[Cite as *State v. Kay*, 2012-Ohio-3426.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2012-01-007
	:	O P I N I O N
- vs -		7/30/2012
	:	
SAMUEL J. KAY,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BUTLER COUNTY AREA I COURT
Case No. TRD1101533

Michael T. Gmoser, Butler County Prosecuting Attorney, Donald R. Caster, Government Services Center, 315 High Street, 11th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Abraham Kay, 55 Public Square, Suite 1200, Cleveland, Ohio 44113, for defendant-appellant

PIPER, J.

{¶ 1} Defendant-appellant, Samuel Kay, appeals his conviction in the Butler County Area I Court for failing to stop for a school bus.

{¶ 2} On October 26, 2011, Rick Walters was operating a school bus for the Talawanda School District. During his afternoon route, Walters was dropping off school-children at their homes. As Walters was heading eastbound down the street, he activated his warning lights, indicating that he was preparing to stop the bus. Walters then brought the

school bus to a complete stop, engaging the parking break in the process. Walters opened the door, which caused the red stop sign arm to swing out and activate the red lights indicating the loading/unloading of children.

{¶ 3} Instead of allowing the children to disembark the bus, Walters held their departure because he noted a car approaching the bus at a normal rate of speed. The car did not slow down or make any attempt to stop. Walters honked his horn, and then made note of the car's description and its license plate number. After completing his bus route, Walters faxed information regarding the car's description and license plate number to the police.

{¶ 4} Sergeant John Jones of the Oxford Police Department received the report, and conducted a follow-up investigation. Sergeant Jones learned that the license plate number belonged to a car that matched Walter's description of the car that failed to stop. Sergeant Jones learned the identity of the car's owner, later determined to be Kay, and called him on the phone. When asked about the incident, Kay admitted that he knew what Sergeant Jones was referring to and that he felt that he did not have time to stop by the time he passed the school bus. Kay agreed to come to the police station to pick up the citation that Sergeant Jones issued for failure to stop.

{¶ 5} Despite expressing remorse at the police station for the incident, Kay later challenged the citation. Kay filed a motion to suppress his statements made during his phone call with Sergeant Jones, and the court held a hearing on the motion, at which Sergeant Jones testified. The court denied Kay's motion to suppress, and then held a trial, at which Walters and Sergeant Jones testified. The trial court found Kay guilty of the offense, and fined him $250. Kay now appeals his conviction and fine.

{¶ 6} Kay's brief fails to set forth any specific assignments of error as is required by App.R. 16(3) and Loc.R. 11. However, it is within our discretion to consider Kay's arguments despite his nonconformance to the applicable appellate and local rules of procedure.

{¶ 7} Kay first argues that his conviction was not supported by sufficient evidence. When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson,* 12th Dist. No. CA2006-01-007, 2007-Ohio-2298. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, superseded on other grounds.

{¶ 8} Kay was convicted of failing to stop for a school bus, in violation of Oxford Municipal Code 331.38(a), which states,

> The driver of a vehicle upon meeting or overtaking from either direction any school bus stopped for the purpose of receiving or discharging any school child * * * shall stop at least ten feet from the front or rear of the school bus and shall not proceed until such school bus resumes motion, or until signaled by the school bus driver to proceed.
>
> It is no defense to a charge under this subsection (a) hereof that the school bus involved failed to display or be equipped with an automatically extended stop warning sign as required by subsection (b) hereof.

{¶ 9} Kay argues that the state failed to demonstrate that he had sufficient time to see that the oncoming school bus had stopped and that he had sufficient time to stop at least ten feet in front of the bus. However, this is not the standard set forth in the ordinance. Instead, the ordinance specifically imposes a duty on an oncoming driver to stop at least ten feet from the front of a school bus when that bus is stopped for the purpose of discharging a child. Therefore, the state had to prove (1) the school bus was stopped; (2) for the purpose

of discharging children; and (3) that the driver failed to stop at least ten feet from the front of the school bus.

{¶ 10} Walters testified that on the afternoon of the incident, he was dropping off the school-children on his route at their homes, and had come to a "complete stop." After Walters had applied his break, he opened his door, "which makes the stop sign go out and the red student light … loading lights come on." Walters testified that he held the children from disembarking because he saw a car "approaching at normal speed." Walters testified that the car driven by Kay did not stop, and made no motion to stop. Walters stated that he saw the car coming toward him at the time he began the stopping process, and that the car had approximately 1,500 feet to stop once the bus' yellow lights were on, and approximately 1,000 feet once he had stopped and the red lights were employed. Walters also testified that he honked his horn because Kay had not stopped, and further stated that Kay appeared to be surprised at seeing the bus as he drove past it.

{¶ 11} Sergeant Jones testified that when he called Kay on the phone, Kay stated that he knew why Sergeant Jones was calling, and that he felt that he could not stop for the bus because he was at the "point of no return" when he saw the school bus. Kay admitted that he was the only occupant of his vehicle, and later apologized for committing the violation when he went to the police station to pick up the citation.

{¶ 12} When viewed in a light most favorable to the prosecution, the testimony demonstrates that (1) the school bus was stopped, (2) that Walters stopped the bus in order to discharge children, and (3) that Kay failed to stop at least ten feet from the front of the school bus. Kay's conviction is therefore supported by sufficient evidence.

{¶ 13} Kay also argues that his conviction is not supported by sufficient evidence because the state failed to prove that the bus was traveling on a two-lane road at the time of the incident. Kay cites to Oxford Ordinance 331.38(C), which states, "where a highway has

been divided into four or more traffic lanes, a driver of a vehicle need not stop for a school bus approaching from the opposite direction which has stopped for the purpose of receiving or discharging any school child * * *." Kay asserts that subsection (c) is an element of the offense, and that the state failed to prove that the road on which the incident occurred contained less than four lanes of traffic. We disagree.

{¶ 14} The fact that a driver need not stop for a school bus on a highway with four traffic lanes is an affirmative defense, not an element of the offense that must be proved by the state. According to Black's Law Dictionary, an affirmative defense is "a defendant's assertion of facts and arguments that, if true, will defeat the plaintiff's or prosecution's claim, even if all the allegations in the complaint are true. The defendant bears the burden of proving an affirmative defense." (9th Ed.2009).

{¶ 15} The prosecution did not have the duty to prove that the road contained less than four lanes. Instead, the subsection that sets forth the four-lane rule is stated in a different section from subsection (a), which sets forth the elements of the offense. The language setting forth the four-lane rule is stated in such a way as to focus on a scenario that will defeat the state's claim, even if the state was able to show that the school bus was stopped for the purpose of discharging children and the driver failed to stop ten feet from the front of the bus.

{¶ 16} The record indicates that Kay never argued that the road on which the incident occurred contained four lanes of traffic. Kay did not tell Sargent Jones during the phone call that he did not stop because it was a four-lane road. Nor did Kay question either Walters or Jones during the trial regarding how many traffic lanes the road had. Therefore, Kay has failed to carry his burden of proving the affirmative defense as set forth in Oxford Code 331.38(c).

{¶ 17} Having found that Kay's conviction is supported by sufficient evidence and that he did not assert or prove an affirmative defense, his first argument is overruled. Kay next argues that his motion to suppress should have been granted because Sargent Jones should have given him *Miranda* warnings before engaging in the telephone conversation with him.

{¶ 18} Appellate review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Cochran*, 12th Dist. No. CA2006-10-023, 2007-Ohio-3353. Acting as the trier of fact, the trial court is in the best position to resolve factual questions and evaluate witness credibility. *Id.* Therefore, when reviewing a trial court's decision regarding a motion to suppress, a reviewing court is bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Oatis*, 12th Dist. No. CA2005-03-074, 2005-Ohio-6038. "An appellate court, however, independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, whether as a matter of law, the facts satisfy the appropriate legal standard." *Cochran* at ¶ 12.

{¶ 19} When a suspect is the focus of custodial interrogation, he is entitled to receive notice of his privilege against compelled self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). Custodial interrogation, as defined by *Miranda,* is any "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. "In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.'" *State v. Gumm*, 73 Ohio St.3d 413, 429, 1995-Ohio-24, quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870 (1980).

{¶ 20} The record indicates that Kay was not subjected to custodial interrogation, and was therefore not entitled to *Miranda* warnings. The record indicates that Sergeant Jones

called Kay on his cell phone, and that Kay chose to answer the phone and speak to Sergeant Jones. Kay was free to hang up the phone at any time and was under no obligation to answer Sergeant Jones' questions. Sergeant Jones testified at the motion to suppress hearing that Kay never stated a desire not to speak with him, and instead, answered all of his questions. Sergeant Jones also testified that Kay was "very accommodating," throughout the phone call. The record is therefore clear that Kay was not in a custodial interrogation setting, and Sergeant Jones was not required to give Kay *Miranda* warnings.

{¶ 21} Having found that Kay was not entitled to *Miranda* warnings, the trial court properly overruled his motion to suppress. As such, both of Kay's arguments are overruled.

{¶ 22} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.