



New Jersey

P.O. Box 32159
Newark, NJ 07102
Tel: 973-642-2086
Fax: 973-642-6523
info@aclu-nj.org
www.aclu-nj.org

ALEXANDER SHALOM
Senior Supervising Attorney and
Director of Supreme Court Advocacy
973-854-1714
ashalom@aclu-nj.org

November 2, 2020

Hon. Ronald B. Sokalski, J.S.C.
Superior Court of New Jersey
Passaic Vicinage, Criminal Division
77 Hamilton Street
Paterson, NJ 07505
Via email to: Laura Picciocchi Laura.picciocchi@njcourts.gov

Re: State v. Jhabed Malique, Municipal Appeal #6240

Dear Judge Sokalski:

Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal brief in support of Defendant’s appeal of his conviction and sentence entered in the Paterson Municipal Court on March 11, 2020.

Table of Contents

Preliminary Statement2
Statement of Facts and Procedural History3
Argument5
I. The State cannot prove the mens rea of obstruction because Mr. Malique did not act with purpose to obstruct, impair, or pervert the administration of law.....5
II. The State cannot prove the actus reus element of obstruction because Mr. Malique’s actions did not constitute “flight, intimidation, force, violence, or physical interference or obstacle” or “an independently unlawful act.”7

A. Mr. Malique did not affirmatively act to interfere or create an obstacle.	8
B. Mr. Malique did not commit an independent unlawful act.....	11
III. The State cannot prove that Mr. Malique’s actions caused an actual impairment of the administration of law	13
Conclusion	14

Preliminary Statement

The municipal court found Mr. Malique guilty of obstruction of the administration of law, under N.J.S.A. 2C:29-1. This statute has three elements that the State must prove beyond a reasonable doubt in order to convict Mr. Malique: (1) that he engaged in “flight, intimidation, force, violence or physical interference or obstacle”, or “an independently unlawful act”; (2) that the act obstructed, impaired, or perverted the administration of law or prevented or attempted to prevent a public servant from lawfully performing an official function; and (3) that the obstruction, impairment, or perversion was purposeful. The State failed to prove any, much less all three, of these elements beyond a reasonable doubt and, therefore, this Court should find him not guilty after *de novo* review.

Statement of Facts and Procedural History

The arrest in this case arose as police sought to effectuate an arrest as part of a large narcotics interdiction investigation. 1T6:5-9.¹ The State does not allege that Mr. Malique played any role in that drug case. Instead, Mr. Malique, like many other people, witnessed police trying to arrest a suspect on North Bridge Street, in Paterson. In attempting to make the arrest, police stopped vehicular traffic on the bridge by parking a car in the flow of traffic. 1T28:10-12. The pedestrian traffic on the sidewalks that abut the street on the bridge, however, was not closed off. 1T12:5-6, 1T36:1-37:2.

At some point, Mr. Malique, along with several other individuals, approached the Nissan Altima from which police were trying to extract the suspect. 1T15:1-18. Mr. Malique, and others, filmed the attempted arrest by walking from the sidewalk onto the street. 1T15:24-17:25, 1T37:3-38:23. Detective Sergeant Pachelli and Detective Giaquinto ordered the individuals to back up by screaming “back up” as loud as they possibly could several times. 1T17:14-18:8.

Upon hearing these orders, Mr. Malique, and the other individuals, complied and backed up approximately thirty feet off the street and onto the sidewalk. 1T18:13, 1T30:5-25. Meanwhile, police officers struggled with the suspect in the

¹ 1T refers to the trial transcript dated February 12, 2020;
2T refers to the trial transcript dated March 11, 2020.

Nissan Altima for three to five minutes. 1T18:5-19:13. During that time, before the suspect was handcuffed and taken out of the vehicle, police officers never again commanded, nor otherwise indicated to Mr. Malique, or other bystanders, that they should move from the sidewalk where they stood. 1T20:9-21:23.

Once the suspect had been successfully apprehended and handcuffed – when, presumably, vehicular traffic over the bridge would soon begin to flow again – Mr. Malique proceeded to leave the scene, remaining on the sidewalk as he filmed (still behind the low concrete barrier that separated the street from the sidewalk). 1T20:9-21:23. As Mr. Malique attempted to exit the bridge, Detective Sergeant Pachelli advised Detective Colorone to place Mr. Malique under arrest. 1T21:13-22:5, 1T39:7-9.

As he was being arrested, Mr. Malique stated, “I’m sorry. I will delete the video.” 1T22:1, 1T48:1-12. Mr. Malique was arrested even after he asked to leave, saying again he had already deleted the video. 1T22:13-17, 1T48:1-23. Mr. Malique had his phone confiscated and was placed in one of the police vehicles. 1T22:13-17, 1T32:16-24.

It is undisputed, and the municipal court held, that Mr. Malique’s recording was “not an unlawful act.” 2T36:23-24. Despite that, the municipal court held that though his act was not unlawful, it was purposeful because

his conscious objective was to walk up to the vehicle while this struggle was taking place, [and] stick his hand in the

vehicle. He also purposely walked past Detective Giaquinto who had secured Mr. Stewart and was waiting for transport vehicle and walked within very close proximity to that officer.

[2T37:10-16.]

Argument

A person is not guilty of “obstruction of law or a governmental function” unless he or she “purposely obstructs, impairs or perverts the administration of law or other governmental function or prevents or attempts to prevent a public servant from lawfully performing an official function by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.” N.J.S.A. 2C:29-1(a).

I. The State cannot prove the *mens rea* of obstruction because Mr. Malique did not act with purpose to obstruct, impair, or pervert the administration of law.

It is undisputed that Mr. Malique acted with a singular purpose in approaching the officers: to record the arrest of fellow citizen. The record is devoid of any proof, and the State did not claim, that Mr. Malique ever acted with the purpose of impairing or obstructing the administration of the officers’ official duties. To the contrary, Detective Giaquinto, under oath, explicitly contended that Mr. Malique approached the officers to more clearly record the arrest. 1T17:22-18:4.

Mr. Malique’s actions repeatedly show a lack of purpose to obstruct. When asked to back away, he did so and continued to film from approximately thirty feet

away—in no way attempting to obstruct the officer’s arrest. Additionally, once officers stated that he was under arrest, he immediately apologized *for recording and deleted his video*, clearly indicating his purpose was to record, not obstruct the officers’ function in any way. 1T21:13-22:13, 1T48:1-18.

But the municipal court focused on the wrong action for a finding of purpose. The court held that because Mr. Malique purposefully walked toward the officers, it did not matter whether the act of obstruction was purposeful. 2T36:24-37:16. Such a construction of the statute – and *mens rea* requirements in general – would lead to absurd results.

Imagine police chasing a bank robbery suspect. Officers turn a corner while running and bump into Mr. Jones who is absentmindedly looking at a newspaper. The suspect gets away. Mr. Jones certainly has prevented a public servant from lawfully performing an official function by means of physical interference. But he cannot be guilty of violating N.J.S.A. 2C:29-1 because he did not *obstruct* purposefully. This is so even though he purposefully read the newspaper (and, perhaps, even did so in reckless disregard for those who might be running down the street).

Indeed, this is how *mens rea* requirements are *always* applied. If, for example, a person fatally shoots a victim but the jury believes that the shooter thought the gun was unloaded, the jury cannot convict of murder because the person

purposely pulled the trigger. *See, e.g., State v. Sexton*, 311 N.J. Super. 70, 76 (App. Div. 1998), *aff'd*, 160 N.J. 93 (1999) (finding that it was harmful error to allow a jury to consider a murder charge where there was no evidence that the defendant intended to kill the victim, where he fired what he thought was an unloaded gun at the victim).

The same result must apply here: the *mens rea* requirement must apply to the obstruction, not the act that caused the obstruction, or else it becomes meaningless. Nof the evidence indicates Mr. Malique sought to obstruct officers. Indeed, his apologies (for recording) and attempts to get the officers to not arrest him (by deleting the video) belie such a conclusion: he did not think he had violated the law by being too close to officers; he thought (incorrectly) that it may have been unlawful to record police in public. Because the State cannot prove that Mr. Malique acted purposefully in obstructing, a critical element of the crime, the Court must find him not guilty.

II. The State cannot prove the *actus reus* element of obstruction because Mr. Malique’s actions did not constitute “flight, intimidation, force, violence, or physical interference or obstacle” or “an independently unlawful act.”

The statute makes clear that “not just any interference with the administration of law constitutes the criminal act of obstruction.” *State v. Camillo*, 382 N.J. Super.

113, 118 (App. Div. 2005) (quoting *Final Report of the New Jersey Criminal Law Revision Commission, Vol. II, 1971*, at 280). Accordingly,

[s]imply obstructing, impairing or perverting the administration of law or the governmental function is [not] a statutory violation; the obstruction must be carried out in a manner described in the statute: “by means of flight, intimidation, force, violence, or physical interference or obstacle, or by means of any independently unlawful act.”

[*Camillo*, 382 N.J. Super. at 118 (quoting N.J.S.A. 2C:29-1) (citing *State v. Kent*, 173 N.J. Super. 215, 222 (App. Div. 1980)).]

The State does not suggest evidence of flight, intimidation, force, or violence.

Thus, the argument rests on whether Mr. Malique’s actions constituted a “physical interference or obstacle” or an “independently unlawful act.”

A. Mr. Malique did not affirmatively act to interfere or create an obstacle.

The State is required to show beyond a reasonable doubt that Mr. Malique affirmatively acted to physically interfere or place an obstacle to prevent the police from performing an official function. *State v. Berlow*, 284 N.J. Super. 356, 360 (Law Div. 1995). Since the State cannot prove (and does not allege) any physical contact or placement of an obstacle to prevent the police from performing an official function, we turn to the alternative argument that may best represent the officers’ reasoning for arresting Mr. Malique—failing to follow the instructions of an officer. As the Appellate Division explained in *Camillo*, a physical act may include failure

to follow the instructions of an officer or failure to engage in some physical conduct, either of which ultimately result in interference. *Camillo*, 382 N.J. Super. at 121.

However, the facts of this case do not support this conclusion. In his testimony, Detective Giaquinto stated that Mr. Malique:

had his cell phone out and we believed him to be videotaping us, or attempting to videotape us within the vehicle. Which is why we believe he was coming so close because you couldn't really see what was going on within the vehicle, unless you came extremely close to the vehicle.

[1T17:24-18:4.]

Upon being ordered to back up, “[Mr. Malique] backed up along with the other individuals to near the sidewalk”, a distance of “thirty feet.” 1T18:7-13. Mr. Malique moving thirty feet away to the sidewalk shows affirmative *obedience* of officers’ orders. Thus, there was no failure to follow the instructions of an officer nor failure to engage in some physical conduct as was outlined in *Camillo*.

During the next three to five minutes, as the struggle to arrest the person in the Nissan continued, Mr. Malique remained near the sidewalk, filming at a distance of thirty feet, following the officers’ orders to stay away from the vehicle. 1T20:13-24. Approximately three to five minutes later, officers awaited a transport vehicle after having successfully apprehended, handcuffed, and moved the person to the ground. Seeing this occur, Mr. Malique walked past the officers as he walked toward River Street. 1T19:2-21:15. Once more, the State did not put forth any evidence of

either physical contact or a physical act that should be considered interference, nor did it demonstrate that Mr. Malique failed to follow the instructions of the officers. Mr. Malique was ordered to move away from the assailant's vehicle, and he did. Minutes later after the assailant was in handcuffs, Mr. Malique tried to leave the scene, but was arrested. Critically, even though police had blocked the street, they did not stop – by word or deed – pedestrian traffic on the sidewalk. 1T21:21, 1T36:1-37:2. In other words, he was walking in a place where officers had not forbidden it.

As the New Jersey Supreme Court held in *State v. Lashinsky*, the “question in each case calls for an assessment of defendant's actions in light of all the surrounding circumstances the activity giving rise to a police [officer's] order, the reasonableness of that order itself and the defendant's reaction to it.” 81 N.J. 1, 10 (1979). The Court continued, “[a]n individual may not, in our view, be arrested for disorderly conduct solely because the arresting officer capriciously or in bad faith finds behavior annoying or distracting. To trigger the application of the statute, conduct must be truly obstructive.” *Id.* Here, the totality of the circumstances require Mr. Malique's acquittal.

The act that gave rise to the police officer's order was Mr. Malique's filming of a public arrest, which officers claim to have drawn their attention away from the initial arrestee, Tyheem Stewart. The order directing Mr. Malique to “back up” was, of course, reasonable. 1T17:15-19. As soon as he heard officers' commands, Mr.

Malique complied by backing up to a distance of nearly thirty feet away. 1T18:9-13. This conduct is certainly not “truly obstructive.”

Turning to the next encounter between law enforcement and Mr. Malique, once again, the totality of the circumstances favor Mr. Malique. After three to five minutes of a chaotic arrest, the person was handcuffed and surrounded by four law enforcement officials awaiting a transport vehicle. 1T20:19-21:12. Believing the scene was secure, as Detective Giaquinto acknowledged it was, (1T21:13-16) even if only momentarily, Mr. Malique attempted to leave and continue on with his day. In an attempt to do so, he silently walked past officers, still recording – as was his right (*see infra*, Point II, B), and attempted to exit the bridge, while remaining on the sidewalk. 1T 20:9-21:12. In response, law enforcement chose to arrest him. Walking on an open sidewalk, as all members of the public were entitled to do, cannot constitute interference or obstacle.

B. Mr. Malique did not commit an independent unlawful act.

Mr. Malique’s actions are best characterized as a concerned citizen approaching the scene of a public arrest and filming. As the Third Circuit held in the unanimous decision in *Fields v. City of Phila.*, “recording police activity in public falls squarely within the First Amendment right of access to information.” 862 F.3d 353, 359 (3d Cir. 2017). This is not a right enjoyed only by our free press; the fundamental First Amendment right to film police is vested with every member of

the public. *Id.* (citing *PG Publ'g. Co. v. Aichele*, 705 F.3d 91, 99 (3d Cir. 2013); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972)). Moreover, the New Jersey Constitution offers even broader protections for speech and its corollary provisions regarding speech are even “more sweeping in scope than the language of the First Amendment.” *State v. Schmid*, 84 N.J. 535, 557 (1980), *appeal dismissed sub nom.*, *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *see also N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.*, 138 N.J. 326, 353 (1994), *cert. denied*, 516 U.S. 812 (1995). Accordingly, the freedom to engage in the expressive activity of filming in public is not only protected “by the First Amendment to the United States Constitution,” it is further protected “by the New Jersey Constitution, most particularly Article I, paragraph 6.” *Ramos v. Flowers*, 429 N.J. Super. 13, 25-26 (App. Div. 2012) (reversing a grant of summary judgment against the plaintiff’s civil rights claims against a law enforcement officer and holding that the freedom of the press, which is “intimately associated with individual expressional and associational rights,” protects the right to film in public).

In *Fields*, Richard Fields was arrested and later released with a citation for “Obstructing Highway and Other Public Passages” after attempting to film police breaking up a house party on his iPhone from a public sidewalk on the other side of the street. *Fields*, 862 F.3d at 356. When the arresting officer noticed Fields filming, he asked Fields “whether he ‘like[d] taking pictures of grown men’ and ordered him

to leave.” *Id.* “Fields refused, so the officer arrested him, confiscated his phone, and detained him,” before issuing a ticket for obstruction. *Id.* While the Fields decision arose out of an affirmative civil rights suit, the Third Circuit found that Mr. Fields’ conduct never constituted obstruction, noting he was actually arrested in “retaliation” for his exercise of his First Amendment right to engage in “photographing, filming, or otherwise recording police officers conducting their official duties in public.” *Id.* Like Mr. Fields, Mr. Malique was arrested in “retaliation” for exercising his First Amendment right to film police, not because his physical position or the fact that he was filming created any “physical interference or obstacle.”

III. The State cannot prove that Mr. Malique’s actions caused an actual impairment of the administration of law.

Even if recording while walking in the vicinity of law enforcement might under some circumstances rise to the level of obstruction, it is clear that it did not amount to obstruction in this case. As Detective Giaquinto acknowledged, the police officers were able to ignore Mr. Malique for three to five minutes as they effectuated their “chaotic” arrest and ultimately handcuffed Mr. Stewart. 1T20:9-21:15. At the beginning of this arrest, Mr. Malique approached Mr. Stewart’s car to film, which did not result in “physical interference or obstacle.” Officers commanded Mr. Malique and others to move away from the scene—which they did. For the remainder of this chaotic arrest, police officers were able to discharge their governmental

functions all while ignoring Mr. Malique who followed orders and stood approximately thirty feet away. *Id.* Once again, there was no “physical interference or obstacle.” Similarly, Mr. Malique walking by and recording did not create obstruction to a governmental function; rather, quite the opposite, at least two of the four officers awaiting the transport vehicle for the initial arrestee were able to turn their attention to Mr. Malique without there being any effect on their ability to control Mr. Stewart. Specifically, Detective Calderon left Mr. Stewart behind and walked toward River Street toward Mr. Malique and arrested him while at least one officer, Detective Giaquinto, looked on—all while still being able to secure the already handcuffed person. 1T21:21-22:5. Because no obstruction took place, the charge must be dismissed.

Conclusion

Because Mr. Malique did not intend to cause an obstruction, did not create an obstacle or commit an independently unlawful act, and, ultimately, did not cause an actual interference with law enforcement officers’ efforts, this Court’s *de novo* review of the case must produce a not-guilty verdict.

Respectfully submitted,



Alexander Shalom (021162004)