

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

City of Toledo

Court of Appeals No. L-12-1278

Appellee

Trial Court No. CRB-12-15265-0101

v.

Samuel L. Lewis

DECISION AND JUDGMENT

Appellant

Decided: July 26, 2013

* * * * *

David L. Toska, Chief Prosecutor, and Sharon D. Gaich,
Assistant Prosecutor, for appellee.

John W. Yerman, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Appellant, Samuel L. Lewis, entered a plea of no contest to and was convicted of recklessly violating a protection order in violation of Toledo Municipal Code 537.27(A)(2), a misdemeanor of the first degree. Lewis appeals the judgment of conviction asserting the underlying civil stalking protection order is void and cannot be

the basis for a criminal charge and conviction in the Toledo Municipal Court. For the reasons that follow, we conclude that in order to sustain the conviction, the state must establish, beyond a reasonable doubt, that the underlying protection order was issued in conformance with all requirements of R.C. 2309.214. Accordingly, we reverse the judgment of the trial court.

{¶ 2} On July 11, 2011, Samuel Lewis filed a petition for a civil stalking or sexually-oriented-offense protection order in the Lucas County Court of Common Pleas pursuant to R.C. 2903.214. In his petition, Lewis sought protection against Robin Vargas. After an ex-parte hearing, the common pleas court granted a temporary protection order prohibiting Vargas from having any contact with Lewis. A full hearing was held August 3, 2011. Both Lewis and Vargas were present. Upon conclusion of the testimony, the common pleas court denied Lewis' petition for a protection order. The common pleas court then entered a protection order, sua sponte, prohibiting Lewis from having any contact with Vargas until August 3, 2014.

{¶ 3} On August 22, 2012, Robin Vargas filed a complaint in Toledo Municipal Court alleging Lewis had violated the terms of the August 3, 2011 protection order by leaving a voice message on her cell phone. A warrant was issued.

{¶ 4} After arraignment, Lewis moved to dismiss the charge alleging the protection order was void ab initio. The trial court denied the motion to dismiss. Lewis entered a plea of no contest, reserving his right to appeal, and was found guilty of recklessly violating the terms of the August 3, 2011 protection order in violation of

Toledo Municipal Code Section 537.27(a)(2), a misdemeanor of the first degree. Lewis was ordered to pay a \$1,000 fine and court costs. He was also ordered to serve 180 days in jail. The sentence was stayed pending appeal.

{¶ 5} Lewis filed a motion asking the municipal court to reconsider its denial of his motion to dismiss. The motion for reconsideration was denied. Lewis appealed and asserts two assignments of error for our review.

1. The trial court committed prejudicial error by finding defendant guilty of violating a statute that mandated a finding that Defendant violated a civil protection order which, in this matter, was void ab initio.

2. The issue before the court is whether Defendant/Appellant can be found guilty of a crime that required an issuance of a valid court order pursuant to Ohio Revised Code §2903.214, when, in fact, no valid order exists.

Second Assignment of Error

{¶ 6} In his second assignment of error Lewis argues the trial court erred when it found him guilty of violating Toledo Municipal Code 537.27(a)(2) because the underlying protection order was not issued in conformance with R.C. 2903.214.

{¶ 7} Recently, the Supreme Court of Ohio determined that in order to sustain a conviction for the crime of violating a civil stalking or sexually-oriented-offense protection order under R.C. 2919.27(A)(2), the state must prove beyond a reasonable

doubt *all requirements* of R.C. 2903.214(F)(1). *See State v. Smith*, ___ Ohio St.2d ___, 2013-Ohio-1698, ___ N.E.2d ___, ¶ 16.

{¶ 8} In *Smith*, the petitioner obtained an ex parte civil stalking protection order against Robert L. Smith, Jr. *Id.* at ¶ 4. On the day the order was issued, the clerk of courts ordered the sheriff serve a copy of the order upon Smith. *Id.* Before Smith was served, the petitioner “showed Smith a copy and told him he was not allowed to be around her.” *Id.* at ¶ 5. The next morning, Smith broke into petitioner’s home. *Id.* at ¶ 6. An altercation ensued. *Id.* Petitioner called 9-1-1. *Id.* at ¶ 7. Smith attempted to flee but was apprehended and arrested. *Id.* Shortly thereafter, a deputy sheriff served Smith with a copy of the protection order. *Id.* at ¶ 8. Smith was charged with and convicted of violating the protection order in violation of R.C. 2919.27(A)(2). *Id.* at ¶ 9. Smith appealed, arguing there was no evidence that the order was served before the alleged offense. *Id.* at ¶ 14.

{¶ 9} Mindful of the importance of protection orders, the *Smith* court asserted that the violation of a *properly issued* protection order “must not be countenanced.” *Id.* at ¶ 27. Reversing the judgment of conviction, the court emphasized Smith’s right to have the protection order “served in conformity with the law.” *Id.* Justice Kennedy reasoned,

A plain reading of R.C. 2919.27(a)(2) * * * demonstrates that it incorporates the requirements of R.C. 2903.214. Therefore, to prove a violation of R.C. 2919.27(A)(2), the state must prove, beyond a reasonable

doubt, all requirements of R.C. 2903.214, including the requirement that the order be delivered to the defendant. *Id.* at ¶ 16.

{¶ 10} R.C. 2919.27(A)(2) is nearly identical to Toledo Municipal Code 537.27(a)(2). If we apply Justice Kennedy’s reasoning to the case at bar, the requirements of R.C. 2903.214 are incorporated into Toledo Municipal Code 537.27(a)(2).

{¶ 11} R.C. 2903.214 specifically prohibits a court from issuing a protection order that requires a petitioner to do or refrain from doing an act that the court may require a respondent to do or refrain from doing unless very specific requirements are met. R.C. 2903.214(E)(3) provides, in pertinent part, as follows:

A court may not issue a protection order that requires a petitioner to do or to refrain from doing an act that the court may require a respondent to do or to refrain from doing under division (E)(1) of this section unless all of the following apply:

(a) The respondent files a separate petition for a protection order in accordance with this section.

(b) The petitioner is served with notice of the respondent’s petition at least forty-eight hours before the court holds a hearing with respect to the respondent’s petition, or the petitioner waives the right to receive this notice.

(c) If the petitioner has requested an ex parte order pursuant to division (D) of this section, the court does not delay any hearing required by that division beyond the time specified in that division in order to consolidate the hearing with a hearing on the petition filed by the respondent.

(d) After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against that evidence, the court determines that the petitioner has committed a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order issued pursuant to division (E)(3) of this section, has committed a sexually oriented offense against the person to be protected by the protection order issued pursuant to division (E)(3) of this section, or has violated a protection order issued pursuant to section 2903.213 of the Revised Code relative to the person to be protected by the protection order issued pursuant to division (E)(3) of this section.

{¶ 12} Applying *Smith* to the case at bar, to sustain a conviction for a violation of a protection order pursuant to Toledo Municipal Code 537.27(a)(2), the state must establish, beyond a reasonable doubt that the Lucas County Court of Common Pleas properly issued the protection order prohibiting petitioner from having any contact with the respondent.

{¶ 13} Here, the respondent in the underlying case, Robin Vargas, did not file a separate petition for a protection order as required by R.C. 2903.214(E)(3)(a). Because no petition was ever filed, Samuel Lewis was never served with a copy of the petition as required by R.C. 2903.214(E)(3)(b). Further, Samuel Lewis was never afforded an opportunity to defend himself against any evidence presented by Robin Vargas in support of a request for a protection order as required by R.C. 2903.214(E)(3)(d). Appellant's second assignment of error is found well-taken. As a result, the court declines to address the first assignment of error. *See* App.R. 12(A)(1)(c).

{¶ 14} Judgment of the Toledo Municipal Court is reversed and the conviction is vacated. Costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

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>.