

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

City of Toledo

Court of Appeals No. L-12-1223

Appellee

Trial Court No. CRB-11-19621

v.

Roy Jenkins

DECISION AND JUDGMENT

Appellant

Decided: July 12, 2013

* * * * *

David L. Toska, Chief Prosecuting Attorney, and
Arturo Quintero, Assistant Prosecuting Attorney, for appellee.

Adam H. Houser, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Roy Jenkins appeals from his conviction for interference with custody in violation of Toledo Municipal Code 515.04(a), a misdemeanor of the third degree.

{¶ 2} The following facts are not in dispute. Joy Jenkins is the adult child of Roy and Regina Jenkins. Pursuant to an order issued by the Lucas County Court of Common

Pleas, Juvenile Division, in case No. 04-132874, Roy and Regina have been awarded “legal custody” of Joy’s three minor children. Joy Jenkins has been awarded “parenting time.”

{¶ 3} Pursuant to the juvenile court order, Joy was permitted parenting time on Thanksgiving Day, 2011. Roy refused to allow the visitation. On December 15, 2011, Joy filed a complaint in the Toledo Municipal Court alleging her father “did knowingly refuse to allow” the court ordered visitation.

{¶ 4} Roy Jenkins was convicted after entering a plea of no contest, assessed a fine in the amount of \$50, and ordered to pay court costs. The fine and costs were stayed, pending appeal. On the day of the plea hearing, counsel for Roy Jenkins indicated “there is ongoing litigation [in the juvenile court] and that’s basically where this matter has been for an extended period of time and continues to stay * * *.”

{¶ 5} Roy Jenkins now appeals and assigns the following errors for our review:

1. The Conviction of the Appellant was the Result of an Improper Interpretation of the Statute by the Trial Court.
2. There was Insufficient Evidence to Convict the Appellant of Interference with Custody.
3. The Toledo Municipal Court was the Improper Forum for the Case and was an Abuse of Discretion for the Court to Hear the Case.

{¶ 6} We address Jenkins’ second assignment of error first.

{¶ 7} The term “sufficiency of the evidence” refers to “the legal decision the trial court makes on whether the evidence presented is legally sufficient to prove each element of the crime.” *State v. Lee*, 5th Dist. No. 98-CA-00249, 1999 WL 333330, *3 (May 10, 1999), citing *State v. Thompson*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). “Whether the evidence is legally sufficient to sustain a verdict is a question of law.” *Thompson* at 386, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1992), wherein the Supreme Court of Ohio held:

An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Id.* at paragraph two of the syllabus.

{¶ 8} The Rules of Criminal procedure provide “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 indictment, information, or complaint * * *.” Crim.R. 11(B)(2). Here, the complaint alleges:

ROY JENKINS did knowingly refuse to allow visitation between the complainant (Ms. Joy Jenkins) and her three minor children * * * as ordered by the Court of Comm. Pleas, Lucas County, Juvenile Division in case no. 04132847. Her Thanksgiving Day visitation was denied. This occurred in Toledo, Lucas County, Ohio.

During the plea hearing, the prosecutor stated that had the case proceeded to trial, the following facts would have been proven beyond a reasonable doubt:

Ms. Joy Jenkins, who is present here, the complainant, has three minor children has been – that the visitation orders have been ordered by the Court of Common Pleas. She does not have custody of the children, but she does have visitation rights according to the order of the Court of Common Pleas. She was on this particular time, which is November the 24th, 2011, she was denied her visit, her Thanksgiving –

* * *

– visitations that have been agreed to and were approved by the court, Your Honor, and therefore, he did interfere with custody and visitation for the – for our victim, who is present here today.

{¶ 9} Under Toledo Municipal Code 515.04(a) interference with custody occurs when a person, “knowing he is without privilege to do so or being reckless in that regard,” “entice[s], take[s], keep[s] or harbor[s] a child under the age of eighteen from his or her parent, guardian or custodian.” The term “privilege” is defined as “immunity,

license or right conferred by law, or bestowed by express or implied grant, or arising out of status, position, office or relationship, or growing out of necessity.” Toledo Municipal Code 501.01(l).

{¶ 10} Prior to Roy’s no contest plea, the parties stipulated that Roy and Regina Jenkins have been awarded legal custody of their grandchildren and Joy Jenkins has been awarded parenting time under Lucas County Juvenile Court case No. 04-132847. A copy of the juvenile court order was not presented to the municipal court.

{¶ 11} The juvenile court chapter of the Ohio Revised Code defines the term “legal custody” as follows:

[A] legal status that vests in the custodian the right to have physical care and control of the child and to determine where and with whom the child shall live, and the right and duty to protect, train, and discipline the child and to provide the child with food, shelter, education, and medical care, all subject to any residual parental rights, privileges, and responsibilities. * * *. R.C. 2151.011(B)(21).

In turn, “residual parental rights, privileges and responsibilities” are defined as

[T]hose rights, privileges, and responsibilities remaining with the natural parent after the transfer of legal custody of the child, including, but not necessarily limited to, the privilege of reasonable visitation, consent to adoption, the privilege to determine the child’s religious affiliation, and the responsibility of support. R.C. 2151.011(B)(48).

{¶ 12} It has long been held that a parent’s right to the custody of his or her child is “paramount.” *In re Hayes*, 79 Ohio St.3d 46, 48, 679 N.E.2d 680 (1997). Generally, a change of legal custody from a parent to a nonparent will not occur but for an adjudication of dependency or neglect. *In re Alexander C*, 164 Ohio App.3d 540, 2005-Ohio-6134, 843 N.E.2d 211, ¶ 7 (6th Dist.) An adjudication of neglect requires proof that “the parents were willfully at fault in abandoning or neglecting the children or refusing to perform their parental duties.” *Id.* at ¶ 45, citing *In re Bibb*, 70 Ohio App.2d 117, 120 435 N.E.2d 96 (1st Dist.1980). “[A] finding of dependence under R.C. 2151.04 must be grounded on whether the children are receiving proper care and support.” *Id.*

{¶ 13} In this case, the city of Toledo alleged that Roy Jenkins “knowingly refused” to allow a court ordered visitation. However, the city failed to allege that Roy was “without privilege” to do so. A conviction based upon a no contest plea is improper when factual matter presented to the court in support of the complaint “negates the existence of an essential element of the offense charged.” *State v. Stow Veterans Assn.*, 35 Ohio App.3d 45, 46, 519 N.E. 2d 660 (9th Dist.1987). Essential to a finding of guilt for interference with custody is evidence that the actor knew he was *without privilege* to do the prohibited act or was being reckless in that regard. There is nothing in the record to support a finding that as legal custodian of the children Roy Jenkins was without privilege to refuse the Thanksgiving Day visitation.

{¶ 14} At this point, it is important to note that the Toledo Municipal Code recognizes two affirmative defenses to the interference with custody charge. The

affirmative defense to the charge of “enticing or taking” is that the “actor believed his conduct was necessary to preserve the child’s health or safety.” The affirmative defense to the charge of “keeping or harboring” is that the “actor in good faith gave notice to law enforcement or judicial authorities within a reasonable time after the child * * * came under his shelter.” With these defenses in mind, it is not unreasonable to conclude that a legal custodian charged by the juvenile court with the right and duty to protect a child would also be afforded, in certain limited circumstances, the “privilege” to refuse a court ordered visitation.

{¶ 15} After viewing the evidence in a light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. The stipulated facts coupled with the facts admitted by Roy Jenkins are insufficient to constitute the crime of interference with custody under Toledo Municipal Code 515.04(a). Appellant’s second assignment of error is well-taken.

{¶ 16} Because our disposition of the second assignment of error determines the outcome of this appeal, we do not reach the merit of the claims raised in the first and third assignments of error.

{¶ 17} We reverse the judgment of the Toledo Municipal Court and vacate appellant’s conviction for violating Toledo Municipal Code 515.04(a). Appellee is ordered to pay the costs of this appeal.

JUDGMENT REVERSED.

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L-12-1223

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

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

James D. Jensen, J.
CONCUR.

JUDGE

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>.