[Cite as *Dayton v. Flinn*, 2010-Ohio-3341.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

CITY OF DAYTON	:	
	:	Appellate Case No. 23728
Plaintiff-Appellee	:	
	:	Trial Court Case Nos. 2009-CR-5553
v.	:	
	:	(Criminal Appeal from City of Dayton
PATRICIA L. FLINN	:	Municipal Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 16th day of July, 2010.

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BROGAN, J.

{¶ 1} The Dayton Municipal Court found Patricia Flinn guilty of violating section 93.05 of the City of Dayton's Housing Ordinance, contained in the Revised Code of General Ordinances (R.C.G.O.),[1] for failing to comply with the administrative

[1]Chapter 93 is the Housing Ordinance. See R.C.G.O. 93.01.

order of a housing inspector.[2] In a post-trial brief, Flinn argued that the order is invalid under the Housing Ordinance. The court rejected her challenge to the validity of the order because she had not pursued an administrative appeal. Flinn also argued in the brief that violating section 93.05 is not a strict-liability offense, requiring the city to prove a culpable mental state, which it did not do. The court disagreed, concluding that the offense is one of strict liability. Flinn has appealed from her conviction, and she now assigns error to these two legal conclusions. We find no error and will affirm.

I

{¶ 2} Neither party disputes the facts, which are anyway not important to the legal questions raised. Nevertheless, to establish the context, we give a cursory review. On June 18, 2008, after receiving complaints from Flinn's neighbors about the smell emanating from her property, the city sent a housing inspector to Flinn's home. The inspector quickly discovered the cause of the smell–cats, many, many cats. The cats had created a rather malodorous mess, which Flinn had not adequately cleaned up. The inspector found several violations of Dayton's Housing Ordinance, and the following day served Flinn with a notice of the violations accompanied by an "emergency order" for compliance. Flinn received the notice and order on June 24, 2008; the order gave her until July 1, 2008, to comply. The order told Flinn how to proceed if she wanted to appeal the order–within ten days she

[2]The court sentenced Flinn to a sixty-day suspended sentence, imposed a $500 suspended fine, and ordered her to pay $91 in court costs. The court also imposed two years of supervised probation, which included several conditions.

must request a hearing before the Housing Appeals Board. Flinn never requested a hearing.

{¶ 3} It was not until almost a year later, on May 8, 2009, that inspectors returned to Flinn's home. They discovered that Flinn still had not complied with the order. The same day (the 8th), an inspector swore out a criminal complaint for violation of section 93.05 of the Housing Ordinance, failure to comply with the order of a housing inspector. The complaint was filed in the Dayton Municipal Court, and a bench trial was held. Flinn was convicted, prompting this timely appeal.

II

{¶ 4} As we said, Flinn assigns two errors to the trial court, each raising a question of law.

First Assignment of Error

{¶ 5} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FINDING THE APPELLANT GUILTY ABSENT PROOF OF SERVICE OF NOTICE OF VIOLATION(S) ALLOWING FOR A REASONABLE TIME FOR PERFORMANCE."

{¶ 6} Flinn does not directly contest here the court's rejection of her validity challenge. That is, she does not argue why, as a legal matter, the court should have allowed her to challenge the order's validity despite not pursuing an administrative appeal. Rather, she argues the validity issue itself–whether the order is or not. Flinn contends that the order is invalid because it does not specify a

reasonable time for performance and does not match section 93.09's definition of an "emergency order." Of course, that issue is irrelevant if the court properly rejected her challenge.

{¶ 7} Division (B) of section 93.05 states that "[a]ny person failing to comply with the order served pursuant to this section shall be deemed guilty of a misdemeanor." Based on the language, the city must prove that the defendant failed to comply with an order that was served in the manner prescribed by section 93.05. All that need be proven with respect to the order, then, is its existence and that the city served it properly. To the contents of the order the Housing Ordinance allows challenges via administrative appeal: section 93.06 says that, at an appeal hearing, "the petitioner shall be given an opportunity to be heard and to show cause why any item appearing on such notice and order should be modified or withdrawn." R.C.G.O. 93.06(A). So, based on the language of the ordinance, the city does not have the burden to prove, during a criminal trial, an order's validity.

{¶ 8} Flinn argues that there is no procedure to appeal "emergency orders," citing R.C.G.O. 93.05(A)(4). But this subdivision says only that the notice and order must "*[a]dvise* the owner, operator, or occupant of the procedure for appeal, except emergency orders issues pursuant to § 93.09." R.C.G.O. 93.05(A)(4) (Emphasis added). Neither this section, nor any other, says that an emergency order may not be appealed. Also, the section governing appeals extends the right broadly: "*[a]ny* person affected by *any* notice and order * * * issued in connection with the enforcement of *any* provision of the housing chapter * * * may request and shall be granted a hearing on the matter before the Housing Appeals Board." R.C.G.O.

93.06(A) (Emphasis added). Finally, we note that, regardless of what the ordinance says, Flinn's order says that she has the right to appeal. But she did not try to pursue this right by relying on the order.

{¶ 9} In *Dayton v. Sheibenberger* (1986), 33 Ohio App.3d 263, 265, we held that "before the city may successfully prosecute for a violation of Section 93.05, the underlying order must comply with elementary due process, *i.e.*, fair notice." Fair notice concerns the conduct of the defendant, that is, what conduct is prohibited. *State v. Mushrush* (1999), 135 Ohio App.3d 99, 109. At issue in *Sheibenberger* were the limits imposed by the due-process clause under the void-for-vagueness doctrine, which in part says that people must have fair notice of what conduct is prohibited. See *Kolender v. Lawson* (1983), 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited."). We found that the order in *Sheibenberger* was too vague for an average person to know what he had to do to comply. Here, Flinn does not argue that she did not know that her failure to comply with the order was prohibited or that she did not know how to comply. After examining the order ourselves we see nothing on its face that would render it unconstitutionally vague.

{¶ 10} Our cases have said that the validity of an administrative order is properly contested along the administrative-appeal path. In *Sheibenberger*, we said that "the initial order of the housing inspector finding noncompliance gave rise to a separate avenue of appeal; appellant's avenue to challenge the validity of the initial

order was before the Dayton Housing Appeals Board and not by way of an affirmative defense to the criminal action." *Sheibenberger*, at 264. Later, in a case concerning a nuisance order, we said, citing *Sheibenberger*, that "[defendant] may not raise issues related to the nuisance order's validity * * * as a defense to criminal charges for violating the order." *Dayton v. Lowe* (April 24, 1998), Montgomery App. No. 16651.

{¶ 11} In *Yakus v. United States*, 321 U.S. 414, 64, S.Ct. 660 (1944), the United States Supreme Court held that no principle of law or provision of the United States Constitution precludes Congress from making criminal the violation of an administrative regulation by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity.

{¶ 12} The first assignment of error therefore is overruled.

Second Assignment of Error

{¶ 13} "THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY CONCLUDING THAT CITY OF DAYTON RCGO § 93.05 CONSTITUTED A STRICT LIABILITY OFFENSE."

{¶ 14} Flinn points to our decision in *State v. Moler*, Montgomery App. No. 22106, 2008-Ohio-2081, to support her contention that violating section 93.05 is not a strict-liability offense. In *Moler* we said expressly that failure to comply under section 93.05 is not a strict-liability offense, and we said that "unless and until the City of Dayton amends this ordinance, the appropriate culpable mental state for a violation of R.C.G.O. [93.05] is recklessness." *Moler*, at ¶47. But soon after we

decided *Moler* Dayton did amend the ordinance. The city added language that makes crystal clear its purpose to impose strict criminal-liability for violations of section 93.05: "No culpable mental state is required to commit an offense; it being [sic] the express intent of this section to impose strict criminal liability for each offense." R.C.G.O. 93.99(A). Curiously, the city did not amend section 93.05; rather it amended section 93.99, which specifies the penalty for violating section 93.05. Flinn contends that because section 93.99 is not the section defining the offense the strict-liability doctrine still does not apply. We disagree.

{¶ 15} In the General Offense Code,[3] Dayton has adopted R.C. 2901.21(B), concerning strict-liability offenses. Section 130.07 states that "[w]hen 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, 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." R.C.G.O. 130.07(B).[4] Dayton has also adopted that part of R.C. 2901.03(B) saying that the definition of an offense may span multiple sections. See R.C.G.O. 130.04(B). Here, section 93.05 does not specify a degree of culpability for the prohibited conduct (failing to comply). So the question, then, is whether section 93.05 "plainly indicates a purpose to impose strict criminal liability."

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[3]The General Offense Code, Title XIII of the R.C.G.O., contains provisions generally applicable to criminal offenses.

[4]The language is identical to R.C. 2901.21(B), and the section expressly cites this section of the Revised Code.

{¶ 16} The Ohio Supreme Court in *State v. Lozier*, 101 Ohio St.3d 161, 2004-Ohio-732, found the Ohio Legislature's plain purpose to impose strict criminal-liability for a drug offense in a section other than the one the defendant was charged with violating. Section 2925.03 prohibits trafficking of drugs. Division (A) says, "No person shall knowingly do any of the following: (1) Sell or offer to sell a controlled substance * * *." Division (C)(5)(b) relevantly says, if the drug is LSD, and "* * * if the offense was committed *in the vicinity of a school* or *in the vicinity of a juvenile*, trafficking in L.S.D. is a felony of the fourth degree * * * ." (Emphasis added). But it is section 2925.01 that defines the disjunctive phrases. In section 2925.01, the Court found that the definition of "in the vicinity of a juvenile" contains express strict-liability language, whereas the definition of "in the vicinity of a school" does not.

{¶ 17} In *Lozier*, the Court found the legislature's plain purpose in a separate, implicitly-referenced section of Chapter 2950 of the Revised Code. Here, section 93.05 expressly cross-references section 93.99. We find, accordingly, in the separate, explicitly-referenced section 93.99 of the Housing Ordinance, that Dayton's plain purpose is to impose strict criminal-liability for failure to comply under section 93.05. Therefore, because the city has amended the Housing Ordinance to make its purpose plain, we can now conclude that a violation of section 93.05 is a strict-liability offense for which proof of culpability is not required.

{¶ 18} The second assignment of error is overruled.

III

{¶ 19} Having overruled both assignments of error, the judgment of the municipal court is Affirmed.

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DONOVAN, P.J., and GRADY, J., concur.

Copies mailed to:

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