

FILED
10-01-2021
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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Case No. 2020AP001450 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JEFFREY S. CLEMONS,

Defendant-Appellant.

On Appeal from a Judgment of Conviction
Entered in Barron County Circuit Court,
Judge James C. Babler

BRIEF OF DEFENDANT-APPELLANT

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TABLE OF AUTHORITIES

Wisconsin Statutes

Wis. Stat. § 946.41(1).7

Wis. Stat. § 805.17(2)7

County Ordinance

Barron County Ordinance No. 9.164

Case Law

City of Milwaukee v. Wilson, 96 Wis.2d 11, 21, 291 N.W.2d 452 (1980)7

State v. Booker, 2006 WI 79, ¶ 12, 292 Wis.2d 43, 717 N.W.2d 6767

STATEMENT OF ISSUE

Did the circuit court err when it found by clear and convincing evidence that Clemons obstructed an officer by knowingly providing false information to obstruct his investigation?

STATEMENT ON PUBLICATION

The defendant-appellant does not request that the opinion in this appeal be published as he is aware that as a single judge appeal, it is ineligible for publication under this Court's operating procedures.

STATEMENT ON ORAL ARGUMENT

Defendant-appellant does not request oral argument of the issue presented in this case but stands ready to provide if this Court believes that oral argument would be useful in the exposition of the legal arguments presented herein.

STATEMENT OF THE CASE

This is an appeal from a judgment of conviction from the Circuit Court of Barron County, Hon. James C. Babler presiding. Clemons was convicted of violating Barron County Ordinance No. 9.16, Obstructing an Officer. (R. 37; App. 4)) Clemons asserts that the judgment was not supported by clear, satisfactory, and convincing evidence of guilt.

On June 5, 2019, Clemons went to the Barron County Sheriff's Office and reported a restraining order violation because Lindsey Lundequam and Johanna Survila (mother and daughter) followed him while he was driving his recently purchased motorcycle. (27:19-20) Deputy Fick reported that Clemons told him he purchased the motorcycle at Eau Claire Harley that day and had driven it from Eau Claire directly to Barron County Sheriff's Office. (27:21) The motorcycle had 56 miles on it. (28)

After an investigation, Deputy Fick determined Lundequam and Survila's story could not have occurred based on Clemons' statements to him that he purchased his motorcycle from Eau Claire. (27:22-26; 60:32-33) Lundequam and Survila were both cited with obstructing. (27:26)

Lundequam and Survila's court trial was held on September 10, 2019. (R. 27; App. 32-61) Clemons testified that on June 5, 2019, he purchased a motorcycle from Rice Lake Harley, drove around, took his girlfriend to Chetek and was coming back through Rice Lake when Lundequam and Survila followed him and pinned him down. (27:10-12, 14-17) Clemons called the sheriff's office and had the dispatch on speaker phone while driving to the sheriff's office because he "didn't know if they were going to try to run me over or what." (27:16) Clemons' testified he was going to the sheriff's office to report a restraining order violation since he had a restraining order against Lundequam. (27:15)

Deputy Fick testified that Clemons "advised me he bought it from the Eau Claire Harley. I know the city of Eau Claire does not have a Harley shop. But The Lake Hallie Harley Shop is adjacent to the Eau Claire/Lake Hallie border." (27:21) He testified that he then "[d]id a Google Maps search of routes from Lake Hallie Harley-Davidson Shop to the sheriff's office, routing that it would have had to have taken Highway 25. It showed it was roughly 52 miles from Lake Hallie to the sheriff's office." (27:21) He then testified that "when I had MapQuested, there was multiple routes. And the one that I believed to be accurate, based on Mr. Clemons' statement, showed 52 miles." (27:25)

The State dismissed the citations against Lundequam and Survila because Clemons testimony was inconsistent with what Deputy Fick testified Clemons told him on the date of the incident. (27:28)

The following day, September 11, 2019, the State filed a criminal complaint charging Clemons with one count of obstructing an officer. (R. 1) An adjourned initial appearance was held on September 25, 2019, after Attorney Matthew Kirkpatrick was appointed by the court to represent Clemons. (R. 56) At a subsequent hearing on November 27, 2019, the State amended the charge to an ordinance, and Attorney Kirkpatrick indicated he would file a motion to withdraw as Clemons would no longer be entitled to court-appointed representation. (57:2-3) The court set a court trial for January 21, 2020. (57:3)

On January 21, 2020, Clemons requested an adjournment since he had not received discovery from Attorney Kirkpatrick. (58:8) The court granted a continuance. (Id.) On May 15, 2020, the court held a motion hearing, and then trial was set for August 5, 2020. (R. 59; App. 15-174) At the motion hearing, Clemons repeatedly indicated that he still did not have all of the discovery to include the “statement that was given to Emmons” and the 911 call. (59:3) The prosecutor indicated that Clemons received discovery from his office which “included the police reports from the initial incident.” (59:5) He told the court that if Clemons wanted additional information, he would need to obtain it on his own. (59:6)

On August 5, 2020, Deputy Fick and Clemons testified. (R. 60; App. 63-158) Clemons testified that he wrote a statement consistent with his testimony and gave it to Mr. Emmons. (60:11, 32, 54) This statement was introduced by the state as Exhibit 5. (R. 32; App. 6) He indicated that the two women were “chasing” him in violation of the harassment order he has against them. (60:11) Clemons spoke with other officers at the sheriff’s department in addition to Deputy Fick. (60:12)

However, Clemons admitted that he may have told him Eau Claire “by a mistake.” (60:22, 74) At the previous court trial on September 10, 2019, Clemons testified “I think, I told them that I bought the bike in Eau Claire because I was so startled, but – I think I remember saying something like that because I was just – I mean, I was practically shaking.” (27:17)

Clemons repeatedly testified that Deputy Fick not only saw the purchase papers from Rice Lake Harley on the day of the incident, but also took a picture of them. (60:22, 23) Deputy Fick further testified that he never saw any purchase papers or Clemons’ written statement prior to the day of trial. (60:35-36) The written statement and purchase paperwork was admitted into evidence as Exhibits 5, 6, and 8. (R. 32, 33, 36; App. 6-31)

Deputy Fick testified that Clemons told him “he purchased it from Eau Claire and driven directly here. And his only detour was when he was being

followed by” Lundequam and Survila, which was “a side street off of Hillsdale there on Highway 25.” (60:30) However, Deputy Fick never consulted with Clemons regarding the route he took. (60:24, 25, 45-47)

The second half of the trial took place on August 18, 2020, at which time, both Deputy Fick and Clemons, testified again consistent with their testimony at the court trial on September 10, 2019. (61)

ARGUMENT

I. THERE WAS INSUFFICIENT EVIDENCE FOR THE COURT TO FIND CLEMONS OBSTRUCTED AN OFFICER.

A. Standard of Review.

In considering the sufficiency of the evidence, the Court of Appeals “task as a reviewing court is limited to determining whether the evidence presented could have convinced a trier of fact, acting reasonably, that the appropriate burden of proof had been met.” *City of Milwaukee v. Wilson*, 96 Wis.2d 11, 21, 291 N.W.2d 452 (1980).

Whether the evidence presented at trial is sufficient to support the conviction is a question of law the Court reviews de novo, *see State v. Booker*, 2006 WI 79, ¶ 12, 292 Wis.2d 43, 717 N.W.2d 676. However, the circuit court's findings of fact will not be disturbed unless they are clearly erroneous, WIS. STAT. § 805.17(2).

B. Applicable Law.

Barron County’s ordinance of obstructing is analogous to its criminal counterpart, Wis. Stat. § 946.41(1). Thus, it requires clear, satisfactory, and convincing evidence that:

1. The defendant obstructed an officer.
To obstruct an officer means that the conduct of the defendant prevents or makes more difficult the performance of the officer's duties.
2. The officer was doing an act in an official capacity.
3. The officer was acting with lawful authority.

4. The defendant knew that (officer) was an officer acting in an official capacity and with lawful authority and that the defendant knew (his) (her) conduct would obstruct the officer.

WIS JI-Criminal 1766 Obstructing An Officer —946.41(1)
(Wisconsin Jury Instructions - Criminal (2020))

C. The State did not prove by clear, satisfactory, and convincing evidence that Clemons obstructed Deputy Fick.

The crux of the issue at the court trials was whether Clemons told Deputy Fick that he purchased his motorcycle at Eau Claire Harley in attempt to intentionally obstruct Deputy Fick's investigation into Clemons' claim that Lundequam and Survila were in violation of a harassment restraining order. When taking all of the testimony and evidence into consideration, this simply does not make sense.

Clemons initially testified at Lundequam and Survila's court trial on September 10, 2019, that on June 5, 2019, he purchased a motorcycle at Rice Lake Harley. Afterwards, he took his girlfriend for a ride and ended up dropping her off at work. On his way back, Lundequam and Survila started following him and pinning him down. He was terrified and called 911. He stayed on the phone with dispatch until he arrived at the Barron County Sheriff's Office.

Deputy Fick testified that while he was investigating Clemons' claim that Lundequam and Survila violated the harassment restraining order, Clemons told him at least two times that he purchased his Harley in Eau Claire. Deputy Fick corrected Clemons and told him it had to have been Lake Hallie Harley since Eau Claire does not have its own Harley dealership. Deputy Fick testified that Clemons only showed him the registration paper, which indicated that he purchased the motorcycle that day. Clemons testified that he showed all his paperwork, which clearly indicates he purchased the motorcycle at "Rice Lake Harley." Since Clemons had just purchased the motorcycle that morning, it doesn't make sense

that Clemons would only show him the registration paper and not the whole file folder that Clemons testified to.

Clemons also had his written statement, dated June 6, 2019, admitted into evidence. That written statement is consistent with his testimony. He testified that he turned that statement into Mr. Emmons who he believed was the investigator on the case. However, Deputy Fick testified that he never saw Clemons' written statement. Months prior to the trial, at the motion hearing on May 15, 2020, Clemons told the court and district attorney that "they have withheld the statement that was given to Emmons." This corroborates Clemons testimony at both trials that his testimony was consistent with his statement dated June 6, 2019.

Clemons admitted that he may have mistakenly said Eau Claire Harley due to the stress he was under when he first arrived at the sheriff's office. However, Deputy Fick also testified that he used Google maps to find the route that Clemons would have used albeit he never actually consulted with Clemons on the route that he took. Deputy Fick never contacted Clemons and said he was waiting on Clemons to turn in his statement and purchase papers.

According to Clemons testimony and Exhibits 5 and 6, which were the purchase paperwork and his written statement, he did turn over those documents to law enforcement. Deputy Fick testified he never saw them, yet he never contacted Clemons to verify the route he allegedly took or to verify any other information.

Specifically with Element 4, the state (or county, since the criminal charge was reduced to an ordinance) had to prove that "the defendant knew (his) (her) conduct would obstruct the officer." Clemons testified that he may have mistakenly said Eau Claire, but Clemons testimony, the purchase papers, and written statement dated June 6, 2019, both clearly support that he meant to say Rice Lake Harley. There is nothing in the record to support that Clemons *knew* his conduct would obstruct the officer's investigation.

The circuit court committed clear error in finding the material testimony of Deputy Fick to be more credible than the material testimony of Clemons, and that

findings that properly credited Clemons' testimony and supporting documents would have compelled a ruling that he was not guilty.

CONCLUSION

For the foregoing reasons, the Court of Appeals should reverse the decision of the circuit court and remand this matter with directions to dismiss the ordinance conviction against Clemons.

Dated this 1st day of October, 2021

Respectfully submitted,

Electronically Signed By: Renee M. Taber

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13-point body text, 11-point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 1,894 words.

Dated this 1st day of October, 2021.

Electronically Signed By: Renee M. Taber

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