COURT OF APPEALS
DECISION
DATED AND FILED

July 18, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1991 **Cir. Ct. No. 2009CV2896**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

VILLAGE OF LANNON,

PLAINTIFF-RESPONDENT,

V.

BARNEY W. SCHULTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: KATHLEEN B. STILLING, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.[1] Barney W. Schultz appeals from a judgment of the trial court, affirming Village of Lannon municipal ordinance violations and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(b) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

imposing an $8,850 forfeiture. Schultz was found to be in violation of municipal ordinances governing the accumulation of litter, rubbish or debris and the storage of trash or junk on property in the Village. Schultz argues that the Village's complaint was fundamentally defective because it was signed by the Village attorney and not the building inspector, that the municipal court lacked jurisdiction, that the building inspector did not have authority to issue orders regarding one of the ordinances, that the Village failed to prove violation of one of the ordinances, and that the forfeiture imposed was excessive and overly burdensome. In response, the Village asserts that the trial court exceeded its discretion in reducing the forfeiture due to the similarity between the two ordinances. We reject these arguments and affirm the trial court's judgment.

¶2 This case is about a municipal prosecution for accumulation of excessive litter, rubbish or debris[2] and impermissible storage of trash or junk[3] on

[2] LANNON, WIS., MUNICIPAL CODE (2010) § 14-33. Prohibition of Litter, Rubbish or Debris.

No owner or occupant shall, accumulate or allow the accumulation outside of a building or accessory structure of waste matter, litter, refuse, rubbish, lumber, metal scraps, machine parts, discarded or non-functioning appliances, accessories, furniture or other material on such property which present a blighted appearance on the property or which constitutes a nuisance or which tends to decrease the value of neighboring properties. Yards shall be kept substantially clear of debris and shall be provided with adequate lawn or ground cover of vegetation, hedges or bushes. All areas not covered by any of the foregoing shall be treated to prevent dust or the blowing or scattering of dust particles into the air. All trees, bushes or vegetation which overhang a public entrance shall be properly trimmed to avoid obstruction of the view and movements of vehicles and pedestrians.

[3] LANNON, WIS., MUNICIPAL CODE (2010) § 30-128. Storage of trash or junk.

No person shall accumulate or store or permit the accumulation or storage of any junk or trash upon any property in the village, unless it is in connection with the operation of an authorized junkyard.

LANNON, WIS., MUNICIPAL CODE (2010) § 30-126 defines "trash" and "junk."

(continued)

Schultz's property in the Village. Starting with a March 5, 2007 letter from the building inspector, the Village encouraged Schultz to bring his property into compliance with Village ordinances. The Village worked with Schultz for some time, allowing extensions in which to clean up his property. When these informal enforcement attempts failed, the Village filed suit in municipal court, which was transferred to the city of Brookfield municipal court due to a judicial recusal. After a municipal court trial, Schultz was found guilty of violating LANNON, WIS., MUNICIPAL CODE (2010) §§ 30-128 and 14-33 for 177 days and was assessed the $50 minimum per diem forfeiture, amounting to $8,850 for each ordinance, totaling $17,000.[4] Schultz appealed to Waukesha County Circuit Court, where the case was tried to the court. The trial court affirmed the municipal court's judgment, but reduced the amount of the forfeiture because "the behavior is overlapping."

¶3 Schultz raises several points on appeal, which we group as follows: interpretation of Village ordinances, proof of decrease in value of neighboring

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Junk means old iron, chain, brass, copper, tin, lead, other base metals, trailers, farm machinery and equipment or any parts thereof to be junked or demolished, taken apart or destroyed for salvage materials, paper, waste paper, used lumber or building material, paper clippings, rags, rubber, glass or bottles and all articles and things discarded as manufactured articles composed of or consisting of any one or more of the articles mentioned including industrial metal or scrap or other material commonly included within the term "junk."

Trash means any rubbish, ashes, paper, dirt, stones, bricks, tin cans, boxes, barrels, or other substances whatsoever, oil, kerosene, benzine, or other similar oil or oily substance or liquid, wood, brush, or any form of discarded vegetation, foundry sand and industrial waste of any kind or description, sewage material removed from septic tank or dry well used in connection with sewage disposal system.

[4] We were unable to locate this municipal court decision in the record. The parties cite to an earlier decision that does not rule on the merits. *See* ***Useni v. Boudron***, 2003 WI App 98, ¶1 n.2, 264 Wis. 2d 783, 662 N.W.2d 672 (improper record cites are a burden on the appellate court). The parties do not dispute that the municipal court ruled as indicated.

properties, proof of violation period, multiplicity of ordinances and amount of forfeiture. Where these issues involve a question of law, such as statutory interpretation, we review the trial court's decision de novo. *See* ***Grosse v. Protective Life Ins. Co.***, 182 Wis. 2d 97, 105, 513 N.W.2d 592 (1994). On questions of fact, we review the trial court's decision for erroneous exercise of discretion. *See* ***Lellman v. Mott***, 204 Wis. 2d 166, 172, 554 N.W.2d 525 (Ct. App. 1996).

Interpretation of Village Ordinances

¶4 Schultz first argues that the Village's complaint in municipal court was fundamentally defective and should have been dismissed. The original municipal complaint was signed by the Village attorney. Under CODE § 14-35, "the Building Inspector may file an action in the name of the Village in the Circuit Court for Waukesha County, Wisconsin …." Under WIS. STAT. § 800.02(2)(a) (2007-08), "The citation shall be signed by a peace officer or endorsed by a municipal attorney or, if applicable, signed by a conservation warden."[5] Schultz relies on case law interpreting the summons and complaint requirements of WIS. STAT. § 801.02 and the attorney signature requirements of WIS. STAT. § 802.05(1) to argue that the defective signature was a fundamental error that could not be cured and that the complaint should have been dismissed. The Village responds that the complaint was a civil action, which, like any other civil action, may be brought by a party "in his [or her] own proper person or by an attorney of the suitor's choice." WIS. CONST. art. I, § 21.

[5] The statute has since been amended to read: "The citation or complaint shall be signed by a law enforcement officer, attorney representing the municipality, or, if applicable, a conservation warden." *See* 2009 Wis. Act 402, § 54 (effective January 1, 2011).

¶5 We agree with the Village that it is not a defect for the municipal attorney to sign a municipal complaint on behalf of the municipality. Under WIS. STAT. § 800.02(1), "An action in municipal court for violation of a municipal ordinance is a civil action, and the forfeiture or penalty imposed by any ordinance of the municipality may be collected in an action in the name of the municipality." The municipality has the right to choose to have an attorney bring the action on behalf of the municipality. *See* ***Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.***, 2011 WI 36, ¶102, 333 Wis. 2d 402, 797 N.W.2d 789 (a litigant's right to choose representation by counsel is protected by the state constitution).

¶6 Schultz's second argument is that the municipal court did not have jurisdiction over this matter as CODE § 14-35(4) requires this municipal action to be filed initially in circuit court.[6] The Village responds that the ordinance's allowance that the complaint may be filed in circuit court is permissive for claims brought under WIS. STAT. ch. 823; the ordinance does not deprive the municipal court of jurisdiction over the violation of a municipal ordinance.

¶7 WISCONSIN CONST. art. VII, § 14 states: "The legislature by law may authorize each city, village and town to establish a municipal court. All municipal courts shall have uniform jurisdiction limited to actions and proceedings arising under ordinances of the municipality in which established." *See also* WIS. CONST. art. VII, § 2 ("The judicial power of this state shall be vested in a … municipal court if authorized by the legislature under section 14."). In turn, WIS. STAT. § 800.02(1), and WIS. STAT. § 800.01(1) acknowledge the subject matter

[6] CODE § 14-35(4) states: The Village "Building Inspector may file an action in the name of the Village in the Circuit Court for Waukesha County, Wisconsin, in accordance with the provisions of Chapter 823, Wis. Stats., as amended from time to time."

jurisdiction of the municipal court for municipal ordinance violation cases. *See* WIS. STAT. § 800.01(1) ("In municipal court, ordinance violation cases are commenced when the complaint or citation is filed with or transmitted to the court.").[7] The Village of Lannon municipal court, and that of the City of Brookfield when the case was transferred, had jurisdiction over this complaint arising out of the alleged violation of municipal ordinances.

¶8 Third, Schultz contends that the building inspector is only authorized to enforce the building code and therefore was not authorized to issue orders to correct violations of the Lannon Health Code, in particular CODE § 30-128 regarding storage of trash or junk on property in the Village. Schultz reads the Village Code to confer enforcement authority for CODE Chapter 30 only on the Waukesha County Health Department. The Village responds that CODE § 30-88(a) provides that "[t]he chief of police, the chief of the fire department, the building inspector and health department shall enforce those provisions of this article [Article IV, Public Nuisances] that come within the jurisdiction of their offices," and that the ordinance at issue, CODE § 30-128, is within this same article of the Village Code. Thus, argues the Village, the building inspector had authority under the code to enforce the section on storing trash or junk on property within the Village.

¶9 We agree with the Village that the building inspector was authorized to enforce the ordinance prohibiting storage of trash or junk. Under CODE § 30-26

[7] The previous version of this statute also recognized the municipal court's jurisdiction over municipal ordinance violation cases. WIS. STAT. § 800.01(1) (2007-08) ("In municipal court, personal jurisdiction in municipal ordinance violation cases … is obtained over a defendant when ….") (amended by 2009 Wis. Act 402, § 47 (effective January 1, 2011)).

and 27, the county health department may make rules for the enforcement of the provisions of the health code. These rules, when approved by the Village Board, have the same effect as ordinances. CODE § 30-27. This grant of rule-making authority to the county health department does not bar other Village officials from enforcing the nuisance provisions of the Village Code. As indicated by the Village, CODE § 30-88(a) expressly permits the building inspector to enforce the public nuisance provisions. Further, Schultz concedes the Village's argument by not addressing it in his reply brief. *See* ***Wisconsin DNR v. Building and All Related or Attached Structures Encroaching on the Lake Noquebay Wildlife Area***, 2011 WI App 119, ¶21, 336 Wis. 2d 642, 803 N.W.2d 86.

Proof of Decrease in Value of Neighboring Properties

¶10 Fourth, Schultz argues that the Village failed to prove a violation of CODE § 14.33. Schultz indicates that the trial court "correctly determined that the Village must prove three elements," ownership or occupancy, accumulation of prohibited materials and a blighted appearance or nuisance that "tends to decrease the value of neighboring properties." Schultz contends that the Village failed on the third element, in that it did not show blight, nuisance or an effect on the property values in the area. Schultz further argues that the condition of his property cannot affect the values of neighboring properties because he has since cleaned up his property. The Village responds that it showed that the condition of Schultz's property "tended" to decrease the value of neighboring property through the evidence presented at the four-day trial, including photographs of Schultz's property.

¶11 We agree with the Village and the trial court that the ordinance does not require a concrete showing of a reduction in neighboring property values. As

the trial court indicated: "[T]he language that something tends to decrease is not by its nature an absolute. The word 'tend,' meaning to have or to be an influence on or to go or move in a particular direction, is really something that's more of a fluid notion, is this something that would tend to." The trial court, after hearing and seeing all the evidence about the condition of the property, found that "looking at that property that it would affect a sale value of the neighboring properties." We will not overturn this finding supported by the evidence. *See* WIS. STAT. § 805.17(2); *see also* ***Gerth v. Gerth***, 159 Wis. 2d 678, 682, 465 N.W.2d 507 (Ct. App. 1990).

¶12 Next, Schultz argues that the forfeiture imposed by the trial court was excessive and overly burdensome. Schultz argues that the Village did not prove the number of days during which Schultz was in violation, that Schultz's personal financial and health limitations "keep him from working to his full potential," that he has made continued attempts to clean up his property to comply with Village ordinances, and that the ordinances "overlap." The Village responds that a trial court is within its discretion when it imposes a forfeiture within the maximum and minimum limits set by the ordinance. In this case, however, argues the Village, the trial court erred by imposing a forfeiture below the per diem minimum. There are three issues the parties raise in this portion of their briefs that we must address: Schultz's contention that the Village did not prove 177 days, Schultz's argument that he has been "doubly fined" because the ordinances overlap, and the trial court's determination of the amount of forfeiture.[8]

[8] We need not address Schultz's argument that the forfeiture was unfair due to the fact that he ultimately brought his property into compliance. Schultz does not contest that he was in violation for some period of time. Similarly, we need not address Schultz's commentary about his health, as he does not indicate how that affects his appeal.

Proof of Violation Period

¶13 Regarding the trial court's finding that Schultz was in violation for 177 days, Schultz argues that the testimony of the building inspector, Mr. Blankenheim, was "so completely inconsistent as to when he visited Mr. Schultz's property and when the photographs admitted into evidence … were taken" that "the Village failed to prove when the violation of the ordinance ended." Schultz points to specific instances of Blankenheim's testimony regarding the photos and states that it is "replete with inconsistencies." Blankenheim's credibility, however, is for the trial court to determine, not this court.[9] ***Lellman***, 204 Wis. 2d at 172. It is not clear from Schultz's brief what period of noncompliance he concedes; he argues that "[t]he Village cannot have proven their case if they cannot even determine for how long Mr. Schultz was allegedly in violation of the ordinances." Schultz argues that he "did ultimately comply with the Village order and cleaned up his property to be in compliance," and that he "did what he needed to do to get in compliance with the Village ordinances within six months of receiving the order to correct." But Schultz does not provide any record cites showing proof of this compliance. At trial, Schultz's counsel stated that "the issue is that to extend the penalty beyond the original date to say we're asking for forfeitures for August 15th, 16th through October, that's not in the complaint." Agreeing with Schultz's argument, the trial court found that Schultz was in violation for those days alleged in the complaint—nothing more. Additionally, we note that the 177 days in violation that the trial court found would correspond to

[9] Blankenheim was thoroughly examined and cross-examined. His testimony takes up eighty-seven pages in the trial transcript.

Schultz's assertion that he was in compliance within six months of the order to correct.

Multiplicity of Ordinances

¶14 Schultz argues that he was "doubly fined for the same violation." "Multiplicity arises where the defendant is charged in more than one count for a single offense." ***State v. Davison***, 2003 WI 89, ¶34, 263 Wis. 2d 145, 666 N.W.2d 1. In reviewing alleged multiplicity, we first determine whether the charged offenses are identical in law and fact. ***Id.***, ¶43. If so, the presumption is that the legislature did not intend to punish under both statutes. ***Id.*** If the offenses are not identical in law and fact, the presumption is that the legislature intended to permit cumulative punishments. ***Id.***, ¶44.

¶15 We need only reach the first step in our analysis, because the two ordinances are not identical in law and fact. Most notably, the types of materials prohibited are not identical. Furthermore, CODE § 14-33 contains affirmative requirements for lawn care that are not included in CODE § 30-128. Finally, though certainly not exhausting the list of ways in which the ordinances differ, § 14-33 covers only owners and occupants, while § 30-128 covers any person. Because the two sections are not identical in law and fact, we presume that the legislative body that enacted the ordinances intended possible cumulative punishment.

Amount of Forfeiture

¶16 Finally, we turn to the Village's argument that the trial court acted outside its authority by imposing a forfeiture below the alleged statutory minimum of $50 per day of noncompliance per ordinance. The Village waived its ability to raise this alleged trial court error when it failed to cross-appeal. ***Luedtke v. Luedtke***, 65 Wis. 2d 387, 392, 222 N.W.2d 643 (1974) (issue that does not involve an error which, if corrected, would merely support the judgment or order appealed from must be brought before this court on cross-appeal).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.