

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

STATE OF OHIO/CITY OF HAMILTON, :
 :
 Plaintiff-Appellee, : CASE NO. CA2008-06-135
 :
 - vs - : OPINION
 : 7/27/2009
 :
 JOSEPH P. EBBING, Trustee, :
 :
 Defendant-Appellant. :

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 07CRB05985-A

Colleen H. Taylor, Assistant Hamilton City Prosecutor, 345 High Street, Suite 710, Hamilton, Ohio 45011, for plaintiff-appellee

Joseph P. Ebbing, 3800 Princeton Road, Hamilton, Ohio 45011, defendant-appellant, pro se

RINGLAND, J.

{¶1} Defendant-appellant, Joseph P. Ebbing, trustee, pro se, appeals convictions for multiple violations of the city of Hamilton housing code.

{¶2} Appellant is the owner of real estate located at 419 and 423 Sycamore Street, Hamilton, Ohio. On May 9, 2007, the public health inspector for the city of Hamilton conducted a site investigation for appellant's properties and the structures thereon, noting several housing code violations. The health inspector testified at trial that the properties have been vacant for at least eight years. On May 10, the health

inspector sent a letter to appellant outlining the violations at the Sycamore Street properties, giving appellant a time-frame to remedy the problems and ordering appellant to submit a rehabilitation or demolition plan within 30 days. According to the inspector, the notice was sent to two separate addresses registered to appellant on Princeton Road, but both returned unclaimed. She then sent the letter via regular mail to the address listed on the county auditor's website for the properties and the letter was not returned.

{¶3} The properties were re-inspected on June 29, 2007, but none of the housing code violations were resolved. Photographs were taken of the property. Once again the property was inspected on July 9, 2007 with no resolution of the violations. That day, the health inspector signed affidavits citing the unresolved violations. Appellant was charged with failure to effectively board the structure, failure to submit a rehabilitation plan, failure to affix a protective coating along the exterior surface of the structure, failure to maintain a weather and watertight structure, and failure to install gutters and downspouts. Following a trial before a magistrate, appellant was found guilty as charged and fined a total of \$750. Appellant sought findings of fact from the magistrate and filed objections to the trial court. The trial court overruled appellant's objections. Appellant timely appeals, raising 16 assignments of error. In the interest of convenience, we will address appellant's assignments of error out of order and combine assignments where the issues raised by appellant overlap.

{¶4} Assignment of Error No. 15:

{¶5} "THE TRIAL COURT ERRED IN NOT REQUIRING THE PROSECUTION TO PROVE THAT THE DEFENDANT-APPELLANT HAD BEEN SERVED A NOTICE OF VIOLATION."

{¶6} In his 15th assignment of error, appellant argues that the prosecution

failed to prove that the proper notice procedure was followed for the violations under Hamilton Cod. Ord. 1705.05 and that the trial court erred in finding that he was properly served with notice of the violations.

{¶17} Hamilton Cod. Ord. 1705.05 requires that the property owner be served notice of the violations in writing and given 30 days to cure the violations by bringing the structure into compliance. In this case, the health inspector testified that she initially sent notice to appellant by certified mail on May 10, but the mailings were returned unclaimed. She then sent the notice via ordinary mail to the tax mailing address and the letter was not returned. *Cantrell v. Celotex Corp.* (1995), 105 Ohio App.3d 90, 94 (a properly addressed letter is presumed to be received in due course). The health inspector also testified that she posted a copy of the notice on the property in question.

{¶18} Further, although appellant claims that he did not receive notice of the violations, he appeared in court on the date of the scheduled hearing. Accordingly, we find no error by the trial court in finding that proper notice of the violations was received by appellant.

{¶19} Appellant's 15th assignment of error is overruled.

{¶110} Assignment of Error No. 4:

{¶111} "THE TRIAL COURT ERRED IN FAILING TO CONFIRM THAT THE DEFENDANT-APPELLANT WAS PROVIDED A COPY OF ALL CHARGES TO WHICH HE WAS ACCUSED."

{¶112} Similar to the previous assignment of error, in his fourth assignment of error, appellant argues that he was not provided a copy of all of the charges prior to trial.

{¶113} Appellant failed to raise this issue to the trial court. *State v. Williams* (1977), 51 Ohio St.2d 112, paragraph one of the syllabus. However, we note that the record demonstrates that appellant was served with a summons for each charge on

September 28, 2007 as he acknowledged at the October 17, 2007 hearing.

{¶14} Appellant's fourth assignment of error is overruled.

{¶15} Assignment of Error No. 6:

{¶16} "THE TRIAL COURT ERRED IN OVERRULING, IGNORING, OR DISMISSING APPELLANT'S MOTION TO DISMISS."

{¶17} In his sixth assignment of error, appellant argues the trial court erred in failing to grant his motion to dismiss. There is no record that appellant ever submitted a motion to dismiss in this case. Accordingly, appellant's sixth assignment of error is overruled.

{¶18} Assignment of Error No. 7:

{¶19} "THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST OF A TRIAL BY JURY."

{¶20} Assignment of Error No. 10:

{¶21} "THE TRIAL COURT ERRED IN NOT ADVISING THE DEFENDANT-APPELLANT OF HIS RIGHT TO TRIAL BY JURY."

{¶22} In his seventh assignment of error, appellant argues the trial court erred by denying his request for a jury trial. In his tenth assignment of error, appellant argues the trial court erred by failing to advise him of his right to trial by jury.

{¶23} Appellant only faced misdemeanor charges in this case. Pursuant to Crim.R. 23(A), a defendant is required to make a jury demand to secure a jury trial. Appellant never made any request. Moreover, appellant signed a waiver of jury trial on the day of trial. Appellant's seventh and tenth assignments of error are overruled.

{¶24} Assignment of Error No. 8:

{¶25} "THE TRIAL COURT ERRED IN NOT ADVISING THE DEFENDANT-APPELLANT OF HIS RIGHT TO COUNSEL."

{¶26} Assignment of Error No. 9:

{¶27} "THE TRIAL COURT ERRED IN NOT ADVISING THE DEFENDANT-APPELLANT OF HIS RIGHT TO HAVE COUNSEL PROVIDED TO HIM AT NO EXPENSE."

{¶28} Under his eighth assignment of error, appellant argues the trial court did not advise him of his right to counsel, while, in his ninth assignment of error, appellant claims the trial court erred by failing to advise him of his right to appointed counsel.

{¶29} A review of the December 2007 trial transcript reveals that appellant was advised of his right to counsel. At that hearing, appellant confirmed that the court advised him of his right to counsel and asked if he wanted an attorney to represent him. Appellant then executed a written waiver of counsel. Appellant's eighth and ninth assignments of error are overruled.

{¶30} Assignment of Error No. 12:

{¶31} "THE TRIAL COURT ERRED IN FAILING TO PRESUME THE DEFENDANT-APPELLANT INNOCENT UNTIL PROVEN GUILTY BEYOND A REASONABLE DOUBT."

{¶32} Assignment of Error No. 13:

{¶33} "THE TRIAL COURT ERRED IN FAILING TO ESTABLISH THE TIME AND DATE OF THE COMMISSION OF THE ALLEGED CRIMES."

{¶34} Assignment of Error 16:

{¶35} "THE TRIAL COURT ERRED IN NOT REQUIRING THE PROSECUTION TO BEAR THE BURDEN OF PROOF FOR ALL ELEMENTS OF ALL OF THE OFFENSES OF WHICH THE COURT FOUND THE DEFENDANT-APPELLANT GUILTY."

{¶36} Appellant's 12th, 13th and 16th assignments of error each raise various

challenges to the sufficiency of the evidence. In his 12th assignment of error, appellant argues that the prosecution failed to present any evidence to prove the five violations. Similarly, appellant claims in his 16th assignment of error that all of the elements of the criminal charges were not proved.

{¶37} As a preliminary matter, we recognize that appellant's various assignments of error tend to implicate the Ohio Supreme Court decision of *State v. Collins*, 89 Ohio St.3d 524, 2000-Ohio-231. In *Collins*, the Supreme Court examined R.C. 2901.21(B), which requires a statute defining a criminal offense to expressly specify the mental culpability element. *Id.* The court stated, "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 such section, then culpability is not required for a person to be guilty of the offense." *Id.* However, if the statute fails to indicate a culpable mental state, a default mental state of recklessness is applicable. *Id.*

{¶38} Appellant argues that the charging instruments failed to include the mens rea element and the housing code does not specify the applicable mental state. The violations for which appellant was cited are defined by the code as follows:

{¶39} "The owner shall effectively board the structure, post a sign on the front of the building containing the owner's name and phone number to be contacted in case of emergency using at least two-inch lettering within two days from the receipt of the notice of violation, or within such other time that the head of the Code Enforcement Agency shall permit." Hamilton Cod. Ord. 1705.191(a).

{¶40} "Proposal to Demolish or Rehabilitate. The owner of a properly boarded structure shall receive from the Code Enforcement Agency a Notice to Elect Whether to Rehabilitate or Demolish the structure. Within thirty days after the aforesaid Notice to Elect is sent to the owner, the owner of the structure shall submit a proposal to either

rehabilitate or demolish the structure and a timetable for completing such proposal." Hamilton Cod. Ord. 1705.191(d).

{¶41} "Every structure, used for human habitation, shall be so maintained that it will be weather and watertight." Hamilton Cod. Ord. 1713.11.

{¶42} "The exterior surfaces of all structures shall be kept painted or protected with an approved coating or material where necessary for the purpose of preservation and avoiding a blighting influence on adjoining premises. Exterior wood, composition or metal surfaces shall be protected from the elements by paint or another protective covering." Hamilton Cod. Ord. 1713.12.

{¶43} "All gutters and downspouts shall be properly installed in accordance with the City Building Code and kept in sound working condition and in good repair." Hamilton Cod. Ord. 1713.25.

{¶44} Other Ohio Appellate Districts have found that where a housing code does not explicitly indicate the applicable mental state, the default mens rea of recklessness applies. *State v. Moler*, Montgomery App. No. 22106, 2008-Ohio-2081, ¶47; see, also, *State v. Kelley*, 178 Ohio App.3d 569, 2008-Ohio-5167. However, a review of the housing code at issue in this case plainly indicates a strict liability standard. Specifically, Hamilton's housing code explicitly states, "the provisions of this chapter are specifically intended to impose strict liability." Hamilton Cod. Ord. 1705.99. Accordingly, we find no *Collins* violation.

{¶45} In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would support a conviction. *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶33; *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing a record for sufficiency, "the relevant inquiry

is whether, after viewing 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." *Id.*

{¶46} After review of the record, we find sufficient evidence to support appellant's convictions for failure to effectively board the structure, failure to affix a protective coating along the exterior surface of the structure, failure to maintain a weather and watertight structure, and failure to install gutters and downspouts. In this case, the prosecution presented pictures of the offending properties and the testimony of the city health inspector. The health inspector testified about the dilapidated condition of the property and appellant's failure to effectively board the property, including missing or broken windows and doors. She further discussed the absence of gutters and any protective coating, such as siding or paint.

{¶47} In addition to his general arguments of insufficiency, in his 13th assignment of error, appellant claims that no time and date of the violations was established. After review, the prosecution clearly set forth the date of the violations. The health inspector testified that she inspected the offending properties on May 9, 2007 as well as re-inspection dates of May 12, May 17, and June 29. Moreover, the health inspector stated that she once again inspected the properties on July 9, and the violations remained. She executed affidavits on that date.

{¶48} However, we find insufficient evidence to support appellant's conviction for failure to submit a rehabilitation plan. The section defining failure to submit a rehabilitation plan provides, "[t]he owner of a properly boarded structure shall receive from the Code Enforcement Agency a Notice to Elect Whether to Rehabilitate or Demolish the structure." Hamilton Cod. Ord. 1705.191(d). There is no evidence that the property was ever a "properly boarded structure." Rather, appellant was convicted

for improperly boarding the structures at issue. Accordingly, without the requisite "properly boarded structure," appellant cannot be found in violation of Hamilton Cod. Ord. 1705.191(d).

{¶149} Accordingly, appellant's 12th, 13th and 16th assignments of error are sustained to the extent that they apply to the failure to submit a rehabilitation plan. In all other instances the assignments of error are overruled.

{¶150} Assignment of Error No. 1:

{¶151} "THE TRIAL COURT ERRED IN FAILING TO QUESTION AND ASSESS SUBJECT MATTER JURISDICTION."

{¶152} Throughout his brief, appellant continually reiterates a defense of impossibility. Specifically, appellant urges that the limited egress to the properties prevented him from bringing them into compliance with the housing code. Appellant claims that the city removed egress to the properties in 2000 and he sent a letter informing the city that, once egress was provided, he would remedy the violations. Appellant argues that the city's actions excused the violations. Moreover, in his first assignment of error, appellant argues that impossibility deprived the court of jurisdiction since the housing code only applies to structures used for human habitation within the city. Appellant argues that since the city eliminated all egress, the properties are uninhabitable and, as a result, no longer subject to the housing code.

{¶153} In this case, both the magistrate and trial court were unconvinced by appellant's impossibility defense. Specifically, the magistrate held, "the court finds that there was no agreement with the City of Hamilton that the repairs on the Sycamore Street address would be delayed until egress was provided to the property. The evidence presented at trial only shows an attempt by Defendant to get the City of Hamilton to agree to this arrangement. The City of Hamilton never actually agreed to

this delay. Therefore, the court finds that this evidence does not provide a defense to these housing code violations."

{¶154} Similarly, the trial court stated, "the Defendant also testified and did not deny that the violations occurred, but rather sought to prove that the city had agreed to allow the violations to exist until egress was provided by the City. The Defendant failed to prove this point."

{¶155} Impossibility of compliance is an affirmative defense for which the defendant bears the burden of proof. *Olmsted Twp. v. Riolo* (1988), 49 Ohio App.3d 114, 117, citing *Smedley v. State* (1916), 95 Ohio St. 141, 143.

{¶156} After review of the record, we find no error in the decision of the trial court since appellant failed to satisfy his burden of proof. Appellant failed to present any evidence demonstrating that the lack of egress prevented rehabilitation or that the city agreed to delay rehabilitation until egress was restored. See *City of Warrensville Heights v. Shaffer*, Cuyahoga App. No. 80482, 2002-Ohio-3269, ¶13.

{¶157} Appellant's first assignment of error is overruled.

{¶158} Assignment of Error No. 14:

{¶159} "THE TRIAL COURT ERRED IN FAILING TO BARR [sic] PROSECUTION BEYOND THE STATUTE OF LIMITATIONS."

{¶160} In his 14th assignment of error, appellant argues that the statute of limitations had expired for prosecution of the violations. R.C. 2901.13 provides that the statute of limitations for unclassified misdemeanors, such as those in the case at bar, is two years. Appellant was cited for the violations which occurred in July 2007 and trial was conducted in February 2008, well within the two-year range. Appellant's 14th assignment of error is overruled.

{¶161} Assignment of Error No. 5:

{¶62} "THE TRIAL COURT ERRED IN FAILING TO MERGE TWO CHARGES OF THE SAME OFFENSE."

{¶63} Under his fifth assignment of error, appellant argues that he was improperly convicted of two violations of the same offense under Hamilton Cod. Ord. 1705.191. Appellant argues that the convictions should have been merged by the trial court.

{¶64} Based upon our foregoing analysis, finding insufficient evidence for appellant's failure to submit a rehabilitation plan, appellant's fifth assignment of error is overruled as moot.

{¶65} Assignment of Error No. 11:

{¶66} "THE TRIAL COURT ERRED IN FAILING TO ADMINISTER JUSTICE."

{¶67} In his 11th assignment of error, appellant questions the impartiality of the judge. After review of the record, we find no evidence indicating a lack of impartiality on behalf of the judge. Appellant's 11th assignment of error is overruled.

{¶68} Assignment of Error No. 2:

{¶69} "THE TRIAL COURT ERRED IN NOT DETERMINING THE HAMILTON CITY HOUSING CODE UNCONSTITUTIONAL."

{¶70} Assignment of Error No. 3:

{¶71} "THE TRIAL COURT ERRED IN FAILING TO DISMISS ALL CHARGES SUA SPONTE FOR LACK OF CAUSE; IN THAT NO CRIMINAL OFFENSE WAS SET FORTH."

{¶72} In his second and third assignments of error, appellant challenges the constitutionality of the housing code. In his second assignment of error, appellant argues that the housing code is unconstitutional since it serves no public purpose and usurps private property rights of owners. Under his third assignment of error, appellant

argues the Ohio Constitution does not grant authority to the legislature to regulate the management of private property pursuant to the revised code.

{¶73} Appellant failed to raise his constitutional arguments at the trial level. It is well-settled that "[f]ailure to raise at the trial court level the issue of the constitutionality of a statute or its application, which issue is apparent at the time of trial, constitutes a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan* (1986), 22 Ohio St.3d 120, syllabus.

{¶74} Appellant's second and third assignments of error are overruled.

{¶75} Accordingly, we hereby reverse and discharge appellant's conviction for failure to submit a rehabilitation plan and affirm all remaining convictions.

POWELL, P.J., and YOUNG, J., concur.