

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio, : Case Nos. 09CA12
 : 09CA13
Plaintiff-Appellee, :
v. :
David Sturbois, : DECISION AND JUDGMENT ENTRY
and :
 : **Released 5/28/10**
Penelope Plesset, :
Defendants-Appellants.¹ :

APPEARANCES:

Adam J. Baker, Athens, Ohio, for appellants.

Patrick J. Lang, Athens Law Director, and Lisa A. Eliason, Athens Chief City Prosecutor, Athens, Ohio, for appellee.

Harsha, J.

{¶1} Two owners of rental property in Athens, Ohio, appeal their convictions for minor misdemeanor violations of an Athens city ordinance that requires them to file a form listing their name, the address of their rental unit, and the names of their tenants. The owners filed motions to dismiss and asserted both constitutional and statutory challenges to the ordinance. The trial court found that the city of Athens violated their constitutional right to equal protection of the laws based upon a city policy of selective enforcement, i.e., the city’s decision to exempt owners of large apartment buildings.

¹ Judith Edinger was also a named appellant but died during the pendency of this appeal. We have dismissed her appeal.

{¶2} Instead of dismissing the case after finding a constitutional violation, the trial court issued a journal entry indicating that it would give the city of Athens a few weeks to begin enforcing the ordinance against owners of large apartment buildings. Several weeks later, satisfied that the ordinance was being enforced constitutionally, the trial court denied the owners' motions to dismiss. The owners thereafter entered pleas of no contest and were found guilty. This appeal followed.

{¶3} The owners argue that after finding that the city of Athens acted unconstitutionally, the trial court should have dismissed the charges, rather than permitting Athens time to "cure" the illegal action. We agree. The existence of an equal protection violation merits but one result here: dismissal of the charges against the owners. The court ordered remedial actions had no effect on the underlying unconstitutional application of the ordinance.

{¶4} The owners also put forth a variety of challenges to the actions of the trial court and the constitutionality of the ordinance. However, we decline to address these issues. Our resolution of the owners' first assignment of error renders these arguments moot.

I. Statement of Facts

{¶5} Athens City Code (ACC) 29.03.08.1 is titled "Tenant/Occupant Education Form." It was enacted in 2005, apparently in response to concerns about tenant irresponsibility in the Mill Street area. It requires landlords of "rental dwellings and rooming houses permitted for fewer than ten occupants" to submit a form to the Athens

office of Code Enforcement.² The form requires information about the rental address, the owner's information, and the names of the tenants living at the rental address.

{¶6} The City did not enforce ACC 29.03.08.1 prior to 2007. When Athens administrative officials began enforcement they made a policy decision to exempt large apartment buildings. Apparently the city council believed that large apartment buildings with on-site management should be exempted because of the difficulty and cost in enforcing the ordinance on a large scale and because those facilities with centralized management could effectively monitor their tenants. Under the office of Code Enforcement's interpretation of the ordinance, buildings with ten or more rental units were exempted. And apartment complexes with eight or more units per building were also exempted. Under this policy, 2,944 Athens rental units were subject to enforcement. 1,903 units were exempt.

{¶7} David Sturbois and Penelope Plesset own rental property in the city of Athens. Because they did not submit the form to the office of Code Enforcement, the City filed the minor misdemeanor charges underlying this appeal.

{¶8} In their motions to dismiss, the owners argued that ACC 29.03.08.1 violated their constitutional rights to privacy, equal protection of the laws, and due process. The court rejected a number of their arguments outright. But it found that the owners might have a legitimate argument that the ordinance violated equal protection.

² The quoted clause is demonstrative of the overall lack of clarity in the language of ACC 29.03.08.1. The trial court determined that "permitted" should be read "to which permits have been issued." The court also found that "rental dwellings" could mean a single unit within an apartment complex. Thus, there could be multiple "rental dwellings" inside one apartment building. As long as each unit or rental dwelling was "permitted" for fewer than ten occupants (as one would expect most apartment units are), it falls within the ordinance.

And the court determined that it could only make that determination by taking additional evidence from relevant parties. Accordingly, the court conducted a hearing.

{¶9} There, the court heard testimony from the city employees and public officials regarding their interpretation of ACC 29.03.08.1 and what prompted the decision to exempt large apartment buildings. After the hearing, the trial court found that ACC 29.03.08.1 survived a facial equal protection challenge. The court found that the ordinance applied to all Athens landlords who own rental units “permitted for less than ten occupants.” The court explained: “ACC Section 29.03.08.1 does not, on its face, violate equal protection guarantees. The language used applies the ordinance’s requirements to all rental dwellings with occupancy permits for less than ten persons, whether or not in large apartment complexes.”

{¶10} Though it found that ACC 29.03.08.1 was facially constitutional, the court determined that the city of Athens’ enforcement policy unconstitutionally violated equal protection guarantees. The court stated: “[a]lthough valid on its face, a law may violate equal protection guarantees in its enforcement *** [w]hen the city administration decided to pare the number of enforcements to a more manageable number, it created criteria unrelated to the educational purpose of the ordinance *** [w]hile the fact that not every person subject to enforcement is charged does not establish lack of equal protection, a policy decision to exclude a class of persons similarly situated does constitute impermissible selective enforcement.”

{¶11} Instead of immediately dismissing the complaint, the trial court advised the city it would dismiss the charges if Athens did not begin enforcing the ordinance constitutionally. It stated: “[i]t is now incumbent upon the City to either enforce the law

uniformly or to dismiss the complaints against the Defendants. The Court hereby schedules a status hearing for March 16, 2009 at 11:00 a.m. If the City has not taken substantial steps by then to enforce the ordinance against large apartment complexes or has not voluntarily dismissed the complaints against these Defendants, the Court intends to grant Defendants' Motions to Dismiss."

{¶12} At the March 16 hearing Athens presented evidence indicating that it had taken steps to enforce the ordinance against large apartment complexes. The court satisfied, concluded that the city had taken sufficient steps to enforce the ordinance, and found that "the ordinance is not now being enforced in an unconstitutional manner in contravention of equal protection guarantees. Defendants' Motions to Dismiss are therefore denied."

{¶13} After, the owners pled no contest and were found guilty, they filed this consolidated appeal.

II. Assignments of Error

{¶14} I. THE TRIAL COURT ABUSED ITS DISCRETION WHEN ITS FEBRUARY 26, 2009 DECISION FOUND DEFENDANTS'/APPELLANTS' CONSTITUTIONAL PROTECTION OF EQUAL PROTECTION WAS VIOLATED BY THE ENFORCEMENT OF ATHENS CITY CODE SECTION 29.03.08.1, BUT THE TRIAL COURT DID NOT DISMISS THE COMPLAINTS, AND INSTEAD, GAVE THE CITY OF ATHENS SEVERAL WEEKS TO CURE THE EQUAL PROTECTION VIOLATIONS.

{¶15} II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT ATHENS CITY CODE SECTION 29.03.08.1 DID NOT INFRINGE UPON THE LANDLORDS' REASONABLE EXPECTATION OF PRIVACY.

{¶16} III. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT FINDING THAT ATHENS MUNICIPAL CODE SECTION 29.03.08.1 (AS CURRENTLY WRITTEN) DOES NOT BEAR A RATIONAL RELATIONSHIP TO ANY LEGITIMATE GOVERNMENTAL GOALS AND, THEREFORE, VIOLATES THE LANDLORD'S CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION PURSUANT TO THE 14TH AMENDMENT OF THE US CONSTITUTION AND PURSUANT TO ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION.

{¶17} IV. THE TRIAL COURT ABUSED ITS DISCRETION IN THAT THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY BY ACTING AS ATHENS CITY COUNCIL WHEN THE TRIAL COURT CHANGED THE LANGUAGE OF THE ATHENS MUNICIPAL CODE SECTION 29.03.08.01 TO END ANY EXEMPTION BASED ON NUMBER OF RENTAL UNITS WITHOUT ANY REVIEW OR APPROVAL OF THE ATHENS CITY COUNCIL.

{¶18} V. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT FINDING THAT THE ATHENS MUNICIPAL CODE SECTION 29.03.08.01 VIOLATES THE LANDLORD'S SUBSTANTIVE DUE PROCESS GURANTEED BY THE 14TH AMENDMENT OF THE US CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION SINCE THE SUBJECT ORDINANCE UNCONSTITUTIONALLY IMPUTES TENANT'S *MENS REA* THAT ACCOMPANIES

THE TENANT'S FAILURE TO COMPLY WITH SAID ORDINANCE TO THE LANDLORD'S *MENS REA*.

{¶19} VI. THE TRIAL COURT ABUSED ITS DISCRETION BY NOT FINDING THAT THE ATHENS MUNICIPAL CODE SECTION 29.03.08.01 VIOLATES THE LANDLORD'S SUBSTANTIVE DUE PROCESS GUARANTEED BY THE 14TH AMENDMENT OF THE US CONSTITUTION AND BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND VIOLATES THE LANDLORD'S LIBERTY AND PROPERTY RIGHTS AS PROTECTED UNDER THE FOURTH AMENDMENT OF THE US CONSTITUTION AND ARTICLE I OF THE OHIO CONSTITUTION.

III. Legal Analysis

A. Failure to Dismiss After Finding of Equal Protection Violation

{¶20} The owners contend that the trial court abused its discretion because, despite finding that the application of ACC 29.03.08.1 was unconstitutional, it nonetheless denied their motion to dismiss and allowed Athens to "cure" the constitutional infirmity. The owners argue that the constitutional violation required dismissal of their charges.

{¶21} At the onset, our standard of review is not abuse of discretion. In essence we must decide the appropriate remedy for a constitutional violation. Because the city of Athens did not appeal that issue, we are not reviewing a decision finding the ordinance unconstitutional as it is being applied. That is, we are not reviewing the merits of a motion to dismiss based upon a claim of selective prosecution. Rather, the question before us is whether the trial court applied the proper remedy after finding a

constitutional violation of selective enforcement. We conclude that issue is purely legal in nature and requires a de novo review.

{¶22} An individual may challenge a statute as being unconstitutional on its face and/or unconstitutional as applied to a particular set of facts. *Ruble v. Ream*, Washington App. No. 03CA14, 2003-Ohio-5969, at ¶17, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, 55 N.E.2d 629, at paragraph four of the syllabus. “If a statute is unconstitutional as applied, the State may continue to enforce the statute in *different circumstances* where it is not unconstitutional, but if a statute is unconstitutional on its face, the State may not enforce the statute under any circumstances.” *Women’s Med. Professional Corp. v. Voinovich* (C.A.6, 1997), 130 F.3d 187, 193. (Emphasis added).

{¶23} A statute may be unconstitutional as applied if the government selectively enforces it in violation of equal protection rights. In *Yick Wo v. Hopkins* (1886), 118 U.S. 356, 373-374, 6 S.Ct. 1064, the Supreme Court explained: “[t]hough the law itself be fair on its face, and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution.” Selective enforcement, also known as discriminatory prosecution, is now a well-recognized defense to a criminal charge. See, generally, *What Constitutes Such Discriminatory Prosecution or Enforcement of Laws as to Provide Valid Defense in State Criminal Proceedings* (1979; Supp.2009), 95 A.L.R.3d 280.

{¶24} Although the court found that the ACC 29.03.08.1 passed the facial challenge, it determined that the city of Athens' administrative interpretation of the ordinance, and its subsequent policy of selective enforcement, rose to the level of an equal protection violation, i.e., selective enforcement. Thus, as the cases addressing discriminatory enforcement indicate, the proper remedy is dismissal. See, e.g., *Yick Wo*, supra; *Cleveland v. Trzebuckowski*, 85 Ohio St.3d 524, 534, 1999-Ohio-285, 709 N.E.2d 1148; *State v. Flynt* (1980), 63 Ohio St.2d 132, 139, 407 N.E.2d 15 (Brown, dissenting justice, explaining "I conclude that having made a proper showing of discriminatory prosecution, the defendants are entitled to discharge *** [i]f, and when, the public authorities decided to undertake a generalized enforcement of the law, the defendants could again be charged."); *State v. Norris*, 147 Ohio App.3d 224, 226, 2002-Ohio-1033, 769 N.E.2d 896; *Village of Fairlawn v. Fuller* (1966), 8 Ohio Misc. 266, 273, 221 N.E.2d 851 ("[b]ut where, as in the cases now before this court, it is shown that there was intentional discrimination-when the persons directly charged with enforcement of the ordinance chose to prosecute particular violators and to permit other violators to proceed unmolested with their full knowledge and approval, the court *must dismiss* the prosecutions, not because the defendants are not guilty of the offense charged but because a court cannot take part in or countenance prosecutions conducted in violation of the constitutional rights of the defendants. The courts, above all other agencies of government, are bound to accord to all persons the equal protection of the laws.") (Emphasis added). Accordingly, once the owners established the defense of selective enforcement, the trial court should have dismissed their charges.

{¶25} Specific violations of equal protection are not alleviated simply because a court has ordered the State to engage in remedial activity or correct its course in future prosecutions. And here, the trial court's order that Athens should enforce ACC 29.03.08.1 against large apartment building owners could not retroactively cure the unconstitutionality of its earlier enforcement policy. After a successful applied challenge, Athens may prospectively enforce ACC 29.03.08.1 under "different circumstances." But it may not continue an enforcement action that it initiated under a prior illegal policy. *Voinovich*, supra.

B. Remaining Assignments of Error

{¶26} Our resolution of the owners' first assignment of error renders their remaining arguments moot and we decline to address them. App.R. 12(A)(1)(c). Our appellate jurisdiction is limited to actual cases or controversies under Section 2, Article III of the Ohio Constitution. Cases are moot "when they are or have become fictitious, colorable, hypothetical, academic or dead." *Grove City v. Clark*, Franklin App. No. 01AP-1369, 2002-Ohio-4549, at ¶11, quoting *Culver v. Warren* (1948), 84 Ohio App. 373, 393, 83 N.E.2d 82. "A moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason cannot have any practical legal effect upon a then-existing controversy." *Id.* Our reversal renders all other issues moot.

IV. Conclusion

{¶27} The owners' first assignment of error is well-taken. Dismissal was the proper remedy after the trial court found that the city of Athens violated the owners' right

to equal protection by selectively enforcing ACC 29.03.08.1. Accordingly, we reverse and remand with instructions to discharge the owners.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

McFarland, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.