ORIGINAL

IN THE SUPREME COURT OF OHIO
2013

STATE OF OHIO,

Plaintiff-Appellee,

-vs-

ROBERT SMITH, JR.

Defendant-Appellant

Case No. 12-0239

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

Court of Appeals Case No. 11AP-512

MOTION OF PLAINTIFF-APPELLEE FOR RECONSIDERATION

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MOTION OF PLAINTIFF-APPELLEE FOR RECONSIDERATION

Pursuant to S.Ct.Prac.R. 18.02(B)(4), and for the reasons stated in the attached memorandum in support, plaintiff-appellee State of Ohio respectfully requests that this Court reconsider its disposition of the present case.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

This Court decided this case on April 30, 2013, and held that to sustain a conviction for violating a civil stalking or sexually-oriented-offense protection order, under R.C. 2919.27(A), "the state must prove that the order was delivered as required by R.C. 2903.214(F)(1) before the alleged offense occurred." *State v. Smith*, 2013-Ohio-1777, ¶ 1.

I. R.C. 2919.27 only required the State to show the order was "issued" and this Court agrees that the order was issued.

R.C. 2919.27 only requires that the defendant recklessly violate the order that has been "issued":

> (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. [Emphasis added]

Footnote 1 demonstrates the point: "Appellee, the state of Ohio, contends, and a review of the SSOOPO and indictment clearly shows, that the SSOOPO was issued pursuant to R.C. 2903.214, not R.C. 2929.26, as the lower courts stated. Our analysis, therefore, addresses R.C. 2903.214 only." [Emphasis added] By this language, this Court acknowledges that the order was "issued" and that such order was "pursuant to R.C. 2903.214."

The Court conceded elsewhere in the opinion that the court had "issued" a SSOOPO order. At paragraph four, the majority opinion conceded that "[t]he court granted the petition that day, set a mandatory full hearing date, and, pursuant to Sup.R. 10.03, issued Form 10.03-E, an ex parte SSOOPO." [Emphasis added; footnote omitted]. The Court further conceded at paragraph five that "the court issued the SSOOPO * * *." See, also, Opinion, ¶ 25 ("the court * * * issued Form 10.03-E").

Given these concessions that the order was "issued," and given the further concession that such issuance occurred "pursuant to R.C. 2903.214," there was no room to insert a delivery/service requirement as an additional element for the offense under R.C. 2919.27(A)(2). As conceded, the State proved issuance "pursuant to R.C. 2903.214." The State also proved recklessness and proved a violation of the plain terms of the stay-away part of the order. Since the State satisfied all of these elements, there was no basis in the statute upon which to superimpose an additional requirement that delivery/service be proven.

Reconsideration is warranted. It is rare that a judicial opinion sets out to interpret certain statutory language, then concedes that the statutory language was satisfied, but

then goes above and beyond the conceded language to conclude that something more is required. As the State noted in its merit brief, a court cannot use statutory interpretation to add or delete language that is not present in the statute. And yet that is exactly what has occurred here, with the majority opinion conceding "issued" and "pursuant to R.C. 2903.214" and yet superimposing an additional delivery/service on top of the conceded language. This obvious error in statutory analysis warrants reconsideration.

II. First, the order is issued, then, it can be delivered.

Nowhere is "delivery" mentioned or required by R.C. 2919.27. Indeed, this Court focused on R.C. 2903.214(F)(1), which itself treats "issued" and "delivery" as different concepts:

> (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.

Therefore, issuance occurs first, then delivery. This Court found that "delivery" is synonymous with "service." Opinion, ¶¶ 20, 24. That being true, the court must only direct that the already-issued order be delivered.

The State disagrees with the fact that "delivery" and "service" are synonymous because not all deliveries are equivalent to legal service. In any event, even if the terms are synonymous, R.C. 2903.214(F)(1) only requires the court to "direct" delivery/service "on the same day the order is entered" but the delivery/service itself will rarely occur on that date. Indeed, requiring that service be accomplished on the same day would be nearly impossible in the vast majority of cases. In the end, neither delivery nor service are mentioned in R.C. 2919.27 and, therefore, neither are required. Only issuance is required, and, as this Court conceded, the issuance requirement was met.

"Causing delivery" simply means that the court must let law enforcement know that the order needs to be served. R.C. 2903.214(F)(1). The court must do this the day the order is issued, as was the case here. This Court stated:

> In this case, the Franklin County Court of Common Pleas carried out the mandate of R.C. 2903.214(F)(1) in conformity with our interpretation. On April 12, 2010, the court granted the petition and issued Form 10.03-E. It also directed the clerk to issue an order to serve to the sheriff for service upon Smith.

Opinion, ¶ 25. Again, this passage confirms that a court first "issues" the order, and then it causes the delivery/service of the order. The two concepts of issuance and delivery are just different.

R.C. 2903.214(K)(1)(a) even addresses prosecution for violating the statute: "A person who violates a protection order <u>issued</u> under this section is subject to ... [c]riminal prosecution for a violation of section 2919.27 of the Revised." The majority opinion concedes that the order was issued pursuant to R.C. 2903.214. The State then had to only prove reckless violation of the order according to the plain terms of R.C. 2919.27

Contrary to the majority's holding, R.C. 2903.214(D)(2)(b) and (E)(2)(a) do not support the Court's position. The court "issues" the order after the hearing ("(2)(a) If the court, after an ex parte hearing, issues a protection order described in division (E) of this section...."). Additional steps are then taken to "deliver" the order to the defendant. R.C. 2903.214(D)(2)(b) further demonstrates this point because the order remains issued and, therefore, valid even before it is delivered or served:

> (D)(2)(b) <u>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</u> 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. [Emphasis added]

Service is not a requirement to have a valid ex parte temporary protection order. The order is valid once issued. It only expires on a "date certain" that cannot exceed five years from issuance. If the order is not even valid until served, the order itself is completely worthless and there is no point of an ex parte hearing. But a valid order exists after the ex parte hearing and is designed to "ensure the safety" of the person seeking the order:

> (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

R.C. 2903.214. The order is effective and in full force once issued and the delivery and service provisions are designed to allow the respondent an opportunity to be heard to defend against the same at a later hearing.

R.C. 2903.214(F)(4) further demonstrates that an order that is issued is valid, independent of delivery/service:

> (F)(4) Regardless of whether the petitioner has registered the protection order in the county in which the officer's agency has jurisdiction pursuant to division (M) of this section, any officer of a law enforcement agency shall enforce a protection order <u>issued</u> pursuant to this section by any court in this state in accordance with the provisions of the order, including removing the respondent from the premises, if appropriate. [Emphasis added]

This Court's decision means that the order must be "served" (now synonymous with "delivered") on "the same day that the order is entered." This interpretation is impractical and inconsistent with a reading of R.C. 2919.27.

The State is not simply rearguing points previously made. The State could not anticipate that this Court would concede the order was issued and yet still find the evidence insufficient.

The majority opinion also commits obvious error warranting reconsideration when it contends that "R.C. 2919.27(A)(2) * * * demonstrates that it incorporates the requirements of R.C. 2903.214." Opinion, ¶ 16. The opinion does not point to any statutory language that purports to "incorporate" R.C. 2903.214. To be sure, the statute includes the phrase "pursuant to section * * * 2903.214," but the majority opinion concedes that the order was issued "pursuant to R.C. 2903.214." The State satisfied the "pursuant to" phrase in the statute, as conceded by the majority opinion.

In any event, R.C. 2919.27(A)(2) only "incorporated" an "issuance" requirement. Paragraph (A)(2) requires proof of an order "issued" pursuant to R.C. 2903.214, not proof of an order "delivered" pursuant to R.C. 2903.214. At best, paragraph (A)(2) incorporated an issuance requirement, not a delivery requirement too.

III. Public policy implications demand a different result.

R.C. 2903.214 exists to provide immediate "relief" (protection) to victims. See R.C. 2903.214(C). Subsection (D)(1) requires the court to hold an ex parte hearing "as soon as possible" and allows the court to "enter any temporary orders, with or without bond" at the hearing "that the court finds necessary for the safety and protection of the person to be protected by the order."

Requiring service before an offender can be convicted of violating a protection order (that he/she may have seen, read, and been familiar with) only encourages these offenders to avoid service and continue to harass and stalk their victims. Even then, a defendant may assert that he was served with such an order but had not read it to be familiar with its terms. Yet, the State should still be able to prove they acted in reckless

disregard of the order. In contrast, prosecuting an offender who has not been served but is aware of the order is fully consistent with the plain language of R.C. 2919.27.

The very nature of these orders is to provide immediate protection to victims. This is why they are ex parte in nature. These orders are of absolutely no effect if service is required before a person can be prosecuted for recklessly violating the order.

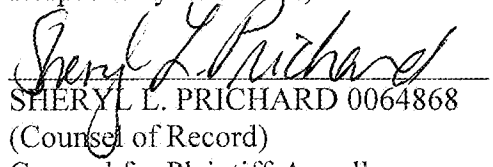
During oral argument, the Court expressed concern that it seems that a defendant could be arrested for violating a protection order issued after testimony by the victim. The legislature created this ex parte mechanism and the court is charged with the responsibility to ensure that those seeking such an order provide adequate proof to obtain the order.

This is not a situation of a completely-unsuspecting defendant who had a protection order against him. This is a familiar scenario where a defendant knows he is to stay away and continues to threaten and harass a victim who is left with no protection until the offender is sought out and formally served by law enforcement.

This Court's finding that "the victim and the state often have recourse" because an offender "often commits other crimes during the same incident, such as burglary or assault" highlights the flawed logic here. Opinion, ¶27. Protection orders exist precisely because harassment often consists of conduct that is not criminal. The purpose of the statute is to prevent the offender from having any contact with the victim and to provide the victim with protection from any and all additional crimes that might occur.

This Court's holding undermines the legislature's intent in providing such protection orders for victims. Given the significant ramifications of this decision, reconsideration is warranted.

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 8th day of May, 2013, to Stephen Hardwick Assistant State Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, counsel for defendant.

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