

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11-0587

NOV 8 2011

STATE OF WEST VIRGINIA,

*Plaintiff Below,  
Respondent,*

v.

LISA MARIE DAVIS,

*Defendant Below,  
Petitioner.*

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SUMMARY RESPONSE TO THE PETITION FOR APPEAL

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I.

**RESPONSE TO THE PETITIONER'S STATEMENT OF FACTS**

**A. STATEMENT OF FACTS**

The instant case involves a prosecution for obstructing an officer [W. Va. Code § 61-5-17(a)] which originated in the Magistrate Court of Marion County. On August 13, 2010, the Magistrate Court found Lisa Davis, hereafter referred to as "the Petitioner," guilty of the aforementioned crime. (App. at 2.) Magistrate Melissa Pride Linger subsequently sentenced the Petitioner to pay court costs of one hundred sixty-five dollars and eighty cents (\$165.80) plus ten days in jail, with full credit given for time served. The Defendant appealed on August 17, 2010. (*Id.*)

On November 24, 2010, a bench trial was held before Hon. Fred L. Fox, II, Senior Status Judge, and by order entered March 1, 2011, the Circuit Court of Marion County affirmed the magistrate court. (*Id.* at 1.) The court made several findings of fact regarding the Petitioner's

conduct, and those findings are unopposed by the Petitioner's Counsel, and remains unopposed on appeal. (*Id.*)

The following is the relevant portion of the circuit court's finding of fact:

3. At the bench Trial before the Circuit Court, the State called Marion County Deputy Sheriff Christopher F. Gearde to testify. He testified that on May 26, 2011, he went to the Defendant's residence in Marion County to execute an arrest warrant upon Phillip Moran for Violation of home confinement in a felony case. The Defendant and Phillip Moran were romantically linked at the time and Mr. Moran has given the Defendant's residence as his own address. While standing on the front porch, *Deputy Gearde asked the Defendant if Mr. Moran was inside the residence. The Defendant denied his presence in the home. This exchange repeated multiple times.* Another deputy then heard a noise within the structure and advised Deputy Gearde. Upon Deputy Gearde entering the residence, the Defendant then admitted that Phillip Moran was there. Mr. Moran was found in the residence and taken into custody. Deputy Gerade noted that the Defendant was not abusive and made no physical act to oppose him. The Defendant did not dispute Deputy's testimony.

(*Id* at 2-3.) (Emphasis added.)

Deputy Sheriff Gearde testified (with questioning by the prosecution):

A. Okay. We actually parked a distance down from the residence, and we walked up to the residence. It is a single-wide trailer. We got down to the trailer - - I got down to the front door, Corporal Love goes around to the back side of the trailer in case he tries to escape, if he is in there. So we go down there, and I knock and announce, and there is a vehicle there. I cannot remember what type of vehicle it was, that we were told would be there, but that vehicle was there. We knocked, and it took her a few minutes before she answered the door, Ms. Davis. And when she did answer the door, she appeared very nervous, so I told her why we were there, and asked if I could step in. She said, yes. I said, ma'am, we're looking for Phillip Moran. We're looking for your boyfriend. I said, your know, we have a capias, failure to appear warrant, that needs to be served, and you know, we need to - - you know, we need to take him in and get this taken care of.

*Well, she was adamantly denying that she hadn't seen him in a certain amount of time, and she didn't know where he was. Meanwhile, Deputy Love was around the backside of the trailer watching the trailer, and he could hear someone inside banging around against the wall, which is in the back bedroom end of the bedroom. There is always the bedroom in the single-wide trailers. He could hear you know, someone banging around there, so they told Deputy Jeremy Evans, and Deputy*

Evans came around and told me, he said, Hey someone's back there. So I told her, I said ma'am, you need to be honest with me. I said, you know, I find out he's here, I said you're going to be arrested, and you're going to be charged with obstructing. You know, you just need to be honest with me now tell me if he is here (sic). Well, she adamantly denied it.

So, as I started to walk toward the back bedroom, because I heard a loud thump, as I started to walk towards the back bedroom she said, well, he's back there. So then we went back there, and I believe he had a knife. He was in the closet. He didn't come at us with a knife, but he did have a knife in the closet. Then we took him into custody.

*Ms. Davis was charged with obstructing because she hindered my investigation.*

Q. And she basically told you *several times* before you actually were in the process of going back to get Mr. Moran that he wasn't there?

A. Correct.

(*Id.* at 11-13.) (Emphasis added.)

The Petitioner appealed from only one issue, raised at the circuit court bench trial. (Pet. at 3-4.) That issue is whether the Petitioner's conviction for obstruction under W. Va. Code § 61-5-17(a) (obstructing an officer) should be reversed, because, as the Petitioner contends, she should have been charged under W. Va. Code § 61-5-17(c) (making a false statement to an officer).

## II.

### ARGUMENT

#### A. **THE CIRCUIT COURT OF MARION COUNTY DID NOT ERR WHEN IT CONVICTED THE PETITIONER OF OBSTRUCTION, PURSUANT TO W. VA. CODE SECTION 61-5-17(a).**

W. Va. Code § 61-5-17 provides, in pertinent part:

(a) Any person who by threats, menaces, acts or otherwise, forcibly or illegally hinders or obstructs, or attempts to hinder or obstruct, any law enforcement officer acting in his or her official capacity it guilty of a misdemeanor.

....

(c) Any person who with intent to impede or obstruct a law-enforcement officer in the conduct of an investigation of a felony offense, knowingly and willfully makes a materially false statement, is guilty of a misdemeanor . . . However the provisions of this section do not apply to statements made by a spouse, parent, stepparent, grandparent, sibling, half-sibling, child, stepchild or grandchild, whether related by blood or marriage, or the person under investigation.

While this Court has never directly addressed the differences in parts (a) and (c) of West Virginia's obstruction statute, this Court has addressed certain elements relating to obstruction. Moreover, while sparse, other states' courts have provided rulings that are directly applicable to the case at bar.

Starting at home, in *State v. Johnson*, 134 W. Va. 357, 59 S.E.2d 485 (1950), this Court concluded that actual force or violence is not a necessary element of the crime of obstructing an officer as defined by West Virginia Code § 61-5-17(a). This Court stated in *Johnson* that "[t]he words 'forcibly' or 'illegally' used in the statute clearly mean any unlawful interference with the officer in the discharge of his official duties, whether or not force be actually present." 134 W. Va. at 360, 59 S.E.2d at 487. Thus, while the statute in question employs the word "forcibly," force need not be present for the commission of the crime of obstruction.

This Court, despite having previously held that refusal to identify oneself, standing alone, does not constitute obstruction<sup>1</sup>, explained in *State v. Srnsky*, 213 W. Va. 412, 582 S.E.2d 859 (2003), that the withholding of information from a police officer may constitute obstruction for a conviction under W. Va. Code § 61-5-17(a). *State v. Srnsky*, 213 W. Va. at 414, 582 S.E.2d at 861.

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<sup>1</sup>In *State ex rel. Wilmoth v. Gustke*, 179 W. Va. 771, 373 S.E.2d 484 (1988), this Court concluded that "when done in an orderly manner, merely questioning or remonstrating with an officer while he or she is performing his or her duty, does not ordinarily constitute the offense of obstructing an officer." (*Id.* at 773, 373 S.E.2d at 486.)

The Petitioner dismisses the circuit court's conclusion of law that *Srnsky* indicated that "mere vocal actions could hinder a law-enforcement officer." (App. at 4.) The Petitioner contends that *Srnsky* "simply 'addresses the narrow question of whether failure of a citizen to give one's name when asked by a law enforcement officer, without more, constitutes the offense of obstructing an officer.'" (Pet'r's Br. at 8.) Here, the Petitioner ignores Syl. Pt. 4 in *Srnsky, supra.*, which states that:

The charge of obstructing an officer may be substantiated when a citizen does not supply identification when required to do so by express statutory direction or when the refusal occurs after a law enforcement officer has communicated the reason why the citizen's name is being sought in relation to the officer's official duties.

Thus, *mere vocal actions* may constitute a hindrance to a law enforcement officer attempting to act in his or her official capacity. That the *Srnsky* Court further elaborates on this later in its decision (the Petitioner suggests this is *dicta*) is irrelevant, as the Court speaks through its syllabus points.

While West Virginia case law thus supplies some guidance in the present matter, a survey of other courts' decisions under similar factual circumstances provides this court clear direction.

In *Duke v. State*, 423 S.E.2d 427 (Ga. 1992) (applying Ga. Code Ann. § 16-10-24(a))<sup>2</sup>, the court affirmed the misdemeanor obstruction conviction of a Defendant who, when a police officer went to her home with a warrant for the arrest of another individual, knowingly lied by informing them that the arrestee was not there. The court rejected the Defendant's argument that because she

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<sup>2</sup>Ga. Code Ann. § 16-10-24(a) (2011) provides in pertinent part:

(a) Except as otherwise provided in subsection (b) of this Code section, a person who knowingly and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties is guilty of a misdemeanor.

merely lied to the officers and did not employ words which could be construed as forcible resistance or opposition to the officers, the evidence was insufficient to authorize her conviction.<sup>3</sup> The court noted that the applicable statute no longer required evidence of a forcible resistance, and it overruled earlier cases to the extent that they held otherwise.

In *Turner v. Jones*, 415 F. App'x 196, 199 (11th Cir. 2011), United States Eleventh Circuit Court of Appeals revisited Ga. Code Ann. § 16-10-24(a). That court determined that “verbal exchanges without threats of force and violence can authorize a conviction under [the misdemeanor obstruction] statute.” (Citation omitted.) Furthermore, the court in *Hudson v. State*, 218 S.E.2d 905 (Ga. 1975) (applying Ga. Code Ann. § 26-2505), affirmed the obstructing an officer conviction of a Defendant who initially gave the officer a false name and then apparently refused to show his driver's license. The court also affirmed the obstruction conviction of a second Defendant, the first Defendant's mother, who initially told the officer that the first Defendant was gone, when she knew he was actually on the premises. Thus, as the Georgia courts have concluded, mere verbal exchanges, including lying to a police officer, may constitute obstruction for purposes committing the crime of obstructing an officer. Georgia courts are not alone in reaching this conclusion.

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<sup>3</sup>The *Duke* court further elaborated:

Wilfully lying to an officer, who is attempting to execute an arrest warrant, as to the present location of the arrestee does not constitute a mere verbal exchange. As verbal threats of force and violence can hinder an officer and authorize a felony conviction under existing OCGA § 16-10-24(b), lying with the intent of misdirecting him as to the performance of his official duties can certainly constitute a hinderance and authorize a misdemeanor conviction under existing OCGA § 16-10-24(a).

*Duke v. State* 423 S.E.2d at 428 (1992).

The court in *Caines v. State*, 500 So.2d 728 (Fla. Dist. Ct. App. 2d Dist. 1987) (applying Fla. Stat. Ann. § 843.02 (1985))<sup>4</sup>, in a prosecution under a statute making it an offense to obstruct or oppose a public officer without violence, affirmed the conviction of a Defendant who gave a false name and address to a police officer who had arrested the Defendant for theft, with the result that an information was filed against the wrong person. The court stated that the record clearly supported a finding that the Defendant obstructed the officer as he was carrying out the duties of pursuing a criminal investigation and processing the Defendant's arrest. Declaring that it seemed obvious that one who gives an officer false identification under the circumstances of the instant case is "hindering" the officer's performance of duties, the court declined to follow *Z.P. v. State*, 440 So. 2d 601 (Fla. Dist. Ct. App. 3d Dist. 1983), § 8[b], a delinquency proceeding where the court questioned whether a minor's giving of a false name to an arresting officer would constitute a crime. 500 So.2d at 729.

Conversely, in *State v. Stephens*, 387 N.E.2d 252 (1st Dist. Hamilton County, Ohio 1978) (applying Ohio Rev. Code Ann. § 2921.31(A)), the court reversed the conviction of a Defendant who lied to officers. There, the Defendant merely falsely told police officers that she did not know, and had never seen, the person for whom the police officers had an arrest warrant, where an officer then received word that person was in the Defendant's basement, and where the officers then went in and

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<sup>4</sup>Fla. Stat. Ann. § 843.02 (West 2011) provides:

Whoever shall resist, obstruct, or oppose any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

arrested the person. The *Stephens* court thus concluded that to be an act which “hampers or impedes a public official, a Defendant's act must substantially stop an officer's progress.” Courts following *Stephens* have further elaborated that there must be some “substantial stoppage” of the officer's progress before one can say an officer was hampered or impeded.

Close inspection renders *Stephens* inapposite for two reasons. The first is that the statute in *Stephens*, much like statutes in other similar cases where courts have found that the singular act of lying to an officer did not rise to the level of obstruction<sup>5</sup>, requires an act which *actually* causes an impediment, hindrance, interruption, prevention, or delay. W. Va. Code § 61-5-17(a) *does not* require actual causation of a hindrance or obstruction.<sup>6</sup> Mere attempts to hinder or obstruct are enough to merit conviction under W. Va. Code § 61-5-17(a).

The Respondent further argues that *Stephens* is inapposite is because in *Stephens*, the Defendant's statements, even if false, did not cause “substantial stoppage of the officer's progress.” In fact, they had no effect whatsoever on the police pursuing the arrestee. The Defendant in *Stephens* did not impede or hamper the arresting officer in his official duties. The Defendant's statements did

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<sup>5</sup>The court in *People v. Dewlow*, 369 N.E.2d 270 (1st Dist. Ill. 1977) (applying Ill. Rev. Stat. ch. 38 § 31-1 (1975)), reversed the conviction of a Defendant who falsely identified himself as the stepbrother of an arrested juvenile whom a police officer had determined should be released into the custody of a parent, guardian, or responsible adult. The court stated that the Defendant's misrepresentations did not constitute resistance or obstruction in that the officer did in fact release the juvenile to the custody of his court-appointed guardian without any interference on the part of the Defendant.

<sup>6</sup>Ohio Rev. Code Ann. § 2921.31(A) (West 2011) provides:

(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.

not actually stop the arresting officer's progress, because the officer had previously seen the arrestee fleeing the premises and called for backup to apprehend him. In the instant case, the Petitioner actually hindered and obstructed a police officer. The Petitioner, while standing on her front porch (factual similarity to *Stephens* noted), was asked by Deputy Gearde if the Petitioner's boyfriend was inside the residence. The Petitioner denied the fugitive's presence in the home. (App. at 2-3.) This exchange was repeated multiple times, and the Petitioner made repeated "adamant" denials to Deputy Gearde's line of questioning. (*Id.* at 11-13.) It was not until another deputy then heard a noise within the structure and advised Deputy Gearde, who then entered the residence. Only at that point in time did the Petitioner finally admit to Deputy Gearde that her boyfriend was in fact inside the residence. Thus, the Petitioner's repeated, adamant lies to Deputy Gearde caused the police "substantial stoppage of progress," and obstructed a police officer acting in his official capacity. These repeated, adamant denials to Deputy Gearde are more than a singular "materially false statement," as spelled out in W. Va. Code § 61-5-17(c), and thus rise to the level of obstructing a law enforcement officer acting in his or her official duty, as provided for in W. Va. Code § 61-5-17(a).

Finally, there exists one curious case involving statutory construction, that is nevertheless distinguishable from the case at bar. In *Wilbourn v. State*, 164 So.2d 424 (Miss. 1964) (applying Miss. Code Ann. § 2294 (1942)), a case decided under a statute<sup>7</sup> making it an offense to attempt to

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<sup>7</sup> The statute, Miss. Code Ann. § 2294 (1942) provides:

If any person or persons by threats or force, abuse or otherwise, attempt to intimidate or impede a judge, justice of the peace, juror, witness, prosecuting or defense attorneys or any officer in the discharge of his duties or to obstruct or impede the administration of justice in any court, he shall, upon conviction, be punished by imprisonment in the county jail, not less than one month, nor more than six months and by fine not exceeding three hundred dollars.

intimidate or impede an officer in the discharge of duties by threats, force, abuse, or otherwise, the court reversed the conviction of a defendant who made a false statement to a sheriff during the course of an investigation of a crime that was calculated to mislead the officer. The court stated such an “utterance, being unaccompanied by threat, force, or abuse, was not violative of the statute,” in that “[t]he phrase ‘or otherwise’ referred to acts or stratagem of the same general nature as the preceding ‘threats, force or abuse,’” and that it “indicat[ed] acts common to or characteristic of the preceding group of words, or an approximation” of them. *Wilbourn*, 164 So.2d at 426.

*Wilbourn* is distinguishable from the instant case because of the inherent differences in the two statutes. The *Wilbourn* court was merely observing that the word “otherwise” in the Mississippi statute did not function as a catch-all, because the word “otherwise” was clearly modified by the preceding phrase “threats or force,” the immediately preceding word “abuse,” and proceeding phrase “attempt to intimidate or impede.” Thus, for practical purposes, a mere utterance or “vocal action” (to use the circuit court’s phrase), could not alone trigger the use of the operative word “otherwise” under the Mississippi statute. However, in W. Va. § 61-5-17(a) the phrase “acts or otherwise” clearly operates as an catch-all phrase, not limited by the presence of the preceding two words “threats, menaces.” Thus, in the instant case, “acts” functions to include actions that are not necessarily threatening or menacing in nature, including the behavior for which the Petitioner was arrested and convicted. As previously noted, this Court has held that while such obstructing acts may not include the “mere questioning or remonstrating with an officer,” this Court has found that:

the charge of obstructing an officer may be substantiated when a citizen does not supply identification when required to do so by express statutory direction or when the refusal occurs after a law enforcement officer has communicated the reason why the citizen's name is being sought in relation to the officer's official duties.

Syl. Pt. 4 *State v. Srusky*, 213 W. Va. 412, 582 S.E.2d 859.

Therefore, the Petitioner's conduct, specifically her repeated "adamant" lies to a law-enforcement officer acting in his official capacity, was an "act" forbidden by W. Va. Code § 61-5-17(a). Thus, W. Va. Code § 61-5-17(a) was clearly the correct statute under which to convict the Petitioner, and case law from this Court and courts of other jurisdiction support the Petitioner's conviction.

### III.

### CONCLUSION

The Petitioner's assignment of error is without merit. Her conviction should be affirmed.

*Respectfully submitted,*

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Respondent,

By counsel,

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**CERTIFICATE OF SERVICE**

I, JACOB MORGENSTERN, Assistant Attorney General for the State of West Virginia, do hereby certify that a true and exact copy of the foregoing "*SUMMARY RESPONSE TO THE PETITION FOR APPEAL*" was served upon the following by depositing the same, postage prepaid in the United States, mail on this the 8<sup>th</sup> day of November, 2011, addressed as follows:

To: Roger D. Curry  
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\_\_\_\_\_  
JACOB MORGENSTERN