

IN THE SUPREME COURT OF OHIO
2012

STATE OF OHIO,

Case No. 12-0239

Plaintiff-Appellee,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

ROBERT L. SMITH, JR.,

Court of Appeals
Case No. 11AP-512

Defendant-Appellant

MERIT BRIEF OF PLAINTIFF-APPELLEE STATE OF OHIO

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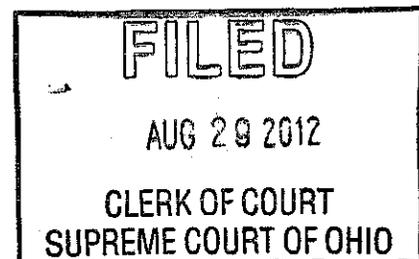


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STATEMENT OF FACTS

On April 27, 2010, a Franklin County Grand Jury indicted defendant, Robert L. Smith, Jr., on one count each of aggravated burglary, violating a protection order, domestic violence, and resisting arrest. (R. 2) Defendant exercised his right to a jury trial, which began on April 4, 2011. The State presented three witnesses.

Shasta Pickens, the victim, lived at 879 Camden Avenue in Columbus, Ohio, on April 17, 2010. (Tr. Vol. 1, p. 52) Ms. Pickens previously dated defendant for about six months to a year. (Id. at 54) Defendant would stay at her house, but he did not have his name on the lease, have a key to the house, or receive his mail there. (Id. at 55) In early 2010, Ms. Pickens decided to end the relationship with defendant. (Id.)

Ms. Pickens' relationship with defendant was "rocky," and they had many altercations. (Id. at 57) On April 12, 2010, Ms. Pickens obtained a protection order against defendant. (Id.) She presented it to defendant when he was at her house on April 16, 2010, and told him that he was not allowed to be around her. (Id. at 58) Defendant was angry about the protection order against him. (Id. at 59)

On April 17, 2010, Ms. Pickens was cooking in her kitchen when she heard a loud bang come from the basement. (Id.) When she opened the door to the basement, she saw defendant coming up the steps toward her. (Id.) Defendant entered her home through the basement window. (Id.) Defendant said to Ms. Pickens, "Yeah, bitch, you thought it was over." (Id. at 60) He grabbed Ms. Pickens by the neck and put her in a chokehold to a point where she thought she would pass out. (Id.) The two tussled around for a while. (Id.) Ms. Pickens tried to fight back, but defendant slammed her into the wall several times, leaving bruises on her arms and a bite mark on her back. (Id. at 61, 69)

The abuse lasted approximately ten minutes. (Id. at 62) Defendant stopped assaulting Ms. Pickens when her son and his friend came home. (Id.) At that point, Ms. Pickens was able to call 911. (Id.) She called 911 the first time and hung up. (Id.) She called a second time and told police to come to 879 Camden Avenue. (Id.)

The police arrived in about two or three minutes. (Id. at 64) Officer Rohaley was first to respond with his partner, Officer Bear. (Id. at 89-90) Officer Bear made contact with Ms. Pickens and learned that defendant was in the basement. (Id.) Officer Rohaley secured the outside of the house to prevent defendant from escaping. (Id. at 90) He saw two hands come out of the basement window, and then saw defendant's face. (Id. at 91-92) Officer Rohaley drew his weapon and ordered defendant to stop. (Id.) Defendant went back inside the basement. (Id.) Officer Rohaley heard Officer Bear say from inside the house to "get down," so Officer Rohaley went into the house to assist and found Officer Bear wrestling with defendant. (Id. at 92)

Defendant's turbulent behavior persisted. (Id. at 93) The officers tried to detain defendant, but he grabbed on to the banister at the stairs. (Id.) When the officers tried to pull him away, defendant tore the banister out of the wall. (Id.) Other officers responded, and at one point the officers had defendant on the ground with his hands underneath him. (Id.) Defendant was still wrestling with Officer Bear, who could not gain control of defendant's hands, so officers deployed a taser on defendant. (Id.)

Officer Rohaley testified that a higher use of force was necessary since defendant never complied with officers and his behavior got more violent when he was placed under arrest. (Id. at 94) When officers handcuffed defendant, they found a black pocket knife by defendant's left hand. (Id. at 94-95) As officers walked defendant up the stairs,

he continued to try to pull away from them and directed profanity and derogatory terms toward the officers. (Id. at 96) Ms. Pickens provided a written statement of the events to the police that same day. (Id. at 80)

At the end of the State's case, the State moved to amend the indictment for the original fourth-degree felony resisting arrest count to a second-degree misdemeanor resisting arrest. (Tr. Vol. I, p. 117) The trial court allowed the amendment. (Id.)

Defense counsel made a Crim.R. 29 motion as to all the counts at the close of the State's case. (Id. at 118) The trial court overruled his motion as it pertained to the aggravated burglary, violating the protection order, and resisting arrest. (Id. at 120-122) However, the trial court sustained defense counsel's motion as to the domestic violence count. (Id. at 122)

The jury found defendant guilty of all counts in the indictment, except for the count of domestic violence which had been previously dismissed. (Tr. Vol. 2, p. 65-66) A sentencing hearing was held on May 18, 2011. (Id. at 81) The trial court sentenced defendant to five years for the aggravated burglary and two years for violating a protection order. These sentences were run consecutively. (Id.) The trial court also ordered defendant to a concurrent sentence of thirty days in the county jail for resisting arrest. (Id.)

The Tenth District affirmed the convictions. (App. R. 33, 34) This Court granted review of appellant's appeal. *State v. Smith*, 103 Ohio St.3d 1539, 966 N.E.2d 893, 2012-Ohio-2025.

ARGUMENT

Response to Proposition of Law: Service of a protection order on a defendant is not an element of the crime of violating a protection order, as defined in R.C. 2919.27(A).

The plain language of R.C. 2919.27 clearly indicates that the State need not prove the defendant has been served with a protection order to convict him of violating a protection order.

(A) No person shall recklessly violate the terms of any of the following:

(1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code;

(2) A protection order issued pursuant to section 2151.34, 2903.213, or 2903.214 of the Revised Code;

(3) A protection order issued by a court of another state.

(B)(1) Whoever violates this section is guilty of violating a protection order.

R.C. 2919.27

The statute at issue here is not ambiguous. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need to apply rules of statutory construction. *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991); *Sears v. Weimer*, 143 Ohio St. 312, 55 N.E.2d 413, (1944), paragraph five of the syllabus; *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 11. “In interpreting a statute, this court has held that ‘the intent of the law-makers is to be sought first of all in the language employed, and if the words be free from ambiguity and doubt, and express plainly, clearly and distinctly, the sense of the law-making body, there is no occasion to resort to other means of interpretation.’” *State ex rel. Cordray v. Midway Motor Sales, Inc.*, 122 Ohio St.3d 234, 237, 2009-Ohio-

2610, 910 N.E.2d 432, 435, citing *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574, (1902), paragraph two of the syllabus. “The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.” *Slingluff* at paragraph two of the syllabus.

The statute here is unambiguous and words should not be inserted. “If the meaning of the statute is unambiguous and definite, it must be applied as written and no further interpretation is necessary.” *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545, 660 N.E.2d 463 (1996). Thus, “it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.” *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50, 524 N.E.2d 441, (1988), paragraph three of the syllabus. See also, *State v. Moody*, 104 Ohio St. 3d 244, 247, 2004-Ohio-6395, 819 N.E.2d 268, 271.

The protection order was issued pursuant to R.C. 2903.214. The State notes that the parties and the Tenth District mistakenly believed that the order was issued pursuant to R.C. 2919.26. A review of the protection order (State’s Exhibit D) and indictment, makes clear that it was issued pursuant to R.C. 2903.214. The same logic applies nonetheless.

R.C. 2903.214 outlines the requirements to obtain the order:

(C) A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state all of the following:

(1) An allegation that the respondent engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order or committed a sexually oriented offense against the

person to be protected by the protection order, including a description of the nature and extent of the violation;

(D)(1) If a person who files a petition pursuant to this section requests an ex parte order, the court shall hold an ex parte hearing as soon as possible after the petition is filed, but not later than the next day that the court is in session after the petition is filed. The court, for good cause shown at the ex parte hearing, may enter any temporary orders, with or without bond, that the court finds necessary for the safety and protection of the person to be protected by the order. Immediate and present danger to the person to be protected by the protection order constitutes good cause for purposes of this section. ***

(2)(a) If the court, after an ex parte hearing, issues a protection order described in division (E) of this section, the court shall schedule a full hearing for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and an opportunity to be heard at, the full hearing. The court shall hold the full hearing on the date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division. Under any of the following circumstances or for any of the following reasons, the court may grant a continuance of the full hearing to a reasonable time determined by the court:

(i) Prior to the date scheduled for the full hearing under this division, the respondent has not been served with the petition filed pursuant to this section and notice of the full hearing.

(ii) The parties consent to the continuance.

(iii) The continuance is needed to allow a party to obtain counsel.

(iv) The continuance is needed for other good cause.

(b) *An ex parte order issued under this section does not expire because of a failure to serve notice of the full hearing upon the respondent before the date set for the full hearing under division (D)(2)(a) of this section or because the court grants a continuance under that division.*

(E)(1)(a) After an ex parte or full hearing, the court may issue any protection order, with or without bond, that contains terms designed to ensure the safety and protection of the person to be protected by the protection order, including, but not limited to, a requirement that the respondent refrain from entering the residence, school, business, or place

of employment of the petitioner or family or household member. If the court includes a requirement that the respondent refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member in the order, it also shall include in the order provisions of the type described in division (E)(5) of this section.

R.C. 2903.214 (Emphasis added) These sections show the legislature's intent that the order be issued, and thus valid, after the hearing. Therefore, this protection order was valid on April 12, 2010. The court set a full hearing ten court days after the order was issued, as required by the statute. R.C. 2903.214(D)(2)(a)

R.C. 2919.27 only requires that the State prove that defendant recklessly violated a "protection order issued pursuant to ... 2903.214 of the Revised Code." The protection order was issued pursuant to R.C. 2903.214 which does not require service in order for the order to be effective. Subsection (D)(2)(b) states that an order does not expire even when service fails. Therefore, service is not even a requirement to have a valid ex parte temporary protection order. The statute's intent that a protection order be valid once issued by the court is further shown by subsection (E)(2)(a): "Any protection order issued pursuant to this section shall be valid until a date certain but not later than five years from the date of its issuance."

The court also complied with R.C. 2903.214(F)(1):

(F)(1) The court shall cause the delivery of a copy of any protection order that is issued under this section to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the respondent on the same day that the order is entered.

On April 12, 2010, the court ordered the sheriff's office to serve defendant with a copy of the order. (State's Exhibit D)

R.C. 2903.214(K)(1)(a) addresses prosecution for violating the statute: "A person who violates a protection order issued under this section is subject to ... [c]riminal

prosecution for a violation of section 2919.27 of the Revised Code, if the violation of the protection order constitutes a violation of that section.”

The protection order was properly obtained and was introduced into evidence as State’s Exhibit D. R.C. 2919.27 only required that the State prove that defendant recklessly violated its terms. The State made that showing via Pickens’ testimony.

Ms. Pickens testified that she had dated defendant and ended the relationship. Her experience with him was “rocky” and she felt the need to get a protection order against him. (Tr. Vol. I, p. 57) The court granted that order and Ms. Pickens showed defendant the protection order when he was at her house on April 16, 2011. Defendant knew that he was not allowed to be around Ms. Pickens and was angry about the order. (Id. at 58-59) Yet, the next day, defendant entered her home through the basement window, while she was upstairs cooking in the kitchen. He came up the stairs and said, “yeah, bitch, you thought it was over.” (Id. at 60) Ms. Pickens testified that defendant put her in a chokehold, they tussled around, and defendant threw her into the wall several times, hitting her with a closed fist. Ms. Pickens said she was left with bruises on her arms and a bite mark on her back. (Id. at 60-61, 69)

No testimony other than that of Ms. Pickens was necessary to prove the charges. Defendant argues that there was insufficient evidence presented as to his reckless violation of a protection order, because he allegedly did not know about the protection order and therefore could not have disregarded a “known” risk. The State, however, presented evidence that defendant did have notice of the protection order, and therefore defendant acted recklessly. No evidence to the contrary was presented.

As properly noted by the Tenth District Court:

Service of the protection order on the defendant is not an element of the crime of violating a protection order. The General Assembly could have required the prosecution to establish service of the order as an element of proving a violation of a protective order, or could have mirrored the language in R.C. 2919.26(G), but it did not. Therefore, we decline to expand the statute to require prior service of the order on a defendant before a violation can be established.

Smith, 10th Dist. No. 11AP-512, 2001-Ohio-6730 at ¶ 17. Although the Tenth District cited R.C. 2919.26(G), R.C. 2903.214(F) is analogous, although less is required of the court under R.C. 2903.214(F).

R.C. 2919.26(G)(1) states:

A copy of any temporary protection order that is issued under this section shall be issued by the court to the complainant, to the alleged victim, to the person who requested the order, to the defendant, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the defendant on the same day that the order is entered...

R.C. 2903.214(F)(1) does not require the court to issue a copy but to “cause delivery”:

The court shall cause the delivery of a copy of any protection order that is issued under this section to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the respondent on the same day that the order is entered.

Defendant claims that service in accordance with Civ.R. 4.1(B) was required.

The statute does not require “service” but, rather, delivery. Therefore, strict compliance with Civ.R. 4.1(B) was not required. The court fulfilled its obligation in ordering the sheriff’s office to deliver a copy to defendant. Therefore, compliance with the statute was complete and the protection order was valid and effective upon its issuance.

In any event, the statute did not make compliance with service/delivery a mandatory precondition for a prosecution for violating the order. The State need only

prove recklessness in violating the order. It need not prove successful delivery/service in order to be able to show that defendant, who was aware of the order anyway, was reckless in violating it.

Several districts have adopted the position taken by the State here. The Second, Fourth and Ninth Districts have found that R.C. 2919.27 does not require proof of service of the protection order. *State v. Rutherford*, 2nd Dist. No. 08CA11, 2009-Ohio-2071, ¶ 28 (“R.C. 2919.27(A) does not make service of a civil protection order an element of the offense of violation of a civil protection order. Rather, that statute requires the State to prove beyond a reasonable doubt that defendant acted in disregard of a known risk that a protection order likely existed against him.”); *State v. Bunch*, 9th Dist. No. 20059, 2001 WL 39599, *2 (Jan. 17, 2001) (“[Ohio] Revised Code does not require that service of a CPO be accomplished upon the person against whom a CPO is issued before the person can be found to have violated the order.”) See also, *State v. McElrath*, 9th Dist. No. 25688, 2012-Ohio-1927, ¶ 6.

In *State v. Davidson*, 4th Dist. Nos. 04CA2771, 04CA2773, 2004-Ohio-6828, ¶ 11, the wife of the defendant was granted a protection order against the defendant and she testified that she showed him and gave him a copy of the order. A deputy also testified that he gave Davidson a copy of the protection order. *Id.* at ¶ 12. Davidson testified that he did not know about the protection order and that the deputy never served him. *Id.* at ¶ 13. Even with this contradicting testimony, the Fourth District found that the testimony presented by the State was sufficient evidence to establish that Davidson knew about the protection order and therefore recklessly violated it. *Id.* at ¶ 14.

Here, in accordance with R.C. 2919.27(A)(2) and (B)(4), the judge instructed the jury that in order to find defendant guilty of violating a protection order, the jury would have to find that defendant recklessly violated the terms of the protection order (State's Exhibit D). Further, the jury also had to find that defendant violated the protection order while committing aggravated burglary. See R.C. 2919.27.

Ms. Pickens testified that she showed defendant the protection order and told him he was not allowed to be around her. As in *Davidson*, this testimony was enough to establish that defendant knew of the protection order. Therefore, defendant disregarded a "known risk" and recklessly violated the protection order when he came back to Ms. Pickens's home the next day and committed aggravated burglary.

In *State v. Bombardiere*, 3rd Dist. No. 14-06-27, 2007-Ohio-1537, the Third District considered a similar case. The court found that, despite the fact that no evidence was presented to show whether Bombardiere was served with a protection order, evidence was admitted to show that he was aware of the existence of the order. *Id.* at ¶ 16. Therefore, the evidence was sufficient to support the conviction for violating the protection order. Defendant's reliance on the dissent in this case is not persuasive.

The Eleventh District also found that the State need not prove a defendant received a copy of the protection order before he may be convicted of violating it. The State may present circumstantial evidence that the defendant was aware of the order. *State v. McLean*, 11th Dist. No. 2003-T-0117, 2005-Ohio-1563.

Defendant asserts that the Tenth District's decision is in conflict with decisions from the First and Fifth Districts and urges this Court to adopt the position of the First and Fifth Districts.

In *State v. Franklin*, 1st Dist. No. C-000544, 2001 WL 698107, *1 (June 22, 2011), Franklin was found sitting on the couch with his domestic violence complainant, Christman. When police arrived, Christman denied that Franklin did anything wrong and no evidence was presented regarding a protection order or that Franklin was aware of any such order. *Id.* No hearing was ever held to issue the order, therefore, it was found to be invalid. *Id.* at *2. Here, there is no question that a protection order was granted by the court on April 12, 2010. The only question was whether defendant was aware of it and acted recklessly in violating it.

State v. Mohabir, 5th Dist. No. 04CA17, 2005-Ohio-78, is distinguishable as well. The Fifth District found that the temporary protection order at issue in that case was never issued in compliance with R.C. 2919.26. Here, Ms. Pickens testified that she obtained an order issued from the court and she showed the order to defendant. In *Mohabir*, there was no such testimony by a witness that the defendant was aware of the order. The issue revolved around whether the sheriff properly served it and whether defendant even knew of the order. *Id.* at ¶ 35.

State v. Conkle, 5th Dist. No. 03CA8, 2003-Ohio-2410, is also distinguishable. In *Conkle*, the victim failed to appear at the hearing to secure a protection order. Because the victim did not appear as required by 2919.26(C)(1), the order was invalid and Conkle could not be found to be in violation of that order. Here, there is no assertion that the protection order was invalid. Rather, defendant only argues that he was not served with the order.

It is noteworthy that defendant did not ask the Tenth District Court to certify the claimed conflict. The State asserts that the reason for this failure is because the cases are

distinguishable and no conflict exists. A plain reading of R.C. 2919.27 demonstrates that the State need not prove the defendant was served with the protection order. The Tenth District Court's interpretation finding that service of the order is not an element of the crime was proper.

Ex parte temporary protection orders by their nature are designed to provide immediate protection for victims. To hold that the State must prove that a defendant was served with a copy of a protection order before a defendant can be prosecuted for violating such an order would encourage defendants to avoid service and continue to harass, stalk and be a threat to their victims. This rationale is analogous to situations where a party tries to avoid service of a subpoena even though they are aware they have received a subpoena to come to court. In such a circumstance, this Court has held that person may be held in contempt for violating a subpoena even where service is not proven but it can be proven that the person had knowledge of the subpoena. In *Denovchek v. Trumbull Cty. Bd. of Commrs.*, 36 Ohio St.3d 14, 15, 520 N.E.2d 1362, 1363 (1988), this Court held that under Civ.R. 45(C), "[w]here a subpoena is left at the business location or place of employment of a witness and where that witness has *actual knowledge* of the subpoena, a valid service of summons has been completed." (Emphasis added.)

It is clear that R.C. 2919.27 does not require that the State prove service of the protection order as an element of the offense. R.C. 2903.214 is intended to protect the victim and allows the court issuing the order to act swiftly to accomplish this purpose. Such an order becomes effective after the ex parte hearing. If the legislature had intended that proof of service be required, it would have inserted language into the statute.

CONCLUSION

The State respectfully requests that this Court affirm the Tenth District's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by regular U.S. Mail on this 29th day of August, 2012, to STEPHEN P. HARDWICK, Ohio Public Defender's Office, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant.



SHERYL L. PRICHARD