

[Cite as *State ex rel. Cleveland v. Foxworth*, 2015-Ohio-1825.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101651

**STATE OF OHIO EX REL.
CITY OF CLEVELAND ETC.**

PLAINTIFFS-APPELLEES

vs.

COLIE FOXWORTH, ET AL.

DEFENDANTS-APPELLANTS

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-12-784968

BEFORE: Jones, P.J., Kilbane, J., and McCormack, J.

RELEASED AND JOURNALIZED: May 14, 2015

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LARRY A. JONES, SR., P.J.:

{¶1} This cause came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the trial court records and briefs of counsel.

{¶2} Defendant-appellant Colie Foxworth appeals from the trial court's June 11, 2014 judgment in which the court found Foxworth in contempt of its September 25, 2012 order, declared the building at issue a nuisance, and granted a permanent injunction ordering it boarded up, and the liquor license to be held in safekeeping until it could be transferred to a neutral third-party. We affirm.

I.

{¶3} Plaintiff-appellee the city of Cleveland initiated this action against Foxworth in June 2012 by filing a verified petition for injunctive relief and motion for an ex parte temporary restraining order. In those pleadings, the city alleged that Foxworth owned property located on Outhwaite Avenue in Cleveland, and resided in an apartment also located on Outhwaite Avenue in Cleveland. The property that Foxworth owned was operated as a "corner store," for which he had a liquor license.

{¶4} The pleadings further alleged that the corner store had a "general reputation for illegal drug sales and other illegal drug activity," and constituted a nuisance in the neighborhood. Specifically, the Cuyahoga County Sheriff's Office began investigating the store because of complaints it had received about drug activity at the store. As part of its investigation, in April 2012, the sheriff's office, using a confidential reliable informant, made an undercover buy of Oxycontin from Foxworth. On April 30, 2012, the city

obtained a search warrant for the store and Foxworth's residence.

{¶5} The sheriff's office planned another controlled buy with an informant for May 2, 2012. A detective from the sheriff's office set up surveillance of the premises, and the informant was prepared for the transaction. An undercover purchase of Oxycontin from Foxworth was made. The Cleveland police were called to the scene.

{¶6} After the sale, law enforcement saw Foxworth exit the store and lock the premises. The police approached and arrested him. They advised him that he was under arrest for violations of state drug laws and that they had a search warrant for the store and his residence.

{¶7} After being advised of his rights, Foxworth told the police that there was crack cocaine near the cash register, but no other drugs were in the store. The search revealed, in part, the following:

- 33 individually wrapped white papers containing suspected crack cocaine located on a shelf near the cash register;
- \$1,765 in a paper bag on a rack next to the cash register;
- \$253 in the cash register;
- \$12 in an air freshener box;
- a suspected drug ledger next to the cash register;
- a box of Chore Boys on a counter next to the cash register;¹
- a silver grinder with suspected marijuana;

¹Chore Boys are commonly used in the illicit drug community to make crack cocaine pipes.

- buckets and jars containing U.S. currency in coins;
- 18 shotgun shells located on a shelf below the cash register; and
- a gun and ammunition on a shelf below the cash register.

{¶8} In regard to his residence, Foxworth told the police that there was a gun in it.

The search of Foxworth's residence revealed the following:

- \$14,020 in a sock located in a ceiling tile;
- six guns;
- 2 baggies of suspected marijuana;
- numerous tablets of suspected Oxycontin;
- 2 scales (a digital and a balance); and
- 2 bracelets found in a sock in a ceiling tile.

{¶9} On May 11, 2012, Foxworth was indicted on drug trafficking, drug possession, having weapons while under disability, and possession of criminal tools charges.² See *State v. Foxworth*, Cuyahoga C.P. No. CR-12-562324.

{¶10} Based on the above-mentioned allegations contained in the pleadings, the trial court granted the city's ex parte motion for a temporary restraining order and found the store to be a nuisance; it ordered it closed during the pendency of the case. On June 25, 2012, the court held a preliminary injunction hearing, at the conclusion of which it

²The pleadings also set forth that Foxworth had several prior convictions for drug-related offenses. The Cuyahoga County Clerk of Courts public website shows Foxworth had convictions in two other cases: (1) Cuyahoga C.P. No. CR-89-240099, trafficking in drugs, permitting use of premises for felonious drug abuse, and possessing criminal tools; and (2) Cuyahoga C.P. No. CR-95-335241, trafficking in drugs.

extended the restraining order.

{¶11} In September 2012, the city and Foxworth entered into an agreed judgment. The agreement, which was also signed and filed by the court, provided that Foxworth would abate the nuisance at the corner store by doing the following:

Colie Foxworth shall immediately begin processing the necessary paperwork to transfer the business and liquor license to Tiffany Smith³ or an entity owned and operated by Tiffany Smith, who shall own and operate the permit Premises. Upon removal of the boards from the Premises, Colie Foxworth may work for 5 days at the Premises to teach Tiffany Smith how to run the cash register and any other machinery, to order products, etc. However, beyond that time, he shall never work in the Premises again. If Cleveland Police or the Cuyahoga County Sheriff's Office finds Colie Foxworth working at the Premises, it shall be cause to re-board the Premises, as set forth in Paragraph below. Colie Foxworth shall not work at the Premises in any capacity. He shall not have any ownership interest in the business nor take any direct profits from the business.

{¶12} The parties' agreement further provided that the court would retain jurisdiction over the matter and, that if the agreement was broken, the city had the right to file a motion to show cause and make the following requests:

- a. that the building must be re-boarded and the property shall be declared a nuisance, which results in the building being put on the next ballot to vote whether it should be dry for the sale of alcoholic beverages; and/or
- b. that the Liquor Permit must be placed in safekeeping.

{¶13} On October 15, 2012, Foxworth was sentenced to a nine-month prison term, after having plead guilty in August 2012 to trafficking in drugs, having weapons while under disability, and possessing criminal tools, with related forfeitures. The docket from his criminal case shows that Foxworth was not immediately taken into custody. He

³Tiffany Smith is Foxworth's daughter, and the agreement was made in her presence.

appeared before the court again on October 25, 2012, to be remanded to prison for the commencement of his sentence, but at his request, the trial court granted him a two-week extension. Foxworth appeared again on November 8, 2012, at which time he was remanded for the commencement of his nine-month sentence.

{¶14} On May 8, 2014, the city filed a motion to show cause. In the motion, the city alleged that, although the parcel had been transferred to Smith, no paperwork had been filed to transfer the liquor license from Foxworth to Smith. The city further alleged that, on February 21, 2014, Foxworth was found working at the store; it attached the affidavit of Detective Ramon Kindell in support of that contention.

{¶15} In his affidavit, Kindell, a vice detective in the district where the store was located, averred that once Foxworth was released from prison, the Cleveland police began receiving complaints again about the store and that Foxworth was operating it. The detective further averred as follows:

on February 21, 2014, I walked into the [store], in an undercover capacity. Colie Foxworth, who I know from photos and previous dealings, was the only person in the store. Mr. Foxworth asked me, "What can I help you with?" I attempted to purchase alcohol but Mr. Foxworth informed me that he could not sell any alcohol until the following Sunday (as his license was under suspension) but directed me to the nearest location to purchase alcohol. It was obvious that Mr. Foxworth was working at the store as he was the only employee present.

{¶16} In June 2014, the trial court granted the motion, and set the matter for a contempt hearing, at which Foxworth was to appear and demonstrate why he should not be held in contempt.

{¶17} Detective Kindell testified at the hearing, the sum and substance of which

was the same as his affidavit. Tiffany Smith also testified. She stated that she lived in Akron, Ohio and was a probation officer there. According to Smith, she and her father were unable to get the paperwork processed for the transfer for the nine months that he was in prison. Smith testified that after Foxworth's release from prison, "we've just been meeting one hurdle after the other with various continuations * * * and we've been trying to get it done ever since he's been home."

{¶18} Smith further testified that she and her father were not trying to be noncompliant, but that they both were "totally confused about this process." She stated that "there's no way that anybody can be compliant, not just us, but even the city." She explained that the store has been Foxworth's life's work, that he attempted, unsuccessfully, to obtain other employment, and she did not "understand what the state or city would have him do if he's not able to work."

{¶19} Foxworth also testified. He reiterated his daughter's testimony about the store being his life's work, explaining that it had been his family's business for generations. He admitted to helping Detective Kindell on the day in question, but testified that he happened to be outside when he saw that the detective was in the store and decided to help him. According to Foxworth, his (Foxworth's) son was working the store at that time, but was in the bathroom, which was located in the basement, so he decided to help the customer. Foxworth testified that his son ran the store, but admitted that his son is a college student in Erie, Pennsylvania.

{¶20} Foxworth asked the court for another chance. He testified that he was not a

“typical” drug dealer, but that he did it because he was in financial trouble and was trying to get out of that trouble. He further testified that he was “looked up to” in his community because he invested in it and did a lot “as far as keeping it clean and safe.”

{¶21} In regard to Smith and Foxworth’s testimonies, the trial court stated that it was “totally appalled at the total, incomplete utter lack of credibility.” The court declared the store a nuisance and ordered that it be boarded up and put on the next ballot for a ban on selling alcoholic beverages. The court also ordered the transfer of the liquor license in an “arm’s length transaction to any party not related in any manner to the present permit holder.”

{¶22} Foxworth now appeals, assigning the following two errors:

First Assignment of Error: The trial court erred when it declared the appellant had no constitutional right to earn a living through working for businesswoman in violation of the appellant[’]s constitutional rights on a state and federal level which being the absolute right to life, liberty, and the pursue [sic] of happiness.

Second Assignment of Error: The trial court denied transfer of license to relative as a business owner and operator.

II.

{¶23} In his two assignments of error, Foxworth challenges the trial court’s decision to grant the city’s request for a permanent injunction and its order that the liquor license be transferred to someone other than his daughter.

{¶24} The standard of review for this court regarding the granting of an injunction by a trial court is whether the trial court abused its discretion. *Perkins v. Quaker City*, 165 Ohio St. 120, 125, 133 N.E.2d 595 (1956). An abuse of discretion connotes more

than an error of law or judgment. It applies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶25} In determining whether to grant injunctive relief, courts take into consideration the following four factors: (1) the likelihood or probability of a plaintiff's success on the merits; (2) whether the issuance of the injunction will prevent irreparable harm to the plaintiff; (3) what injury to others will be caused by the granting of the injunction; and (4) whether the public interest will be served by the granting of the injunction. *Corbett v. Ohio Bldg. Auth.*, 86 Ohio App.3d 44, 49, 619 N.E.2d 1145 (10th Dist.1993).

{¶26} Upon review, we find that the above factors weighed in favor of granting the injunction and that the trial court, therefore, did not abuse its discretion. Specifically, the record demonstrates that the city showed that Foxworth violated the terms of the September 2012 agreement. The trial court, who was in the best position to judge the credibility of the witnesses,⁴ found it incredible that neither Smith, a probation officer, nor Foxworth understood what Foxworth was agreeing to.⁵

{¶27} Further, Foxworth was given time prior to being remanded to prison to get

⁴See *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80-81, 461 N.E.2d 1273 (1984).

⁵At the permanent injunction hearing, the city's attorney informed the trial court that "[t]here [have] been conversations for two years now between myself and Ms. Smith, and the conversations have always been get this liquor permit transferred and everything would be fine. And then we discover that Colie Foxworth is working at the store * * * [a]nd it's gotten to the point where the city just can't tolerate this anymore, and that's why we are here."

his affairs in order, and certainly had time after being released from his nine-month sentence to also do so.

{¶28} On this record, any harm to Foxworth was outweighed by the harm that would be caused to the city and the community by not granting the injunction. Foxworth does not have a constitutional right to work at that business as he contends. Moreover, we are also not persuaded by his contention that the court impermissibly interfered with this inheritance. He cannot use his inheritance to do that which is illegal.

{¶29} In light of the above, Foxworth's two assignments of error are overruled.

{¶30} Judgment affirmed.

It is ordered that appellees recover of appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., PRESIDING JUDGE

MARY EILEEN KILBANE, J., and
TIM McCORMACK, J., CONCUR