NOT FINAL UNTIL TIME EXPIRES FOR REHEARING
AND, IF FILED, DETERMINED

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

KATHRYN ORBANES

Appellant,

v.

Appeal No. CRC 10-00042 APANO
UCN~~522009MM031568XXXXNO~~

522010AP000042XXXXCR

STATE OF FLORIDA
Appellee.
_____/

Opinion filed _____.

Appeal from a judgment and sentence
entered by the Pinellas County Court
County Judge John D. Carballo

Thomas Matthew McLaughlin, Esquire
Attorney for Appellant

Jennifer Y. Colyer, Esquire
Office of the State Attorney
Attorney for Appellee

ORDER AND OPINION

PETERS, Judge.

THIS MATTER is before the Court on Appellant, Kathryn Orbanes', appeal from a conviction, after a jury trial, of Obstructing or Resisting an Officer Without Violence, in violation of § 843.02 Florida Statutes. After review of the record and the briefs, this Court reverses the judgment and sentence.

Factual Background and Trial Court Proceedings

On October 31, 2009, at around 3:30 p.m., a woman called the Clearwater Police Department to complain that her neighbors, the Appellant, Kathryn Orbanes and her husband, George Martin, were playing their music too loudly. Officer Daniel O'Brien of the Clearwater Police Department responded to the call and upon arrival could hear no excessive noise. Officer O'Brien walked into the complaining party's backyard and talked, in turn, with all parties about the situation. The officer asked Appellant and Mr. Martin to keep the music down and asked the complaining party not to park in the Appellant's driveway. Mr. Martin appeared to the officer to have been drinking. There was an odor of alcohol coming from him, he was slurring his speech and talking loudly. When the officer explained to the Appellant and Mr. Martin what he had told the complaining party, Mr. Martin became argumentative and the officer told him to "please just go in your house and keep the noise down." Officer O'Brien concluded his investigation. There was no violation of the municipal noise ordinance. There was no sufficient reason to arrest anyone for disorderly intoxication or disorderly conduct. The officer walked back to his police cruiser, which was parked in the street a short distance away. When the officer arrived at his vehicle he hesitated for a short time and heard noises coming from the Appellant's house. The officer heard a door slam and a loud male voice say, "Thanks a lot, you f------ b----." Officer O'Brien then walked again into and through the backyard of the complaining party's home and found Mr. Martin sitting at the bottom of a staircase in the back of his residence. Officer O'Brien told Mr. Martin that he was causing a disturbance and was being arrested for disorderly intoxication.

Mr. Martin then became argumentative and profane with Officer O'Brien. Mr. Martin said "[y]ou have no right to arrest me. I'm on my property. I didn't [do] anything f------ wrong. Get away from me." Mr. Martin continued sitting on the staircase and arguing with Officer O'Brien. The officer grabbed Mr. Martin's wrist in an attempt to pull him up into a standing position. Mr. Martin resisted the officer, pulled away and braced. After two warnings, Officer O'Brien subdued Mr. Martin with his taser. During this encounter Appellant was inside the house.

Officer O'Brien, testified that as he was attempting to take Martin into custody, the Appellant came outside and pulled Mr. Martin away from him. The Appellant in her testimony denied ever pulling on Mr. Martin and testified that she was only standing beside him. Officer O'Brien testified that he warned Appellant to stop interfering or she would be charged with obstructing an officer. He further testified that the Appellant continued to pull Mr. Martin and then placed herself between Mr. Martin and the officer in a "blocking manner." At that point, Officer O'Brien sprayed Mr. Martin in the face with pepper spray. A back-up officer arrived and completed the arrest of Mr. Martin. Officer O'Brien then arrested the Appellant. In doing so the officer testified that he "had to take her to the ground" because she was "bracing."

In the jury trial, at the conclusion of the State's case, the Appellant moved for judgment of acquittal arguing that the State had failed to show that the officer was in lawful execution of a legal duty. For purposes of the motion, the Appellant conceded that her act of pulling away and blocking the police from arresting Mr. Martin constituted obstruction and identified the sole issue as to whether the officer was in the execution of a legal duty when he attempted to arrest Mr. Martin. The State agreed that the sole issue

was whether the officer had the authority to make an arrest for disorderly intoxication. The trial court found there was no probable cause for the arrest for disorderly intoxication but did not think it was relevant. The trial court denied the motion for judgment of acquittal. The Appellant was found guilty by the jury. This appeal was timely filed.

Issue

Appellant's first issue is that she was entitled to a judgment of acquittal because the State failed to present sufficient evidence to prove the charge of Obstructing or Resisting an Officer Without Violence. As detailed below, this first issue is dispositive and the remaining issues presented in this appeal will not be addressed.

Standard of Review

In reviewing a motion for judgment of acquittal, a de novo standard of review applies. *Pagan v. State,* 830 So.2d 792, 803 (Fla.2002), *cert. denied,* 539 U.S. 919, 123 S.Ct. 2278, 156 L.Ed.2d 137 (2003); *State v. Fagan,* 857 So2d 320 (Fla. 2nd DCA 2003).

Judgments of Acquittal

The rule is well established that the prosecution, in order to present a prima facie case, is required to prove each and every element of the offense charged beyond a reasonable doubt, and when the prosecution fails to meet this burden, the case should not be submitted to the jury, and a judgment of acquittal should be granted. *Baugh v. State,* 961 So.2d 198, 203-204 (Fla. 2007).

> Generally, an appellate court will not reverse a conviction that is supported by competent, substantial evidence. *See id.* (citing *Donaldson v. State,* 722 So.2d 177 (Fla.1998); *Terry v. State,* 668 So.2d 954, 964 (Fla.1996)). If, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the existence of the elements of the crime beyond a reasonable doubt, sufficient evidence exists to sustain a conviction. *See id.* (citing *Banks v. State,* 732 So.2d 1065 (Fla.1999)). In moving for a judgment of acquittal, a defendant "admits not only the facts

> stated in the evidence adduced, but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." *Beasley v. State,* 774 So.2d 649, 657 (Fla.2000) (quoting *Lynch v. State,* 293 So.2d 44, 45 (Fla.1974)). We have repeatedly reaffirmed the general rule that "courts should not grant a motion for judgment of acquittal unless the evidence is such that no view which the jury may lawfully take of it favorable to the opposite party can be sustained under the law."

Fitzpatrick v. State, 900 So.2d 495, 507 (Fla. 2005).

The Present Case

1. *The Charged Offense.* Appellant was charged, tried and convicted of Obstructing or Resisting an Officer Without Violence, in violation of Florida Statute § 843.02. In pertinent part, the statute provides "[w]hoever shall resist, obstruct, or oppose any officer ... 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..." § 843.02, Fla. Stat. (1989) (emphasis added). This statute is not ambiguous; the plain language of section 843.02 makes it an offense for *any* person to resist, without violence, a law enforcement officer when the officer is engaged in a lawfully executed legal duty. *C.E.L. v. State*, 24 So.3d 1181, 1189 (Fla. 2009) (emphasis added). Therefore a person can violate the statute by resisting, obstructing, or opposing the lawful arrest of another person. The Misdemeanor Information filed in the present case is based on that legal assumption; it contained the following allegation:

> "Kathryn Orbanes ... did knowingly resist, obstruct or oppose Daniel O'Brien, a law enforcement officer of the Clearwater Police Department, Pinellas County, Florida, while in the lawful execution of a legal duty, which consisted of conducting a lawful arrest, without offering to do violence to the person of the officer, ..."

To support a conviction for obstruction without violence, the State must prove: (1) the officer was engaged in the lawful execution of a legal duty; and (2) the defendant's

action, by [her] words, conduct, or a combination thereof, constituted obstruction or resistance of that lawful duty. *C.E.L.*, 24 So.3d at 1185 -1186. "To determine whether the State established the first element, whether the officer was engaged in a lawfully executed legal duty, the court must first look to the legal standard that governs his or her actions. (internal citation omitted). After examining the applicable legal standard, the next inquiry is whether the officer complied with that legal standard at the point where the act of resistance occurred." *Id.* at 1186. "[W]hen the duty being performed by the officer is an arrest, as in this case, the lawfulness of the arrest is an essential element of the offense." *M.W. v. State*, 51 So.3d 1220, 1222 (Fla. 2nd DCA 2011). If an arrest is unlawful, it follows that no charge of obstructing that arrest without violence can prevail. It does not matter that the person charged with the obstruction is a third party, not the person who was being subjected to the unlawful arrest. *See Smiley v. State*, 354 So2d 922 (2nd DCA 1978).

2. *The Arrest of Mr. Martin.* Officer O'Brien arrested Mr. Martin for disorderly intoxication. To support a conviction for disorderly intoxication, the State must prove either that Mr. Martin was intoxicated, and endangered the safety of another person or property or that Mr. Martin was intoxicated or drank any alcoholic beverage in a public place and caused a public disturbance. A "public place" is a place where the public has right to be and to go. Fla. Std. Jury Instr. (Crim) 29.1.

The evidence presented by the State in the present case did not establish *probable cause* to arrest Mr. Martin for disorderly intoxication.[1] The trial court found there was no

[1] The existence of probable cause justifying a warrantless arrest depends on whether, when the arrest was made, "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent [person] in believing that the [person arrested] had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct.

such *probable cause*. What is more, the evidence did not establish *probable cause* to arrest Mr. Martin for any other offense. [2] Officer O'Brien testified there was no violation of the municipal noise ordinance. Neither party has argued nor does this court find in the record any *probable cause* to arrest Mr. Martin for disorderly conduct. *See State v. Saunders,* 339 So.2d 641, 644 (Fla. 1976); *Harbin v. State,* 358 So.2d 856, 857 (Fla. 1st DCA 1978); *C.N. v. State*, 49 So.3d 831, 832 (Fla. 2nd DCA 2010); *Fields v. State,* 24 So.3d 646, 648 (Fla. 3rd DCA 2009).

The evidence presented by the State in regard to the arrest of Mr. Martin for disorderly intoxication established only that Mr. Martin had been drinking and was argumentative and profane on his own property. There was no evidence that Mr. Martin endangered the safety of another person or property or that he drank any alcoholic beverage in a public place and caused a public disturbance. There was no evidence to establish the necessary *probable cause*; there was no evidence to establish the lawfulness of the arrest which was an essential element of the charged offense. The motion for judgment of acquittal should have been granted.

223, 13 L.Ed.2d 142 (1964). Determining whether the probable-cause standard is met requires an evaluation of "the totality of the circumstances." *Jenkins v. State,* 924 So2d 20, 24 (Fla. 2nd DCA 2006).

[2] "Where, by objective standards, probable cause to arrest for a certain offense exists, the validity of an arrest does not turn on the fact that an arrest was effected on another charge. *Chaney v. State*, 237 So.2d 281 (Fla. 4th DCA 1970), *cert. denied*, 403 U.S. 904, 91 S.Ct. 2205, 29 L.Ed.2d 680 (1971); *United States v. Ullrich*, 580 F.2d 765 (5th Cir. 1978)." *Thomas v. State*, 395 So.2d 280, 281 (Fla. 3rd DCA 1981). "[T]he propriety of an arrest does not turn on the charges upon which the arrest was effected." *Gasset v. State,* 490 So.2d 97, 98 (Fla. 3rd DCA 1986). "Neither does the validity of an arrest turn on the offense announced by the officer at the time of the arrest, i.e., that the officers intended an arrest for loitering and prowling does not preclude finding that probable cause existed to arrest for a different offense." *State v. Cote,* 547 So.2d 993, 996 (Fla. 4th DCA 1989).

Conclusion

The State failed to establish a prima facie case that Appellant committed the offense of Obstructing or Resisting an Officer Without Violence. Based upon the foregoing, this court concludes the Appellant was entitled to a judgment of acquittal. We reverse the judgment and sentence.

IT IS THEREFORE ORDERED that the judgment and sentence of the trial court is reversed. This matter is remanded to the trial court with directions to enter a judgment of acquittal and to vacate and set aside the conviction and sentence.

ORDERED at Clearwater, Florida this 25th day of May, 2011.

Original order entered on May 25, 2011 by Circuit Judges Michael F. Andrews, Raymond O. Gross, and R. Timothy Peters.

cc: Honorable John D. Carballo
Thomas Matthew McLaughlin, Esquire
Office of the State Attorney