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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2176**

State of Minnesota,
Respondent,

vs.

Timothy Garth Hansen, Jr.,
Appellant.

**Filed October 22, 2012
Reversed
Collins, Judge***

Blue Earth County District Court
File No. 07-VB-09-8313

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Eileen Wells, Mankato City Attorney, Christopher D. Cain, Assistant City Attorney,
Mankato, Minnesota (for respondent)

Michael K. Mountain, Mountain Law Office, Mankato, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Stauber, Judge; and Collins,
Judge.

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant was charged with and acquitted of obstructing legal process, but was convicted of failure to comply with a peace officer's lawful order or direction. Appellant challenges the conviction, arguing that the district court erred and abused its discretion when, during the trial, it added the failure-to-comply charge for consideration by the jury as a lesser-included offense. Because failure to comply with a peace officer's lawful order or direction is not a lesser-included offense in the charged offense of obstructing legal process, we reverse.

FACTS

On September 18, 2009, a fire occurred at the apartment building in which appellant Timothy Hansen resided. Hansen initially complied with the direction to leave the building but subsequently ran back into the burning building despite repeated directions from police officers not to do so. Hansen was physically removed from the building, arrested, and charged with misdemeanor obstruction of legal process under Minn. Stat. § 609.50 (2008).

In a pretrial hearing on March 1, 2010, the district court raised the potential applicability of Minn. Stat. § 169.02, subd. 2 (2008), misdemeanor failure "to comply with a lawful order." In a pretrial hearing on August 16, 2010, the district court again mentioned the failure-to-comply statute, and the prosecutor noted that it is a traffic statute.

During an in-camera conference on the second day of trial, August 27, 2010, the district court stated, “I am satisfied that my. . . initial thought process of having the Count II, lesser included—failure to comply with an order of a peace officer included would be given and provided to the jury. So, I intend to do that.” Hansen objected, arguing that the addition of this charge was “more exposure to [Hansen].”

The district court instructed the jury on the two charges. The jury found Hansen not guilty of obstruction of legal process and guilty of failure to comply with a peace officer’s lawful order or direction. Hansen sought to have the guilty verdict set aside, arguing that the requirement to comply with a peace officer’s lawful order or direction under Minn. Stat. § 169.02 is a traffic regulation having no application to this case. The district court denied the motion, adjudicated the conviction, and sentenced Hansen to 60 days in jail, with 50 days stayed. This appeal followed.

DECISION

Hansen argues that the district court erred by adding the charge of failure to comply with a lawful order or direction of a peace officer and characterizing it as a lesser-included offense in the charged offense of obstruction of legal process. “[W]hen evaluating whether to give a lesser-included offense instruction, [district] courts must determine whether (1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense.” *State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005).

A lesser-included offense is a “crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1 (2008). A crime is “necessarily proved” if it is impossible to commit the greater offense without committing the lesser offense. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). “In determining whether one offense necessarily is proved by the proof of another, the trial court must look at the statutory definitions rather than the facts in a particular case.” *State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997) (quotation omitted).

The statute prohibiting obstruction of legal process states in relevant part: “Whoever intentionally does any of the following may be sentenced as provided in subdivision 2 . . . obstructs, resists, or interferes with a peace officer while the officer is engaged in the performance of official duties.” Minn. Stat. § 609.50, subd. 1(2). The statute prohibiting failure to comply with a peace officer’s lawful order or direction is contained in Chapter 169, “Traffic Regulations,” and states:

Subdivision 1. Application to persons, places, and vehicles. The provisions of this chapter relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways, and upon highways, streets, private roads, and roadways situated on property owned, leased, or occupied by the regents of the University of Minnesota, or the University of Minnesota, except:

(1) where a different place is specifically referred to in a given section;

(2) the provisions of sections 169.09 to 169.13 apply to any person who drives, operates, or is in physical control of a motor vehicle within this state or upon the ice of any boundary water of this state, and to any person who drives, operates, or is in physical control

of a snowmobile on a snowmobile trail within this state.

Subd. 2. Penalty for not complying with peace officer. It is a misdemeanor for any person to willfully fail or refuse to comply with any lawful order or direction of any peace officer invested by law with authority to direct, control, or regulate traffic.

Minn. Stat. § 169.02 (2008).

Based on the plain language defining the offenses, failure to comply with a peace officer's lawful order or direction is not a lesser-included offense in the offense of obstructing legal process. It is possible for a person to obstruct, resist, or interfere with a peace officer without failing or refusing to comply with the order or direction of a peace officer. For simple example, a person might shove or strike an officer as the officer attempts to arrest someone else, without ever having personally received any order or direction from an officer. Because it is possible to commit the offense of obstructing legal process without committing the offense of failure to comply with a peace officer's lawful order or direction, the latter is not a lesser-included offense in the former.

Moreover, it is significant that the failure-to-comply statute is part of Minnesota's traffic regulations. In *City of St. Paul v. Willier*, 304 Minn. 430, 231 N.W.2d 488 (1975), Willier was observed by police officers driving erratically and committing multiple traffic violations. *Willier*, 304 Minn. at 431, 231 N.W.2d at 489. When Willier reached home and got out of his vehicle, the officers asked him to produce identification. *Id.* Willier refused and was charged with failure to comply with a peace officer's lawful order. *Id.* Willier argued that Minn. Stat. § 169.02, subd 2 applied only to a situation

“where a driver or other person refuses to comply with a peace officer’s order regulating traffic.” *Id.* The supreme court disagreed, holding that the statute applied to Willier’s conduct. *Id.*

Here, citing *Willier*, the state argues that the focus of Minn. Stat. § 169.02, subd. 2 is solely on the defendant’s conduct in failing to comply with a peace officer’s order or direction, and does not require any nexus to traffic regulation. We disagree. *Willier* goes no further than to hold that a person can violate the statute by refusing to obey a lawful order or direction of a peace officer that does not immediately involve regulating traffic. *Willier* does not support the proposition that a violation of the failure-to-comply statute can occur without any nexus whatsoever to traffic regulation. Hansen had not been in a vehicle or on a roadway, and the police officers who engaged him were not at the scene to regulate traffic. The district court erred by concluding that this traffic regulation is a lesser-included offense in the offense of obstructing legal process.

Because the statutory offense of failure to comply with a peace officer’s lawful order or direction is independent of, and not a lesser-included offense in the offense of obstruction of legal process, the district court abused its discretion by adding the charge.

Reversed.