

IN THE SUPREME COURT OF OHIO

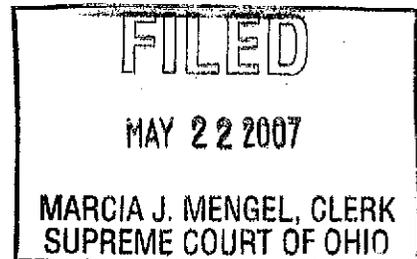
JEFFREY L. PRICE	:	Supreme Court Case
	:	No. 2006-1689
Appellant	:	
	:	
v.	:	On Appeal from the
	:	Montgomery County
STATE OF OHIO	:	Court of Appeals,
	:	Second Appellate District
Appellee.	:	
	:	Court of Appeals
	:	Case No. 21370

REPLY BRIEF OF APPELLANT, JEFFREY L. PRICE

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ARGUMENT

Appellant's Response to State's Response to Propositions of Law No. I and II:

A SUBSEQUENT DIVORCE DECREE PARENTING TIME ORDER MODIFIES A PRIOR-ISSUED CPO ORDER TO THE EXTENT THAT THE TWO ORDERS CONTRADICT

The State alleges that the concept of the Civil Protection Order (CPO) only temporarily allocates parental rights and responsibilities until later modified by a domestic relations court is misapplied via the case law. However, the Ohio Revised Code (O.R.C.), specifically section 3113.31(E)(3)(b), directs that a CPO only governs matters of child visitation and custody to the extent that no other court action, such as divorce, otherwise allocates parental rights and responsibilities for care of children so as to terminate the related sections of the CPO. The Code section specifically provides for the termination of temporary parenting time orders "on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues an order allocating parental rights and responsibilities for the care of children." *Id.* The Code section is clear and is applicable to the present facts. CPO directives for child visitation and/or custody terminate upon issuance of a later divorce decree.

Initially, in the present case, a CPO was ordered suspending Mr. Price's visitation rights; however, the later Divorce Decree specifically granted visitation rights, thus superseding the then-terminated CPO.

The State elects to interpret the Domestic Relations Court's later Divorce Decree visitation order, "at the Mother's discretion," to mean that it was exclusively Ms. Price who was allowed to make contact to structure visits "as had been the parties' practice for many years." [Appellee's Brief, p. 5] This is not the intended or a practical interpretation.

First, there was no evidence submitted to show that the past pattern of visitation between Mr. Price and his son was exclusively initiated by Ms. Price. Rather, the evidence simply revealed that visits had been accomplished for over a four year period. [Trial Transcript (TT), pp. 23-25] Second, to interpret the Court's clear grant of visitation to Mr. Price to mean that it was completely up to Ms. Price to communicate regarding visitation is to make the order completely devoid of any right granted in Mr. Price. This could not have been the Court's intent.

For example, what if Mr. Price changed his mailing address or phone number? Surely the Court's intention in such cases would not be for Mr. Price to forever lose contact with his son. What if visitation has been scheduled and the visiting parent has a medical emergency and is going to have to reschedule? Under this interpretation, there is no way to convey that message. The day-to-day interpretation of these orders is not a tidy concept revolving in a vacuum. Rather, these orders govern the day-to-day lives of many parents and play out multiple times a week or even each day.

The State further sets forth that after the Divorce Decree granted Mr. Price visitation with his son and he followed that order for nearly four years, the CPO still prohibited him from contacting his son. [See Appellee's Brief at p. 5] Clearly, this cannot be the case, as the later Court issuing the Divorce Decree granted visitation with the minor child to Mr. Price. As previously set forth, the CPO only governs the issues of child custody and visitation unless and until a later action, such as divorce, terminates the prior order. In this case, the CPO order for visitation was terminated.

The additional directive called for by the State likewise cannot be so. The State concludes that "a 'no contact' order will always survive a subsequent visitation order." [Appellee's Brief, p. 5] This not only contradicts the language of the Revised Code; it also

contradicts the Second District Court of Appeal's view of the State's own position in this case when it held in its majority opinion that "the State concedes the CPO visitation order was superceded [sic] by the divorce decree provisions pursuant to R.C. 3113.31 (E)(3)(b)." (Appx., 4).

Contrary to the interpretation of the State, the language of the Divorce Decree in this matter did modify the terms of the once governing CPO. If the Court issuing the Divorce Decree intended for Mr. Price, as the State insists, to further petition the court for visitation, it wouldn't have issued a functionally hollow visitation order for Mr. Price. The intention was for Mr. Price, like he had for four years, to have visitation and to communicate to exercise it. Further, Mr. Price was following that very directive when he left messages for his son. Mr. Price did not violate the CPO.

Appellant's Response to State's Response to Proposition of Law No. III:

**THE LATER VISITATION ORDER, AS DIRECTED,
REQUIRED CONTACT TO OCCUR AND TO THE
EXTENT THAT CONTACT OCCURRED, IT DID NOT
VIOLATE THE APPLICABLE PORTIONS OF THE CPO**

As set forth above, Mr. Price could not have violated the "no contact" portion of the CPO because the later-issued Divorce Decree implicitly required such contact to carry out the Order. Therefore, to violate the CPO, Mr. Price's contact would have had to extend outside the bounds of general contact restriction and into the category of communication of a threatening nature, and the like, outlined in the CPO language.

The State sets forth an interpretation of a fictional domestic violence witness impacted by communication. [See Appellee's Brief at p. 7] The problem with the emotional impact the State sets forth is that they were never the emotions or sentiments experienced by the witness in the case at bar. Mr. Price's guilt should not be determined based on some derived impact

his actions or words may have had on some fictional victim. Rather, Mr. Price, and every citizen for that matter, is entitled to be punished for the impact, if any, his or her actions actually had on a victim. In this actual case, the complaining witness testified regarding the messages as follows:

“Q. And there’s nothing harassing about the phone calls; is that right?”

“A. Yes, ma’am.” (TT, p. 32)

Therefore, the “mistake” that the State alleges being made regarding the content of the messages must not have only been that of Mr. Price and Judge Donovan, but also the complaining witness herself, as she specifically testified that the messages left were not harassing.

The State attempts to analogize the present facts to those of the well-known Frazier case which placed a family housecat at the center of a CPO dispute when it was the directed recipient of a mailed letter. State v. Frazier, 158 Ohio App.3d 407, 2004-Ohio-4516. We should spare drawing comparisons between an eight-year-old child and a housecat, even as domesticated as such a feline may be, regarding communications in and around a CPO. Suffice it to differentiate the two, in this case a later Domestic Relations Court saw fit to specifically address, retain jurisdiction over, and grant visitation between Mr. Price and his son. As mentioned, this later order superseded the CPO. Mr. Price’s communications were not at odds with his governing orders and a four-year pattern of permitted conduct between the parties. This case, being addressed by this honorable Court, involves much more than a “transparent ruse” like that of the Frazier case. Id. In addition, contrary to the facts in Frazier, there is no evidence to suggest that these calls were an attempt to defy an order or cause emotional distress. See Id. First, the communications were in an effort to fulfill, not defy, a

very specific order and, second, the complaining witness, by her own admission, was placed in no distress.

As a result, Mr. Price did not violate the CPO.

Appellant's Response to State's Response to Proposition of Law No. IV:

**PRICE'S CONVICTION IS NOT SUPPORTED BY THE
MANIFEST WEIGHT OF THE EVIDENCE**

The finding of the jury of Mr. Price having violated the CPO was against the manifest weight of evidence presented.

The State insists that the evidence presented at trial proved beyond a reasonable doubt that Mr. Price acted with "heedless indifference to the consequences" and "perversely disregard[ed] a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." [Appellee's Brief, p. 9] The State supports this conclusion by alleging a number of unsupported conclusions of fact. First, the State alleges that Mr. Price could have been held in violation of the CPO for coming within 500 feet of Ms. Price. Yet, there was no evidence presented that Mr. Price ever set foot near the residence. Next, the State alleges that Mr. Price leaving the messages of love for his son could have been "found to be harassment." *Id.* Yet, as set forth above, the complaining witness testified in complete contradiction to such a claim. [TT, p. 32]

Instead, the actual evidence presented at trial revealed that Ms. Price thought that she could use the CPO directive of no contact and the Divorce Decree order for visitation at her discretion interchangeably at her whim against Mr. Price. [TT, p. 32] Further, the jury had for supporting evidence the testimony of the responding law enforcement officers who admitted that they only reviewed the CPO (the only document presented by Ms. Price at the

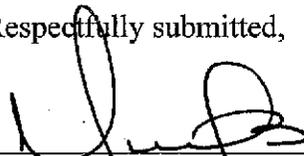
time) and had no knowledge of the Divorce Decree visitation order when they approved charges. [TT, pp. 51 and 52] Finally, the State concludes by stating that "Price knew if he wanted visitations, he had to petition the Court, not Ms. Price." [Appellee's Brief, p. 10] Mr. Price had no need to petition the Court because he had already been granted visitation and had visited with his son in accordance with that Order for four years.

Giving proper deference to the perspective of the initial trier of fact, the conclusion remains that the finding of the jury was against manifest weight of the evidence.

CONCLUSION

In response to the State's arguments, Justice Donovan's opinion in her dissent that "a serious injustice would occur in affirming this felony conviction based upon a review of all the facts and circumstances before us" still rings true. (Appx. 7) Therefore, we respectfully request this Court to hold that, on the facts presented, Mr. Price did not violate the CPO in his quest to continue to be a part of his son's life.

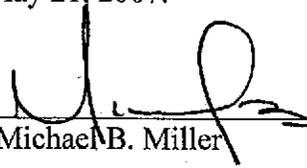
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Merit Brief was sent by ordinary U.S. Mail to counsel of record for Appellee, Ms. Johnna Shia, Montgomery County Assistant Prosecuting Attorney, Appellate Division, Dayton-Montgomery County Courts Building, P.O. Box 972, 301 W. Third St., 5th Floor, Dayton, Ohio 45422 on May 21, 2007.



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JEFFREY L. PRICE

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :
Plaintiff- Appellee : C.A. Case No. 21370
vs. : T.C. Case No. 05-CR-1494
JEFFREY L. PRICE : (Criminal Appeal from Common
Pleas Court)
Defendant-Appellant :

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OPINION

Rendered on the 28th day of July, 2006.
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BROGAN, J.

Jeffrey Price appeals from his conviction of violating a protection order (second
offense) after a jury trial.

The facts underlying the appeal are set out in the parties' briefs and are not in dispute.

Catherine and Jeffrey Price were married in 1998 and one child, Justin, was borne of their marriage. In 2000, the Prices began having marriage difficulties and Catherine obtained a civil protection order from the Montgomery County Common Pleas Court, Domestic Relations Division. Jeffrey was ordered to stay away from his family. He was ordered to refrain from contacting them. Jeffrey's visitation rights with Justin were suspended until he engaged in regular counseling for his bi-polar disorder and took medication. The CPO was to remain in full force for five years, except with regards to Jeffrey's parental responsibilities, such as support and visitation orders.

In April 2001, the Prices were divorced and the decree provided that Jeffrey's visitation privileges with Justin "shall be at the Mother's discretion." The court invited Price to seek more extensive visitation once he completed the Court's parenting seminar. After the Prices were divorced, Catherine permitted Jeffrey to visit with Justin on a regular basis for nearly four years until Justin began exhibiting violent tendencies after visits with Jeffrey. Catherine last permitted her son to visit with his father in December 2004.

Between April 11, 2005 and April 13, 2005, Appellant Jeffrey Price contacted his ex-wife, Catherine Price, by telephone, and left several messages on her digital answering machine. The messages were: "Check your front door." "I love you, Justin, talk to you later." "I love you, Justin." And "Justin, I love you. I'll see you on your birthday." Justin is the couple's son, who was seven years old at the time. After checking the front door, Ms. Price found an Easter Basket for Justin. Ms. Price called

the police and reported that Mr. Price had violated a civil protection order by contacting her. Ms. Price explained that she considered this contact harassment because there were no plans for Price to see Justin on his birthday. Officer Clinton Price of the Kettering Police Department (no relation to the parties) contacted the defendant and asked him if he had made the phone calls in question. Initially, the defendant denied making the calls but then admitted doing so. The defendant told Officer Price he was drunk for one of the calls and the others were made concerning his son's birthday. (T. 48.) Officer Price said the defendant told him he made the calls because he had observed his son standing at a bus stop with no windows open in his ex-spouse's home where she could observe her son's safety. (T. 49.)

In his first assignment, Jeffrey argues that the trial court erred in convicting him of violating the civil protection order (CPO) because the pertinent sections of the order had been terminated by the subsequent divorce decree. He points to R.C. 3113.31 (E)(3)(b) which provides in pertinent part:

"(b) Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(d) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues an order allocating parental rights and responsibilities for the care of children or on the date that a juvenile court in an action brought by the petitioner or respondent issues an order awarding legal custody of minor children."

Appellant argues that the "no contact" order in the CPO was not violated because the divorce decree implied contact with his former wife and child was

necessary for visitation to take place at his former wife's discretion. The State concedes the CPO visitation order was superceded by the divorce decree provisions pursuant to R.C. 3113.31(E)(3)(b), but the no-contact order for any other reason was not modified and was in effect at the time of the incident.

We agree with the State's argument. The defendant's contact with his former spouse by telephone did not concern visitation. Ms. Price had cut off the defendant's visitation privileges in June of 2004. Ms. Price had not arranged for the defendant to see his son on his son's birthday. The no contact order in the CPO was in full force and effect at the time of the defendant's phone calls. The divorce decree did not expressly or impliedly permit the defendant to contact his former spouse in violation of the civil protection order. The first assignment of error is Overruled.

In his second assignment, Price contends he was justified in contacting his son out of "necessity." Price argues that part of the reason he left phone messages for his son was his concern for his son's personal safety. The State argues we should reject this assignment because the defendant did not raise this defense at his trial.

R.C. 2901.05 is a general statute applicable to all chargeable offenses and creates in all cases a right to the affirmative defense of necessity as justification for violation of a statute, if such affirmative defense can be established. Elements of defense of necessity are as follows: (1) harm must be committed under pressure of physical or natural force, rather than human force; (2) harm sought to be avoided is greater than, or at least equal to that sought to be prevented by the law defining offense charged; (3) actor reasonably believes at moment that his act is necessary and is designed to avoid the greater harm; (4) actor must be without fault in bringing about

situation; and (5) harm threatened must be imminent, leaving no alternative by which to avoid the greater harm. *State v. Harkness* (1991), 75 Ohio App.3d 7, 598 N.E.2d 836; *State v. Melchoir* (1978), 56 Ohio St.2d 15, 381 N.E.2d 195; *City of Dayton v. Gigandet* (1992), 83 Ohio App.3d 886, 615 N.E.2d 1131; *State v. Prince* (1991), 71 Ohio App.3d 694, 595 N.E.2d 376. Pursuant to R.C. 2901.05(A), "the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused."

It is noteworthy that the defendant did not request a jury instruction on the defense of necessity nor did he argue in his final argument that he had established such a defense.

The Clermont County Court of Appeals has held that a jury instruction on the defense of necessity was not warranted where a defendant charged with telephone harassment repeatedly called her former husband at his work number after being warned repeatedly not to do so unless it was a genuine emergency involving the children, simply because the defendant felt the calls were necessary. *State v. Gibbs*, 134 Ohio App.3d 247.

None of the four phone messages left by the defendant related to his son's safety. The second assignment of error must be Overruled.

In his last assignment, Price again argues that since the final divorce decree authorized him to have visitation with his son "at his wife's discretion," the decree necessarily supercedes the no contact provisions of the civil protection order. We agree the decree authorized the defendant to respond to visitation arrangements authorized by Ms. Price. It did not authorize other contacts unrelated to arranged

visitation permitted at the discretion of Ms. Price. The third assignment of error is Overruled. The Judgment of the trial court is Affirmed.

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WOLFF, J., concurs.

DONOVAN, J., dissenting:

I disagree. The divorce decree's grant of visitation at appellant's former wife's discretion not only permitted contact between Price and his son, Justin, but also necessitated communication between Price and his former wife. For four years, appellant was visiting his child and contacting his former wife, all ostensibly in direct contravention of the CPO. If this is true, then the language of the latter divorce decree permitting visitation is a complete nullity since appellant was to have "no contact" with Justin or his former wife due to the unmodified language in line 6 of the CPO.

As a result of clearly conflicting orders issued by the Domestic Relations Court, Price's legal rights and duties were not clearly defined. Price's ability to communicate with his former wife in order to visit with his son was left to her every whim. In fact, she acknowledged on cross-examination the inconsistency between the orders as evidenced by this exchange.

"Q. So the protection order as you understood it said that your ex-husband could not visit with your son, correct?"

"A. Yes, ma'am.

"Q. And yet you were allowing his visitation; is that correct also?"

"A. Yes, ma'am.

"Q. You called the police because Jeff left these messages saying that he loves his son; is that right?

"A. Yes, ma'am.

"Q. And did you also think the protection order was in your discretion?

"A. Yes, ma'am.

"Q. So you thought that if you wanted to use the protection order one day, then you could call the police, but if you wanted to have him visit, then that would be okay, too?

"A. Yes, ma'am."

I recognize that the CPO was initially issued for the protection of Price's son and his former wife, however, I am unable to find that sentiments of love, an Easter basket and a hope to see a child on his birthday constitute a violation of the CPO issued in 2000. The clear language of the CPO states Price "shall not abuse a family or household member by harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, contacting or forcing sexual relations upon them." The contact admitted here can hardly be deemed abuse or harassment. In fact, Price's former wife acknowledged on cross that the calls were not harassing in this exchange:

"Q. And there's nothing harassing about the phone calls; is that right?

"A. Yes, ma'am."

I am convinced after reviewing the record that a serious injustice would occur in affirming this felony conviction based upon a review of all the facts and circumstances before us. Not only do the contacts herein fall far short of harassment

and abuse, but equity weighs heavily in Price's favor as well. Aristotle defined equity as "a better source of justice, which corrects legal justice where the latter errs through being expressed in a universal form and not taking account of particular cases."

Ethics, book 5, c. 10. I would reverse.

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