[Cite as *State v. Martauz*, 2009-Ohio-3247.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	
V.	)	CASE NO. 08-MA-177
	)	
FRANCIS MARTAUZ,	)	OPINION
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Mahoning County Court Number Five Case No. 08CR281
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gain Prosecutor Meghan Brundege Ralph M. Rivera Assistant Prosecutor 21 W. Boardman St. 6th Floor Youngstown, Ohio 44503-1426
For Defendant-Appellant	Francis Martauz, pro se 9900 Cherry Hills Drive Canfield, Ohio 44406

JUDGES:

Hon. Gene Donofrio
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: June 22, 2009

[Cite as *State v. Martauz*, 2009-Ohio-3247.]
DONOFRIO, J.

{¶1} Defendant-appellant, Francis Martauz, appeals from a Mahoning County Court Number Five judgment convicting him of obstructing official business, after a bench trial.

{¶2} On February 25, 2008, Sheriff Deputy Eric Harris went to appellant's residence to serve him with papers regarding his divorce. He waited in a church parking lot near appellant's home for appellant to return from work. Appellant returned and pulled his truck up to his road-side mailbox. Deputy Harris pulled up behind appellant's truck and activated his lights and siren. Instead of stopping, appellant backed up towards Deputy Harris's cruiser requiring Deputy Harris to back up his cruiser to avoid being struck. Deputy Harris ordered appellant to stop. Appellant stopped, exited his truck, and started walking towards Deputy Harris. Deputy Harris ordered appellant to get back in his vehicle numerous times before appellant complied. After a brief check on his radio, Deputy Harris approached appellant's truck. Appellant was on his cell phone. As Deputy Harris approached, appellant locked his doors and rolled up his windows. After several commands by Deputy Harris, appellant rolled down his window and unlocked his doors. Deputy Harris then served appellant with the divorce papers.

{¶3} As a result, Deputy Harris also issued appellant a summons for obstructing official business, a second-degree misdemeanor in violation of R.C. 2921.31.

{¶4} Appellant was initially charged with obstructing justice. On the day trial was set to begin however, the matter was dismissed on appellant's motion. Appellant was subsequently charged with obstructing official business. Prior to the trial on obstructing official business, he moved to have the charge dismissed on double jeopardy grounds. The trial court denied appellant's motion to dismiss and proceeded with the scheduled bench trial.

{¶5} The trial court found appellant guilty. It then sentenced him to 30 days in jail, all suspended, 12 months of reporting probation, and a $100 fine.

{¶6} Appellant filed a timely notice of appeal on August 15, 2008.

{¶7} The trial court granted appellant's motion for a stay of sentence pending this appeal.

{¶8} Appellant is acting pro se in this appeal. He raises four assignments of error. Appellant's first and fourth assignments of error share a common argument. Therefore, we will address them together. They state:

{¶9} "THE COURT ERRED WHEN IT FOUND THAT A VIOLATION OF OBSTRUCTION OF OFFICIAL BUSINESS OCCURRED FOR AN INCIDENT THAT OCCURRED IN UNDER TWO MINUTES."

{¶10} "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶11} Appellant argues that the entire incident that Deputy Harris alleged constituted obstructing official business lasted a total of two minutes. He points out that Deputy Harris testified as much and the incident report and his cell phone record provide further support. Appellant also argues that he complied with Deputy Harris's orders and even asked that Deputy Harris serve him with the divorce papers.

{¶12} Additionally, appellant asserts that Deputy Harris's testimony was inconsistent. He points out that Deputy Harris initially testified that appellant was on his cell phone for ten to fifteen minutes while he stood outside the vehicle ordering appellant to hang up the phone. However, appellant points out that Deputy Harris also testified that he was on his patrol radio for only a minute and appellant's cell phone records indicated that he was only on his phone for one minute.

{¶13} When considering a manifest weight of the evidence challenge stemming from a bench trial, "the trial court assumes the fact-finding function of the jury. Accordingly, to warrant reversal from a bench trial under a manifest weight of the evidence claim this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Cleveland v. Walms*, 169 Ohio App.3d 600, 2006-Ohio-6441,

at ¶16, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other.'" *Thompkins* at 387. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. Id. at 390.

{¶14} Still, determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶15} Appellant was convicted of obstructing official business in violation of R.C. 2921.31(A), which provides:

{¶16} "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."

{¶17} Only two witnesses testified at trial, Deputy Harris and appellant.

{¶18} Deputy Harris testified that on February 25, 2008, he sat in a church parking lot up the street from appellant's home waiting for appellant to return from work so that he could serve him with some papers. (Tr. 9-10). When Deputy Harris saw appellant's truck pull in front of his mailbox, he activated his lights and sirens and pulled up behind him. (Tr. 10). Deputy Harris stated that appellant looked in his rearview mirror and then put his truck in reverse. (Tr. 10). Deputy Harris then told appellant over the PA microphone to put his truck in park and not to back up any further. (Tr. 10-11). However, appellant continued to back up. (Tr. 11). Deputy Harris had to back up so that appellant would not hit his cruiser. (Tr. 11). He stated that appellant then parked his truck and got out. (Tr. 11). Deputy Harris stated that he told appellant approximately 15 times to go back to his truck, for officer safety. (Tr. 11). Deputy Harris stated that appellant eventually complied after several loud commands. (Tr. 11).

{¶19} Deputy Harris stated that after appellant went back to his truck, he made some radio communications and then approached appellant's truck. (Tr. 11). As he approached appellant's truck, Deputy Harris heard appellant lock his doors, saw him roll up his windows, and saw that he was talking on his cell phone. (Tr. 11). Deputy Harris stated that he told appellant to get off of his cell phone, roll down his window, and unlock his door because there were papers for him to sign. (Tr. 12). Deputy Harris stated that appellant refused, stating that he was calling his attorney. (Tr. 12). Deputy Harris stated that this lasted for ten to fifteen minutes. (Tr. 12). Appellant then complied and Deputy Harris served him with the papers. (Tr. 12).

{¶20} Deputy Harris testified that during this time, appellant made every attempt to avoid being served with the papers. (Tr. 13). Deputy Harris also stated that at the time of this incident, he was in full uniform and driving a marked sheriff's department car. (Tr. 13).

{¶21} On cross examination, Deputy Harris admitted that in his arrest report he noted that the entire incident lasted only two minutes. (Tr. 17-18). He also admitted that when appellant got out of his truck the first time and began walking toward him, appellant was going to accept service. (Tr. 19). And he stated that once he ordered appellant back into his truck, appellant had 30 seconds to one minute alone while he checked in on his police radio. (Tr. 21-22). Finally, he admitted that when appellant backed up his truck, it was in an attempt to pull into his driveway, not to get away. (Tr. 31-32).

{¶22} Additionally, appellant introduced Exhibit B/3, a certified copy of his divorce case docket. The docket reflects that appellant was to be served on February 4, 2008, but that the order to serve was returned because the server was "unable to make contact with and serve." The docket does not reflect any return of service. The prosecutor agreed that the docket did not show a return of service.

{¶23} Appellant then took the stand in his own defense. He testified that at the time in question, he pulled up to his mailbox, got his mail, and began to back up so that he could pull into his driveway. (Tr. 42). He then heard the siren and saw the

patrol car. (Tr. 42). Appellant stated that he knew he was going to be served. (Tr. 42). He stated that he started to turn into his driveway but Deputy Harris yelled for him to stop. (Tr. 43). Appellant stated that when he heard Deputy Harris yell for him to stop, he got out of his vehicle, walked toward the officer, and requested the papers. (Tr. 43). Appellant stated that Deputy Harris only yelled at him once to get back in his vehicle and he complied. (Tr. 43). He stated that when he got back into his vehicle, he called his attorney. (Tr. 43). Deputy Harris then started walking toward appellant and was yelling. (Tr. 43). Appellant rolled up his window so he could hear on his cell phone. (Tr. 43). He testified that the phone call he made when he went back to his truck was to his divorce attorney and that the call lasted only one minute because he got the answering service. (Tr. 40-41). His itemized cell phone bill corroborated this fact reflecting that the call was made at 5:36 p.m. (Ex. C). When he got the answering service, appellant hung up his phone and rolled down the window. (Tr. 43-44).

{¶24} Appellant stated that he then requested the papers from Deputy Harris. (Tr. 44). Deputy Harris ordered appellant out of the car and handcuffed him. (Tr. 44).

{¶25} Appellant stated that his intent all along was to move his car out of on-coming traffic and was not to avoid Deputy Harris. (Tr. 45).

{¶26} The manifest weight of the evidence supports appellant's conviction. The trial court was faced here with making a credibility determination between Deputy Harris and appellant. And although an appellate court is permitted to independently weigh witnesses' credibility when determining whether a conviction is against the manifest weight of the evidence, we must give deference to the fact-finder's determination of witnesses' credibility. *State v. Wright*, 10th Dist. No. 03AP-470, 2004-Ohio-677, at ¶11. The policy underlying this presumption is that the trier of fact is in the best position to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. Id.

{¶27} Given the credibility call the trial court had to make, the evidence supports the trial court's finding of guilt. Deputy Harris was in the course of the official business of serving appellant. He was dressed in full uniform and was in his marked cruiser. When appellant saw the cruiser with its lights and siren activated behind his truck, he continued in reverse, backing up so that Deputy Harris had to move his cruiser to avoid being hit. Appellant's own testimony corroborates this fact. Appellant stated that he was merely trying to pull into his driveway. However, from Deputy Harris's viewpoint, appellant was attempting to back into him or get away. Furthermore, Deputy Harris stated that when appellant exited his vehicle, he had to order appellant back approximately 15 times before appellant complied. And when Deputy Harris approached appellant's truck, appellant rolled up his windows and locked his doors. Appellant also corroborated this fact. These facts taken as a whole establish that appellant was obstructing Deputy Harris from serving him.

{¶28} Appellant makes much of the fact that Deputy Harris wrote in his incident report that the event took from 5:30 p.m. until 5:32 p.m. However, appellant's cell phone record that he referred to reflects that appellant called his attorney from his car at 5:36 p.m. So it is reasonable to conclude that the incident took longer than two minutes. Furthermore, there is no time limit set out in the obstructing official business statute. A person's actions are what determine if he committed the offense, not the length of those actions.

{¶29} Accordingly, appellant's first and fourth assignments of error are without merit.

{¶30} Appellant's second assignment of error states:

{¶31} "THE COURT ERRED BY NOT DISMISSING THE CASE BASED ON DOUBLE JEOPARDY."

{¶32} Appellant was initially charged with obstructing justice. The case was set for a bench trial. The state made a motion to amend the charge. Appellant made a motion to dismiss. The trial court denied the state's motion to amend and granted appellant's motion to dismiss. The parties had not presented any evidence yet.

{¶33} The state then charged appellant with the instant charge of obstructing official business. Prior to trial, appellant argued that the court should dismiss the charge based on double jeopardy grounds. The court denied the motion.

{¶34} Here appellant alleges that he was tried twice for the same incident in violation of double jeopardy.

{¶35} In his motion to dismiss based on double jeopardy, appellant argued that in a bench trial jeopardy attaches as soon as the court and the parties "start talking." (Tr. 5). Appellant, however, was mistaken.

{¶36} During a bench trial, jeopardy does not attach until the court begins to hear evidence. *State v. Meade* (1997), 80 Ohio St.3d 419, 424, citing *United States v. Martin Linen Supply Co.* (1977), 430 U.S. 564, 569, 97 S.Ct. 1349. When the trial court grants a motion to dismiss before jeopardy attaches, double jeopardy concerns do not prohibit the state from re-indicting the defendant. *State v. Larabee* (1994), 69 Ohio St.3d 357, 358-59, citing *Serfass v. United States* (1975), 420 U.S. 377, 95 S.Ct. 1055.

{¶37} Because the trial court in this case had yet to hear any evidence, jeopardy had not attached. Therefore, the state was free to re-charge appellant after the court dismissed the obstructing justice charge.

{¶38} Accordingly, appellant's second assignment of error is without merit.

{¶39} Appellant's third assignment of error states:

{¶40} "THE COURT ERRED BY IN [sic.] NOT DISMISSING THE CASE BASED ON RULE 29."

{¶41} Appellant argues here that the trial court should have granted his Crim.R. 29 motion for acquittal after the state presented its case. Appellant bases this argument on his Exhibit B/3, the certified copy of his divorce case docket. Appellant points out that the docket does not reflect any official business of service on February 25, 2008. He argues that based on the best evidence rule, Deputy Harris's testimony on the subject should not have been admitted. Appellant contends that because Exhibit B/3 does not show that service was ever returned, he cannot

have obstructed official business. Additionally, appellant argues that the trial court erred by taking his motion under advisement and not immediately ruling on it.

{¶42} Crim.R. 29 provides for the defendant to make a motion for acquittal after the evidence on either side is closed if the evidence is insufficient to sustain a conviction. Crim.R. 29(A) specifically provides in part, "The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case." In this case, the court improperly reserved its ruling on appellant's motion made at the close of the state's case. (Tr. 39). The court should have immediately ruled on the motion. However, the court's error was harmless. As will be seen next, the state's evidence was sufficient as to all elements of obstructing official business.

{¶43} An appellate court applies the same test when reviewing a challenge based on a denial of a motion for acquittal as when reviewing a challenge based upon on the sufficiency of the evidence. *State v. Thompson* (1998), 127 Ohio App.3d 511, 525.

{¶44} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict. *State v. Smith* (1997), 80 Ohio St.3d 89, 113. In essence, sufficiency is a test of adequacy. *Thompkins*, 78 Ohio St.3d at 386. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. In reviewing the record for 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. *Smith*, 80 Ohio St.3d at 113.

{¶45} In this case, the state presented evidence going to each of the elements of obstructing official business. The evidence is set out in detail above. Deputy Harris testified to the following. He was in full uniform and in a marked cruiser. He was at appellant's house to serve him with papers. Appellant backed his truck up even though Deputy Harris's cruiser was directly behind him with lights and siren activated. Deputy Harris had to instruct appellant approximately 15 times to get

back into his truck. Appellant locked his doors and rolled up his windows when Deputy Harris approached his truck. This evidence, when viewed in a light most favorable to the state, supports a charge of obstructing official business.

{¶46} Appellant also seems to argue that under the best evidence rule, the court should not have allowed Deputy Harris to testify that he served appellant because the court docket of appellant's divorce case was the "best" evidence on the subject. The court docket does not reflect that service was ever made.

{¶47} The best evidence rule provides: "A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."

{¶48} This is not the type of situation where the best evidence rule applies. The best evidence rule generally applies to duplicate copies of documents.

{¶49} And more importantly, service was never contested. Deputy Harris testified that he served appellant and appellant admitted that Deputy Harris served him. Thus, the fact that Deputy Harris served appellant was never in question.

{¶50} Based on the foregoing, the trial court properly denied appellant's motion for acquittal.

{¶51} Accordingly, appellant's third assignment of error is without merit.

{¶52} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

DeGenaro, J., concurs.