[Cite as *Columbus v. Kiner*, 2011-Ohio-4479.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

City of Columbus,	:	
Plaintiff-Appellee,	:	
		No. 11AP-21
v.	:	(M.C. No. 2010 CRB 024461)
Jonathan Kiner,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 6, 2011

Richard C. Pfeiffer, *Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *David L. Strait*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Defendant-appellant, Jonathan Kiner, appeals from a judgment of the Franklin County Municipal Court, finding him guilty of violating a protection order following his plea of no contest. For the following reasons, we affirm.

{¶2} On October 27, 2010, appellant was charged in Franklin County Municipal Court with one count of violating a protection order, a first-degree misdemeanor, in

violation of R.C. 2919.27(A)(2). The complaint, which was signed by appellant's wife, alleged:

> [O]n or about the 20th day of October, 2010 [appellant] did recklessly violate a term of a protection order or consent agreement issued pursuant to section 2903.214 of the Revised Code, to wit: Term 7 in which the respondent shall not initiate or have any contact with the protected person, and Term 10 in which the respondent shall not cause or encourage any person to do any act prohibited by the protection order issued in case number 10 DV 06-0708 on July 6, 2010 in the Court of Common Pleas Franklin County Ohio by Judge Gill by means of sending a document in the mail to Michelle Kiner, via Franklin County Clerks Office, in violation of [R.C.] 2919.27(A)(2).

{¶3} Appellant, represented by counsel, pleaded no contest to the charge of violating a protection order at a hearing held on December 6, 2010. At the hearing, the plaintiff-appellee, city of Columbus ("city"), recited the facts of the case, indicating that appellant was the subject of a protection order issued by the judge presiding over the divorce proceedings between appellant and his wife. The city stated that the protection order prohibited appellant from (1) initiating or having any contact with his wife, and (2) causing or encouraging any person to do any act prohibited by the protection order. According to the city, appellant recklessly violated these terms by serving his wife with a copy of his answer to the divorce complaint via certified mail. The city noted that appellant had served his wife's counsel of record with the pleading.

{¶4} The city described appellant's answer as "atypical" given that several pages contained communications directed towards his wife. To illustrate, the city quoted from an excerpt in the pleading where appellant wrote, "Michelle, I am asking you sincerely for the sake of our children as well as theirs and our financial future,

please adhere to the necessary demands." (Tr. 5.) The city also quoted the following passage from the pleading:

> I no longer miss you. I no longer hate you for putting me in jail. I do not deserve this. My children do not deserve this. Michelle, I have missed the entire summer, Father's Day, swimming, riding bikes. And soon I will miss Trick or Treat. I will miss Thanksgiving dinner and Christmas if this is not wrapped up by then. There must be some compassion still in you Michelle.

(Tr. 5-6.) The city noted that similar language "goes on for about four pages and is very specifically addressed to the victim in this situation." (Tr. 6.)

{¶5} Appellant did not take exception to the city's factual recitation, and the trial court accepted his plea of no contest. The hearing proceeded to mitigation, at which time appellant's counsel argued that appellant did not intend to violate the protection order because he believed that the order did not prohibit him from serving the pleading on his wife. After hearing the arguments of counsel, the trial court sentenced appellant to a two-year term of probation.

{¶6} Appellant now appeals, advancing the following assignment of error for our consideration:

> The Franklin County Municipal Court erred by entering a conviction on a no contest plea where the facts presented to the court did not establish the offense.

{¶7} In his sole assignment of error, appellant argues that the facts presented by the city at the plea hearing did not support the trial court's decision to find him guilty based on his plea of no contest to violating a protection order. Specifically, he claims that the facts did not establish that he acted "recklessly" in violating the protection order.

{¶8} A plea of no contest is "not an admission of defendant's guilt, but is an admission of the truth of the facts alleged in the * * * complaint." Crim.R. 11(B)(2). In misdemeanor cases, a no contest plea must be supported by an "explanation of the circumstances" of the offense charged. R.C. 2937.07; *Cuyahoga Falls v. Bowers* (1984), 9 Ohio St.3d 148. Although a no contest plea relieves the government of its burden to prove guilt beyond a reasonable doubt, the statutorily required explanation of circumstances must contain facts supporting all elements of the offense. *State v. Gilbo* (1994), 96 Ohio App.3d 332, 337. This requirement "does not mandate that sworn testimony be taken but instead only contemplates some explanation of the facts surrounding the offense to ensure that the trial court does not make a finding of guilty in a perfunctory fashion." *State v. Jasper*, 2d Dist. No. 2005 CA 98, 2006-Ohio-3197, ¶32, citing *Bowers* at 151.

{¶9} In pertinent part, R.C. 2919.27(A)(2) provides: "No person shall recklessly violate the terms of * * * [a] protection order issued pursuant to section * * * 2903.214 * * * of the Revised Code." A person acts "recklessly" when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. R.C. 2901.22(C). A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist. Id.

{¶10} Appellant argues that the city failed to establish that he "recklessly" violated the protection order because his conduct, i.e., serving the pleading on his wife via certified mail, was an effort to comply with the order, rather than a perverse

disregard of the order. However, neither the complaint nor the city's factual recitation described appellant's conduct in such a manner. "While the court may consider an argument from the defendant that the facts, as explained by the state and admitted by the no contest plea, do not constitute the offense charged, the defendant, by pleading no contest, has waived the right 'to present additional affirmative factual allegations to prove that [she] was not guilty.' " *State v. Murphy* (1996), 116 Ohio App.3d 41, 43, citing *Gilbo* at 337; see also *State ex rel. Stern v. Mascio*, 75 Ohio St.3d 422, 424, 1996-Ohio-93; *State v. Chavers*, 9th Dist. No. 10CA0031, 2011-Ohio-3248, ¶17. " 'The essence of the "no contest" plea, is that the accused cannot be heard in defense. Thus any statement by him must be considered as in mitigation of penalty.' " *Gilbo* at 337, quoting *State v. Herman* (1971), 31 Ohio App.2d 134, 140. Because the facts alleged in the complaint and the city's factual recitation did not indicate that appellant acted in good faith or that he attempted to comply with the protection order, we decline to consider such allegations here.

{¶11} Nevertheless, we find that appellant's conduct, as described in the city's factual recitation, satisfied each element required for a violation of R.C. 2919.27(A)(2), including the element of "recklessness." We found similar conduct to constitute recklessness in *State v. Gordon*, 10th Dist. No. 03AP-490, 2003-Ohio-6558. There, the defendant pleaded no contest to violating the terms of a civil protection order ("CPO") obtained by his wife after mailing her several letters while he was incarcerated. Id. at ¶2.

{¶12} Appealing from the denial of his motion to withdraw the no contest plea, the defendant argued in *Gordon* that he was unaware of an available defense, i.e., that

his conduct did not satisfy the element of recklessness. Id. at ¶12. He claimed that he did not recklessly disregard the CPO because he believed that it prohibited him only from visiting or calling his wife. Id. Applying the definition of recklessness contained in R.C. 2901.22(C), we rejected this argument. Id. Specifically, we reasoned:

> [E]ven if appellant's unsworn assertions that he did not know written communications were prohibited by the CPO were true, his actions and inactions constituted recklessness pursuant to R.C. 2919.27. Even if his claims that he set the CPO papers aside and did not read them "in detail" were true, he was aware or should have been aware that his voluntary failure to read the order could result in violation of the order. He admittedly knew that the CPO placed restrictions on contacting his wife. Knowing the CPO restricted contact with his wife, his subsequent writings in the face of such knowledge indicate a perverse disregard of a risk that his conduct was likely to cause a CPO violation. Appellant's contact with his wife through writings, while being fully aware a CPO was in effect, demonstrated a heedless indifference to the consequences of his actions. Neither indifference, laziness, inattention, nor anger constitutes an excuse for failing to read court orders and comply therewith.

Id.

{¶13} We reach the same result here. By using the court process to deliver a personalized and "atypical" divorce pleading to his wife, appellant exhibited a heedless indifference to the consequences and perversely disregarded the risk that he was likely to violate the terms of the protection order. This is particularly so because appellant had served the pleading to his wife's counsel of record, thereby making it unnecessary for appellant to serve his wife as well. See Civ.R. 5(B). Despite appellant's argument to the contrary, nothing in the protection order permitted appellant to contact his wife through the court process. The protection order unambiguously prohibited "any contact" with appellant's wife, whether or not the contact was directed through the clerk of courts.

Appellant's conduct in the face of this order amounted to a perverse disregard of a known risk that he was likely to violate the protection order. Thus, we find that appellant's actions amounted to recklessness under the definition set forth in R.C. 2901.22(C).

{¶14} Based on the above, we find that the city sufficiently explained the circumstances supporting each element of appellant's violation of R.C. 2919.27(A)(2), and, therefore, we hold that the trial court had an adequate basis to enter its finding of guilt following appellant's plea of no contest.

{¶15} Accordingly, appellant's assignment of error is overruled. Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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