

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo

Court of Appeals No. L-08-1406

Appellee

Trial Court No. CRB-07-24809

v.

Mark Lyphout

DECISION AND JUDGMENT

Appellant

Decided: September 4, 2009

* * * * *

David L. Toska, Chief Prosecutor, and Arturo M. Quintero,
Assistant Prosecutor, for appellee.

George E. Gerken, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction in the Toledo Municipal Court for violating a protection order. For the reasons that follow, we reverse.

{¶ 2} Appellant, Mark Lyphout, and Tricia Taylor-Lyphout were divorced in July 2005. Sometime in 2006, Tricia Lyphout obtained a civil protection order against appellant. That order expired in August 2007.

{¶ 3} On the night of September 6, 2007, Tricia Lyphout told appellant during a phone conversation that she was going to get a new civil protection order the next day. On September 7, 2007, Tricia Lyphout filed for a civil protection order pursuant to R.C. 3113.31, in the Lucas County Court of Common Pleas, Domestic Relations Division. Tricia Lyphout alleged that appellant made constant threats to kill her. That same day, the domestic relations court granted an ex parte civil protection order against appellant. The order prohibited appellant from, "harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, or forcing sexual relations" with Tricia Lyphout.

{¶ 4} Pursuant to R.C. 3113.31(D)(2)(a), the court set September 14, 2007, for the full hearing on the ex parte civil protection order. On September 14, 2007, the domestic relations court, pursuant to R.C. 3113.31(D)(2)(b), ordered the hearing and the civil protection order to be continued because service of process notifying appellant of the September 14, 2007 hearing failed. Subsequent rescheduled hearings were set aside for the same reason. Indeed, service of process was not perfected until March 8, 2008.

{¶ 5} On October 19, 2007, appellant drove to Tricia Lyphout's residence in Toledo to pick up their children. During the drive, Tricia Lyphout placed two calls to appellant. During the calls, appellant and Tricia Lyphout argued about how the children

where going to be picked up. According to testimony by Tricia Lyphout, during these calls appellant called her a "stupid bitch," "worthless bitch," "psycho bitch" and threatened: "I'm going to make you pay for what you have done, you fucking bitch." Tricia Lyphout testified that she felt scared, harassed and annoyed by appellant's comments. On October 23, 2007, Tricia Lyphout filed a complaint with police claiming that appellant violated the September 7, 2007 civil protection order.

{¶ 6} Appellant pled not guilty and the matter proceeded to a bench trial in the Toledo Municipal Court. During trial, appellee, city of Toledo, introduced into evidence a copy of the ex parte protection order from the domestic relations court and testimony from Tricia Lyphout as to the telephone comments made by appellant on October 19, 2007.

{¶ 7} At the close of appellee's case in chief, appellant moved for a verdict of acquittal pursuant to Crim.R. 29. Appellant argued that to be held criminally liable for violating a civil protection order there must be service of the order on him or evidence that he had actual notice of the order and its terms. Since appellee conceded that appellant was not served with the ex parte order until 2008, five months after the alleged violation, and appellee presented no evidence that appellant had actual notice of the terms of the order, appellant insisted that he could not be convicted of disregarding the order.

{¶ 8} The trial court denied appellant's Crim.R. 29 motion, and found him guilty, sentencing him to 180 days in jail, \$1,000 fine and court costs. From this verdict

appellant now makes this appeal. Appellant sets forth the following four assignments of error:

{¶ 9} "I. The trial court used an improper standard to determine sufficiency of service.

{¶ 10} "II. Evidence was insufficient to show that defendant acted with reckless disregard of a known risk that a civil protection order was likely to exist.

{¶ 11} "III. The trial court did not have personal jurisdiction over defendant thereby violating his due process rights under the 14th amendment of the U.S. Constitution and Art. 1, Section 16 of the Ohio Constitution.

{¶ 12} "IV. The trial court erred when it denied the defendant's rule 29(A) motion in that the evidence was not sufficient to sustain a conviction."

{¶ 13} We will address the fourth assignment of error first.

{¶ 14} Appellant, in his fourth assignment of error, contends that the trial court improperly denied appellant's Crim.R. 29 motion because the evidence was insufficient to sustain a conviction. When a court reviews sufficiency of the evidence it must determine whether the evidence submitted is legally sufficient to support all elements of the offense charged. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386-387. Specifically, we must determine whether the state has presented evidence which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact

have found the essential elements of the crime proven beyond a reasonable doubt. Id. at 390 (Cook, J., concurring).

{¶ 15} A civil protection order serves as a preemptive measure to deter domestic violence from occurring by criminalizing any violation of the terms within the order. *Parrish v. Parrish*, 95 Ohio St.3d 1201, 1204, 2002-Ohio-1623. The order is issued pursuant to R.C. 3113.31, and can be issued with both parties present or ex parte.

{¶ 16} "If the court, after an ex parte hearing, issues an order * * * the court shall schedule a full hearing for a date that is within seven 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. * * *" R.C. 3113.31(D)(2)(a).

{¶ 17} If service of notice for the full hearing is not perfected, the court may grant a continuance of the ex parte order. R.C. 3113.31(D)(2)(b).

{¶ 18} Violation of a civil protection order is a criminal offense. R.C. 2919.27(A)(1). In the instant case, appellant was found guilty of violating Toledo Municipal Code 537.27, which is materially identical to R.C. 2919.27(A)(1). Both provide that, "No person shall recklessly violate the terms of * * * [a] protection order issued * * * pursuant to section * * * 3113.31 of the Revised Code." R.C. 2919.27(A)(1), Toledo Municipal Code 537.27(a)(1). Anyone who violates a protection order issued pursuant to R.C. 3113.31 is guilty of a first degree misdemeanor. R.C. 2919.27(B)(2), Toledo Municipal Code 537.27(b).

{¶ 19} Appellant contends that he is not guilty of violating Toledo Municipal Code 537.27 because he was not served with proper notice of the ex parte order prior to October 19, 2007. Absent proper notice, appellant insists that he could not have recklessly violated the civil protection order.

{¶ 20} It is uncontested that service of process was made on appellant after October 19, 2007. However, appellee argues that actual notice of the civil protection order is sufficient notice.

{¶ 21} To determine whether actual notice is sufficient we begin with R.C. 3113.31(D)(2)(a), which provides that the issuing court, "shall give the respondent notice of, and an opportunity to be heard at, the full hearing." Appellant argues that the trial court erred when it did not apply Civ.R. 4, which deals with service of process in general. Appellee argues that while Civ.R. 4 is relevant, there is another rule, Civ.R. 65, which should be controlling in this case. We agree.

{¶ 22} "It is a well-settled rule of construction that where a provision couched in general terms conflicts with a specific provision on the same subject, the latter must control." *State v. Taylor* (2007), 113 Ohio St.3d 297, 2007-Ohio-1950, ¶ 12, quoting *Humphrys v. Winous Co.* (1956), 165 Ohio St. 45, 48. Civ.R. 65 deals with injunctions, including restraining orders. A civil protection order is a variation of a restraining order. Blacks Law Dictionary (8 Ed.2004) 1340. Therefore, following the rules of statutory construction Civ.R. 65 controls. Civ.R. 65(D) provides:

{¶ 23} "Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding upon the parties to the action, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them *who receive actual notice of the order whether by personal service or otherwise.*" (Emphasis added.)

{¶ 24} Nevertheless, actual notice requires more than general knowledge that an order has been issued. *Midland Steel Products Co. v. U.A.W. Local 486* (1991), 61 Ohio St.3d 121, 126. "A court's order is an 'order' only to the extent of its terms. To know an order, one must know its terms." *Id.*

{¶ 25} In *State v. Bunch* (2001) 9th Dist. No. 20059, a temporary protection order ("TPO") had been granted in the Summit County Domestic Relations Court. The TPO prevented Bunch from contact with both his son and the child's mother. A full hearing followed and a civil protection order was issued for five years. The domestic relations court noted that Bunch had been served with the petition and notice of hearing.

{¶ 26} At trial on the criminal charge, Bunch denied service of the civil protection order itself, and no evidence of service was presented. However, Bunch admitted that a TPO had been issued and that he had violated the terms of the TPO. Further the complainant had told Bunch that a civil protection order had been issued and pursuant to

that he could have no contact with her or the child. Her testimony that Bunch replied "I know" was sufficient to find him guilty.

{¶ 27} Thus, the issue before this court is whether, prior to appellant's Crim.R. 29 motion at the close of city's case in chief, appellee introduced evidence that appellant knew of the terms in the civil protection order which Tricia Lyphout later claimed appellant violated.

{¶ 28} The only testimony in the city's case in chief concerning appellant's knowledge of the existence of the order or its terms is from Tricia Lyphout's testimony:

{¶ 29} "A. The whole time, he's like, 'Bitch, everybody's going to know you're lying. Nobody's going to believe you. I'm going to make you pay for what you've done, you fucking bitch.' And he said – he said, I haven't been served yet, so you can't do shit.'

{¶ 30} "Q. He said, 'I have not been served'?"

{¶ 31} "A. He said, 'I haven't been served yet, so you can't do shit.'"

{¶ 32} The testimony above describes the comments appellant made to Tricia Lyphout on October 19, 2007.

{¶ 33} Viewing the record in a light most favorable to the prosecution, we fail to see how reasonable minds can conclude that appellant received actual notice of the terms contained within the civil protection order prior to October 19, 2007. Absent proper service or actual notice of the prohibited behavior, appellant cannot be held criminally liable for disobedience of the order's terms.

{¶ 34} Accordingly, appellant's fourth assignment of error is well-taken.

{¶ 35} Appellant's first, second, and third assignments of error are moot.

{¶ 36} The judgment of the Toledo Municipal Court is reversed. This matter is remanded to the trial court for further proceedings consistent with this decision. Appellee is ordered to pay court costs, pursuant to App. R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

John R. Willamowski, J.
CONCUR.

JUDGE

Judge John R. Willamowski, Third District Court of Appeals, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.