[Cite as *State v. Hypes*, 2017-Ohio-7936.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 27485
	:	
v.	:	T.C. NO. 16-CRB-2426
	:	
KEITH C. HYPES	:	(Criminal Appeal from
	:	Municipal Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 29th day of September, 2017.

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DONOVAN, J.

{¶ 1} Defendant-appellant Keith C. Hypes appeals his conviction and sentence for one count of Housing/Zoning, in violation of R.C.G.O. 93.05(B), a misdemeanor of the third degree. Hypes filed a timely notice of appeal with this Court on February 28, 2017.

{¶ 2} City of Dayton Housing Inspector Michael Weinkauf testified that on June 11,

2013, he issued a notice of violations and order for compliance to Hypes regarding a residence he owns located at 208 Floral Avenue in Dayton, Ohio. In the order, Weinkauf noted several housing violations including damage to the gutters, damage to one of the exterior doors, and paint peeling from the exterior of the house. There is also a notation on the first page of the legal order that Weinkauf personally served Hypes with the document. On June 14, 2013, Weinkauf also posted a copy of the order on the front door of Hypes' residence on Floral Avenue. We note that Hypes' residence is located in a historical landmark district requiring that residents obtain specific permits from the City of Dayton before making repairs.

{¶ 3} After being served with the order, Hypes contacted the Department of Building Services and requested a meeting with the housing inspector in order to discuss his case. At the meeting held in July of 2013, Hypes provided documentation regarding his personal health and finances. As a result of the meeting, the housing inspector gave Hypes an extension of time in which to complete the necessary repairs to his house.

{¶ 4} Thereafter, on November 10, 2015, Weinkauf went back to Hypes' residence at 208 Floral Avenue in order to assess what repairs had been completed on the house. Once there, Weinkauf observed that the repairs to the gutters had not been completed and the house still needed to be painted. Based upon his failure to complete the repairs to the house, the City of Dayton filed a complaint against Hypes on May 9, 2016, for violation of R.C.G.O. 93.05(B). At his arraignment on June 1, 2016, Hypes pled not guilty to the charged offense.

{¶ 5} After several continuances, a bench trial was held on January 18, 2017. The trial court found Hypes guilty of violating R.C.G.O. 93.05(B). On February 22, 2017, the

trial court sentenced Hypes to sixty days in jail, suspended, and basic supervised probation for eighteen months. The trial court also ordered Hypes to pay a fine of $250.00 and court costs of $111.00. The trial court suspended the fine of $250.00. Hypes filed a motion to stay imposition of the sentence pending the outcome of his appeal. Hypes' motion to stay was denied.

{¶ 6} It is from this judgment that Hypes now appeals.

{¶ 7} Initially, we note that in his reply brief, Hypes points out that the State did not respond to our show cause order issued on June 30, 2017, regarding its failure to file its appellee's brief within the time allotted by App.R. 18(C). While it did not respond to our show cause order, the State filed its responsive brief on July 14, 2017. As a result, in deciding the appeal, we "may accept the appellant's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action." App.R. 18(C); *In re D.D.J.*, 2d Dist. Montgomery No. 27256, 2017-Ohio-4202, ¶ 2.

{¶ 8} Hypes' first assignment of error is as follows:

{¶ 9} "THE TRIAL COURT ERRED IN OVERRULING DEFENDANT-APPELLANT'S CRIMINAL RULE 29(A) MOTION AND FINDING DEFENDANT-APPELLANT GUILTY OF FAILURE TO COMPLY WITH A LEGAL ORDER AS THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AS A MATTER OF LAW."

{¶ 10} In his first assignment, Hypes contends that the trial court erred when it overruled his Crim.R. 29 motion for acquittal because the City adduced insufficient evidence to convict him of violating R.C.G.O. 93.05(B). Specifically, Hypes argues that

the City failed to adduce any evidence "regarding the service of the legal order as required for conviction by [R.C.G.O.] 93.05(B)."

{¶ 11} Crim. R. 29(A) states that a court shall order an entry of judgment of acquittal if the evidence is insufficient to sustain a conviction for the charged offense. "Reviewing the denial of a Crim. R. 29 motion therefore requires an appellate court to use the same standard as is used to review a sufficiency of the evidence claim." *State v. Witcher,* 6th Dist. Lucas No. L–06–1039, 2007-Ohio-3960. "In reviewing a claim of insufficient evidence, '[t]he relevant inquiry is whether, after reviewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " (Citations omitted). *State v. Crowley,* 2d Dist. Clark No. 2007 CA 99, 2008-Ohio-4636, ¶ 12.

{¶ 12} R.C.G.O. 93.05 states in pertinent part:

Sec. *93.05*. - Notice of violations.

(A) Whenever the housing inspector determines that there has been a violation of any provision of this chapter, except violations of § 93.04, violations of §§ 93.60 through 93.69, and except where a housing violation citation tag has been issued pursuant to § 93.051, he shall give notice of such violation to the person responsible therefor and order compliance with this chapter as hereinafter provided. Such notice and order shall:

(1) Be put in writing on an appropriate form;

(2) Include a list of violations, refer to the section or sections of this chapter violated and order remedial action which, if taken, will effect compliance with the provisions of this chapter;

(3) Specify a reasonable time for performance;

(4) Advise the owner, operator, or occupant of the procedure for appeal, except emergency orders issued pursuant to § 93.09.

(5) *Be served on the owner, occupant, or agent in person*. However, this notice and order shall be deemed to be properly served upon the owner, occupant, or agent if a copy thereof is sent by registered or certified mail to his last known mailing address, residence, or place of business, and a copy is posted in a conspicuous place in or on the dwelling affected. ***

(Emphasis added).

{¶ 13} In the instant case, the record establishes that Weinkauf personally served Hypes a copy of the legal order pursuant to R.C.G.O. 93.05(A)(5). As previously noted, there is a notation on the first page of the legal order that Weinkauf personally served Hypes with the document. State's Ex. 3. We further note that Weinkauf testified that he "issued" the legal order to Hypes at his residence on June 11, 2013. Additionally, there is another notation on the first page of the legal order establishing that Weinkauf posted a copy of the legal order on the front door of Hypes' residence June 14, 2013. *Id*. Viewed in a light most favorable to the prosecution, we find that the State adduced sufficient evidence to establish that Hypes received notice of the legal order pursuant to R.C.G.O. 93.05(A). Therefore, the trial court did not err when it overruled Hypes' Crim.R. 29(A) motion for acquittal.

{¶ 14} Hypes' first assignment of error is overruled.

{¶ 15} Hypes' second assignment of error is as follows:

{¶ 16} "THE TRIAL COURT ERRED TO DEFENDANT-APPELLANT'S

PREJUDICE WHEN IT CONSTRUED DAYTON MUNICIPAL CODE 93.05(B) AS CRIMINALIZING A VOLUNTARY ACT AND FAILING TO DETERMINE WHETHER DEFENDANT-APPELLANT WAS CAPABLE OF COMPLYING WITH THE LEGAL ORDER."

{¶ 17} In his second assignment, Hypes contends that the trial court erred when it interpreted R.C.G.O. 93.05(B) "as criminalizing a voluntary act instead of an omission and [by] failing to consider Mr. Hypes' financial difficulties in complying with the order." On appeal, Hypes argues that R.C.G.O. 93.05(B) criminalizes an "omission" to act. Therefore, Hypes argues that he could only be found guilty of the offense if he was capable of completing the repairs to his home required by the legal order pursuant to R.C.G.O. 130.07(A), which states as follows:

> **Requirements for criminal liability.**
>
> (A) Except as provided in subsection (B) of this section, a person is not guilty of an offense unless both of the following apply:
>
> (1) His liability is based on conduct which includes either a voluntary act, or an omission to perform an act or duty which he is capable of performing;
>
> (2) He has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

{¶ 18} Based upon the language in R.C.G.O. 130.07(A), Hypes argues that R.C.G.O. 93.05(B) criminalizes an "omission" to act, and the State therefore had to prove that Hypes was capable of performing the repairs, physically or financially, in order to satisfy the legal order.

{¶ 19} However, R.C.G.O. 93.05(B) is a strict liability offense, as codified in

R.C.G.O. 93.99(A), which states as follows:

> **Penalty.**
>
> (A) Any person who violates §§ 93.03 *through 93.05*, 93.06 through 93.45(A), 93.47(D) through 93.52, and 93.60 through 93.69, *or who fails to comply with any of the requirements contained therein, is guilty of a misdemeanor of the third degree*, punishable as provided by § 130.99. *No culpable mental state is required to commit an offense; it being the express intent of this section to impose strict criminal liability for each offense*. Each day a violation continues is a separate offense.

(Emphasis added).

{¶ 20} R.C.G.O. 93.05(B) being classified as a strict liability offense, R.C.G.O. 130.07(A) does not apply to the instant case. Rather, R.C.G.O. 130.07(B) is applicable, which states as follows:

> (B) When the section defining an offense does not specify any degree of culpability, and *plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, culpability is not required for a person to be guilty of the offense*. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(Emphasis added).

{¶ 21} Therefore, whether Hypes acted voluntarily or by omission when he failed to complete the repairs listed in the legal order is altogether irrelevant for the purposes of our analysis. The State was not required to prove that Hypes was capable of completing

the repairs to his home pursuant to the legal order. The State only had to prove that Hypes did not complete the repairs to his home in order to satisfy the elements of R.C.G.O. 93.05(B), which it did.

{¶ 22} Hypes' second assignment of error is overruled.

{¶ 23} Hypes' third and final assignment of error is as follows:

{¶ 24} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT DID NOT CONSIDER DEFENDANT-APPELLANT'S AFFIRMATIVE DEFENSE OF IMPOSSIBILITY."

{¶ 25} In his final assignment, Hypes argues that the trial court failed to consider his affirmative defense of impossibility before finding him guilty of violating R.C.G.O. 93.05(B).

{¶ 26} "[W]hile a strict-liability offense does not require proof of intent or culpable mental state, a strict-liability offense may still be subject to affirmative defenses." *State v. Williams*, 189 Ohio App.3d 111, 2010-Ohio-3334, 937 N.E.2d 624. ¶ 27 (2d Dist.). A person may raise the defense of impossibility of performance or compliance; however, it is incumbent upon the party seeking to raise this defense to prove the defense by a preponderance of the evidence. *Dayton v. Smith*, 2d Dist. Montgomery Nos. 21167, 21168, 21169, 2006-Ohio-4928, ¶ 11. The defense of impossibility generally arises in contempt proceedings, where it implies that the completion of a task is beyond or outside of one's control. *State v. Rader*, 2d Dist. Montgomery No. 25660, 2013-Ohio-4822, ¶ 19. "Impossibility of performance is not a valid defense where [a party] created the impossibility by his own actions." *Id*. citing *Ruben v. Ruben,* 10th Dist. Franklin No. 12AP–717, 2013–Ohio–3924, ¶ 32.

{¶ 27} In the instant case, Hypes testified that it was impossible for him to complete the repairs to his house because he lacked the necessary finances to hire someone to paint the house.[1] Specifically, Hypes testified that, as of 2015, he was unemployed, he was no longer receiving unemployment compensation, and his only income came from refereeing youth sporting events which averaged between $8,000.00 and $12,000.00. Thus, Hypes maintained that he could not afford to hire someone to paint his house, nor could he afford to purchase the materials in order to paint the house himself. Hypes testified that he believed the cost to hire someone to paint the house would be approximately $8,000.00, however, he did not provide any documentary evidence to support his estimate.

{¶ 28} During his cross-examination, Hypes testified that he had previously been employed as a senior accountant as of 2012, but had not been able to find a job in that, or any, field. Hypes also testified that he did not currently have any health problems that would restrict him from working, and he was not on any type of disability. Hypes testified that he had already scraped the old paint off of the house in order to prepare it to be painted and that he was physically able to paint the house himself. Hypes further testified that he had not sought any assistance or outside resources to paint the house.

{¶ 29} With respect to Hypes' affirmative defense of impossibility, the trial court stated, "the defense would want me to look at the financial aspect and because he had limited means [sic] conclude that he was unable to comply with the legal order and I'm not willing to make that leap." Based upon this statement, we conclude that the trial court

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[1] At the time that the trial was held, Hypes testified that he had repaired the gutters on his residence per the legal order issued by Weinkauf.

considered Hypes' impossibility defense and rejected it. Hypes specifically testified that he was physically able to paint his house. Moreover, Hypes testified that he is a trained accountant, yet has not been employed as such since 2012. Although he testified that he could not find employment in the accounting field, he provided no evidence that he had been actively searching for a job other than as a referee for youth sports. Although the trial court did not explicitly find that Hypes was willfully underemployed, the evidence is sufficient to support such a conclusion and a finding that impossibility of compliance was not established by a preponderance of the evidence. Upon review of the entire record, we find no error in the decision of the trial court.

{¶ 30} All of Hypes' assignments of error having been overruled, the judgment of the trial court is affirmed.

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FROELICH, J. and TUCKER, J., concur.

Copies mailed to:

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