

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2012-239
Plaintiff-Appellee,	:	On Appeal from the Franklin
v.	:	County Court of Appeals
ROBERT L. SMITH, JR.,	:	Tenth Appellate District
Defendant-Appellant.	:	Court of Appeals
	:	Case No. 11AP-512

Reply Brief of Appellant Robert L. Smith, Jr.

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Argument

Proposition of Law:

A defendant can only be convicted of violating a protection order under R.C. 2929.27 if that order has been lawfully served.

The State is incorrect that *State v. Mohabir*, 5th Dist. No. 04CA17, 2005-Ohio-78, presents a holding that is materially distinguishable from the argument Robert Smith makes in this case. In *Mohabir*, the Fifth District found that the evidence insufficient to prove that the defendant had violated a restraining order because “the state did not introduce evidence explaining the significance of the notation, or extrinsic evidence *demonstrating actual service upon appellant* at the jail or anywhere else in strict accordance with the statute.” *Id.* at ¶ 35. Robert is arguing here that he is not guilty of violating a restraining order because it was not served upon him. In *Mohabir*, the Fifth District vacated a conviction because the State did not “demonstrate[] actual service upon” the defendant. *Id.*

Further, the State’s attempt to distinguish between “delivery” (which R.C. 2903.214 requires) and “service” is unhelpful to the State. There is no definition of “delivery” in the criminal code, but in the Uniform Commercial Code, the General Assembly has defined the term to mean the “voluntary transfer of possession.” 1301.201(B)(15). Here, Ms. Pickens testified only that she “show[ed]” the order to Robert. T.p. 58. She never testified that she gave him a copy that he could read. The order was not delivered to Mr. Smith until after he was under arrest.

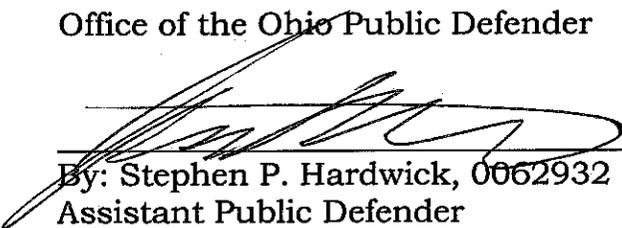
Finally, the State is correct that the order in this case was issued under R.C. 2903.214, not R.C. 2929.26, as the lower court determined. The State is also correct that there is no difference between the two sections that is material to this case.

Conclusion

The State did not take the steps needed to make the protection order in this case enforceable. As a result, this Court should vacate Robert Smith's convictions for violating a protection order and aggravated burglary, discharge Mr. Smith as to the protection order charge, and remand the case for a new trial on the charge of aggravated burglary.

Respectfully submitted,

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Certification of Service

This is to certify that a copy of the foregoing **Reply Brief of Appellant Robert L. Smith, Jr.** was forwarded by regular U.S. Mail, postage prepaid to the office of Sheryl Prichard, Assistant Franklin County Prosecutor, Hall of Justice, 373 S. High Street, 14th Floor, Columbus, Ohio 43215 this 14th day of September, 2012.



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Appendix to

Reply Brief of Appellant Robert L. Smith, Jr.

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 143
*** Annotations current through August 6, 2012 ***

TITLE 13. COMMERCIAL TRANSACTIONS -- OTHER COMMERCIAL TRANSACTIONS
CHAPTER 1301. GENERAL PROVISIONS
NON-UCC LEGISLATION

Go to the Ohio Code Archive Directory

ORC Ann. 1301.201 (2012)

§ 1301.201. General definitions [UCC 1-201]

(A) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code, that apply to particular chapters or sections therein, have the meanings stated.

(B) Subject to definitions contained in Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code, that apply to particular chapters or sections therein:

(1) "Action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.

(2) "Aggrieved party" means a party entitled to pursue a remedy.

(3) "Agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in *section 1301.303 of the Revised Code*.

(4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.

(5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.

(6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Chapter 1302. of the Revised Code may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is for decision by the court. Conspicuous terms include the following:

(a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(b) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery" with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods" means:

- (a) Goods of which any unit, by nature or usage of trade, is the equivalent of any other like unit; or
 - (b) Goods that by agreement are treated as equivalent.
- (19) "Genuine" means free of forgery or counterfeiting.
- (20) "Good faith," except as otherwise provided in Chapter 1305. of the Revised Code, means honesty in fact and the observance of reasonable commercial standards of fair dealing.
- (21) "Holder" means:
- (a) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession;
 - (b) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
 - (c) The person in control of a negotiable electronic document of title.
- (22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.
- (23) "Insolvent" means:
- (a) Having generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute;
 - (b) Being unable to pay debts as they become due; or
 - (c) Being insolvent within the meaning of federal bankruptcy law.
- (24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government . The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.
- (25) "Organization" means a person other than an individual.
- (26) "Party", as distinguished from "third party", means a person that has engaged in a transaction or made an agreement subject to Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code.
- (27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.
- (28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.
- (29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.
- (30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) "Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Chapter 1309. of the Revised Code. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under *section 1302.42 of the Revised Code*, but a buyer may also acquire a "security interest" by complying with Chapter 1309. of the Revised Code. Except as otherwise provided in *section 1302.49 of the Revised Code*, the right of a seller or lessor of goods under Chapter 1302. or 1310. of the Revised Code to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Chapter 1309. of the Revised Code. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under *section 1302.42 of the Revised Code* is limited in effect to a reservation of a "security interest." Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to *section 1301.203 of the Revised Code*.

(36) "Send" in connection with any writing, record, or notice means:

(a) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances; or

(b) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent.

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or any other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority. The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

HISTORY:

129 v S 5 (Eff 7-1-62); 131 v 417 (Eff 11-4-65); 137 v S 85 (Eff 1-1-79); 138 v H 736 (Eff 10-16-80); 140 v S 283 (Eff 9-20-84); 142 v H 421 (Eff 6-29-88); 144 v H 693 (Eff 11-6-92); 145 v S 147 (Eff 8-19-94); 146 v S 155 (Eff 8-15-96); 148 v H 283 (Eff 9-29-99); 149 v S 74. Eff 7-1-2001; 2011 HB 9, § 1, eff. June 29, 2011.