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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-1973-06T5

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EARL DAVIS,

Defendant-Appellant.

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Submitted October 29, 2007 - Decided December 6, 2007

Before Judges Parrillo and Alvarez.

On appeal from the Superior Court of New Jersey,  
Law Division, Ocean County, Indictment No. 26-06.

Robert L. Tarver, Jr., attorney for appellant.

Marlene Lynch Ford, Ocean County Prosecutor,  
attorney for respondent (Thomas Cannavo, Assistant  
Prosecutor, on the brief).

PER CURIAM

Defendant Earl Davis was found guilty, after a trial de novo in the Law Division, of disorderly conduct, N.J.S.A. 2C:33-2(a)(1), and resisting arrest, N.J.S.A. 2C:29-2(a). He appeals and we now reverse the former conviction and affirm the latter.

According to the State's proofs, while on patrol on February 5, 2005, at around 2:20 a.m., Officer James Citta observed a parked Ford Excursion with lights flashing in the lot near the Sawmill Bar located in a residential area of Seaside Park. After calling in the license plate, Citta approached the vehicle on foot and saw defendant inside, lying across the rear seat almost on the floor. He tapped on the window several times to get defendant's attention, and when he finally did, asked defendant to roll down the window. Defendant complied after the second request.

Citta noticed a baseball bat on the floor next to defendant, called for backup and ordered defendant out of the vehicle. Defendant questioned the reason for the request, but eventually opened the door and exited the vehicle. Defendant also refused at first to provide identification or to identify the owner of the vehicle. According to Citta, defendant was uncooperative and arguing about having to deal with this "fuckin' bull shit" and being harassed for no reason. Citta perceived defendant as taking an "aggressive stance." According to Officer Daniel Fitzgerald, who had arrived at the scene to provide assistance, defendant was yelling profanities and waving his arms around. At the time, because bars were closing, "there would have been some pedestrian traffic" in the area, although Officer Fitzgerald did not see any.

After being advised of the consequences if he did not cooperate, defendant was in fact told he was under arrest and to place his hands behind his back. Defendant refused and pushed Officer Fitzgerald in the chest while attempting to flee on foot. The two officers were able to grab him and wrestle him to the ground, where defendant continued to struggle. Eventually defendant was subdued with pepper spray, handcuffed, and taken to police headquarters, where he was issued a summons and released.

Defendant offered a different account. Earlier in the evening of February 4, around 6:00 p.m., defendant had two drinks at a friend's house and then went out to "clubs" with friends, ending up at the Sawmill and eventually another local bar, Jack and Bill's. Although he did not drink after leaving his friend's house much earlier that evening, defendant felt tired and wished to leave. So, after retrieving the keys to his friend's Ford Excursion, defendant unlocked it, turned it on with a remote starter, thus activating the vehicle's flashing lights, and awaited the return of his companions. Defendant then sat lying across the back seat with one foot on the floor while talking on the cell phone to his girlfriend. When Officer Citta arrived, defendant rolled down the window as requested, although he hesitated in exiting the car upon further command,

fearful for his own safety because of the reputation of the Seaside Park police for beating people up.

Nonetheless, defendant exited the vehicle and questioned why he needed to produce identification, which, upon further request, he handed over to the officer. Defendant denied yelling, using profanity, waving his arms, or taking an aggressive stance. Instead, Officer Citta just grabbed defendant's arms and pushed him into Officer Fitzgerald after telling him he was under arrest and while his arms were behind his back. Fitzgerald then started punching defendant in the face and then both officers began punching and kicking defendant while throwing him to the ground. On the ground, the officers kicked and punched defendant again and stepped on him. Defendant was sprayed after being handcuffed.

In relying upon the State's version of events, the municipal court judge concluded:

I find, first of all, that the initial acts of Mr. Davis once he exited the motor vehicle, the tumultuous activities, the loud noises, the statements made, they're certainly done in a public area. The municipal parking lot at the north end of Seaside Park cannot be described as anything but a public area.

And I find that he, in fact, is guilty of the violation under 2C:33.2(a)(1).

I further find that there reached a point in time under 2C:29.2(a)(1) where he purposely resisted lawful arrest.

. . . .

I'm satisfied here that, in fact, for whatever reason -- and it may be just the youthful impetuosity and simply a bad decision on the part of Mr. Davis -- that he, in fact, resisted the officers which led to the spraying with the pepper spray and led to the roll-around involving the officer and the sergeant . . . .

The Law Division judge also credited the State's account in reaching her decision:

There was clearly a reluctance to cooperate, and I find that that did continue when he eventually did exit the vehicle; that there was an anger, and an annoyance, and an agitation on the part of the defendant; and there was a failure to cooperate. I find under the circumstances the officers were justified in asking the defendant to submit credentials and that he refused to do so.

He was advised that if he continued not to cooperate that he would be arrested. He refused to cooperate, became more agitated, using foul language towards the officers, and as a result of that lack of cooperation -- and at that point in time I find there was agitated and disorderly conduct and movement by the defendant. I don't find that there was a great uproar or confusion of voices as described in Webster's and in Stampono on page 255. That case is 341 [N.J.] Super[. 247], Appellate Division, 2001. I do find that there was disorderly violent agitated movement by the defendant and a lack of willingness to cooperate, and as a result of that the arrest ensued.

I also find based upon the testimony that thereafter when the request was made to the defendant to put his hands around so that he could be cuffed, there was the movement and the pushing of the officer, and that resulted in the resisting arrest.

Thus, both the municipal court judge and the Law Division judge found defendant's pre-arrest agitation and loud and profane language to constitute disorderly conduct.

We disagree. In our view, nothing in the factual complex found by the courts below permits a conclusion that defendant's pre-arrest conduct comes within the purview or meaning of the disorderly conduct statute. Although the incident escalated ultimately in defendant's unlawful resistance to arrest, N.J.S.A. 2C:29-2(a)(1), we are equally persuaded that as a matter of law, defendant's pre-arrest conduct does not constitute a petty disorderly persons offense on the facts presented in this record.

Defendant was convicted of disorderly conduct in violation of N.J.S.A. 2C:33-2(a)(1), which provides:

- a. Improper behavior. A person is guilty of a petty disorderly person offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he (1) Engages in fighting or threatening, or in violent or tumultuous behavior . . . .

Thus, in addition to the requirement that defendant act purposely or recklessly, there is the "tumultuous conduct" element, as well as the "public inconvenience, annoyance or alarm" element.

The "public" feature is an integral part of the statute. Indeed, the present statutory offense is rooted in the common

law proscription against "'breach[es] of the peace,' broadly defined as any behavior which disturbs or tends to disturb the tranquility of the citizenry." Cannel, New Jersey Criminal Code Annotated, comment 1 on N.J.S.A. 2C:33-2 (2005) (emphasis added). Consequently, N.J.S.A. 2C:33-2(a) is confined to "public" inconvenience. The term "public" is specifically defined:

'Public' means affecting or likely to affect persons in a place to which the public or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

[N.J.S.A. 2C:33-2(b).]

As the definition makes clear, the "public" element of the offense "require[s] that the comfort of a plurality of persons be jeopardized." Cannel, supra, comment 3 on N.J.S.A. 2C:33-2.

To reiterate then, in order to successfully convict an accused of disorderly conduct under Section 2(a)(1), the State must prove beyond a reasonable doubt that the defendant caused public inconvenience, public annoyance or public alarm, or a reckless risk thereof, by fighting, threatening, violent or tumultuous conduct. We are unable to find these elements in defendant's pre-arrest conduct. He was not fighting, threatening nor violent. While defendant may have been uncooperative and agitated, no assault occurred before his

arrest. And although Officer Citta described defendant as "aggressive," Officer Fitzgerald admitted defendant did not "touch" or "assault" officers prior to the arrest notification. However such conduct may be characterized, and however inappropriate it may be, we are satisfied that it also does not rise to the level of "tumultuous behavior," which implies "a disorderly and violent movement, agitation or milling about of a crowd, usually with great uproar and confusion of voices, a noisy and turbulent popular uprising, a riot." State v. Stampone, 341 N.J. Super. 247, 255 (App. Div. 2001) (citing Webster's Third New International Dictionary 2462 (1993)).

In Stampone, the defendant was very uncooperative, very agitated, and yelling during an exchange with a police officer. Id. at 255-56. We held that his conduct in slamming a car door closed, and thereby almost hitting the officer, to prevent the officer's unauthorized entry into the vehicle, did not constitute "tumultuous" behavior within the meaning of Section 2(a)(1). Id. at 254-55. We consider defendant's pre-arrest conduct in this case no more deserving of penal consequence.

In addition to finding no tumultuous conduct in Stampone, we also found that the State could not prove the "public inconvenience, . . . annoyance or alarm" elements because there was no evidence that any passers-by had noticed the defendant's alleged conduct. Id. at 255. We find likewise here. As in

Stampone, in this case "[t]here was no indication that passers-by were noticing any of [the pre-arrest exchange between defendant and the officers,] or congregating or, [for that matter], that such persons were even present." Ibid. At most, Officer Citta testified that when bars close, "there would have been some pedestrian traffic." Nor was there anything inherent in defendant's pre-arrest conduct that would suggest defendant acted with a purpose or a recklessness to cause any "public" reaction of inconvenience, annoyance or alarm. Rather, defendant's pre-arrest attitude, demeanor and tone, as characterized by the proofs found credible below, suggest merely a personal grievance with what he perceived to be, rightly or wrongly, the unwarranted and unauthorized actions of the police officers. The encounter leading to defendant's arrest remained one between citizen and police, and, on the record before us, provoked no public reaction whatsoever.

To reiterate, we conclude in light of the total factual construct that the State has failed to prove beyond a reasonable doubt the requisite elements of the petty disorderly persons offense of improper behavior under N.J.S.A. 2C:33-2(a)(1). We certainly do not condone such insolent behavior, but we decline to hold it violative of any legal proscription.

Of course, we reach a different conclusion as to defendant's conviction for resisting arrest. Although

defendant's pre-arrest conduct may not, as a matter of law, have been unlawful, it clearly aggravated the situation that ultimately resulted in his arrest. To be sure, "a person approached by a police officer [making a field inquiry, as here,] need not respond to the police and is always free to leave." Stampone, supra, 341 N.J. Super. at 252; see also Florida v. Royer, 460 U.S. 491, 497-98, 103 S. Ct. 1319, 1324, 75 L. Ed. 2d 229, 236 (1983). He is not free, however, to resist an arrest, even if illegal, where, as here, the arrest is done under "color of . . . official authority" and is also announced. N.J.S.A. 2C:29-2(a); see also State v. Brennan, 344 N.J. Super. 136, 143 (App. Div. 2001), certif. denied, 171 N.J. 43 (2002); State v. Kane, 303 N.J. Super. 167, 182 (App. Div. 1997). In this case, there is sufficient credible evidence in the record to sustain the finding under N.J.S.A. 2C:29-2(a) that once their intention to arrest was announced, defendant purposely attempted to prevent the police officers from effectuating his arrest by the use of physical force and violence. See State v. Locurto, 157 N.J. 463, 472-74 (1999); State v. Johnson, 42 N.J. 146, 162 (1964). We therefore reject defendant's contention to the contrary, and find his remaining arguments challenging his conviction under N.J.S.A. 2C:29-2(a) to be without merit. R. 2:11-3(e)(2).

Affirmed in part; reversed in part.