[Cite as *Hamilton v. Noe*, 2009-Ohio-2802.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO/CITY OF HAMILTON,	:	
Plaintiff-Appellee,	:	CASE NO. CA2008-08-182
	:	O P I N I O N
- vs -		6/15/2009
	:	
DANIEL J. NOE,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 08CRB02719

Mary K. Dudley, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Patrick McKnight, 6 S. Second Street, Suite 513, Hamilton, Ohio 45011, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Daniel J. Noe, appeals his conviction and sentence in the Hamilton Municipal Court for theft in violation of R.C. 2913.02(A)(1).

{¶2} On May 10, 2008, Officer Jason Chin of the Hamilton Police Department was dispatched to investigate two men in a white van who had been seen taking scrap metal from the demolition site of a pool house at Eastview Pool in Hamilton, Ohio. When Officer Chin arrived, he stopped a white van pulling away from the area and obtained permission from the

two men inside the van to search the vehicle. During the search, Officer Chin saw a large amount of scrap metal in the rear of the van. The two men, one of whom was Noe, told Officer Chin that they took several pieces of scrap metal from the demolition site. Officer Chin ordered the men to put back the scrap metal, which they did, and then placed them under arrest.

{¶3} Officer Chin filed a criminal complaint against Noe in the Hamilton Municipal Court, charging him with one count of theft in violation of R.C. 2913.02. Noe entered a not guilty plea to the charge. Thereafter, Noe was tried by the bench on the charge. The state presented the testimony of Officer Chin, who testified to the facts related above. The state also presented the testimony of Robert Harris, Parks Recreation Director for the city of Hamilton, who testified that the city planned to "junk" the scrap metal that Noe had taken.

{¶4} The trial court found Noe guilty of theft after rejecting his argument that the city had "abandoned" the scrap metal, and therefore, the scrap metal could not be deemed the proper subject of a theft charge. The trial court fined Noe $75 and ordered him to pay court costs and fees.

{¶5} Noe appeals, assigning the following as error:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FINDING APPELLANT GUILTY OF THEFT."

{¶7} Noe argues the trial court erred in finding him guilty of theft because the evidence shows that the city of Hamilton, which owned the scrap metal that was the subject of the theft charge, "effectively abandoned" the scrap metal, and abandoned property cannot be the proper subject of a theft charge. Alternatively, he contends that the evidence shows that he reasonably believed that the scrap metal had been abandoned, and therefore, the state failed to prove that he acted with the requisite intent to commit a theft offense.

{¶8} In order to convict Noe of theft, the state was required to prove beyond a

reasonable doubt that Noe, with purpose to deprive the city of the scrap metal in question, knowingly obtained or exerted control over the scrap metal, without the consent of the city or a person authorized to give consent for the city. See R.C. 2913.02(A)(1).

{¶9} A defendant cannot be convicted of theft if he can show that (1) the owner of the property actually abandoned the property, or (2) the accused reasonably believed that the property had been abandoned. See *State v. Beyers* (Apr. 26, 1996), Greene App. No. 95-CA-32, p. 3, and *State v. Crisp*, Franklin App. No. 06AP-146, 2006-Ohio-5041, ¶10, citing *Beyers*. "Abandoned property" is property "over which the owner has relinquished all right, title, claim, and possession with the intention of not reclaiming it or resuming its ownership, possession or enjoyment." *Doughman v. Long* (1987), 42 Ohio App.3d 17, 21. To establish that property has been abandoned, the accused must present "affirmative proof of the intent to abandon *coupled with acts or omissions implementing the intent*[.]" (Emphasis added.) *Hamilton v. Harville* (1989), 63 Ohio App.3d 27, 30.

{¶10} In support of his claim that the city abandoned the scrap metal, Noe points to the testimony of Harris, who testified that the city planned to "junk" the scrap metal that Noe had taken. However, while this evidence demonstrates conclusively that the city intended to "throw away" or abandon the scrap metal, it fails to demonstrate conclusively that the city had implemented that intent by the time Noe took the scrap metal. See id. Thus, there was evidence to support the trial court's finding that the city had not actually abandoned the scrap metal at the time Noe took it. See *Beyers* at p. 3; and *Crisp* at ¶10.

{¶11} Noe also argues that the evidence shows that he reasonably believed that the city had abandoned the scrap metal. However, this was a question of fact for the trial court to determine by examining all of the surrounding circumstances of the case, see *Crisp* at ¶10–11, and in this case, there was sufficient evidence to support the trial court's finding that Noe did not reasonably believe that he had a right to take the scrap metal. Moreover, no one

should be permitted to come on to either public property or private property that is not theirs and take any object they may find there.

{¶12} Accordingly, Noe's assignment of error is overruled.

{¶13} Judgment affirmed.

POWELL, P.J., concurs.

RINGLAND, J., dissents.

RINGLAND, J., dissenting.

{¶14} While I agree with the majority's analysis of the holding of *State v. Beyers*, Greene App. No. 95-CA-32, I must dissent from the conclusions reached. There is no dispute of fact or issue of credibility in the evidence presented to the trial court. The uncontroverted evidence indicates that the debris, consisting mainly of concrete rubble with several pieces of scrap metal in it, was on public property. The city parks recreation director, the only witness provided by the state to establish ownership, testified that the rubble came from the park's demolished pool house. The demolition material was not to be sold or donated, but simply to be hauled off to the dump, as evidenced by the state's direct examination:

{¶15} "Q: You know whether there were [sic] had the city gone through and cleaned out lockers and miscellaneous items that were useable?

{¶16} "A: Everything that the city owned was removed. Yes.

{¶17} "Q: Okay what was the plan for that rubble? Where was it going?

{¶18} "A: It was going to be junked."[1]

1. While characterizing the material at the demolition site as "junk" indicates that the property lacked any value, the Ohio Supreme Court has ruled that "the value of stolen property is not an essential element of the offense of theft but, rather, is a finding that enhances the penalty for the offense." *State v. Smith*, 121 Ohio St.3d 409,

{¶19} The majority also correctly cites *Hamilton v. Harville*, 63 Ohio App.3d 27, 30, for the proposition that in order to establish that the property has been abandoned, the accused must present "affirmative proof of the intent to abandon coupled with acts or omissions implementing the intent[.]" In the case at hand, however, the majority opines that the city had not actually abandoned the scrap metal at the time Noe took it. However, uncontroverted evidence indicated that the construction tape surrounding this public area had been removed as well as the fence which prohibited anyone from coming onto the area. As such, the rubble was open to all who came upon this public property. This circumstantially, if not directly, established prior intent to abandon.

{¶20} Admittedly, Noe did not testify in this case. However, as to affirmative defenses of which abandonment appears to be, the trier of fact should consider the evidence bearing upon that affirmative defense regardless of who produced it. See *State v. Levonyak,* Mahoning App. No. 05 MA 227, 2007-Ohio-5044, ¶56-70. In addition to the removal of fencing on this public area, at no time was there any evidence indicating that the public was prohibited from coming onto this property.

{¶21} The trial court in its decision relied on *State v. Enderle* (Aug. 6, 1984), Butler App. No. CA84-01-004. There this court found that the defendant's taking of defective Fisher Price toys from a city dump was sufficient to support a conviction of theft. Appellant in that case had argued that he had not the prerequisite mens rea although the actual issue of abandonment was never discussed. In that case, Fisher Price, even though they had discarded the toys, still had a legitimate interest in the property to prevent the defective toys from reaching the marketplace. In the case at hand, no evidence exists that the city of Hamilton had any further interest in this rubble and these several pieces of metal, and

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2009-Ohio-787, ¶13, reaffirming, following reconsideration, *State v. Smith*, 117 Ohio St.3d 447, 2008-Ohio-1260, ¶31.

therefore, by the state's own evidence it has been established that the owner had actually abandoned this property.

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