

**IN THE COURT OF APPEALS  
FIRST APPELLATE DISTRICT OF OHIO  
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-210263
Plaintiff-Appellee,	:	TRIAL NO. 20CRB-20233
	:	
vs.	:	<i>OPINION.</i>
	:	
MYRON MARTIN,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Appellant Discharged

Date of Judgment Entry on Appeal: December 22, 2021

*Andrew W. Garth*, City Solicitor, *William T. Horsley*, Chief Prosecuting Attorney,  
and *Alexandra T. Saunders*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

*Michael J. Trapp*, for Defendant-Appellant.

**CROUSE, Presiding Judge.**

{¶1} Defendant-appellant Myron Martin appeals his conviction for violating a protection order. Martin raised the following assignments of error for our review: 1) the trial court erred by convicting him on facts not alleged in the complaint, denying him the due process of law; 2) the trial court erred by admitting into evidence state’s exhibit 1, a document lacking authentication as a public record; 3) the trial court erred by entering a judgment of conviction that is not supported by sufficient evidence; and 4) Martin did not receive the effective assistance of counsel for his defense when his trial counsel failed to object to the admission of state’s exhibit 1.

{¶2} Because we agree that Martin’s due-process rights were violated, we sustain his first assignment of error, reverse the judgment of the trial court, and discharge him from further prosecution. In light of our disposition of Martin’s first assignment of error, the remaining assignments of error are moot, and we decline to address them.

***I. Facts and Procedure***

{¶3} The complaint filed in this case charged Martin with recklessly violating the terms of a protection order for having contact with Faith White, the mother of his child, “during a domestic violence related incident” “on or about 10-3-20.” In a companion case (20CRB-18978), Martin was charged with domestic violence “on or about 10-3-20” for “knowingly caus[ing] harm physical harm to Faith White.” The domestic-violence charge alleged that Martin struck White “in [her] face over the course of several days” “causing injury.” After a bench trial, Martin was

convicted of the violating-a-protection-order charge, but was acquitted of the domestic-violence charge.

{¶4} At the trial, White testified that Martin stole her car, and then physically abused her, while keeping her at his sister's house for several days against her will. She claimed she had bruises from the physical abuse. White testified that once she was finally able to get away from Martin, she went to the Cincinnati District Three police station to report the domestic violence.

{¶5} On cross-examination, counsel for Martin questioned White on a series of Facebook messages she sent to Martin, most of which were sent in July 2020, in an attempt to show that she was lying about the domestic-violence incident. After counsel read several of the messages into the record, White stated:

Of course, he's not going to show his side. Of course. He got a whole protection order. I got his side in my whole phone right now. His whole side. He ain't print the ones he sent off. Maybe I should have did that. I should have did that. He ain't print the ones he sent me. I got them.

{¶6} When counsel pressed White to agree that the majority of the messages were coming from her, White asked, "Where his at? When he contacted me?"

{¶7} Officer Josh Espitia testified about his interactions with White at the police station when White came in to report the domestic-violence allegations. Espitia testified that he did not observe any injuries on White, and he noted the same in his report. Espitia said that he filed the domestic-violence charge the same day,

but waited to file the violation-of-the-protection-order charge until he was able to confirm there was a valid protection order in place.

{¶8} Following Espitia’s testimony, Laron Martin, Myron Martin’s sister, testified that Myron was not at her home on the days that White alleged. Laron stated that White brought her daughter to her home, but that neither White, nor Myron Martin stayed at her home during the period from September 29 to October 3 as White had alleged.

{¶9} Based on the evidence presented, the trial court acquitted Martin of the domestic-violence charge, finding that the state did not prove the charge beyond a reasonable doubt. Nevertheless, the court found Martin guilty of violating the protection order. The court explained that it was finding Martin guilty, not based on the alleged domestic-violence incident, but rather based on the communications with White in July 2020, as White alleged in her testimony. Martin’s counsel questioned the court about its verdict:

**COUNSEL FOR MARTIN:** \* \* \* The charge is that on or about October the 3rd that Mr. Martin recklessly violated the terms of a protection order.

\* \* \*

**COUNSEL FOR MARTIN:** That [charge] was tied to the allegations of domestic violence. And what I presented, or the questions I presented, to Ms. White \* \* \* everything that I had only showed [messages] being sent from her.

**THE COURT:** Right. And her response was, where are all the responses? Where's everything that he sent me that I was responding to?

\* \* \*

**THE COURT:** So from that, I am pulling out of the violation of the protection order.

**COUNSEL FOR MARTIN:** And that's from an indefinite period of time? Not from the October 3rd date? From the charges?

**THE COURT:** Yeah.

**COUNSEL FOR MARTIN:** Okay.

**THE COURT:** I am so happy. You have no idea. Because everyone is unhappy. So that means I've done my job.

At sentencing, the court imposed no jail term and remitted fines and costs.<sup>1</sup>

## **II. *The conviction violated Martin's due-process rights***

{¶10} In Martin's first assignment of error, he argues that the court erred "by convicting him on facts not alleged in the complaint, denying him the due process of law." The state concedes this assignment of error.

{¶11} Essentially, Martin argues that the trial court's guilty finding was based on his allegedly sending Facebook messages to White in July 2020, while the

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<sup>1</sup> We note that Martin's appeal is not moot despite the fact that he was not given any jail time or a fine. An appeal is not moot where "the defendant will suffer some collateral disability or loss of civil rights from such judgment or conviction." *State v. Farris*, 1st Dist. Hamilton No. C-150567, 2016-Ohio-5527, ¶ 3, quoting *State v. Wilson*, 41 Ohio St.3d 235, 325 N.E.2d 236 (1975). See *State v. Byrd*, 185 Ohio App.3d 30, 2009-Ohio-5606, 923 N.E.2d 16, ¶ 9 (2d Dist.). Because R.C. 2919.27(B)(3) sets forth an enhanced penalty if the defendant was previously convicted of violating a protection order, Martin would suffer a collateral disability if convicted. Therefore, his appeal is not moot.

complaint alleges, that “Myron Martin on or about 10-3-20, \* \* \* recklessly violate[d] any terms of [a] protection order,” and specified that the violation occurred “during a domestic violence related incident.” By convicting him for conduct different in both time and substance from the conduct alleged in the complaint, Martin contends that he “had no opportunity to defend against what the court found were the essential facts of the offense,” which violated his right to due process of law under the Fourteenth Amendment to the United States Constitution.

{¶12} Martin argues that by finding him guilty of conduct from July, the trial court effectively amended the complaint pursuant to Crim.R. 7(D). Crim.R. 7(D) states that “at any time before, during, or after trial,” the court may “amend the \* \* \* complaint \* \* \*, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.”

{¶13} The trial court did not state that it was amending the complaint in this case. But even if it did, a Crim.R. 7 (D) amendment would have been improper because the amendment would have changed the identity of the crime. It is improper to move the identity of the crime from events on or about October 3, 2020, to completely different events in July 2020. *See, e.g., State v. Vitale*, 96 Ohio App.3d 695, 700-701, 645 N.E.2d 1277 (8th Dist.1994) (“Obviously, if the identity of the crime moves from events on June 14 to different events on June 21, at a different time and place, the identity of the crime has been improperly changed.”). As stated in *Vitale*, “the issue is whether [the defendant] was convicted on the same evidence on which he was indicted.” *Id.* at 701, citing *State v. Barnecut*, 44 Ohio App.3d 149, 150 542 N.E.2d 353 (5th Dist.1988) (“Any variance of proof outside the parameters of

time established by the indictment may constitute a separate offense.”). *See State v. Montoya*, 1st Dist. Hamilton No. C-210154, 2021-Ohio-3429, ¶ 8 (“The question, then, is whether the substance of this complaint sufficiently informed Mr. Montoya from the outset he was being charged with sexually motivated conduct under R.C. 2905.05(B). If it did, then no change occurred in the identity of the offense charged.”).

{¶14} The Sixth Circuit Court of Appeals confronted this issue directly when it held that “appellant was denied due process of law under the Fourteenth Amendment when he was forced during the state court trial to defend against a charge of felony-murder, which was not contained in the indictment.” *Watson v. Jago*, 558 F.2d 330, 331 (6th Cir.1977). In so holding, the court reaffirmed that “ ‘[n]o principle of procedural due process is more clearly established than that of notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge.’ ” *Id.* at 338, quoting *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948).

{¶15} The state concedes that its violation-of-the-protection-order charge was based on the October domestic-violence incident, of which Martin was acquitted. The state agrees that the trial court made it clear that it was convicting Martin for violating the protection order in July; conduct that was “not remotely similar in time or substance to the facts alleged in the complaint.”

{¶16} Based on the trial court’s findings, the state did not prove the violation-of-a-protection-order charge alleged in the complaint. Because the trial court convicted Martin on facts wholly different from those alleged in the complaint,

he was deprived of notice and his ability to defend himself. This violated his constitutional right to due process of law.

{¶17} In light of the foregoing analysis, we sustain Martin's first assignment of error, reverse the judgment of the trial court, and discharge appellant from further prosecution. Because our decision to sustain the first assignment of error is dispositive, the remaining assignments of error are moot and we decline to address them.

Judgment reversed and appellant discharged.

**WINKLER and BOCK, JJ.**, concur.

Please note:

The court has recorded its entry on the date of the release of this opinion