

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 37636

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 657
	)	
Plaintiff-Appellant,	)	Filed: October 12, 2011
	)	
v.	)	Stephen W. Kenyon, Clerk
	)	
JOHN WILLIAM TIFFANY,	)	THIS IS AN UNPUBLISHED
	)	OPINION AND SHALL NOT
Defendant-Respondent.	)	BE CITED AS AUTHORITY
	)	

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Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order dismissing charge of battery upon certain personnel, reversed and remanded.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for appellant. Lori A. Fleming argued.

Swafford Law Office, Chartered; Darren K. Covert, Idaho Falls, for respondent. Darren K. Covert argued.

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GUTIERREZ, Judge

The State appeals from the district court’s order dismissing the information charging John William Tiffany with battery upon certain personnel. We reverse and remand.

**I.**

**FACTS AND PROCEDURE**

In May 2009, Bonneville County Sheriff’s Deputy Patrick Crapo was dispatched at approximately 10:00 p.m. to investigate a report of illegal fireworks being set off in a neighborhood. A neighborhood resident told Deputy Crapo the fireworks were coming from Tiffany’s residence and the neighbor had pictures to prove it. Deputy Crapo approached Tiffany in his front yard and asked if he was lighting fireworks, to which Tiffany responded he was not. The deputy told Tiffany to be quieter and advised him “fireworks that go bang and fly in the air are illegal.”

After Deputy Crapo left Tiffany's house, Deputy Crapo informed the reporting party he could not do anything about the situation because the pictures were too dark for him to identify the person setting off the fireworks. Deputy Crapo told the reporting party, however, she could sign a citation for disturbing the peace. Another neighbor signed the citation, and Deputy Crapo then attempted to serve Tiffany with the citation, but Tiffany was no longer home.

At approximately 11:45 p.m., Tiffany's neighbor called dispatch to report Tiffany was home. When Deputy Crapo returned to the neighborhood, he saw Tiffany and his neighbors engaged in a discussion in Tiffany's front yard. Deputy Crapo asked Tiffany to come speak with him, to which Tiffany agreed. Deputy Crapo asked Tiffany about his earlier statement that there had been "no fireworks at all" and told Tiffany he saw pictures and video which "proved differently." Tiffany turned and began walking away from Deputy Crapo. Deputy Crapo said, "John, come here and talk to me please," and Tiffany said, "No." The deputy again stated, "John, I need to talk to you," and Tiffany again responded, "No." Deputy Crapo then placed his hand on Tiffany's shoulder with a "light touch," at which point Tiffany "swung around with his left arm, hit [Deputy Crapo's] arm and knocked it off his shoulder and then pushed [Deputy Crapo] in the right shoulder." Deputy Crapo advised Tiffany he was under arrest and after a struggle, which required assistance from another officer, Tiffany was finally handcuffed.

Tiffany was charged with battery upon certain personnel, Idaho Code §§ 18-903(a), (c), 18-915(3), for knocking Deputy Crapo's hand off his shoulder and pushing Deputy Crapo. Tiffany filed a motion to dismiss the charge, contending Deputy Crapo's act of touching him was "illegal as a matter of law" and Tiffany's actions in "shrugging off the illegal contact was [a] lawful reaction, and at a minimum self-defense and avoidance of excessive police force." The State opposed the motion, but after conducting two hearings the district court entered an order granting Tiffany's motion to dismiss. The district court concluded the encounter was consensual and any physical contact by Deputy Crapo with the intent of stopping Tiffany from departing was excessive. Therefore, the act of touching Tiffany's shoulder was a battery, and Tiffany's act in knocking Deputy Crapo's hand off his shoulder and pushing Deputy Crapo amounted to "a lawful exercise of his right of self-defense." The State now appeals.

**II.**  
**ANALYSIS**

The State contends the district court erred in dismissing the information upon concluding Deputy Crapo's act of placing his hand on Tiffany's shoulder was a battery and Tiffany's resistance amounted to "a lawful exercise of [Tiffany's] right to self-defense." Idaho Criminal Rule 48 provides, in relevant part:

(a) Dismissal on Motion and Notice. The court, on notice to all parties, may dismiss a criminal action upon its own motion or upon motion of any party upon either of the following grounds:

...

(2) For any other reason, the court concludes that such dismissal will serve the ends of justice and the effective administration of the court's business.

The decision to grant or deny a motion to dismiss an information is left within the sound discretion of the trial court. *State v. Bujanda-Velazquez*, 129 Idaho 726, 728, 932 P.2d 354, 356, (1997); *State v. Curtiss*, 138 Idaho 466, 468, 65 P.3d 207, 209 (Ct. App. 2002). When a trial court's discretionary decision is reviewed on appeal, the appellate court conducts a multi-tiered inquiry to determine: (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989). However, where the question before this Court on appeal is whether the district court acted consistently with the legal standards before it, we exercise free review. *State v. O'Neill*, 118 Idaho 244, 245, 796 P.2d 121, 122 (1990); *Curtiss*, 138 Idaho at 468, 65 P.3d at 209.

The State advances three arguments on appeal; however, because we conclude it is dispositive, we only address the State's contention that, even assuming Deputy Crapo's touching of Tiffany's shoulder was unlawful, Tiffany had no right to forcefully resist. In *State v. Bishop*, 146 Idaho 804, 817, 203 P.3d 1203, 1216 (2009), the Idaho Supreme Court addressed the issue of whether individuals have the right to forcefully resist unlawful acts by police officers in the

context of the resisting and obstructing statute.<sup>1</sup> There, the Court considered whether the defendant's act of resisting an officer's attempt to conduct an unlawful frisk constituted a violation of Idaho Code § 18-705, which "makes it a crime to 'willfully resist[], delay [] or obstruct[] any public officer, in the discharge, or attempt to discharge, . . . any duty of his office.'" *Bishop*, 146 Idaho at 816, 203 P.3d at 1215. The Court concluded "duty" as used in the statute includes "only those lawful and authorized acts of a public officer." *Id.* (citing *State v. Wilkerson*, 114 Idaho 174, 180, 755 P.2d 471, 477 (Ct. App. 1988)). The Court then held, "Because an unlawful act is not considered a 'duty' under the statute, an individual may peacefully obstruct or refuse to obey an officer's unlawful act without violating the statute. *An individual may not, however, use force or violence to resist.*" *Bishop*, 146 Idaho at 817, 203 P.3d at 1216 (emphasis added) (citations omitted).

Applying the holding to the case, the Court concluded that because the evidence indicated "Bishop peacefully resisted the unlawful frisk by merely turning around and telling [the officer] 'no,'" Bishop had not violated the resisting and obstructing statute. *Id.* at 821, 203 P.3d at 1220. Referencing the practical considerations of its holding, the Court noted, "[C]oncluding that a person may peacefully resist an unlawful frisk, for example by turning around and saying 'no,' does not raise the same concerns for public safety as would allowing resistance by physical force or violence." *Id.* at 821 n.16, 203 P.3d at 1220 n.16.

Here, Tiffany was charged under Idaho Code § 18-915(3), which provides, in relevant part:

For committing a violation of the provisions of section 18-903,<sup>[2]</sup> Idaho Code . . . against the person of a former or present peace officer, sheriff or police officer:

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<sup>1</sup> It was already well-established that an individual could not use force to resist a peaceable *arrest* by one she knows, or should have known, is a police officer. *State v. Lusby*, 146 Idaho 506, 509, 198 P.3d 735, 738 (Ct. App. 2008). *Bishop*, however, addressed the issue in the context of other law enforcement "duties."

<sup>2</sup> Idaho Code § 18-903 defines battery as any:

- (a) Willful and unlawful use of force or violence upon the person of another; or
- (b) Actual, intentional and unlawful touching or striking of another person against the will of the other; or
- (c) Unlawfully and intentionally causing bodily harm to an individual.

....

(b) While the victim is engaged in the *performance of his duties* and the person committing the offense knows or reasonably should know that such victim is a peace officer, sheriff or police officer; the offense shall be a felony punishable by imprisonment in a correctional facility for a period of not more than five (5) years, and said sentence shall be served consecutively to any sentence being currently served.

(Emphasis added.) We agree with the State that while the *Bishop* case involved a different statute, the reasoning of *Bishop* is equally applicable in this case. Specifically, the term “duties” in Idaho Code § 18-915(3)(b) includes only those lawful and authorized acts of a police officer. *Bishop*, 146 Idaho at 817, 203 P.3d at 1216. However, it is no defense to a charge of battery upon certain personnel that the officer was engaged in an unlawful act, because while an individual may peacefully obstruct or refuse to obey an officer’s unlawful act, he may not use *force or violence* to resist, regardless of the legality of the officer’s actions. *See id. Accord State v. Lusby*, 146 Idaho 506, 509, 198 P.3d 735, 738 (Ct. App. 2008) (“It is well established that an individual may not use force to resist a peaceable arrest by one she knows or has good reason to believe is a police officer . . .”).<sup>3</sup>

Here, it is clear Tiffany’s actions were a utilization of “force” against Deputy Crapo where he swung his arm and hit Deputy Crapo’s hand, knocking it off his shoulder and followed up by pushing Deputy Crapo backwards--a point Tiffany does not dispute. As compared to the resistance offered by Bishop where he simply turned around and told the officer “no,” *Bishop*, 146 Idaho at 821 n.16, 203 P.3d at 1220 n.16, Tiffany’s acts rose to the level of “force.” Thus, even assuming, without deciding, Officer Crapo acted unlawfully in placing his hand on Tiffany’s shoulder, Tiffany was not entitled to utilize force to resist that action.

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<sup>3</sup> An exception to this rule allows an individual to defend himself against the use of *excessive* force by a law enforcement officer. *State v. Spurr*, 114 Idaho 277, 279, 755 P.2d 1315, 1317 (Ct. App. 1988). No evidence of excessive force exists in this case given that the undisputed testimony shows the officer attempted to accomplish the seizure by lightly placing his hand on Tiffany’s shoulder. Further, as the State points out, even assuming there was a question regarding the level of force utilized by Deputy Crapo, that question is properly resolved by a jury, not by the court as a matter of law. *See id.*

**III.**  
**CONCLUSION**

Accordingly, we conclude the district court erred in dismissing the information charging Tiffany with battery upon certain personnel. The order dismissing the information is reversed and the matter is remanded to the district court for further proceedings consistent with this opinion.

Chief Judge GRATTON and Judge MELANSON **CONCUR.**