misdemeanor, thereby mooting the allied offense issue.

B. Punishing Mr. Washington for obstruction solely during the foot chase would violate Ohio's policy of punishing a defendant individually for each offense of conviction.

The federal courts look at the "*real conduct* that underlies the crime of conviction[.]" *United States v. Booker*, 543 U.S. 220, 250, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). (Emphasis sic.) But the Ohio General Assembly has rejected the notion that a trial court should craft a "sentencing package" that fits a defendant's conduct as a whole. Instead, Ohio looks at each offense of conviction individually. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at paragraph one of the syllabus ("The sentencing-package doctrine has no applicability to Ohio sentencing laws"). The State's theory of this case descends into sentencing package territory—instead of looking at the conduct the jury convicted Mr. Washington of committing, the State seeks to look anew at the underlying conduct at sentencing. Of course, the trial court is permitted to weigh factors that the jury has *not* determined, but the State's change of theory changes the

offense of conviction to something different than what the jury found Mr. Washington guilty of committing.

III. The State forfeited any argument that a risk of physical harm accrued during the foot chase by failing to make that argument in the court of appeals or in its brief in this Court.

Nowhere in the State's brief in the Ninth District did the State argue that it had proven a risk of physical harm during the foot chase. Instead, the State asserted that the trial court had found that the foot chase "carried a new set of risks." State's Merit Brief, Court of Appeals, Dec. 8, 2011 at 8, citing T.p. 19 (resentencing). The State also argued that "actions of running away from the wrecked car created different risks to the officers and the public than those created by the car chase." *Id.* at 11. Nowhere in its merit brief filed in this Court did the State argue that it had proven that one of those "different risks" was a risk of *physical harm* during the foot chase. The State also does not make that argument in its brief in this Court. In fact, the words, "risk," "physical," and "harm" do not appear anywhere in the State's brief.

IV. This Court's allied offense decisions should not have surprised the State.

At the resentencing hearing, the trial court justified its second-guessing of the jury, in part, on the mistaken assumption that *State v. Johnson*, 128 Ohio St.3d 153, 2010 Ohio-6314, changed the allied offense analysis of this case. The trial court stated that "I'm having to do this in hindsight when the prosecutor and defense counsel didn't have the *Johnson* case in front of them at the time this case was tried, because things

might have been framed and argued a bit differently, given the *Johnson* case.” T.p. 20 (resentencing).

The trial court was wrong. *Johnson* did not change the allied offense analysis of this case, which was tried in June 2009. By that time, this Court had issued *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625; *State v. Brown*, 119 Ohio St.3d 447, 2008-Ohio-4569; and *State v. Winn*, 121 Ohio St.3d 413, 2009-Ohio-1059. In *Cabrales*, this Court qualified *State v. Rance*, 85 Ohio St.3d 632 (1999), and held that two offenses need not have an “exact alignment of the elements” to be allied. *Cabrales*, 2008-Ohio-1625, at paragraph one of the syllabus. In *Brown*, this Court clarified that, even in the absence of an exact alignment of the elements, to determine whether two offense are allied, a court must “consider[] the societal interests protected by the relevant statutes.” *Id.* at ¶ 36.

Most importantly, in *State v. Winn*, decided three months before the State took this case to trial, this Court rejected fanciful speculation as a basis to hold that two convictions were not allied offenses. Even though the prosecution in *Winn* could present a few hypothetical examples of how an aggravated robbery might be committed without a kidnapping, this Court rejected the speculation because these “examples lapse into the strict textual comparison that this court rejected in *Cabrales*. We would be hard pressed to find any offenses allied if we had to find that there is no conceivable situation in which one crime can be committed without the other.” *Id.* at ¶ 24.

It may be possible to create hypothetical situations in which a person could flee from the police without obstructing official business, but there are no plausible examples that would avoid “the strict textual comparison that this court rejected in *Cabrales*.” *Id.* It defies common sense to argue that a defendant could “operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person’s motor vehicle to a stop” and not also “do any act that hampers or impedes a public official in the performance of the public official’s lawful duties . . . with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official’s official capacity[.]” Compare R.C. 2921.31(A) with R.C. 2921.331(B). Willfully attempting to elude or flee a police officer necessarily “obstruct[s]” and “delay[s]” the officer’s performance of his or her duty.

In fact, Mr. Washington prevails even under *the dissent’s* standard in *Winn*. The dissent argued that a “strict textual comparison would find the elements [of receiving stolen property and theft] not to be identical, and therefore the crimes not to be allied offenses. But one cannot logically commit theft without also receiving stolen property, so the commission of one offense necessarily results in commission of the other, making them allied offenses of similar import.” *State v. Winn*, 121 Ohio St. 3d 413, ¶31 (Moyer, C.J. dissenting), citing to *Cabrales* at ¶25. Likewise, one “cannot logically” flee from the police without obstructing or delaying an officer’s duty.

Accordingly, if the State was caught flat footed at sentencing in this case, it was only because the State was not paying attention to this Court's decisions. And that was not Mr. Washington's fault.

V. *State v. Johnson* does not support the State's position.

Johnson is not particularly helpful in sorting out the issues of this case. In *Johnson*, the State had argued to the jury that part of the defendant's conduct constituted one offense, and another part constituted a separate offense, and the jury convicted the defendant of both. The question then became whether those two separate acts, which were proven separately to the jury, were allied offenses under R.C. 2945.21.

But in this case, the question is whether the State can change theories at sentencing and obtain consecutive sentences for two offenses that would be allied *as presented to the jury*. Because this Court did not face in *Johnson* the question it faces in this case, it is perilous to attempt to tease relevant holdings out of the various *Johnson* opinions. Nevertheless, the State has argued that the opinion supports its position in this case, so Appellee engages in the same exercise.

A. The State loses under the lead opinion.

1. The State loses under the "blow-by-blow" rule.

The lead *Johnson* opinion held that a series of blows that were separated by time were all one crime under the allied offense statute. *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, at ¶ 56 ("We decline the invitation of the state to parse Johnson's

conduct into a blow-by-blow in order to sustain multiple convictions for the second beating.”) If a defendant commits only one offense when he beats a child, stops, then restarts the beating, a defendant who leads the police on a chase does not commit a new crime by exiting a car and continuing the chase on foot. If the State can divide the case when the car chase turned into a foot chase, the State can infinitely subdivide a case— for example, there is nothing to stop the State from saying that a new crime occurred when Mr. Washington hit the stop sticks, T.p. 358-9, exited the freeway, T.p. 363, or lay down in the drainage ditch. T.p. 447. This kind of “shotgun” prosecution is exactly what the allied offense statute was intended to prevent. *Johnson* at ¶ 46, quoting *State v. Geiger*, 45 Ohio St.2d 238, 242 (1976).

2. The lead opinion started its analysis with the theory the State relied on at trial.

While the lead opinion looked beyond the jury’s verdict, it did not attempt to hold the defendant responsible for a theory never presented to the jury. To the contrary, *Johnson* was a typical allied offense case in that the court considered two separate convictions based on separate facts, and then decided whether those facts were sufficiently connected to be allied. The lead opinion never stated that a trial court could sentence a defendant based on facts a jury had never found.

B. The State loses under the test in Justice O'Connor's concurring opinion.

The concurring opinion authored by Justice O'Connor looked to the facts as presented to the jury. *Johnson*, 2010-Ohio-6314, at ¶ 70 (O'Connor, J., concurring) ("At trial in this case, the state relied on the same evidence to establish that Johnson's conduct—severely beating Milton and causing his death—violated both [statutes]"). The opinion did state that it was "constrained by the record and briefs[.]" *Id.*, but a review of the State's brief in *Johnson* shows that the prosecutor argued based on conduct, not on what Mr. Johnson was convicted of. Merit Brief of Plaintiff-Appellee, *State v. Johnson*, Case No. 2009-1481 (Feb. 23, 2010), pp. 2-3. More specifically, the State argued that one beating occurred, and then the child's mother entered the room, spoke with Mr. Johnson, and then returned to watching her movie. Then, "a few minutes later," Mr. Johnson began to inflict the blows that led to the child's death. *Id.*

So the *Johnson* prosecutor argued from the facts of the case, not the fact of conviction, and the plurality still focused on the theory the State presented to the jury. And applying that focus here, Mr. Washington's convictions were allied and committed with the same animus. It was found by the jury that the risk of physical harm—which the State argued was caused by the automobile chase—elevated the obstructing charge to a felony.

C. Mr. Washington would prevail under the test in Justice O'Donnell's concurring opinion.

In his concurring opinion, Justice O'Donnell focuses on the "conduct" of the defendant, but the opinion makes no attempt to distinguish between conduct proven to the jury and theories invented after trial that the jury never heard. But the gist of the opinion is practical: "the proper inquiry is . . . whether the defendant's conduct, i.e., the actions and behavior of the defendant, results in the commission of two or more offenses of similar or dissimilar import or two or more offenses of the same or similar kind committed separately or with a separate animus as to each." *Johnson*, 2010-Ohio-6314, at ¶ 78. It is absurd to argue that Mr. Washington changed his "animus" when he exited the broken-down car and continued the chase on foot. The reality is that he was continually trying to evade capture.

VI. Lower court cases do not support the State's position.

The State asserts that the Ninth District's decision in this case conflicts a number of lower court cases. Brief, pp. 12-14. Those case were decided before this Court announced *State v. Williams*, Slip Op. No. 2012-Ohio-5699, in which this Court clarified that the facts as found by the jury are the facts courts should defer to when deciding allied offense cases. *Id.* at ¶ 26.

But two of the cases cited by the State hold *exactly the opposite of what the State claims*. In *State v. Carner*, 8th Dist. No. 96766, 2012-Ohio-1190, the Eighth District held that "where the State relied on the same conduct in opening statement and closing

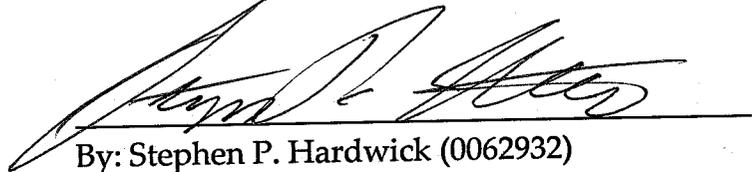
argument to prove both offenses at trial, it cannot then change its theory on appeal." *Id.* at 44, paraphrasing *State v. Sutphin*, 8th Dist. No. 96015, 2011-Ohio-5157, at ¶61.

CONCLUSION

This Court should deny the State's attempt to "play[] fast and loose with the courts." *New Hampshire*, 532 U.S. at 751. This Court should either summarily affirm the decision of the court of appeals pursuant to *State v. Williams* or dismiss this case as improvidently allowed.

Respectfully submitted,

Office of the Ohio Public Defender



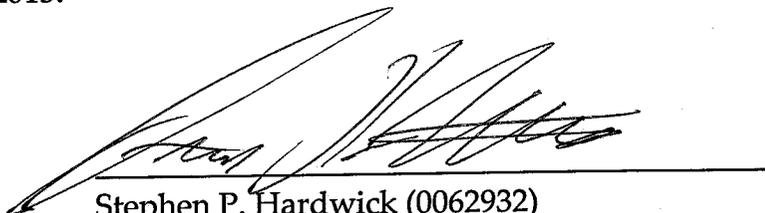
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Counsel for Appellee David T. Washington

Certificate of Service

I hereby certify that a true copy of the foregoing was forwarded by regular U.S. Mail, postage pre-paid to the office of Mary Slanczka, Assistant Lorain County Prosecutor, Lorain County Prosecutor's Office, 225 Court Street, 3rd Fl., Elyria, Ohio 44035 on this 1st day of February, 2013.

A handwritten signature in black ink, appearing to read "Stephen P. Hardwick", is written over a horizontal line.

Stephen P. Hardwick (0062932)
Assistant Public Defender

Counsel for Appellee David T. Washington

#386323

IN THE SUPREME COURT OF OHIO

State of Ohio,	:
	: Case No. 2012-1070
Plaintiff-Appellant,	:
	: On Appeal from the
v.	: Lorain County Court of Appeals,
	: Ninth Appellate District,
David T. Washington,	: Case No. 11CA010015
	:
Defendant-Appellee.	:

APPENDIX TO

MERIT BRIEF OF APPELLEE DAVID T. WASHINGTON

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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 157 and 189
*** Annotations current through September 28, 2012 ***

TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2921. OFFENSES AGAINST JUSTICE AND PUBLIC ADMINISTRATION
OBSTRUCTING AND ESCAPE

Go to the Ohio Code Archive Directory

ORC Ann. 2921.31 (2013)

§ 2921.31. Obstructing official business

(A) No person, without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, shall do any act that hampers or impedes a public official in the performance of the public official's lawful duties.

(B) Whoever violates this section is guilty of obstructing official business. Except as otherwise provided in this division, obstructing official business is a misdemeanor of the second degree. If a violation of this section creates a risk of physical harm to any person, obstructing official business is a felony of the fifth degree.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v H 137. Eff 3-10-2000.

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ORC Ann. 2921.331 (2013)

§ 2921.331. Failure to comply with order or signal of police officer

(A) No person shall fail to comply with any lawful order or direction of any police officer invested with authority to direct, control, or regulate traffic.

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop.

(C) (1) Whoever violates this section is guilty of failure to comply with an order or signal of a police officer.

(2) A violation of division (A) of this section is a misdemeanor of the first degree.

(3) Except as provided in divisions (C)(4) and (5) of this section, a violation of division (B) of this section is a misdemeanor of the first degree.

(4) Except as provided in division (C)(5) of this section, a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds by proof beyond a reasonable doubt that, in committing the offense, the offender was fleeing immediately after the commission of a felony.

(5) (a) A violation of division (B) of this section is a felony of the third degree if the jury or judge as trier of fact finds any of the following by proof beyond a reasonable doubt:

(i) The operation of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

(ii) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

(b) If a police officer pursues an offender who is violating division (B) of this section and division (C)(5)(a) of this section applies, the sentencing court, in determining the seriousness of an offender's conduct for purposes of sentencing the offender for a violation of division (B) of this section, shall consider, along with the factors set forth in *sections 2929.12 and 2929.13 of the Revised Code* that are required to be considered, all of the following:

- (i) The duration of the pursuit;
- (ii) The distance of the pursuit;
- (iii) The rate of speed at which the offender operated the motor vehicle during the pursuit;
- (iv) Whether the offender failed to stop for traffic lights or stop signs during the pursuit;
- (v) The number of traffic lights or stop signs for which the offender failed to stop during the pursuit;
- (vi) Whether the offender operated the motor vehicle during the pursuit without lighted lights during a time when lighted lights are required;
- (vii) Whether the offender committed a moving violation during the pursuit;
- (viii) The number of moving violations the offender committed during the pursuit;
- (ix) Any other relevant factors indicating that the offender's conduct is more serious than conduct normally constituting the offense.

(D) If an offender is sentenced pursuant to division (C)(4) or (5) of this section for a violation of division (B) of this section, and if the offender is sentenced to a prison term for that violation, the offender shall serve the prison term consecutively to any other prison term or mandatory prison term imposed upon the offender.

(E) In addition to any other sanction imposed for a felony violation of division (B) of this section, the court shall impose a class two suspension from the range specified in division (A)(2) of *section 4510.02 of the Revised Code*. In addition to any other sanction imposed for a violation of division (A) of this section or a misdemeanor violation of division (B) of this section, the court shall impose a class five suspension from the range specified in division (A)(5) of *section 4510.02 of the Revised Code*. If the offender previously has been found guilty of an offense under this section, in addition to any other sanction imposed for the offense, the court shall impose a class one suspension as described in division (A)(1) of that section. The court shall not grant limited driving privileges to the offender on a suspension imposed for a felony violation of this section. The court may grant limited driving privileges to the offender on a suspension imposed for a misdemeanor violation of this section as set forth in *section 4510.021 of the Revised Code*. No judge shall suspend the first three years of suspension under a class two suspension of an offender's license, permit, or privilege required by this division on any portion of the suspension under a class one suspension of an offender's license, permit, or privilege required by this division.

(F) As used in this section:

- (1) "Moving violation" has the same meaning as in *section 2743.70 of the Revised Code*.
- (2) "Police officer" has the same meaning as in *section 4511.01 of the Revised Code*.

HISTORY:

GC § 6307-3; 119 v 766, § 3; Bureau of Code Revision, *RC § 4511.02*, 10-1-53; 132 v H 380 (Eff 1-1-68); 137 v S 381 (Eff 10-19-78); *RC § 2921.33.1*, 143 v S 49 (Eff 11-3-89); 148 v H 29. Eff 10-29-99; 149 v S 123, § 1, eff. 1-1-04; 2012 SB 337, § 1, eff. Sept. 28, 2012.