[Cite as *Parma v. Mackay*, 2010-Ohio-2881.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92858

CITY OF PARMA

PLAINTIFF-APPELLEE

vs.

JAMES MACKAY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Parma Municipal Court
Case No. 08 CRB 00350

BEFORE: Jones, J., Kilbane, P.J., and McMonagle

RELEASED: June 24, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

LARRY A. JONES, J.:

{¶ 1} Defendant-appellant, James Mackay ("Mackay"), appeals his conviction. Finding merit to the appeal, we reverse.

{¶ 2} In 2006, Mackay installed a concrete driveway at David Cole's house in Parma. Approximately seven months later, Cole called the city and asked that a building inspector inspect the concrete work because seedpods and leaves were popping through the concrete. The city's building inspector inspected the property and noted numerous holes in the concrete from where leaves had degraded the top layer.

{¶ 3} The city cited Mackay with a violation of Parma Codified Ordinances ("P.C.O.") 1509.01, General Quality. The matter proceeded to a trial before the bench. At trial, the building inspector testified that the driveway showed an advanced stage of degradation and that the top layer of concrete was finished over seeds or leaves. The court found Mackay guilty of violating the ordinance and fined him $250, but stayed his sentence pending this appeal.

{¶ 4} Mackay raises one assignment of error for our review:

> "I. The trial court erred in failing to impose the mens rea and criminal culpability element of recklessness conduct to the evidence presented by [the city]."

{¶ 5} Within this assignment of error, Mackay argues that the trial court erroneously concluded that the offense prescribed by P.C.O. 1509.01 is a strict liability offense.

{¶ 6} R.C. 2901.21(B) sets forth the requisite test for determining whether a criminal statute is a strict liability offense. It provides:

{¶ 7} "When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense."

{¶ 8} In *State v. Collins*, 89 Ohio St.3d 524, 2000-Ohio-231, 733 N.E.2d 1118, the Ohio Supreme Court examined R.C. 2901.21(B), which requires a statute defining a criminal offense to expressly specify the mental culpability element. The Court held that where a statute lacks a mental state and the legislature did not intend strict liability, the mental state of recklessness applies under R.C. 2901.21(B). Id., see, also, *State v. Clay* (2008), 120 Ohio St.3d 528, 2008-Ohio-6325, 900 N.E.2d 1000. "[R]ecklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant. However, for strict liability to be the mental standard, the statute must plainly indicate a purpose to impose it." *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, 803 N.E.2d 770, ¶21.

{¶ 9} Mackay argues that since the city's building code does not specify the applicable mental state, it was incumbent upon the trial court to make a

finding of the mens rea element of recklessness. The city counters that the ordinance at issue imposes strict liability.

{¶ 10} P.C.O. 1509.01, General Quality, provides:

> "(a) All material shall be of good quality for the purposes for which it is intended to be used and shall conform to the trade and manufacturer's standards. Each kind of material must be free from imperfections, including those caused during installation, whether by poor workmanship or other reason, whereby its strength, durability, safety or usefulness is or may be impaired."

{¶ 11} The city reasons that the ordinance "does not affirmatively require action but requires that materials adhere to quality standards as set forth by the city and manufacturers. This absence of a culpable mental state on the part of a person is indicative of the legislature's intent to impose strict liability * * *." We disagree with the city's reasoning.

{¶ 12} *Collins* clearly states that it is not enough that the governing body in fact intend imposition of liability without proof of mental culpability. Id. at 530. Rather, the governing body must plainly indicate that intention in the language of the statute. Id. But P.C.O. 1509.01 contains no indication of the mental state required for a violation. Cf. *Hamilton v. Ebbing*, Butler App. No. CA2008-06-135, 2009-Ohio-3674 (finding no *Collins* violation since Hamilton's housing code explicitly states, "the provisions of this chapter are specifically intended to impose strict liability").

{¶ 13} Alternatively, the city argues that the disputed code section only defines requirements necessary for materials, not for conduct of a person; therefore a mens rea finding is not required. But P.C.O. 1509.01 does define

requirements regarding the conduct of a person, as it specifically states that a person who is convicted of a violation thereof is guilty of a first-degree misdemeanor.

{¶ 14} Based on a plain reading of the statute, we find that P.C.O. 1509.01 does not impose strict liability. When a statute does not impose strict liability, recklessness becomes an element of the offense, and the state is required to prove it beyond a reasonable doubt. *State v. Kelley*, Montgomery App. No. 22438, 2008-Ohio-5167. "Short of a plea of guilty or of no contest, the state cannot be relieved of its obligation to prove, nor can the finder of fact be relieved of its obligation to find, beyond reasonable doubt, the element of recklessness." Id. "A defendant may remain utterly mute at trial, but the state must still prove, and the finder of fact must find, each element of the offense beyond reasonable doubt before a conviction is warranted." Id.

{¶ 15} In this case, the trial court failed to consider whether MacKay acted recklessly. When reading its verdict, the trial court briefly mentioned the issue of mens rea, but made no finding regarding mens rea, nor indicated that it considered if MacKay acted recklessly. That determination is reserved for the finder of fact to make, which is the trial court in this case. See *State v. Moler*, Montgomery App. No. 22106, 2008-Ohio-2081.

{¶ 16} Therefore, we reverse Mackay's conviction, and remand the case to the trial court to vacate his conviction. See *Moler*.

{¶ 17} The sole assignment of error is sustained.

{¶ 18} Accordingly, the judgment of the trial court is reversed, and this cause is remanded for further proceedings consistent with this opinion.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Parma Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, JUDGE

MARY EILEEN KILBANE, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR