

IN THE SUPREME COURT OF OHIO

STATE ex rel.
EDWARD PAYNE,
224 Eldon Avenue
Columbus, Ohio 43204

Petitioner,

vs.

THE HONORABLE CARRIE
E. GLAEDEN
Franklin County Municipal Court
Courtroom 13A
375 South High Street
Columbus, OH 43215-4520

Respondent.

Case No.

07-1924

PETITION FOR WRIT
OF HABEAS CORPUS

MARK J. MILLER (0076300)
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*Counsel for Petitioner,
Edward Payne*

FILED

OCT 18 2007

CLERK OF COURT
SUPREME COURT OF OHIO

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**STATE ex. rel.
EDWARD PAYNE**

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Case No.

**PETITION FOR WRIT
HABEAS CORPUS**

COMPLAINT FOR WRIT OF HABEAS CORPUS

To the Honorable Justices of the Supreme Court of Ohio:

1. Petitioner, Edward Payne, by and through undersigned counsel, hereby petitions this Honorable Court for a Writ of Habeas Corpus requesting this Court to find that Respondent's issuance of a Temporary Protection Order (attached as Exhibit A) on August 10, 2007 is null and void for failure of the Respondent to comply with Ohio Revised Code Section 2919.26 in the matter of *The State of Ohio vs. Edward Payne*, Franklin County Municipal Court Case Number 2007 CRB 19943. Specifically, Petitioner asserts the Respondent failed to comply with R.C. 2919.26(C)(1), R.C. 2919.26(D)(1) and (D)(2) and abused its discretion when it issued the temporary protection order against Petitioner. A complete copy of R.C. 2919.26 is hereby attached as Exhibit B.

2. Pursuant to R.C. § 2725.01, whoever is unlawfully restrained of his liberty may prosecute a writ of habeas corpus to inquire into the cause of such imprisonment,

restraint, or deprivation. A writ of habeas corpus is appropriate in this case because this Court has recognized that in certain extraordinary circumstances where there is an unlawful restraint of a person's liberty, habeas corpus will lie notwithstanding the fact that only nonjurisdictional are involved, but only where there is no adequate legal remedy. *State ex rel. Pirman v. Money* (1994), 69 Ohio St.3d 591. No adequate legal remedy exists here because an order establishing pretrial conditions of release in a criminal case is interlocutory and not a final appealable order. See *State v. Bevacqua* (1946), 147 Ohio St. 20. Since the temporary protection order is specifically designated as a pretrial condition of release, it can be challenged only in the same manner as other pretrial conditions of release in a criminal case. *State v. Dawson* (Oct. 18, 1979), Franklin App. No. 79AP-565, at *2 (attached as Exhibit C). In *Bevacqua*, this Court held that habeas corpus is a proper remedy to contest excessive pretrial bail. *Bevacqua* at syllabus. As was recognized in *Dawson*, excessive bail is analogous to the issuance of temporary protection order. *Dawson* at *2. Thus, the proper remedy in this case is a writ of habeas corpus. The Petitioner has no other adequate remedy at law and the temporary restraining order is a restraint on his liberty.

3. On August 10, 2007, the Petitioner came before the Franklin County Municipal Court for his initial appearance/arraignment on the charges of domestic violence and assault. At that time, the Respondent set bond and issued a temporary protection order in the absence of the alleged victim. A complete and accurate copy of the transcript of these proceedings is attached as Exhibit D.

4. At the Petitioner's arraignment, the court issued a temporary protection order solely on the basis of the prosecuting attorney remarks that Cindy Bentley, the alleged

victim, wished to have a protection order issued. See Transcript, p. 3. According to the prosecuting attorney, he had allegedly spoken with Ms. Bentley over the telephone and she supposedly indicated her desire for a protection order. *Id.* It is undisputed that although Ms. Bentley was allegedly requesting a protection order, she failed to appear at the Petitioner's arraignment. As further explained below, R.C. 2919.26(C)(1) requires the presence of the person actually requesting the protection order.

5. As indicated in the transcript, there was no reading of the alleged facts or allegations regarding the domestic violence and assault charges filed against the Petitioner.

6. Despite the alleged victim's absence at the arraignment and without a reading of any of the alleged facts of the charged offenses, the court issued a temporary protection order. Tr., pp. 3, 6. The court did not make any finding that it believed that the safety and protection of the alleged victim would be impaired by the continued presence of the alleged offender, as required by R.C. 2919.26(D)(1). Rather, the court simply stated that it could, on its own motion, grant a protection order if the prosecuting attorney had the appropriate paperwork. Tr., pp. 3-4.

7. According to the hearsay testimony from the prosecuting attorney at the Petitioner's arraignment, the alleged victim was requesting a protection order. Tr., p. 3. Although Ms. Bentley was supposedly requesting a protection order, she failed to appear at the hearing as required by R.C. 2919.26(C)(1).

8. Pursuant to R.C. 2919.26(C)(1), the person requesting a protection order must appear in court, unless the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint.

9. Here, it is undisputed that the alleged victim Cindy Bentley failed to appear. Also, the court never found that her absence was due to hospitalization or a medical condition resulting from the offenses alleged in the complaints.

10. The Petitioner also directs this Court's attention to the case of *State v. Conkle*, 2003-Ohio-2410 (Ohio App. 5th Dist.)(attached as Exhibit E). In *Conkle*, the trial court issued a temporary protection order in the absence of the alleged victim. On appeal, the court of appeals specifically held that pursuant to R.C. 2919.26(C), the victim must be present before a court can issue such an order (unless there is a finding that the victim is absent due to hospitalization or medical condition resulting from the offense alleged).

11. Based on the foregoing, the Petitioner asserts that the court failed to follow the proper procedures contained in R.C. 2919.26(C)(1) when it issued the temporary protection order. In the alternative, the Petitioner also contends the court failed to comply with R.C. 2919.26(D)(1), as there was insufficient evidence to show that the safety and protection of the alleged victim would be impaired by the continued presence of the alleged offender. In fact, the court failed to make any such finding. As such, the protection order issued against the Petitioner should be dismissed and his Writ granted.

12. On August 10, 2007, the Petitioner filed a motion to dismiss the temporary protection order issued against him. See Motion, attached as Exhibit F.

13. On August 20, 2007, the Petitioner's case came before the Respondent for a scheduled pre-trial. At this pre-trial, the Respondent addressed the Petitioner's motion to dismiss and heard from the alleged victim/prosecuting witness Cindy Bentley. A complete and accurate copy of the transcript of these proceedings is attached as Exhibit G.

14. At this hearing Ms. Bentley testified that she was not in fear of her safety and requested that the protection order be removed because she did not feel like she was in danger around the Petitioner. Tr., pp. 6-7. At the conclusion of this hearing, the Respondent refused to dismiss the protection order. Tr., pp. 12-13. This leaves the Petitioner with no remedy other than to respectfully request this Court to grant a writ of habeas corpus.

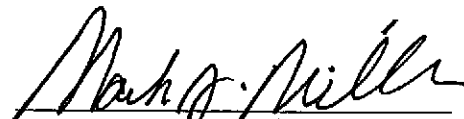
15. In addition to the forgoing arguments, the Petitioner contends that the Respondent failed to comply with the requirements set forth in R.C. 2919.26(D)(2). Pursuant to R.C. 2919.26(D)(2), if the court issues a protection order as an ex parte order, it shall conduct, as soon as possible after the issuance of the order, a hearing in the presence of the alleged offender *not later than the next day* on which the court is scheduled to conduct business after the day on which the alleged offender was arrested or at the time of the appearance of the alleged offender pursuant to summons to determine whether the order should remain in effect, be modified, or be revoked. Thus, if the court issues the order ex parte, the statute explicitly requires the court to hold a hearing the following day.

16. Here, it is undisputed that the court did not hold a timely hearing as mandated by R.C. 2919.26(D)(2). If the Defendant does not receive a timely hearing as required by R.C. 2919.26(D)(2), the temporary protection order must be deemed ineffective. *State v. Finley*, 146 Ohio App.3d 548, at 549 (Ohio App. 1 Dist. 2001)(attached as Exhibit H); also see *State v. Franklin* (June 22, 2001), Hamilton App. No. C-000544 (attached as Exhibit I).

17. For all the above reasons, the Petitioner asserts that the temporary protection order issued by the Respondent is invalid because the Respondent did not issue the temporary protection order in accordance with Ohio law.

18. The Petitioner believes that Respondent abused its discretion in issuing the temporary protection order; therefore, the Petitioner respectfully requests this Court to grant the proposed relief.

Respectfully submitted,



MARK J. MILLER (0076300)

SHAW & MILLER

555 City Park Avenue

Columbus, OH 43215

Phone: (614) 227-0007

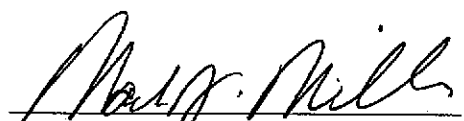
Fax: (614) 227-0001

Counsel for Petitioner,

Edward Payne

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Writ of Habeas Corpus were served upon the Respondent, Judge Carrie Glaeden, Franklin County Municipal Court, 375 South High Street, Courtroom 13A, Columbus, Ohio 43215, via hand-delivery and Mr. James Mantel, Prosecuting Attorney, via facsimile, on this the 18th day of October, 2007.



MARK J. MILLER (0076300)

VERIFICATION AND AFFIDAVIT

STATE OF OHIO

FRANKLIN COUNTY

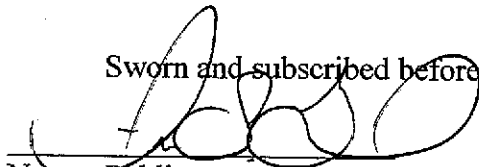
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S.S.

The above named Mark J. Miller, being duly sworn, says the facts stated and matters contained in the foregoing petition and application are true.


Mark J. Miller

Sworn and subscribed before me this 18th day of October, 2007.


Notary Public



AMANDA SUE BOEKE
Notary Public, State of Ohio
My Commission Expires 10-26-08

Order of Protection

Per ORC 2919.26 (G) (2), this order is indexed at:
Office of the Clerk of Court, Franklin County Municipal
Court, Columbus, Ohio

(614) 645-4604 or (614) 462-3548

STATE OF OHIO v.

EDWARD T. PAYNE

DEFENDANT

CASE NO. 07 / 19943

JUDGE GLAEDEN

☒ CRIMINAL TEMPORARY PROTECTION ORDER
(ORC 2919.26)
☐ CRIMINAL STALKING PROTECTION ORDER
(ORC 2903.213)

Time Stamp

PERSON (S) PROTECTED BY THIS ORDER:

ALLEGED VICTIM: BENTLEY, CINDY J. AGE: 27

ALLEGED VICTIM'S FAMILY OR HOUSEHOLD MEMBERS:

AGE: _____

AGE: _____

AGE: _____

ABOVE NAMED DEFENDANT IDENTIFIERS:

Address Where Above Named Defendant May be Found:

241 ELDON AVE
COLUMBUS, OH 43204

SEX <u>M</u>	RACE <u>W</u>	HT <u>6'0"</u>	WT <u>240</u>
EYES <u>BLUE</u>	HAIR <u>BLOND</u>	SSN _____	
DOB <u>10-27-74</u>		DRIVERS LIC NO AND EXP DATE _____	
VEHICLE LICENSE NO. _____		STATE _____	
DISTINGUISHING FEATURES _____			

BRADY - DISQUALIFIED (18 USC 922 (d) (8) requires all "yes" to disqualify subject from purchasing a handgun:

- Does the order protect an intimate partner or child? ☒ Yes ☐ No
- Did suspect/defendant have opportunity to participate in hearing regarding order? ☒ Yes ☐ No
- Does order find subject a credible threat or explicitly prohibit physical force? ☒ Yes ☐ No

IS DEFENDANT BRADY DISQUALIFIED? ☒ YES ☐ NO

COURT ORIGINATING AGENCY IDENTIFIER: OH 25343 J

☐ FIREARMS ACCESS - PROCEED WITH CAUTION

NOTE: THIS IS PAGE ONE OF A TWO-PAGE ORDER WHICH IS INCORPORATED BY REFERENCE
FORM 10.02-A CRIMINAL ORDER OF PROTECTION

(Violence Against Women Act 18 U.S.C.2265 Federal Full Faith & Credit Declaration: Registration of this form is not req
DEFENDANT COPY

Exhibit

A

This cause came to be heard on the motion of the State of Ohio pursuant to R.C. 2919.26 / R.C. 2903.213. The Court finds that the motion for a Temporary Protection Order is well taken. The Court finds that the safety and protection of the protected persons named in this order may be impaired by the continued presence of Defendant. Therefore, the following orders, which are designed to ensure the safety and protection of the protected persons named in this order, are issued to Defendant as pretrial conditions of release in addition to any bail set under Criminal Rule 46. All the following orders apply to the defendant including any orders that are specifically marked in any box below:

- DEFENDANT SHALL NOT ABUSE THE PROTECTED PERSONS NAMED IN THIS ORDER by harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, or forcing sexual relations upon them. [NCIC 01 and 02]
- DEFENDANT SHALL NOT ENTER the buildings, grounds, and parking lots of the residences, schools, businesses, and places of employment or day care centers of protected persons named in this order. [NCIC 04]
- DEFENDANT SHALL STAY AWAY FROM THE PROTECTED PERSONS NAMED IN THIS ORDER and shall not be within 500 feet or (distance) of protected persons, wherever protected persons may be found, or any place the Defendant knows or should know the protected persons are likely to be, even with protected persons' permission. If Defendant accidentally comes into contact with protected persons in any public or private place, Defendant must depart immediately. This order includes encounters on public and private roadways, highways and thoroughfares. [NCIC 04]
- DEFENDANT SHALL NOT INTERFERE with protected persons' right to occupy the residence through actions such as canceling utilities or insurance and interrupting phone service, mail delivery, or the delivery of any other documents or items. Defendant shall surrender all keys and garage door openers as follows: [NCIC 03]
- DEFENDANT SHALL NOT INITIATE OR HAVE ANY CONTACT WITH PROTECTED PERSONS NAMED IN THIS ORDER. This includes, but is not limited to, contact by telephone, fax, e-mail, voice mail, delivery service, writing or communications by any other means in person or through a person with their residences, schools, businesses, day care centers, baby sitters and places of employment. [NCIC 05]
- DEFENDANT SHALL NOT CAUSE OR ENCOURAGE ANY OTHER PERSON to do any act prohibited in Paragraphs 1 through 5 above.
- DEFENDANT IS ADVISED THAT VISITATION ORDERS DO NOT PERMIT DEFENDANT TO VIOLATE ANY OF THE TERMS OF THIS ORDER.
- DEFENDANT SHALL NOT POSSESS, USE, CARRY, OR OBTAIN ANY DEADLY WEAPON. [NCIC 07]
- DEFENDANT SHALL NOT REMOVE, HIDE, DISPOSE OF, DAMAGE OR INJURE ANY PETS owned or possessed by the protected persons named in this Order.
- DEFENDANT MAY PICK UP CLOTHING and personal items from the residence only in the company of a uniformed law enforcement officer within 7 days of the filing of this Order or the date of defendant's release on bond in connection with this charge, whichever is later, and between the hours of
- ☐ DEFENDANT SHALL NOT ILLEGALLY CONSUME, USE, OR POSSESS controlled substances or beverages containing alcohol.
- ☐ IT IS FURTHER ORDERED:

THIS ORDER REMAINS IN EFFECT: (1) until modified by this court; or (2) until the criminal proceedings arising out of the complaint upon which these orders were issued is disposed of by this court or by the common pleas court to which the defendant is bound over for prosecution; or (3) until the court issues a Civil Protection Order (CPO) arising out of the same activities as those that were the basis of the complaint filed in this action.

NOTICE TO DEFENDANT: THE PERSONS PROTECTED BY THIS ORDER CANNOT GIVE LEGAL PERMISSION TO CHANGE OR VIOLATE THIS ORDER. IF YOU CONTACT OR GO NEAR THE PROTECTED PERSONS, EVEN WITH THEIR PERMISSION, YOU MAY BE ARRESTED. ONLY THE COURT CAN CHANGE THIS ORDER. IF THERE IS ANY REASON WHY THIS ORDER SHOULD BE CHANGED, YOU MUST ASK THE COURT TO CHANGE IT. YOU ACT AT YOUR OWN RISK IF YOU DISREGARD THIS WARNING.

IT IS SO ORDERED.

DATE:

8/16/07

JUDGE

Certificate of Service

personally served a copy of the foregoing Order of Protection on the above named defendant in the 10th day of AUGUST, 2007

Signature of Person Making Service to Defendant

Agency/ Department/ Badge#

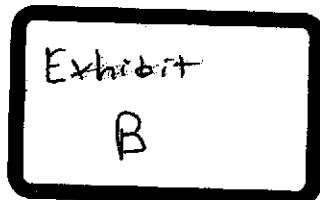
WARNING TO DEFENDANT: See the warning printed on the back of page 2 of this Order.

NOTE: THIS IS PAGE TWO OF A TWO PAGE ORDER WHICH IS INCORPORATED BY REFERENCE
FORM 10.02-A CRIMINAL ORDER OF PROTECTION

TPO Sept 2004

Violence Against Women Act 18 U.S.C. 2265 Federal Full Faith & Credit Declaration. Registration of this form is not required for enforcement.

DEFENDANT COPY



R.C. § 2919.26

CBaldwin's Ohio Revised Code Annotated Currentness

Title XXIX. Crimes--Procedure

Chapter 2919. Offenses Against The Family (Refs & Annos)

Domestic Violence

→ 2919.26 Temporary protection orders

(A)(1) Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.

(2) For purposes of section 2930.09 of the Revised Code, all stages of a proceeding arising out of a complaint alleging the commission of a violation, offense of violence, or sexually oriented offense described in division (A)(1) of this section, including all proceedings on a motion for a temporary protection order, are critical stages of the case, and a victim may be accompanied by a victim advocate or another person to provide support to the victim as provided in that section.

(B) The motion shall be prepared on a form that is provided by the clerk of the court, which form shall be substantially as follows:

"MOTION FOR TEMPORARY PROTECTION ORDER

..... Court

Name and address of court

State of Ohio

v. No.

.....

Name of Defendant

(name of person), moves the court to issue a temporary protection order containing terms designed to ensure the safety and protection of the complainant, alleged victim, and other family or household members, in relation to the named defendant, pursuant to its authority to issue such an order under section 2919.26 of the Revised Code.

A complaint, a copy of which has been attached to this motion, has been filed in this court charging the named defendant with (name of the specified violation, the offense of violence, or sexually oriented offense charged) in circumstances in which the victim was a family or household member in violation of (section of the Revised Code desig-

nating the specified violation, offense of violence, or sexually oriented offense charged), or charging the named defendant with a violation of a municipal ordinance that is substantially similar to (section of the Revised Code designating the specified violation, offense of violence, or sexually oriented offense charged) involving a family or household member.

I understand that I must appear before the court, at a time set by the court within twenty-four hours after the filing of this motion, for a hearing on the motion or that, if I am unable to appear because of hospitalization or a medical condition resulting from the offense alleged in the complaint, a person who can provide information about my need for a temporary protection order must appear before the court in lieu of my appearing in court. I understand that any temporary protection order granted pursuant to this motion is a pretrial condition of release and is effective only until the disposition of the criminal proceeding arising out of the attached complaint, or the issuance of a civil protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint, under section 3113.31 of the Revised Code.

.....

Signature of person

(or signature of the arresting officer who filed the motion on behalf of the alleged victim)

.....

Address of person (or office address of the arresting officer who filed the motion on behalf of the alleged victim)"

(C)(1) As soon as possible after the filing of a motion that requests the issuance of a temporary protection order, but not later than twenty-four hours after the filing of the motion, the court shall conduct a hearing to determine whether to issue the order. The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the person who requested the order is unable to appear and if the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint, another person who is able to provide the court with the information it requests may appear in lieu of the person who requested the order. If the court finds that the safety and protection of the complainant, alleged victim, or any other family or household member of the alleged victim may be impaired by the continued presence of the alleged offender, the court may issue a temporary protection order, as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant, alleged victim, or the family or household member, including a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant, alleged victim, or the family or household member.

(2)(a) If the court issues a temporary protection order that includes a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant, the alleged victim, or the family or household member, the order shall state clearly that the order cannot be waived or nullified by an invitation to the alleged offender from the complainant, alleged victim, or family or household member to enter the residence, school, business, or place of employment or by the alleged offender's entry into one of those places otherwise upon the consent of the complainant, alleged victim, or family or household member.

(b) Division (C)(2)(a) of this section does not limit any discretion of a court to determine that an alleged offender charged with a violation of section 2919.27 of the Revised Code, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a temporary protection order issued under this section, did not commit the violation or was not in contempt of court.

(D)(1) Upon the filing of a complaint that alleges a violation of section 2909.06, 2909.07, 2911.12, or 2911.211 of the Revised Code if the alleged victim of the violation was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the court, upon its own motion, may issue a temporary protection order as a pretrial condition of release if it finds that the safety and protection of the complainant, alleged victim, or other family or household member of the alleged offender may be impaired by the continued presence of the alleged offender.

(2) If the court issues a temporary protection order under this section as an ex parte order, it shall conduct, as soon as possible after the issuance of the order, a hearing in the presence of the alleged offender not later than the next day on which the court is scheduled to conduct business after the day on which the alleged offender was arrested or at the time of the appearance of the alleged offender pursuant to summons to determine whether the order should remain in effect, be modified, or be revoked. The hearing shall be conducted under the standards set forth in division (C) of this section.

(3) An order issued under this section shall contain only those terms authorized in orders issued under division (C) of this section.

(4) If a municipal court or a county court issues a temporary protection order under this section and if, subsequent to the issuance of the order, the alleged offender who is the subject of the order is bound over to the court of common pleas for prosecution of a felony arising out of the same activities as those that were the basis of the complaint upon which the order is based, notwithstanding the fact that the order was issued by a municipal court or county court, the order shall remain in effect, as though it were an order of the court of common pleas, while the charges against the alleged offender are pending in the court of common pleas, for the period of time described in division (E)(2) of this section, and the court of common pleas has exclusive jurisdiction to modify the order issued by the municipal court or county court. This division applies when the alleged offender is bound over to the court of common pleas as a result of the person waiving a preliminary hearing on the felony charge, as a result of the municipal court or county court having determined at a preliminary hearing that there is probable cause to believe that the felony has been committed and that the alleged offender committed it, as a result of the alleged offender having been indicted for the felony, or in any other manner.

(E) A temporary protection order that is issued as a pretrial condition of release under this section:

(1) Is in addition to, but shall not be construed as a part of, any bail set under Criminal Rule 46;

(2) Is effective only until the occurrence of either of the following:

(a) The disposition, by the court that issued the order or, in the circumstances described in division (D)(4) of this section, by the court of common pleas to which the alleged offender is bound over for prosecution, of the criminal proceeding arising out of the complaint upon which the order is based;

(b) The issuance of a protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint upon which the order is based, under section 3113.31 of the Revised Code;

(3) Shall not be construed as a finding that the alleged offender committed the alleged offense, and shall not be introduced as evidence of the commission of the offense at the trial of the alleged offender on the complaint upon which the order is based.

(F) A person who meets the criteria for bail under Criminal Rule 46 and who, if required to do so pursuant to that rule,

executes or posts bond or deposits cash or securities as bail, shall not be held in custody pending a hearing before the court on a motion requesting a temporary protection order.

(G)(1) A copy of any temporary protection order that is issued under this section shall be issued by the court to the complainant, to the alleged victim, to the person who requested the order, to the defendant, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the defendant on the same day that the order is entered. If a municipal court or a county court issues a temporary protection order under this section and if, subsequent to the issuance of the order, the defendant who is the subject of the order is bound over to the court of common pleas for prosecution as described in division (D)(4) of this section, the municipal court or county court shall direct that a copy of the order be delivered to the court of common pleas to which the defendant is bound over.

(2) All law enforcement agencies shall establish and maintain an index for the temporary protection orders delivered to the agencies pursuant to division (G)(1) of this section. With respect to each order delivered, each agency shall note on the index, the date and time of the receipt of the order by the agency.

(3) A complainant, alleged victim, or other person who obtains a temporary protection order under this section may provide notice of the issuance of the temporary protection order to the judicial and law enforcement officials in any county other than the county in which the order is issued by registering that order in the other county in accordance with division (N) of section 3113.31 of the Revised Code and filing a copy of the registered protection order with a law enforcement agency in the other county in accordance with that division.

(4) Any officer of a law enforcement agency shall enforce a temporary protection order issued by any court in this state in accordance with the provisions of the order, including removing the defendant from the premises, regardless of whether the order is registered in the county in which the officer's agency has jurisdiction as authorized by division (G)(3) of this section.

(H) Upon a violation of a temporary protection order, the court may issue another temporary protection order, as a pretrial condition of release, that modifies the terms of the order that was violated.

(I)(1) As used in divisions (I)(1) and (2) of this section, "defendant" means a person who is alleged in a complaint to have committed a violation, offense of violence, or sexually oriented offense of the type described in division (A) of this section.

(2) If a complaint is filed that alleges that a person committed a violation, offense of violence, or sexually oriented offense of the type described in division (A) of this section, the court may not issue a temporary protection order under this section that requires the complainant, the alleged victim, or another family or household member of the defendant to do or refrain from doing an act that the court may require the defendant to do or refrain from doing under a temporary protection order unless both of the following apply:

(a) The defendant has filed a separate complaint that alleges that the complainant, alleged victim, or other family or household member in question who would be required under the order to do or refrain from doing the act committed a violation or offense of violence of the type described in division (A) of this section.

(b) The court determines that both the complainant, alleged victim, or other family or household member in question who would be required under the order to do or refrain from doing the act and the defendant acted primarily as aggressors, that neither the complainant, alleged victim, or other family or household member in question who would be required under the order to do or refrain from doing the act nor the defendant acted primarily in self-defense, and, in accordance with the standards and criteria of this section as applied in relation to the separate complaint filed by the defendant, that

it should issue the order to require the complainant, alleged victim, or other family or household member in question to do or refrain from doing the act.

(J) Notwithstanding any provision of law to the contrary and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or a court of another state, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of a motion pursuant to this section, in connection with the filing, issuance, registration, or service of a protection order or consent agreement, or for obtaining a certified copy of a protection order or consent agreement.

(K) As used in this section:

(1) "Sexually oriented offense" has the same meaning as in section 2950.01 of the Revised Code.

(2) "Victim advocate" means a person who provides support and assistance for a victim of an offense during court proceedings.

(2006 S 260, eff. 1-2-07; 2006 S 17, eff. 8-3-06; 2006 H 95, eff. 8-3-06; 2003 S 50, eff. 1-8-04; 2002 H 548, eff. 3-31-03; 1999 H 137, eff. 3-10-00; 1997 S 98, eff. 3-17-98; 1997 S 1, eff. 10-21-97; 1994 H 335, eff. 12-9-94; 1992 H 536, eff. 11-5-92; 1990 S 3; 1984 H 587; 1980 H 920; 1978 H 835)

UNCODIFIED LAW

2006 S 17, § 5, eff. 8-3-06, reads:

If any provision of a section of the Revised Code as amended or enacted by this act or the application of the provision to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the section or related sections that can be given effect without the invalid provision or application, and to this end the provisions are severable.

HISTORICAL AND STATUTORY NOTES

Amendment Note: 2006 S 260 inserted "if the alleged victim of the offense was a family or household member at the time of the commission of the offense" between "offense" and ", the complainant" in division (A)(1); inserted ", or sexually oriented offense" between "violence" and "described" in division (A)(2); inserted "or sexually oriented offense" between "violence" and "charged" in three instances in the second paragraph of division (B); inserted "if the alleged victim of the offense was a family or household member at the time of the commission of the offense" between "offense" and ", the court" in division (D)(1); inserted ", or sexually oriented offense" between "violence" and "of the type" in divisions (I)(1) and (I)(2); and made other nonsubstantive changes.

Amendment Note: 2006 H 95 deleted "or" after "at the time of the violation" and inserted "or any sexually oriented offense," in the first sentence of division (A)(1); substituted "victim" for "offender" in the fourth sentence of division (C)(1); deleted "or" after "at the time of the violation," and inserted "or any sexually oriented offense," in the first sentence of division (D)(1); and rewrote division (K). Prior to amendment, division (K) read:

"(K) As used in this section, 'victim advocate' means a person who provides support and assistance for a victim of an offense during court proceedings."

Amendment Note: 2006 S 17 deleted "or" after "at the time of the violation" and inserted "or any sexually oriented offense," in the first sentence of division (A)(1); substituted "victim" for "offender" in the fourth sentence of division

(C)(1); deleted "or" after "at the time of the violation," and inserted "or any sexually oriented offense," in the first sentence of division (D)(1); and rewrote division (K). Prior to amendment, division (K) read:

"(K) As used in this section, 'victim advocate' means a person who provides support and assistance for a victim of an offense during court proceedings."

Amendment Note: 2003 S 50 rewrote divisions (A), (B), and (D)(1); and inserted "or offense of violence" three times in division (I). Prior to amendment, divisions (A), (B), and (D)(1) read:

"(A)(1) Upon the filing of a complaint that alleges a violation of section 2919.25 of the Revised Code, a violation of a municipal ordinance substantially similar to that section, a violation of section 2903.11, 2903.12, 2903.13, 2903.211, or 2911.211 of the Revised Code that involves a person who was a family or household member at the time of the violation, or a violation of a municipal ordinance that is substantially similar to section 2903.13, 2903.211, or 2911.211 of the Revised Code that involves a person who was a family or household member at the time of the violation, the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation under section 2935.03 of the Revised Code may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under Criminal Rule 46. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.

"(2) For purposes of section 2930.09 of the Revised Code, all stages of a proceeding arising out of a violation specified in division (A)(1) of this section, including all proceedings on a motion for a temporary protection order, are critical stages of the case, and a victim may be accompanied by a victim advocate or another person to provide support to the victim as provided in that section.

"(B) The motion shall be prepared on a form that is provided by the clerk of the court, which form shall be substantially as follows:

"MOTION FOR TEMPORARY PROTECTION ORDER

" _____ Court

"Name and address of court

"State of Ohio

" v.

No.

"

"Name of Defendant

"(name of person), moves the court to issue a temporary protection order containing terms designed to ensure the safety and protection of the complainant, alleged victim, and other family or household members, in relation to the named defendant, pursuant to its authority to issue such an order under section 2919.26 of the Revised Code.

"A complaint, a copy of which has been attached to this motion, has been filed in this court charging the named defendant with at least one of the following violations of section 2919.25 of the Revised Code that constitutes 'domestic violence' or a municipal ordinance that is substantially similar to that section: knowingly causing or attempting to cause physical harm to a family or household member; recklessly causing serious physical harm to a family or household member; or, by threat of force, knowingly causing a family or household member to believe that the named defendant would cause imminent physical harm to that family or household member; charging the named defendant with felonious assault,

R.C. § 2919.26

aggravated assault, or assault that involved a family or household member in violation of section 2903.11, 2903.12, or 2903.13 of the Revised Code; charging the named defendant with menacing by stalking or aggravated trespass that involves a family or household member in violation of section 2903.211 or 2911.211 of the Revised Code; or charging the named defendant with a violation of a municipal ordinance that is substantially similar to section 2903.13, 2903.211, or 2911.211 of the Revised Code that involves a family or household member.

"I understand that I must appear before the court, at a time set by the court within twenty-four hours after the filing of this motion, for a hearing on the motion or that, if I am unable to appear because of hospitalization or a medical condition resulting from the offense alleged in the complaint, a person who can provide information about my need for a temporary protection order must appear before the court in lieu of my appearing in court. I understand that any temporary protection order granted pursuant to this motion is a pretrial condition of release and is effective only until the disposition of the criminal proceeding arising out of the attached complaint, or the issuance of a civil protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint, under section 3113.31 of the Revised Code.

" _____

"Signature of person

"(or signature of the arresting officer who filed the motion on behalf of the alleged victim)

" _____

"Address of person (or office address of the arresting officer who filed the motion on behalf of the alleged victim)""

"(D)(1) Upon the filing of a complaint that alleges a violation of section 2919.25 of the Revised Code, a violation of a municipal ordinance that is substantially similar to that section, a violation of section 2903.11, 2903.12, 2903.13, 2903.211, or 2911.211 of the Revised Code that involves a person who was a family or household member at the time of the violation, or a violation of a municipal ordinance that is substantially similar to section 2903.13, 2903.211, or 2911.211 of the Revised Code that involves a person who was a family or household member at the time of the violation, the court, upon its own motion, may issue a temporary protection order as a pretrial condition of release if it finds that the safety and protection of the complainant, alleged victim, or other family or household member of the alleged offender may be impaired by the continued presence of the alleged offender."

Amendment Note: 2002 H 548 rewrote division (J), which prior thereto read:

"(J) Notwithstanding any provision of law to the contrary, no court shall charge a fee for the filing of a motion pursuant to this section."

Amendment Note: 1999 H 137 inserted ", the alleged victim, or a family or household member of an alleged victim", and substituted "the alleged victim" for "complainant" twice, in division (A)(1); substituted "victim" for "complainant" in division (A)(2); deleted "the complainant in the above-captioned case," before "moves the court", inserted ", alleged victim,", and substituted "Signature of person" for "Signature of complainant", "Address of person" for "Address of complainant", and "on behalf of the alleged victim" for "on behalf of the complainant" twice, in the form in division (B); inserted ", alleged victim," three times in division (C)(1), three times in division (C)(2)(a), and once in division (D)(1); inserted "to the alleged victim, to the person who requested the order," in division (G)(1); inserted ", alleged victim, or other person" in division (G)(3); inserted ", alleged victim," in division (I)(1), in the first paragraph in division (I)(2), in division (I)(2)(a), and three times in division (I)(2)(b); and made other nonsubstantive changes.

Amendment Note: 1997 S 98 substituted "section" for "division" in division (D)(3); added division (D)(4); rewrote division (E)(2); and added the third sentence in division (G)(1). Prior to amendment, division (E)(2) read:

"(2) Is effective only until the disposition of the criminal proceeding arising out of the complaint upon which it is based, or the issuance of a protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint under section 3113.31 of the Revised Code [.]"

Amendment Note: 1997 S 1 designated division (C)(1); added division (C)(2); and made changes to reflect gender neutral language.

Amendment Note: 1994 S 335 rewrote this section; see *Baldwin's Ohio Legislative Service*, 1994 Laws of Ohio, S 335, page 5-1342 for text of previous version.

CROSS REFERENCES

Anti-stalking protection order as pretrial condition of release, 2903.213

Bail, temporary protection order violations, 2937.23

Commitment of alcoholics and intoxicated persons, 2935.33

Competency of spouse to testify against spouse, 2945.42

Crime victims' rights pamphlet, 109.42

Definitions, 2923.124

Domestic dispute, information regarding relief available, 3113.31

Domestic violence arrest policies, protection orders, 2935.032

Mayor's courts, jurisdiction, 1905.01

Municipal court, jurisdiction, 1901.18, 1901.19

Peace officer training commission, certificate of training for peace officers, 109.77

Peace officer training commission, powers and duties, 109.73

Peace officer training programs, rulemaking powers, 109.744

Police department, general duties, 737.11

Temporary protection orders, jurisdiction of county court judges, 1907.18

Victims' rights pamphlet; publication and distribution, 109.42

LIBRARY REFERENCES

Breach of the Peace § 15.

Westlaw Topic No. 62.

C.J.S. Breach of the Peace §§ 14 to 19, 21 to 25.

C

State of Ohio v. Dawson.

Ohio App. 10 Dist., 1979.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin
County.

State of Ohio, Plaintiff-Appellee,

v.

Richard Dawson, Defendant-Appellant.

No. 79AP-565.

October 18, 1979.

MR. GREGORY S. LASHUTKA, City Attorney,
MR. RONALD J. O'BRIEN, City Prosecutor, MR.
DAVID E. TINGLEY, Assistant, 375 South High
Street, 7th Floor, Columbus, Ohio, For Plaintiff-
Appellee.

MR. DOMINIC J. CHIEFFO, 529 South Third
Street, Columbus, Ohio, For Defendant-Appellant.

DECISION

MCCORMAC, J.

*1 Appellee has moved the court to dismiss the appeal for lack of subject matter jurisdiction, contending that the appeal is not from a final order or judgment.

The state applied to the Franklin County Municipal Court for a temporary protection order against Richard Dawson on behalf of his wife, Judy Dawson. The application was pursuant to R. C. 2919.26.

After a cursory hearing, the court sustained the motion of the state for the temporary protection order and ordered defendant prohibited and restrained from visiting or approaching Judy Dawson or her place of residence and employment, without first obtaining the consent of the court to be in effect until the disposition of the criminal proceedings arising out of a complaint filed under Section 2919.25, Ohio Revised Code, or the issuance of a

protection order pursuant to Section 3113.31, Ohio Revised Code.

The court further ordered defendant to post \$200 cash bail with the clerk of courts.

The complaint referred to in the court's order is an allegation by Judy Dawson that Richard Dawson had committed the charge of domestic violence on June 5, 1979, by knowingly causing physical harm to Judy Dawson, his wife, by means of hitting her in the face with his fist and kicking her in the left leg causing bruises. The complaint shows that both Richard and Judy Dawson reside at the same address.

One of the effects of the trial court order is that Richard Dawson is restrained from visiting or approaching his own place of residence without consent of court.

R. C. 2919.26 permits a judge to issue a temporary protection order as a pretrial condition of release with respect to a charge of domestic violence in violation of R. C. 2919.25.

As a pretrial condition of release, the temporary protection order differs from a temporary order issued pursuant to R. C. 3113.31 or a peace bond order issued pursuant to R. C. 2933.02 to 2933.10, both of which may be considered issued in a special proceeding essentially civil in nature.

However, a temporary protection order differs from a pretrial condition of release pursuant to Crim. R. 46(C) restricting the accused's associations or place of abode during release only in purpose. A Crim. R. 46(C) condition is to assure the defendant's appearance at trial, and a R. C. 2919.26 temporary protection order is to secure the safety and protection of family members. The danger to the safety of others is recognized as a reason to deny immediate pretrial release by Crim. R. 46(D).

*2 R. C. 2919.26(E) expressly provides that a temporary protection order is "a pretrial condition of

release" in addition to bail under Civ. R. 46. Therefore, an order imposing a pretrial condition of release pursuant to R. C. 2919.26 should be considered on the same basis as an order imposing conditions for pretrial release pursuant to Crim. R. 46(C). An order establishing pretrial conditions of release in a criminal case is interlocutory and not a final appealable order. See State v. Bevacqua (1946), 147 Ohio St. 20. The result should not vary because the condition is a special one established by statute rather than by Crim. R. 46.

Since the temporary protection order is specifically designated as a pretrial condition of release, it can be challenged only in the same manner as other pretrial conditions of release in a criminal case.

Accordingly, the motion to dismiss is sustained and the appeal is dismissed for want of a final appealable order.

Motion sustained; appeal dismissed.

WHITESIDE and MOYER, JJ., concur.

Ohio App. 10 Dist., 1979.

State v. Dawson

Not Reported in N.E.2d, 1979 WL 209389 (Ohio App. 10 Dist.)

END OF DOCUMENT

1 APPEARANCES (continued):

2 SHAW AND MILLER,
3 555 City Park Avenue, Columbus, Ohio,
4 By: Andrew F. Selwa, Attorney at Law,

5 On behalf of the Defendant.
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21 - - -
22 Carolyn Scales,
23 Official Court Reporter.
24 - - -
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1 BE IT REMEMBERED THAT, on the 10th day of August,
2 2007, this cause came on for arraignment before the
3 Honorable Carrie Glaeden, Judge. And the parties appearing
4 in person and/or by counsel, as herein set forth, the
5 following proceedings were had:

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- - -

7 MR. LITTLE: State of Ohio versus Edward T. Payne,
8 2007 CRA 19944, accompanying misdemeanor.

9 THE COURT: All right. The misdemeanor, it's a
10 DV. Is Cindy Bentley here? Cindy Bentley? Deputies, can
11 we hold Mr. Payne? He's charged with a new slate DV.

12 (Break in the proceedings.)

13 MR. MANTEL: This is a 2007 CRB 019943, State of
14 Ohio, City of Gahanna, versus Edward T. Payne, charged with
15 domestic violence and assault, both misdemeanors of the
16 first degree. Your Honor, I just had the occasion to speak
17 with Cindy Bentley on the telephone. Apparently there was
18 some confusion. Ms. Bentley informs me that the police did
19 not tell her that she needed to be here today if she wished
20 to have a protection order; and she informed me that she
21 sure would like to have a protection order because she
22 doesn't believe that Mr. Payne's going to listen to you when
23 you tell him to stay away from her.

24 THE COURT: Well, the Court on its own motion can
25 grant a protection order if you happen to have an advocate

1 here who can fill out the paperwork or unless you have the
2 paperwork.

3 MR. MANTEL: I can get some of that, Your Honor,
4 and take care of that if you'll give me a moment, please.

5 THE COURT: I can give you a moment. However,
6 let's set bond first. But knowing that the Court will, on
7 its own accord, issue a protection order, any record or
8 order-in history on Mr. Payne who is charged with a felony
9 F3 abduction as well as the DV/assault with the prosecuting
10 witness being Cindy Bentley?

11 MR. LITTLE: Your Honor, there is a 2000
12 disorderly conduct out of a domestic violence, and there is
13 an aggravated trespass in 2004.

14 THE COURT: All right. And did either of the
15 prosecutors know whether the DV amended to assault or the
16 aggravated trespass involved Ms. Bentley or Ms. Bentley's
17 property?

18 MR. MANTEL: Your Honor, I can convey to you what
19 happened. Apparently Mr. Payne took Ms. Bentley to a
20 residence where Ms. Bentley indicated to the officer that
21 she wanted to go in and not come back out; that is, not
22 leave with Mr. Payne. Mr. Payne found out about that.

23 THE COURT: That would be in 2000. It was a DV
24 amended to a disorderly conduct. I was wondering whether or
25 not that was the same PW.

1 MR. LITTLE: And then he has an '06 aggravated
2 trespass. Wasn't sure if that was her property.

3 MR. MANTEL: That young man has more information
4 than I do. I don't have any other one of these.

5 MR. LITTLE: Your Honor, I don't know.

6 THE COURT: Is there anything you'd like to tell
7 me about your client with regard to bond?

8 MR. SELWA: Andrew Selwa on behalf of Mr. Payne,
9 0081800. To answer your question as far as from the
10 defendant here, he said that the prosecuting witness is not
11 the same as the prior -- prior issues, the 2000 and 2004.
12 He indicates that he only knows the victim for about a year
13 and a half.

14 In regards to bond, Mr. Payne is a 32-year-old
15 male, works at Primer Plastering. He owns his own home
16 since 2002, and the victim does not live with him.

17 THE COURT: Okay. On the abduction, that's
18 100,000 cash or surety. As a condition of bond, no acts of
19 violence or threats of violence against anyone and have
20 absolutely no contact with Cindy Bentley.

21 COUNTY PROSECUTOR'S REPRESENTATIVE: 8-17 at
22 9:30.

23 THE COURT: Thank you. And I believe that
24 concludes all the business with the felony folks, correct?

25 MR. LITTLE: Yes, Your Honor.

1 THE COURT: And then I will deal with setting the
2 bond on the misdemeanor as well as issuing the protection
3 order when the paperwork is ready.

4 MR. MANTEL: I'll complete that forthwith,
5 Your Honor. Thank you.

6 (Break in the proceedings)

7 THE COURT: Okay. Mr. Mantel, are we ready to
8 conclude with Edward Payne?

9 MR. MANTEL: Yes, your Honor.

10 THE COURT: If I could have the file and the
11 protection order that is related to, and I will sign off on
12 that.

13 Mr. Payne, I am now granting the protection order
14 against you covering Cindy Bentley. A violation of this
15 order in and of itself is a separate criminal offense. Do
16 you understand that?

17 THE DEFENDANT: Yes, ma'am, and I will not
18 violate it.

19 THE COURT: And also you are now Brady
20 disqualified, which means you cannot own, use, possess, or
21 purchase any firearms or ammunition. Do you understand
22 that?

23 THE DEFENDANT: Yes. Yes, no problem.

24 MR. MANTEL: May I ask the record reflect that
25 Mr. Payne's being served with his copy of the protection

1 order, your Honor?

2 THE COURT: The record will so reflect. And the
3 bond is set at 2,500 cash/surety or appearance.

4 MR. SELWA: Are we all set, Your Honor?

5 THE COURT: We're all set.

6 THE DEFENDANT: Thank you, very much.

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State v. Conkle

Ohio App. 5 Dist., 2003.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.Court of Appeals of Ohio, Fifth District, Knox
County.

STATE of Ohio, Plaintiff-Appellee,

v.

Deborah G. CONKLE, Defendant-Appellant.

No. 03CA8.

Decided May 9, 2003.

Defendant appealed decision of the Mount Vernon Municipal Court, No. 03 CRB 99, that issued a temporary protection order against her after she was charged with domestic violence. The Court of Appeals, Wise, J., held that trial court erred when it granted motion for temporary protection order.

Reversed.

West Headnotes

Breach of the Peace 62  2062 Breach of the Peace62k15 Security or Order to Keep Peace or Protect Family62k20 k. Application and Proceedings Thereon. Most Cited Cases

Trial court erred when it granted motion for temporary protection order, where victim who requested the protection order failed to appear at hearing on the motion as required by statute. R.C. § 2919.26(C)(1).

Criminal Appeal from the Mount Vernon Municipal Court, Case No. 03 CRB 99.

Heidi A. Mallory, Assistant Law Director, Vernon, OH, for plaintiff-appellee.

Noel B. Alden, Zerkowitz, Barry & Cullers, Mount Vernon, OH, for defendant-appellant.

WISE, J.

*1 {¶ 1} Appellant Deborah Conkle appeals the decision of the Mount Vernon Municipal Court that issued a temporary protection order against her after she was charged with domestic violence. The following facts give rise to this appeal.

{¶ 2} On the night of February 1, 2003, appellant returned to her residence where she lived with her boyfriend, Daniel Woodford, and three children. Appellant had not been home all day and arrived home intoxicated. Unbeknownst to Mr. Woodford, earlier in the evening, appellant had been involved in a traffic accident and had left the scene of the accident. According to Mr. Woodford, appellant was argumentative and violent upon her return to the residence. Mr. Woodford decided that he and the three children would leave the residence for their own safety. While the children were packing their belongings, appellant allegedly struck Mr. Woodford, in the back, and pushed him.

{¶ 3} During this dispute, troopers from the Ohio State Highway Patrol arrived, at appellant's residence, in response to the earlier accident. The troopers observed appellant push Mr. Woodford. One of the troopers called the Knox County Sheriff's Department in reference to a possible domestic violence altercation. In response to the call, Deputy Huffman arrived on the scene and conducted an investigation. Thereafter, the deputy arrested appellant for domestic violence and Mr. Woodford filed a motion for temporary protection order.

{¶ 4} Appellant appeared in court on February 4, 2003, for a hearing on the motion. Mr. Woodford was not present at this hearing. The prosecutor read the report and the deputy's narrative into the record. The prosecutor also read the victim's report into the record, over appellant's objection. The trial court granted Mr. Woodford's motion for temporary protection order.

{¶ 5} Appellant timely filed a notice of appeal and sets forth the following assignments of error for our consideration:

Exhibit
E

{¶ 6} "I. THE COURT GRANTED AN ORDER OF PROTECTION PURSUANT TO OHIO REVISED CODE 2919.25 BY MOTION OF THE ALLEGED VICTIM, WITHOUT THE ALLEGED VICTIM ATTENDING THE HEARING ON PROTECTIVE ORDER, IN VIOLATION OF OHIO REVISED CODE 2919.26(C)(1).

{¶ 7} "II. THE COURT GRANTED AN ORDER OF PROTECTION PURSUANT TO OHIO REVISED CODE 2919.25 AFTER NO EVIDENCE WAS PROPERLY ADMITTED."

{¶ 8} In her First Assignment of Error, appellant claims the trial court erred when it granted the motion for temporary protection order because the victim, Mr. Woodford, failed to appear at the hearing as required by R.C. 2919.26(C)(1). We agree.

{¶ 9} Appellant essentially argues, in this assignment of error, that because Mr. Woodford did not attend the hearing on the motion, as required by statute, the decision to grant the order of protection should be overturned. In support of this argument, appellant cites R.C. 2919.26(C)(1), which provides, in pertinent part:

*2 {¶ 10} "(C)(1) As soon as possible after the filing of a motion that requests the issuance of a temporary protection order, but not later than twenty-four hours after the filing of the motion, the court shall conduct a hearing to determine whether to issue the order. The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the person who requested the order is unable to appear and if the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint, another person who is able to provide the court with the information it requests may appear in lieu of the person who requested the order. * * *"

{¶ 11} Appellant also cites to a decision rendered by the First District Court of Appeals in State v. Franklin (June 22, 2001), Hamilton App. No. C-

000544. In *Franklin*, the court held that the defendant did not violate a temporary protection order because the order was invalid since the arresting officer, who had requested the temporary protection order, did not appear before the trial court for the required hearing, no other testimony was presented to the trial court, and the court did not conduct the required hearing. *Id.* at 7. Appellant argues, in the case sub judice, the victim did not appear for the hearing, as required by statute, and therefore, as in the *Franklin* case, the protection order is invalid.

{¶ 12} The state responds by indicating the trial court relied upon Mr. Woodford's written statement that he was the victim of domestic violence and appellant had threatened the safety of his children. The trial court also relied upon the officer's narrative and report of the incident. The state maintains such evidence is not hearsay because the investigative report was used to provide information only and no determination was made, during the hearing, as to the truth of Mr. Woodford's statement.

{¶ 13} Having reviewed the language of R.C. 2919.26(C)(1), we conclude Mr. Woodford was required to appear at the hearing on the motion for protection order. We reach this conclusion on the basis of the mandatory language which states that, " * * * [t]he person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion." In construing the language of the statutes in the Ohio Revised Code, the Ohio Supreme Court has consistently held that the term "shall" indicates a mandatory, as opposed to permissive or discretionary, obligation. See, e.g., Musisca v. Massillon Comm. Hosp., 69 Ohio St.3d 675, 676, 1994-Ohio-451 and cases cited therein.

{¶ 14} Thus, the obligation of the person who requested the protection order to appear at the hearing is mandatory unless, the person is unable to appear and the trial court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint. In that case, another person who is able to provide the court with the information it requests

may appear in lieu of the person who requested the protection order. There is no evidence, in the record, that Mr. Woodford was unable to attend the hearing due to injuries he sustained from the offense alleged in the complaint.

*3 {¶ 15} Appellant's First Assignment of Error is sustained.

{¶ 16} We will not address the merits of appellant's Second Assignment of Error as we find it moot based upon our disposition of appellant's First Assignment of Error.

{¶ 17} For the foregoing reasons, the judgment of the Mount Vernon Municipal Court, Knox County, Ohio, is hereby reversed.

WISE, J., HOFFMAN, P.J., and FARMER, J., concur.

Ohio App. 5 Dist., 2003.

State v. Conkle

Not Reported in N.E.2d, 2003 WL 21060822 (Ohio App. 5 Dist.), 2003 -Ohio- 2410

END OF DOCUMENT

IN THE FRANKLIN COUNTY MUNICIPAL COURT
COLUMBUS, OHIO

STATE OF OHIO,
PLAINTIFF

VS.

EDWARD T. PAYNE,
DEFENDANT

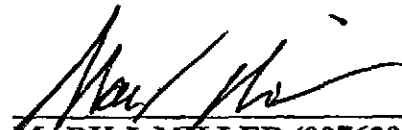
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~~Case No: 2007 CRA 019944~~
Case No: 2007 CRB 019943

JUDGE GLAEDEN

MOTION TO DISMISS CRIMINAL TEMPORARY PROTECTION ORDER

Now comes the Defendant, Edward T. Payne, by and through counsel and moves this Court to dismiss the criminal temporary protection order issued August 10, 2007.


MARK J. MILLER (0076300)
SHAW & MILLER
555 City Park Avenue
Columbus, Ohio 43215
Phone: (614) 227-0007
Fax: (614) 227-0001
Attorney for Defendant

MEMORANDUM IN SUPPORT

I. BACKGROUND

On August 10, 2007, the Defendant appeared at an arraignment hearing in the Franklin County Municipal Court. Cindy J. Bentley, the alleged victim, did not appear at the defendant's arraignment. Despite her failure to appear, the Court proceeded to issue the temporary protection order. No showing was made that Ms. Bentley was hospitalized.

Exhibit
F

II. LAW AND ARGUMENT

O.R.C. 2919.26(C)(1) states, in pertinent part,

The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the person who requested the order is unable to appear and if the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint, another person who is able to provide the court with the information it requests may appear in lieu of the person who requested the order.

O.R.C. 2919.26(C)(1) .

Here, the alleged victim did not appear at the hearing. In issuing the order without the person requesting the order present, the Court has violated Mr. Payne's right to due process of law, and has acted in violation of the Ohio Revised Code Section 2919.26(C)(1). Therefore, the protection order must be dismissed.

III. CONCLUSION

Based on the foregoing reasons the Defendant respectfully requests the court to dismiss the criminal temporary protection order issued August 10, 2007.



MARK J. MILLER (0076300)

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Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the Prosecuting Attorney, James K. Mantel, via fax, this 10th day of August, 2007.



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Attorney for Defendant

1 IN THE FRANKLIN COUNTY MUNICIPAL COURT

2 COLUMBUS, OHIO

3 CRIMINAL DIVISION

4 - - -

5 City of Gahanna, :

6 Plaintiff, :

7 -vs-

: Case No. 2007 CRB 19943

8 Edward T. Payne, :

9 Defendant. :

10 - - -

11 TRANSCRIPT OF PROCEEDINGS

12 - - -

13 HONORABLE CARRIE E. GLAEDEN,
14 Judge, presiding.

15 APPEARANCES:

16 RAYMOND J. MULARSKI, City Attorney,
107 W. Johnstown Road, Gahanna, Ohio,
17 By: James K. Mantel, Asst. City Prosecutor,

18 On behalf of the City.

19 SHAW & MILLER, Attorneys at Law,
555 City Park Avenue, Columbus, Ohio,
20 By: Mark J. Miller,

21 On behalf of the Defendant.

22 - - -

23 Tamra L. Henry,
24 Official Court Reporter.

25 - - -

Exhibit

6

1 BE IT REMEMBERED THAT, on the 20th day of August,
2 2007, this cause came on for motion hearing before the
3 Honorable Carrie E. Glaeden, Judge. And the parties
4 appearing in person and/or by counsel, as herein set forth,
5 the following proceedings were had:

6 - - -

7 THE COURT: All right. Is Mr. Payne and
8 Ms. Bentley here?

9 MR. MILLER: My client is here, yes.

10 THE COURT: Ms. Bentley is not?

11 MR. MILLER: Would you like her here?

12 THE COURT: She needs to be here. That's what we
13 talked about on Friday and you said both people were here.
14 And I said I couldn't do it on Friday. You hadn't even
15 notified the prosecutor about it. So I said we can do this
16 on Monday. When I saw Mr. Mantel, he said he saw you on
17 Friday, you mentioned nothing about it. And I had to call
18 the prosecutor and let him know you intended to do this. I
19 need to hear from Ms. Bentley too.

20 MR. MILLER: Okay.

21 THE COURT: So is she here or not here?

22 MR. MILLER: Yes, she is.

23 THE COURT: Sir, are you Mr. Payne?

24 THE DEFENDANT: Yes.

25 THE COURT: You can stand behind the table,

1 please -- or, actually, you can even have a seat, if you
2 like.

3 Are you Ms. Bentley?

4 PROSECUTING WITNESS: Yes, Your Honor.

5 THE COURT: Ms. Bentley, please have a seat right
6 there.

7 This matter comes before the Court upon defense
8 counsel, Mr. Mark Miller's, motion to dismiss the criminal
9 temporary protection order that the Court issued on
10 arraignment date. It was both the prosecutor and myself
11 that actually moved for or made the motion for the temporary
12 protection order and that was on August 10th. And,
13 Mr. Miller, would you like to expound upon our motion?

14 MR. MILLER: I would. Thank you.

15 At this time we are asking the Court to dismiss
16 the temporary protection order it issued on August 10th for
17 two main reasons. One of the reasons is, Judge, at the time
18 the Court did grant the order, as the Court already knows,
19 the alleged victim in the matter was not present. That is
20 undisputed in this case. Despite her absence, the Court
21 went ahead and ordered the TPO. After speaking with my
22 client on this issue and reviewing Ohio Revised Code 2919.26
23 (C)(1) and also the case of State V Conkle, 2003 Ohio 2410,
24 it's a Fifth District 2003 case, this Court has to dismiss
25 the protection order since the alleged victim wasn't

1 present.

2 Now, pursuant to the statute, Judge, 2919.26
3 (C)(1), that statute reads in part, "The person who
4 requested the order shall appear before the Court and
5 provide the Court with the information that it requests
6 concerning the basis of the motion. If the person who
7 requested the order is unable to appear, and if the Court
8 finds that the failure to appear is because of the person's
9 hospitalization or medical condition resulting from the
10 offense alleged in the complaint, any other person who is
11 able to provide the Court with the information it requests
12 may appear in lieu of the person who requested the order.

13 Also, following that language, in State V Conkle,
14 in that case the alleged victim did not show up at the
15 hearing. And in that case the trial court was reversed
16 because it went ahead and issued the TPO despite the fact
17 that the alleged victim did not appear. That case is
18 directly on point with this case we have here. That's our
19 main argument.

20 In the alternative, Judge, the alleged victim is
21 present today in the courtroom, Ms. Cindy Bentley. It's my
22 understanding that she is requesting the Court, in addition
23 to the reasons that we've already cited, that she wants it
24 removed. She is -- It's my understanding she is not in fear
25 of her safety and/or protection order. These two people

1 have lived together for over a year. And for those reasons,
2 we ask the Court to dismiss the TPO.

3 THE COURT: Okay. Mr. Mantel, is there any
4 response that you'd like to make on behalf of the State of
5 Ohio, the City of Gahanna?

6 MR. MANTEL: No direct response to Mr. Miller's
7 assertion that the orders underlie these circumstances. I
8 would, however, would like to hear Ms. Bentley state on the
9 record her request that this matter -- that this order be
10 removed. And I would like to address the Court after that,
11 if I may, please.

12 THE COURT: Okay. I believe you have brought a
13 detective with you.

14 Ma'am, do you have photo ID with you?

15 PROSECUTING WITNESS: No. I'm sorry, I don't.

16 THE COURT: Please stand. Raise your right hand.
17 (Witness sworn.)

18 All right. You may be seated. Could you please
19 state your name for the record.

20 PROSECUTING WITNESS: My name is Cindy Bentley.

21 THE COURT: And were you involved in an incident
22 that occurred on August 9th, 2007, that ended with Gahanna
23 Police becoming involved?

24 PROSECUTING WITNESS: Yes, Your Honor.

25 THE COURT: Okay. And can you state a little bit

1 about what happened?

2 PROSECUTING WITNESS: Are you asking me what
3 happened, the whole incident?

4 THE COURT: Sure.

5 MR. MANTEL: Your Honor, may I interrupt for just
6 a moment?

7 THE COURT: You may.

8 MR. MANTEL: And I have no idea --

9 THE COURT: Or, actually, go ahead and if you
10 would like to take over the questioning, was that your
11 request?

12 MR. MANTEL: Actually, I don't know what she's
13 going to say at this point, but she has made a written
14 statement and she has made statements to the police. I'm
15 thinking that there may be a problem here if she contradicts
16 any of those statements. At this point there may be a
17 problem with her judgment and the Court might want to take
18 that into consideration at this point.

19 THE COURT: Ma'am, are you in fear of your safety?

20 PROSECUTING WITNESS: No, Your Honor. And may I
21 say something?

22 THE COURT: You may.

23 PROSECUTING WITNESS: When I was asked to make the
24 police statement, there was a lady present, a police
25 officer. She asked me, because it was not to her

1 satisfaction, to rewrite that statement several times, so --

2 THE COURT: Okay.

3 PROSECUTING WITNESS: -- I felt pressured into
4 doing so.

5 THE COURT: Okay.

6 PROSECUTING WITNESS: And that's all.

7 THE COURT: Thank you. Are you aware that the
8 Court, upon it's own motion, meaning I took a look at the
9 case, listened to the facts that I heard in arraignment
10 court and at that time I determined that you needed to be
11 protected?

12 PROSECUTING WITNESS: Yes, Your Honor.

13 THE COURT: That I issued the protection order
14 upon my own motion?

15 PROSECUTING WITNESS: Okay, Your Honor.

16 THE COURT: Okay. And are you now requesting that
17 that protection order not be in place?

18 PROSECUTING WITNESS: Yes, Your Honor.

19 THE COURT: And may I ask you why?

20 PROSECUTING WITNESS: Because I've never been in
21 fear of my life. I don't feel like I'm in danger around
22 Edward Payne. I mean, I didn't even know that that was
23 being in the process. So, you know, I just don't feel --
24 You know, I don't feel it's necessary.

25 THE COURT: Okay. Ms. Bentley, let me ask you

1 this. What if he would have killed you?

2 PROSECUTING WITNESS: I didn't feel that I -- that
3 was not the issue. I don't feel like I was in threat of my
4 life.

5 THE COURT: Okay. And did you ever think that he
6 was going to throw you in the trunk of the car and take off
7 with you?

8 PROSECUTING WITNESS: No, Your Honor.

9 THE COURT: See, that's the thing. No one ever
10 knows when it's going to happen and how far it's going to
11 go.

12 PROSECUTING WITNESS: Right.

13 THE COURT: That's why, oftentimes, I think
14 victims are too close to the situation. And someone who is
15 not involved emotionally, like the Court, issues a
16 protection order.

17 PROSECUTING WITNESS: I understand.

18 THE COURT: Mr. Mantel, what would you like to
19 add?

20 MR. MANTEL: Your Honor, in light of Ms. Bentley's
21 statement, I would ask the Court permit me to read this
22 statement, which I find is curious. Ms. Bentley has
23 indicated that Sergeant Murphy, in fact, made her rewrite
24 this. But it is pretty explicit. It indicates that
25 Ms. Bentley -- "Went to drop off my daughter. Wanted to

1 stay. Boyfriend wouldn't let me, so wrestled and dragged me
2 towards the car. At the time, hit Robert and Cindy
3 Korbelt" -- who I might indicate Cindy Korbelt is Ms.
4 Bentley's mother and Mr. Robert Fuller, I believe, is Ms.
5 Korbelt's husband -- "tried to take off with me." Then in a
6 paren it indicates, "what started the whole thing was my
7 intention on staying there and it upset him a lot. I told
8 my mother, Cindy Korbelt, to go to car and tell him I was
9 staying. And then he came to door and grabbed my hand.
10 Wrestling in doorway. Came in. Pulled. Once out the door,
11 he was basically ripping me apart." Indicates -- it's
12 spelled caulking, but "choking me with my shirt."

13 Your Honor, I don't know how to put this. This is
14 the height of selfish, self-centered, irresponsible behavior
15 on this woman's part to show up here and say something like
16 that after writing this. This man not only assaulted her,
17 he assaulted two other people under these circumstances.

18 MR. MILLER: Objection. I mean --

19 THE COURT: It's just argument.

20 MR. MANTEL: The charges have been filed.

21 Your Honor, this is -- This is wrong. I will tell
22 the Court that I had the opportunity to speak with
23 Ms. Bentley twice on this particular day when the Court
24 issued this order. She misrepresented to me, not once, but
25 three times, where she would be found and how she could be

1 contacted. Told me once that she wanted the protection
2 order and then wavered on that and then hung up on me. What
3 I am suggesting to the Court is that the police, the
4 prosecutor's office and the Court are being used for an
5 improper purpose here. This is not a counseling service and
6 a relocation service. It's not an attempt to sort out the
7 train wreck of one's life by filing these charges and by
8 coming back and playing these games.

9 Your Honor, the Court will see fit to do what you
10 want with this protection order. I will also ask the Court
11 to note that I'm going to serve Ms. Bentley, personally,
12 with a subpoena for the next hearing which is in front of
13 this court on the 29th of this month.

14 THE COURT: Okay. Mr. Miller, you were not at the
15 arraignment; your associate was. I believe that there was a
16 prior conviction that Mr. Payne had and no one knew if it
17 involved Ms. Bentley. Am I recalling this correctly or
18 incorrectly? There, perhaps, was a violation of a
19 protection order. It's written in the felony file. And I
20 don't have the felony file in front of me.

21 ~~MR. MANTEL:~~ Your Honor, I show the record here
22 shows a domestic violence and assault from 1995 with one
23 Lisa Beach. It indicates that matter was dismissed.

24 There is a 2000 -- it says domestic -- Well, it's
25 an assault for Edward T. Payne. But this has a male name.

1 Some -- It looks like a Thai name. It's about eight
2 syllables long for a last name -- George. It was amended to
3 a disorderly conduct.

4 Your Honor, the Court does know that Mr. Payne is
5 on probation to you until November of this year for an OVI.

6 THE COURT: Correct. Okay.

7 In taking a look at the statute Mr. Miller read
8 from 2919.26 (C)(1), a portion of it. And the portion that
9 I would like to read is what immediately continues
10 thereafter. That says, "If the Court finds that the safety
11 and protection of the complainant, alleged victim, or any
12 other family or household member of the alleged victim may
13 be impaired by the continued presence of the alleged
14 offender, the Court may issue a temporary protection order,
15 as a pretrial condition of release, that contains terms
16 designed to ensure the safety and protection of the
17 complainant, alleged victim, or the family or household
18 member, including a requirement that the alleged offender
19 refrain from entering the residence, school, business, or
20 place of employment of the complainant, alleged victim, or
21 the family or household member."

22 The Court -- This Court is determining that the
23 portion that Mr. Miller read is separate and distinct from
24 the portion that I read. That also that the case of State
25 versus Conkle out of the Fifth District is not exactly right

1 on point. With all due respect to the Fifth District Court
2 of Appeals, in paragraph 14 they state that, "Thus the
3 obligation of the person who requested the protection order
4 to appear at the hearing is mandatory, unless the person is
5 unable to appear and the Court finds that the failure to
6 appear is because of the person's hospitalization or medical
7 condition resulting from the offense alleged in the
8 complaint."

9 I find that that case is different because in
10 this case I am the person who requested the protection
11 order. Ms. Bentley did not request the protection order.
12 And, therefore, I did not need to find that her failure to
13 appear was because of her hospitalization or medical
14 condition. Although, to be honest, I did not know at the
15 time what her medical status was because she was not here.

16 I find that I do have the authority, based upon
17 the portion of 2919.26 (C)(1) that I have read into the
18 record, to, on my own accord, issue a temporary protection
19 order as a pretrial condition of release. And, I, in fact,
20 have done that.

21 Now, Ms. Bentley, if I could talk to you for a
22 moment. Mr. Mantel, with all due respect to the prosecutor,
23 used some harsh words about being selfish and self-centered.
24 I find you to be a victim. Victims are oftentimes confused
25 at this time. They love the person. They never in their

1 wildest imagination dreamed something like this would ever
2 happen. My fear is that, with 25 percent of victims of
3 domestic violence, they never figured that the person would
4 kill them, but they end up dead and they don't get a second
5 chance. I don't know you. I don't know Mr. Payne. But I
6 am in fear for your safety. The actions that I have heard,
7 both at arraignment and what you're statement was to the
8 police, concern me, if they don't concern you. Let the
9 system work.

10 My protection order stands. You are not to go
11 around her. If you go around her, that in and of itself is
12 a separate criminal offense.

13 And, ma'am, I don't know whether or not you --
14 Ms. Bentley, I don't know whether or not you heard, but this
15 gentleman has a prior history of being arrested for domestic
16 violence. I believe Mr. Mantel -- wasn't once, but twice.
17 You may want to look into the person who you have fallen in
18 love with to determine if this is the right person for you.

19 So has the alleged victim, Ms. Bentley, been
20 served with her notice to come to court?

21 MR. MANTEL: Yes, Your Honor.

22 THE COURT: Ms. Bentley, you need to appear in
23 court. If you don't appear in court pursuant to this
24 personal service of a subpoena, you can be charged with
25 contempt.

1 PROSECUTING WITNESS: I understand, Your Honor. I
2 will be here.

3 THE COURT: Okay. Is there anything else from the
4 defense, Mr. Miller?

5 MR. MILLER: With all due respect, Your Honor,
6 while we respect the Court's decision, I will have to speak
7 with my client about going to the Court of Appeals.

8 THE COURT: That's absolutely your right and I
9 welcome appeals.

10 MR. MILLER: I would like to add though, for the
11 record, there was no evidence at all presented at the
12 hearing to demonstrate that the alleged victim was absent
13 due to being in the hospital or a medical condition due to
14 this alleged offense.

15 THE COURT: And I agree. And I think that would
16 have been necessary if she was the one who made the motion
17 for the temporary protection order like the Conkle case says
18 and what I believe the first half of 2919.26 (C)(1) says. I
19 am determining that in between, "person who requested the
20 order" period, and where it starts, "The Court finds"
21 totally separate.

22 MR. MILLER: I understand the Court's position.
23 Just one other thing, Judge, and I'll be done.

24 THE COURT: Absolutely.

25 MR. MILLER: I understand the Court made the

1 motion for the TPO?

2 THE COURT: Correct.

3 MR. MILLER: However, 2919.26 (A)(1) specifically
4 states that only the alleged victim, a family household
5 member of an alleged victim or if an emergency exists and
6 the alleged victim is unable to file the motion, a person
7 who made an arrest for the alleged violation may file, and
8 certainly a judge is not listed in that particular section.

9 THE COURT: Okay. And with all due respect and,
10 again, the Court of Appeals may be the ones to decide this
11 in the Fifth District, but I'm finding that C(1) is separate
12 from A(1) and that I'm making the finding that Ms. Bentley's
13 safety and protection is impaired by the continued presence
14 of the alleged offender. And I'm exercising my option that
15 I may issue a temporary protection order as a pretrial
16 condition of release that contains terms to -- designed to
17 ensure her safety and her protection.

18 MR. MILLER: Thank you, Judge.

19 THE COURT: Thank you.

20 - - -

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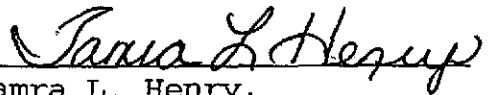
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C-E-R-T-I-F-I-C-A-T-E

I do hereby certify that the foregoing is a true, correct, and complete written transcript of the proceedings in this matter, taken by me on the 20th day of August, 2007, and transcribed from my stenographic notes.


Tamra L. Henry,
Official Court Reporter.

- - -



State v. Finley
Ohio App. 1 Dist., 2001.

Court of Appeals of Ohio, First District, Hamilton
County.

The STATE of Ohio, Appellant,

v.

FINLEY, Appellee. FN*

FN* Reporter's Note: The court sua sponte removed this case from the accelerated calendar.

No. C-000843.

Decided Oct. 19, 2001.

Defendant was charged with violating temporary protection order. The Municipal Court, Hamilton County, granted defendant's motion to dismiss charge, and state appealed. The Court of Appeals, Raymond E. Shannon, J., sitting by assignment, held that defendant never received statutorily required hearing on temporary protection order issued by trial court as condition of pretrial release in prior prosecution for domestic violence, and thus, no rational trier of fact could have concluded that defendant recklessly violated order issued pursuant to that statute.

Affirmed.

West Headnotes

Breach of the Peace 62 ↩ 15.1

62 Breach of the Peace

62k15 Security or Order to Keep Peace or Protect Family

62k15.1 k. In General. Most Cited Cases

Defendant never received statutorily required hearing on temporary protection order issued by trial court as condition of pretrial release in prior prosecution for domestic violence, and thus, no rational trier of fact could have concluded that defendant recklessly violated order issued pursuant to that statute. R.C. §§ 2919.26(C), (D)(1), 2919.27(A)(1).

****303*548** Fay D. Dupuis, City Solicitor, Terrence R. Cosgrove, City Prosecutor, and Jennifer K. Deering, Assistant City Prosecutor, for appellant. Robert Gutzwiller, Cincinnati, for appellee. RAYMOND E. SHANNON, Judge.

{¶ 1} Defendant-appellee, Ardeth Finley, was arrested and charged with violating a temporary protection order pursuant to R.C. 2919.27. The order had *549 been granted without a hearing as a condition of pretrial release in a previous criminal prosecution against Finley for domestic violence. The trial court granted Finley's motion to dismiss the charge. It held that the temporary protection order was ineffective because the state had failed to establish that it was issued in compliance with the due-process requirements of R.C. 2919.26.

{¶ 2} In its sole assignment of error, plaintiff-appellant, the state of Ohio, contends that the trial court erred in granting Finley's motion to dismiss. It argues that a defendant may not voluntarily disregard a court order unless a court has held that the order is invalid, relying on a case from another appellate district, Reynoldsburg v. Eichenberger (Apr. 18, 1990), Licking App. No. CA3492, 1990 WL 52467. But this court has specifically rejected the reasoning set forth in that case.

{¶ 3} R.C. 2919.27(A)(1) provides that no person shall recklessly violate the terms of a protection order issued pursuant to R.C. 2919.26. We stated in State v. Franklin (June 22, 2001), Hamilton App. No. C-000544, 2001 WL 698107, that, absent a timely hearing, a protection order is invalid because it is not issued in compliance with R.C. 2919.26. Therefore, we held in that case that no rational trier of fact could have concluded that the defendant had recklessly violated a valid protection order.

{¶ 4} The state argues that the protection order in this case was not issued pursuant to a motion by the victim or the arresting officer and therefore did not invoke the procedural protections of R.C. 2919.26(C). Instead, it was issued pursuant to R.C. 2919.26(D)(1), which grants a court the authority to

issue a protection order sua sponte as a pretrial condition of release. R.C. 2919.26(D) does allow the sua sponte issuance of a protection order under those circumstances. See State ex rel. Mormile v. Garfield Hts. Mun. Court (1992), 79 Ohio App.3d 539, 607 N.E.2d 890. It then goes on to state, however, that if the court issues the order ex parte, it shall conduct a hearing in the presence of the alleged offender within a certain amount of time and that the hearing shall be conducted under the standards set forth under R.C. 2919.26(C). **304R.C. 2919.26(D)(2). See, also, Lindsay v. Jackson (Sept. 8, 2000), Hamilton App. No. C-990786, 2000 WL 1268810.

{¶ 5} In this case, Finley never received a hearing as required by R.C. 2919.26(D), and the temporary protection order was therefore ineffective. Consequently, no rational trier of fact could have concluded that he had recklessly violated a protection order issued pursuant to that statute, and the trial court did not err in granting Finley's motion to dismiss the charge. Accordingly, we overrule the state's assignment of error and affirm the trial court's judgment.

Judgment affirmed.

GORMAN, P.J., and PAINTER J., concur.

*550 RAYMOND E. SHANNON, J., retired, of the First Appellate District, sitting by assignment.

Ohio App. 1 Dist., 2001.

State v. Finley

146 Ohio App.3d 548, 767 N.E.2d 302, 2001 - Ohio- 4347

END OF DOCUMENT



State v. Franklin

Ohio App. 1 Dist., 2001.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, First District, Hamilton
County.

STATE of Ohio, Plaintiff-Appellee,

v.

Deon FRANKLIN, Defendant-Appellant.

No. C-000544.

June 22, 2001.

Criminal Appeal from Hamilton County Municipal
Court. Judgment Appealed from is Reversed and
Appellant Discharged.

Fay Dupuis, Cincinnati Solicitor, Terrence R. Cosgrove,
City Prosecutor, and Martin P. McConnell,
Assistant City Solicitor, for plaintiff-appellee.
Timothy A. Smith, for defendant-appellant.

OPINION.

GORMAN.

*1 We have *sua sponte* removed this cause from the
accelerated calendar.

Defendant-appellant Deon Franklin appeals from
his conviction in a bench trial for violating a temporary
protective order (TPO), in violation of R.C.
2919.27. Because it is undisputed that the state
failed to prove that the protective order was issued
pursuant to R.C. 2919.26-an essential element of
the charged offense-Franklin's first assignment of
error is sustained and his conviction must be reversed.

On May 5, 2000, two Cincinnati police officers, in
response to a 911 call, went to the apartment of
Melissa Christman to investigate possible domestic
violence. After knocking repeatedly at the apartment
door, the officers were finally admitted by the
building superintendent. They found Christman and

Franklin sitting together on a couch. They claimed
that they did not hear the knocking because they
had been showering together. Although Christman
denied that Franklin had done anything wrong,
Franklin was arrested and removed to a patrol car.
While he was in the car, the officers learned that
Franklin was the subject of a TPO that called for
him to stay away from Christman's apartment. They
charged him with domestic violence and with violating
the protective order. Christman was arrested for
obstructing official business.

The TPO had been issued in response to a motion
filed on March 26, 2000, in conjunction with a
complaint for domestic violence in the case
numbered 00CRB-11396. Christman had not requested
the TPO. Rather, it had resulted from the motion
of the arresting Cincinnati police officer. On the
face of the motion, pursuant to R.C.
2919.26, the arresting officer stated, "I understand
that I must appear before the Court * * * within
twenty-four (24) hours after the filing of this motion,
for a hearing on the motion * * *."

In the portions relevant to this case, R.C.
2919.26(C)(1) permits either the arresting officer or
the victim to obtain a temporary protective order
under the following procedure:

As soon as possible after the filing of a motion that
requests the issuance of a temporary protection order,
but not later than twenty-four hours after the filing
of the motion, the court *shall* conduct a hearing to
determine whether to issue the order. The person who
requested the order *shall* appear before the court and
provide the court with the information that it requests
concerning the basis of the motion.

(Emphasis added.)

The transcript of the proceedings had on March 27
in the case numbered 00CRB-11396, stipulated to by
the parties in this case, was admitted as a defense
exhibit at trial. It reflects not only that the
arresting officer did not appear, but that no testimony
was adduced and no hearing was held. The tran-

script consists of only a portion of one page. The state's exhibits show that Franklin was ultimately acquitted in the March 2000 case.

In the case *sub judice*, after Christman and the arresting police officers had testified, the trial court granted Franklin's motion for a judgment of acquittal on the domestic-violence charge. Franklin then testified, stating, *inter alia*, that there had been no hearing on the TPO. Following a continuance to obtain the transcript for the proceedings that had given rise to the TPO, the trial court found Franklin guilty of violating the protective order and fined him \$250 plus costs.

*2 In his first assignment of error, Franklin challenges the sufficiency of the evidence adduced to establish that he had violated a valid protective order "issued * * * pursuant to section 2919.26 * * *," arguing that no hearing was held on the motion for the protective order within twenty-four hours, as required by R.C. 2919.26(C)(1). See R.C. 2919.27.

The United States Constitution prohibits the criminal conviction of any person except upon proof sufficient to convince the trier of fact of guilt beyond a reasonable doubt. In re Winship (1970), 397 U.S. 358, 90 S.Ct. 1068. As the Ohio Supreme Court has explained in State v. Thompson (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541, 546, "sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law."

To reverse a conviction for insufficient evidence, a reviewing court must be persuaded, after viewing the evidence in a light most favorable to the prosecution, that no rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. See State v. Waddy (1991), 63 Ohio St.3d 424, 430, 588 N.E.2d 819, 825, *certiorari denied* (1992), 506 U.S. 921, 113 S.Ct. 338; see, also, Jackson v. Virginia (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. The elements of the crime in this case are set forth in R.C. 2919.27, which provides that no person shall recklessly violate the terms of a protective order issued pursuant to R.C. 2919.26.

The state does not address Franklin's argument directly. Relying upon the Fifth Appellate District's decision in Reynoldsburg v. Eichenberger (Apr. 18, 1990), Licking App. No. CA 3492, unreported, the state instead contends that Franklin "cannot prevail after he deliberately disobeyed this order, even if [this court] subsequently finds it to be invalid." We disagree. Eichenberger is distinguishable, as an evidentiary hearing was held in that case prior to the issuance of the TPO against a licensed attorney. Here, there was no evidentiary hearing to determine if a protective order was necessary to safeguard Christman from Franklin.^{FN1}

^{FN1} The case *sub judice* is also distinguishable from the situation where, after reviewing the facts presented in the preliminary proceedings, a trial court *sua sponte* issues a protective order.

We hold that, absent a timely hearing prior to the issuance of a TPO, the protective order is invalid, as it has not been issued pursuant to R.C. 2919.26. Therefore, no rational trier of fact could have concluded in this case that Franklin had recklessly violated a valid TPO. See R.C. 2919.27; see, also, State v. Waddy. Accordingly, the first assignment of error is sustained.

The resolution of Franklin's first assignment of error has rendered the second and third assignments of error moot. See App.R. 12(A)(1)(c).

Therefore, the judgment of the trial court is reversed and Franklin is discharged from further prosecution in this case.

Judgment reversed and appellant discharged.

Please Note:

The court has placed of record its own entry in this case on the date of the release of this Opinion.

SUNDERMANN and SHANNON,^{FN*} JJ., concur.

^{FN*} Raymond E. Shannon, retired, from the First Appellate District, sitting by assignment.

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