

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	
-vs-	:	
	:	Case No. 2014CA0027
DARIN R. WELKER	:	
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING: Criminal appeal from the Municipal Court of
Coshocton County, Case No. CRB1400409

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 29, 2015

APPEARANCES:

For Plaintiff-Appellee

ROBERT SKELTON
Law Director
760 Chestnut Street
Coshocton, OH 43812

For Defendant-Appellant

ROBERT WEIR
305 Main Street
Coshocton, OH 43812

Gwin, P.J.

{¶1} Defendant-appellant Darin Welker appeals the October 29, 2014 judgment entry of the Coshocton County Municipal Court. Plaintiff-appellee is the State of Ohio.

Facts & Procedural History

{¶2} On June 23, 2014, appellant was issued a citation and charged with violating Village of West Lafayette Ordinance 618.23(a), which provides that:

(a) No chickens, turkeys, ducks, live poultry or fowl of any kind, horses, ponies, cows, calves, goat, sheep or live animals of any kind except dogs, cats, gerbils, hamsters, guinea pigs, birds or mice shall be kept in the Village.

{¶3} On October 29, 2014, a bench trial was held. At the beginning of the trial, appellant stipulated to the facts necessary to prove the charge, but sought to present an affirmative defense. Appellant stipulated that the ordinance states that no ducks can be kept in the village, and that he is keeping ducks in the village. However, appellant presented evidence on the affirmative defense of necessity.

{¶4} Shirley Wagner (“Wagner”), appellant’s wife, testified that at the time the citation was issued on June 23, 2014, she and appellant had fourteen ducks, but currently have six ducks. Wagner stated that appellant has depression due to post-traumatic stress disorder and the ducks help boost his spirits, provide him emotional support, and help him with his depression. Wagner registered the ducks as emotional support animals through an Emotional Support Animal Registry Association she found on the internet. Wagner testified that there is a difference between therapy animals, who are not pets and are trained to perform services, and emotional support animals,

like the ducks in the instant case, who are pets and are not trained, but give someone comfort. When appellant and Wagner are home, the ducks are in the backyard and at night or when appellant and/or Wagner are not at home, the ducks are kept in a kennel in the backyard.

{¶5} On cross-examination, Wagner stated that she is not a medical doctor. Further, that approximately two weeks prior to trial, she took eight (8) ducks to Amish Country because they were too much for appellant to take care of and that appellant's mood has not changed much after they gave the eight ducks away.

{¶6} Appellant testified that he served primarily in the Ohio National Guard, which is a subsidiary of the Army. Appellant served in Iraq starting in December of 2004 for approximately one year and was medically discharged in 2008. Appellant sees Dr. James Cannon at the V.A. hospital for his psychological care. Appellant introduced Exhibit A, a letter, that appellant testified was from "just a social worker/therapist at the Zanesville facility," which explained the ducks and the situation he is in. The letter is written by Kira Techatanalai ("Techatanalai"), who states that she is the primary social worker at the "Zanesville VA CBOC." The letter states that appellant has a mental health condition that is relieved by emotional support from animals, that appellant's relationship with the ducks is therapeutic, and that he needs them to assist with his mental health.

{¶7} Appellant stated that the ducks help to keep him calm, keep his emotional environment controlled, and that, because of the ducks, he has cut back on his medications. Appellant testified that he feels the ducks are necessary for his medical condition and that he would hate to lose them.

{¶8} At the conclusion of the bench trial, the trial court found appellant guilty of violating village ordinance 618.23(a) and fined appellant \$50.00 plus court costs. The trial court entered a judgment entry on October 29, 2014.

{¶9} Appellant appeals the October 29, 2014 judgment entry of the Coshocton County Municipal Court and assigns the following as error:

{¶10} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING APPELLANT GUILTY OF VIOLATING VILLAGE OF WEST LAFAYETTE ORDINANCE 618.23(A)."

I.

{¶11} Appellant concedes that the ordinance at issue is a strict liability offense and also stipulated to all elements of the offense. However, appellant argues the trial court erred in not applying the affirmative defense of necessity to find appellant not guilty of Village of West Lafayette Ordinance 681.23(a).

{¶12} The defense of necessity is not codified in Ohio law. However, Ohio courts have held that the common-law elements of the defense are: (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than (or at least equal to) that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm. *Dayton v. Thornsbury*, 2d Dist. Montgomery Nos. 16744, 16772, 1998 WL 598124 (Sept. 11, 1998).

{¶13} Appellee argues this Court should affirm the trial court's decision because the affirmative defense of necessity cannot be utilized with a strict liability offense. However, we find this issue is not dispositive in this case, as even if the affirmative defense of necessity could be used in this strict liability case, we find appellant failed to prove the affirmative defense by a preponderance of the evidence.

{¶14} First, appellant created the situation by purchasing the ducks in violation of the ordinance. Further, appellant failed to present sufficient medical evidence showing that the ducks were necessary and that the harm of living without the ducks is clear, imminent, and certain to befall with no reasonable opportunity to avoid the downfall. While a letter from a social worker / therapist stated that the ducks assisted with appellant's mental health, there is no indication in the letter or from any other testimony that the harm without the ducks is imminent, that without the ducks appellant's life is in danger, or that there is no alternative to the commission of the offense or alternate way in which to avoid the greater harm, such as a different type of therapy or another type of emotional support animal not prohibited by the ordinance.

{¶15} Based on the foregoing, appellant's assignment of error is overruled. The October 29, 2014 judgment entry of the Coshocton County Municipal Court is affirmed.

By Gwin, P.J.,

Farmer, J., and

Delaney, J., concur